SRI LANKA SUPREME COURT **Judgements Delivered (2020)**

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Judgments Delivered in 2020

17/12/20	SC/Appeal No. 20/2010	A.M. Lokubanda Track No. 10 – No.3, Mahaambagasweva, Medirigiriya. Plainitff. Vs. B.R. Chandrasena, Track No. 10, Mahaambagasweva, Medirigiriya. Defendant. AND BETWEEN B.R. Chandrasena, Track No. 10, Mahaambagasweva, Medirigiriya. Defendant- Appellant. Vs. A.M. Lokubanda (Deceased) TracK No. 10 – No.3, Mahaambagasweva, Medirigiriya. Plaintiff – Respondent. Maradedde Gedara Ratnayake Mudiyanselage Bandara Menike, Kirimetiya, Galamuna, Pollonnaruwa. Substituted Plaintiff – Respondent. AND NOW BETWEEN. B.R. Chandrasena, Track No. 10, Mahaambagasweva, Medirigiriya. Defendant-Appellant-Appellant. Vs. A.M. Lokubanda (Deceased) Marabedde Gedara Ratnayake Mudiyanselage Bandara Menike. Kirimetiya, Galamuna, Polonnaruwa. Substituted Plaintiff-Respondent- Respondent.
17/12/20	SC APPEAL NO. 58/16	Institute of Data Management (Private) Limited No.13, Lauries Place, Colombo 04. PETITIONER VS. 1. IDM Nations Campus (Pvt) Ltd. No.23, Daisy Villa Avenue, Colombo 04. 2. Janagan Vinayagamoorthy No. 3, 4/4 Fredrica Road, Colombo 06. And No.16, 42nd Lane, Colombo 06. 3. Subyahewa Rathnasiri Paddawala Road, Madakumbura, Karandeniya And No.16, 42nd Lane, Colombo 06. 4. K. L. Management Consultants (Private) Limited No.15-1/1, Kirillapona Avenue, Kirillapona, Colombo 05. 5. IDM Nations Campus Lanka (Pvt) Ltd. No.15 Lauries Place, Colombo 04. RESPONDENTS And now between Institute of Data Management (Private) Limited No.13, Lauries Place, Colombo 04. PETITIONER-PETITIONER VS. 1. IDM Nations Campus (Pvt) Ltd. No.23, Daisy Villa Avenue, Colombo 04. 2. Janagan Vinayagamoorthy No. 3, 4/4 Fedrica Road, Colombo 06. And No.16, 42nd Lane, Colombo 06. 3. Subyahewa Rathnasiri Paddawala Road, Madakumbura, Karandeniya And No.16,42nd Lane, Colombo 06. 4. K. L. Management Consultants (Private) Limited No.15-1/1, Kirillapona Avenue, Kirillapona, Colombo 05. 5. IDM Nations Campus Lanka (Pvt) Ltd. No.15 Lauries Place, Colombo 04. RESPONDENTS-RESPONDENTS

17/ 12/ 20	SC Appeal 210/2015	Udawela Pathiranehelage Dharmasena of Bandaranayake Mawatha, Millathe, Kirindiwela. Plaintiff -Vs- 1. I.L. Malani, 19 1/3, Bauddhaloka Mawatha, Gampaha 2. Sooriya Arachchige Sandasiri Perera No. 247, Weerangula, Yakkala. 3. Polwattege Abeysinghe No. 65/1, School Road, Meddegama, Kiridiwela. 4. D.M. Leelawathi Dissanayake, Anuragoda, Pepiliyawela. Defendants AND Udawela Pathiranehelage Dharmasena of Bandaranayake Mawatha, Millathe, Kirindiwela. Plaintiff- Petitioner Vs 1. I.L. Malani, 19 1/3, Bauddhaloka Mawatha, Gampaha 2. Sooriya Arachchige Sandasiri Perera No. 247, Weerangula, Yakkala. 3. Polwattege Abeysinghe No. 65/1, School Road, Meddegama, Kiridiwela. 4. D.M. Leelawathi Dissanayake, Anuragoda, Pepiliyawela. Defendants – Respondents AND NOW BETWEEN 3. Polwattege Abeysinghe No. 65/1, School Road, Meddegama, Kiridiwela. 4. D.M. Leelawathi Dissanayake, Anuragoda, Pepiliyawela DEFENDANTS-RESPONDENTS-PETITIONERS/APPELLANTS VS. 1a. Lewwanda Pathirannehelage Leelawathie, 1b. Manel Ajantha Chandrakanthie, 1c. Anoma Nalini Swarnakanthie, 1d. Himali Pradeepika Malkanthie, 1e. Priyani Priyadharshini, All of, No. 75/16, Amuhena, Welliwaththa Road, Papiliyawala. SUBSTITUTED PLAINTIFF- PETITIONER RESPONDENTS 1. I.L. Malani, 19 1/3, Bauddhaloka Mawatha, Gampaha. Now at Rathnaloka Enterprise, 37/4, New Trade Complex, Gampaha. 2. Sooriya Arachchige Sandasiri Perera No. 247, Weerangula, Yakkala. DEFENDANTS-RESPONDENTS-RESPONDENTS

17/ 12/ 20	SC/ APPEAL/ NO. 129/14.	1. Matara Kiri Liyanage Mary Agnes Fernando 2. Weliwita Wedage Anita Mary Vivian Fernando 3. Weliwita Wedage Anthony Leo Fernando 4. Weliwita Wedage Tekla Mary Jacinta Fernando 5. Weliwita Wedage Emmanual Rekshi Fernando 6. Weliwita Wedage Neville Ananda Sirimal Fernando 7. Weliwita Wedage Hyacinth Mary Chamali Fernando 8. Weliwita Wedage Anslem Ajith Kumar Fernando All of 189, Fathima Lane (Behind Playground), Kochchikade. Plaintiffs. Vs. 1. Galabodage Thiboshius Silva. 2. Madithapola Lekamge Patricial Fonseka 3. Galabodage Samantha Silva. All of 185, Fathima Lane, Kochchikade. Defendants. NOW 1. Matara Kiri Liyanage Mary Agnes Fernando 1.(a)Weliwita Wedage Anthony Leo Maximus Fernando 2. Weliwita Wedage Anita Mary Vivian Fernando 3. Weliwita Wedage Anthony Leo Fernando 4. Weliwita Wedage Tekla Mary Jacinta Fernando 5. Weliwita Wedage Emmanual Rekshi Fernando 6. Weliwita Wedage Neville Ananda Sirimal Fernando 7. Weliwita Wedage Hyacinth Mary Chamali Fernando 8. Weliwita Wedage Anslem Ajith Kumar Fernando All of 189, Fathima Lane (Behind Playground), Kochchikade. Plaintiff-Appellants. Vs. 1. Galabodage Thiboshius Silva. 2. Madithapola Lekamge Patricia Fonseka 3. Galabodage Samantha Silva. All of 185, Fathima Lane, Kochchikade. Defendant-Respondents. And Now 1. Matara Kiri Liyanage Mary Agnes Fernando 1.(a). Weliwita Wedage Anthony Leo Maximus Fernando 2. Weliwita Wedage Anita Mary Vivian Fernando 3. Weliwita Wedage Anthony Leo Fernando 4. Weliwita Wedage Tekla Mary Jacinta Fernando 5. Weliwita Wedage Emmanual Rekshi Fernando 6. Weliwita Wedage Neville Ananda Sirimal Fernando 7. Weliwita Wedage Hyacinth Mary Chamali Fernando 8. Weliwita Wedage Anslem Ajith Kumar Fernando All of 189, Fathima Lane (Behind Playground), Kochchikade. Plaintiff-Appellant-Petitioners Vs. 1. Galabodage Thiboshius Silva (deceased) 1(a). Madithapola Lekamge Patricia Fonseka 1(b). Galbodage Samantha Silva 2. Madithapola Lekamge Patricia Fonseka. 3. Galaboage Samanth Silva. All of 185, Fathima Lane, Kochchikade. Defendant-Respondent-Respondents
13/ 12/ 20	SC Appeal 154/14	Democratic Socialist Republic of Sri Lanka Complainant Vs Rosemary Judy Perera Accused And between Rosemary Judy Perera Accused-Appellant Vs Democratic Socialist Republic of Sri Lanka Complainant-Respondent And now between Rosemary Judy Perera Accused-Appellant-Appellant Vs Democratic Socialist Republic of Sri Lanka Complainant-Respondent-Respondent
13/ 12/ 20	SC. Appeal 110/15	Hon. Attorney General Attorney General's Department, Colombo 12. Complainant Vs. Mohamed Iqbal Mohamed Sadath Accused And Then Mohamed Iqbal Mohamed Sadath Accused-Appellant Vs. Hon. Attorney General Attorney General's Department, Colombo 12. Complainant-Respondent And Now Mohamed Iqbal Mohamed Sadath Presently at, Remand Prison, Welikada Accused-Appellant-Petitioner Vs. Hon. Attorney General Attorney General's Department, Colombo 12. Complainant-Respondent-Respondent

13/12/20	SC Appeal No. 151/2016	Seneviratne Mudiyanselage Kirihamy Seneviratne of Senani, Panagamuwa, Ambulugala, Mawanella. Plaintiff Vs. 1. Ihala Wahumpurayalage Emalin 2. Viyannalage Kusuma 3. Viyannalage Wimalawathi 4. Viyannalage Nishshanka 5. Viyannalage Cyril 6. Viyannalage Gamini Gunathunga 7. Viyannalage Sita 8. Viyannalage Sunil 9. Viyannalage Lesly Wijethunge 10. Viyannalage Somaratne all of Nayawetunuhena, Attanagoda (Panagamuwa), Ambulugala, Mawanella. Defendants And Now Seneviratne Mudiyanselage Kirihamy Seneviratne of Senani, Panagamuwa, Ambulugala, Mawanella. Plaintiff-Appellant Vs. 1. Ihala Wahumpurayalage Emalin 2. Viyannalage Kusuma 3. Viyannalage Wimalawathi 4. Viyannalage Nishshanka 5. Viyannalage Cyril 6. Viyannalage Gamini Gunathunga 7. Viyannalage Sita 8. Viyannalage Sunil 9. Viyannalage Lesly Wijethunge 10. Viyannalage Somaratne all of Nayawetunuhena, Attanagoda (Panagamuwa), Ambulugala, Mawanella. Defendant-Respondents And Now Between 1. Ihala Vahumpurayalage Emalin (Deceased) 1A. Viyannalage Kusuma 2. Viyannalage Kusuma 3. Viyannalage Wimalawathi 4. Viyannalage Nishshanka 5. Viyannalage Cyril 6. Viyannalage Gamini Gunathunga 7. Viyannalage Sita 8. Viyannalage Lesly Wijethunge 9. Viyannalage Somaratne all of Nayawetunuhena, Attanagoda (Panagamuwa), Ambulugala, Mawanella. Defendant-Respondent-Appellants Vs. Seneviratne Mudiyanselage Kirihamy Seneviratne of Senani, Panagamuwa, Ambulugala, Mawanella. Plaintiff-Appellant-Respondent Viyannalage Sunil (deceased) Nayawetunuhena, Attanagoda (Panagamuwa), Ambulugala, Mawanella. 8. Defendant-Respondent-Respondent Subhasinghe Mudiyanselage Ranjani Kumari of Ehawatte, Atanagoda, Ambulugala, Mawanella. 8A. Substituted Defendant-Respondent-Respondent
10/12/20	SC. FR. Application No. 256/17	W.P.S. Wijerathna No. 02, Kaluwalgoda, Markawita. Petitioner Vs. 1. Sri Lanka Ports Authority No. 19, Chaithya Road, Colombo 1. 2. Chief Human Resources Manager Sri Lanka Ports Authority, No. 19, Chaithya Road, Colombo 1. 3. S.H.S. Padmini Deputy Chief Human Resources Manager, Sri Lanka Ports Authority, No. 19, Chaithya Road, Colombo 1. 4. A. Hewawitharana Harbour Master, Sri Lanka Ports Authority No. 19, Chaithya Road, Colombo 1. 5. S.A.R. Jayathilaka Chief Fire Officer, Sri Lanka Ports Authority, No. 19, Chaithya Road, Colombo 1. 6. Nelum Anawarathna Acting Chief Human Resources Manager, Sri Lanka Ports Authority, No. 19, Chaithya Road, Colombo 1. 7. Nirmal De Fonseka Manager, Mahapola Training Centre, Sri Lanka Ports Authority, No. 19, Chaithya Road, Colombo 1. 8. B.M. Anulawathie Deputy Chief Manager of Administrative and Engineering, Sri Lanka Ports Authority, No. 19, Chaithya Road, Colombo 1. 9. R.G. Hettiarachchi Superintendent of Audit, Auditor General's Department, No. 306/72, Polduwa Road, Battaramulla. 10. Auditor General Auditor General's Department, No. 306/72, Polduwa Road, Battaramulla. 11. Honourable Attorney General Attorney General's Department, Colombo 12. Respondents

21/ 10/ 20	SC/FR APPLICATION 369/2013	Nandasenage Lalantha Anurdha, Nandasena, Pahalagama, Mahabulankulama. PETITIONER Vs 1. Head Quarter Inspector of Police, Police Station, Anuradhapura. 2. C.I Gallage, Officer in Charge - Crime Branch, Police Station, Anuradhapura. 3. S. I. Amarasingha, Police Station, Anuradhapura. 4. P.C. Dias, Police Station, Anuradhapura. 5. Inspector General of Police, Police Headquarters, Colombo 01. 6. Hon. Attorney General, Attorney – General's Department, Colombo 12. RESPONDENTS
19/ 10/ 20	SC Appeal 32/2020	The Democratic Socialist Republic of Sri Lanka Complainant Vs. Hattuwan Pedige Sugath Karunarathne (Presently incarcerated in Welikada Prison) Accused AND Hattuwan Pedige Sugath Karunarathne Accused-Appellant Vs. Hon. Attorney General Attorney General's Department Colombo 12. Complainant-Respondent AND NOW BETWEEN Hattuwan Pedige Sugath Karunarathne Accused-Appellant-Petitioner Vs. Hon. Attorney General Attorney General's Department Colombo 12. Respondent-Respondent
15/ 10/ 20	SC Appeal No. 125/2018	Ramakrishnan Dharmalingam, No. 23, Sedawatta, Wellanpitiya Plaintiff Vs Ramakrishnan Sivalingam, No. 23, Sedawatta, Wellanpitiya. Defendant AND Ramakrishnan Dharmalingam, No. 23, Sedawatta, Wellanpitiya. Plaintiff-Appellant Vs Ramakrishnan Sivalingam, No. 23, Sedawatta, Wellanpitiya. Defendant-Respondent AND NOW Ramakrishnan Sivalingam, No. 23, Sedawatta, Wellanpitiya. Defendant-Respondent-Petitioner Vs Ramakrishnan Dharmalingam, No. 23, Sedawatta, Wellanpitiya. Plaintiff-Appellant-Respondent
13/ 10/ 20	SC (FR) Application No. 357/2018	In the matter of an Application under and in terms of Article 126 read with Article 17 of the Constitution of the Democratic Socialist Republic of Sri Lanka. Aruna Laksiri Unawatuna, No. 02, Buddhist Cultural Centre, Colombo 10. Petitioner Vs. 1. Hon. Maithripala Sirisena, H.E. the President of the Democratic Socialist Republic of Sri Lanka, Presidential Secretariat, Colombo 10. In his place Hon. Attorney-General, Attorney-General's Department, Colombo 12. 2. Chairman and the members of the Election Commission, Election Secretariat, Rajagiriya. 3. Hon. Attorney-General, Attorney-General's Department, Colombo 12. Respondents
01/ 10/ 20	SC Appeal No: 228/2017	W.K.P.I. Rodrigo, No. 82/10, Baptist Road, Pitakotte, Kotte. APPLICANT -VS- Central Engineering Consultancy Bureau, No. 415, Bauddhaloka Mawatha, Colombo 07. RESPONDENT AND BETWEEN W.K.P.I. Rodrigo, No. 82/10, Baptist Road, Pitakotte, Kotte. APPLICANT-APPELLANT -VS- Central Engineering Consultancy Bureau, No. 415, Bauddhaloka Mawatha, Colombo 07 RESPONDENT-RESPONDENT AND NOW BETWEEN W.K.P.I. Rodrigo, No. 82/10, Baptist Road, Pitakotte, Kotte. APPLICANT-APPELLANT-APPELLANT -VS- Central Engineering Consultancy Bureau, No. 415, Bauddhaloka Mawatha, Colombo 07 RESPONDENT- RESPONDENT- RESPONDENT

29/ 09/ 20	SC Appeal No. SC HC LA/54/18	Nestle Lanka PLC 440, T.B. Jayah Mawatha, Colombo 10. Respondent-Appellant- Petitioner Vs. Gamini Rajapakshe Bodiyawatte Ambalan Watte, Ratnapura. Applicant-Respondent-Respondent
29/ 09/ 20	SC FR Application No. 230/2018	1. M. Ashroff Rumy, Attorney-at-Law, Colombo City Coroner of No. 61, Meeraniya Street, Colombo 12. 2. Ms. Iresha Deshani Samaraweera Attorney-at-Law, Additional Colombo City Coroner of No. 36/4, Ketawalamulla Place, Dematagoda, Colombo 09. Petitioners Vs. 1. Hon. Thalatha Athukorale, Minister of Justice & Prison Reforms, Ministry of Justice, Colombo 12. 2. Secretary, Ministry of Justice & Prison Reforms, Ministry of Justice, Colombo 12. 3. Assistant Secretary(Administration) Ministry of Justice & Prison Reforms, Ministry of Justice, Colombo 12. 4. Ms. U.G.L. Anuththara. Of No.142 E.W. Perera Mawatha Colombo 10. 5. Ms. A.L.M. Maharoof of 29/15, School Lane, Dematagoda, Colombo 09. 6. Mr. Edward Ahangama, Attorney at-Law, formerly Colombo City Coroner, No. 141, Pannipitiya Road, Battaramulla. 7. Director of Establishments ` Ministry of Public Administration, Management and Law and Order, Independence Square, Colombo 07. 8. Secretary, Bar Association of Sri Lanka, Hulftsdorp, Colombo 12. 9. Hon. Attorney General Attorney General's Department Colombo 12. Respondents
24/ 09/ 20	S C Rule No. 08/ 2014	R M Karunaratne Banda, No. 95/1, Kahawatta, Ambatenna. COMPLAINANT -Vs- Wasantha Wijewardena, (Attorney-at-Law) No. 03, Colombo Street, Kandy. RESPONDENT
23/ 09/ 20	SC/HCCA/ LA/ 404/2013	Pattiyage Leelawathie Gomes, No. 60/10 J, Templers Road, Mt. Lavinia Plaintiff Vs. 1. Preethi Reeta Bastian, 2. Wajirapani Bastian, 3. Luwis Vidanalage Manel Bridget Bastian All of No. 53/3, Sri Gunaratne Mawatha, Mt. Lavinia. Defendants AND 1. Preethi Reeta Bastian, 2. Wajirapani Bastian, 3. Luwis Vidanalage Manel Bridget Bastian All of No. 53/3, Sri Gunaratne Mawatha, Mt. Lavinia. Defendants-Appellants Vs. Pattiyage Leelawathie Gomes, No. 60/10 J, Templers Road, Mt. Lavinia (deceased) Plaintiff-Respondent AND NOW BETWEEN 1. Preethi Reeta Bastian, 2. Wajirapani Bastian, All of No. 53/3, Sri Gunaratne Mawatha, Mt. Lavinia. Defendants-Appellants-Petitioners Vs. 1. Sriya Sepalika Suludagoda, 2. Lal Kumara Suludagoda, 3. Neetha Kamini Suludagoda, 4. Geetha Chandani Suludagoda, All of No. 60/10 J, Templers Road, Mt. Lavania SUBSTITUTED Plaintiffs-Respondents- Respondents

20/09/20	SC Appeal No. 148/2012	R. Chandrasena 392, Siri Parakumba Mawatha, Makola South, Makola. Applicant Vs The Monetary Board, Central Bank of Sri Lanka, 30, Janadhipathi Mawatha, Colombo 01. Respondent And R. Chandrasena 392, Siri Parakumba Mawatha, Makola South, Makola. Applicant-Appellant Vs The Monetary Board, Central Bank of Sri Lanka, 30, Janadhipathi Mawatha, Colombo 01. Respondent-Respondent And The Monetary Board, Central Bank of Sri Lanka, 30, Janadhipathi Mawatha, Colombo 01. Respondent-Respondent-Appellant Vs R. Chandrasena 392, Siri Parakumba Mawatha, Makola South, Makola. Applicant-Appellant-Respondent And Now Between Bethmage Premawathie Chandrasena (nee Perera), 392, Siri Parakumba Mawatha, Makola South, Makola. Petitioner Vs The Monetary Board, Central Bank of Sri Lanka, 30, Janadhipathi Mawatha, Colombo 01. Respondent-Respondent-Petitioner-Appellant
16/09/20	SC/Spl/LA/159/2017	Hiranya Surantha Wijesinghe Thuduwa Road, Madapatha, Piliyandala Applicant Vs. Tenderlea Farms (Pvt) Limited No. 5A, Thuduwa Road, Madapatha, Piliyandala (office Now at) No. 31, First Lane, Ratmalana Respondent AND BETWEEN Tenderlea Farms (Pvt) Limited No. 5A, Thuduwa Road, Madapatha, Piliyandala (Office now at) No. 31, First Lane, Ratmalana Respondent-Appellant Vs. Hiranya Surantha Wijesighe Thudawa Road, Madapatha, Piliyandala. Applicant-Respondent AND NOW BETWEEN Hiranya Surantha Wijesinghe Thuduwa Road, Madapatha, Piliyandala Applicant-Respondent-Petitioner Vs. Tenderlea Farms (Pvt) Limited No. 5A, Thuduwa Road, Madapatha, Piliyandala (Office now at) No. 31, First Lane, Ratmalana Respondent-Appellant-Respondent
16/09/20	SC Appeal 118/2013	K.H. Dayananda, Revenue Inspector, Dehiwala – Mt. Lavania Municipal Council, Dehiwala - Complainant Vs. Ceylon Electricity Board, No. 75/1, Aththidiya Road, Ratmalana - Defaulter AND Ceylon Electricity Board, No. 75/1, Aththidiya Road, Ratmalana - Defaulter/Appellant Vs. K.H. Dayananda, Revenue Inspector, Dehiwala – Mt. Lavania Municipal Council, Dehiwala - Complainant/ Respondent AND NOW BETWEEN Ceylon Electricity Board, No. 75/1, Aththidiya Road, Ratmalana - Defaulter/Appellant/Appellant Vs. K.H. Dayananda, Revenue Inspector, Dehiwala – Mt. Lavania Municipal Council, Dehiwala - Complainant/Respondent/Respondent
14/09/20	S.C. Appeal 04/2015	People’s Bank No: 75, Sir Chittampalam A.Gardiner Mawatha, Colombo 02. Plaintiff -Vs- Mahavidanage Simpson Kularatne No:622, Tangalle Road, Meddewatta, Matara. Defendant AND People’s Bank No: 75, Sir Chittampalam A.Gardiner Mawatha, Colombo 02. Plaintiff-Appellant -Vs- Mahavidanage Simpson Kularatne No:622, Tangalle Road, Meddewatta, Matara. Defendant-Respondent AND NOW BETWEEN Mahavidanage Simpson Kularatne No:622, Tangalle Road, Meddewatta, Matara. Presently at No.6B 1-1 Colonel Sunil Senanayake Mawatha, Pitakotte. Defendant-Respondent-Petitioner/ Appellant -Vs- People’s Bank No: 75, Sir Chittampalam A.Gardiner Mawatha, Colombo 02. Plaintiff-Appellant-Respondent

14/ 09/ 20	SC Appeal No. 04/2015	People's Bank No. 75, Sir Chittampalam A. Gardiner Mawatha, Colombo 02. Plaintiff -Vs- Mahavidanage Simpson Kularatne No. 662, Tangalle Road, Meddewatta, Matara. Defendant AND People's Bank No: 75, Sir Chittampalam A. Gardiner Mawatha, Colombo 02. Plaintiff – Appellant -Vs- Mahavidanage Simpson Kularatne No. 662, Tangalle Road, Meddewatta, Matara. Defendant – Respondent AND NOW BETWEEN Mahavidanage Simpson Kularatne No. 662, Tangalle Road, Meddewatta, Matara. (Presently at) No. 6B 1-1 Colonel Sunil Senanayake Mawatha, Pitakotte Defendant – Respondent – Appellant -Vs- People's Bank No: 75, Sir Chittampalam A. Gardiner Mawatha, Colombo 02. Plaintiff – Appellant – Respondent
10/ 09/ 20	Case No. SC. Appeal 65/2016	Kushan Ediriweera of, 40, Lake Gardens, Rajagiriya. Represented by his duly appointed next Friend. Chandra Ediriweera of, 40, Lake Gardens, Rajagiriya. Plaintiff Vs. 1. Sadhasivam Sivagankan, 442, High Street, Tooting, London, United Kingdom and 439, Galle Road, Colombo 06. 2. Tissaweerasingham Sundhararajan of, 439, Galle Road, Colombo 06 and of, 17, De Mel Road, Mount Lavinia. Defendants 3. Union Assurance Limited of, No. 20, St. Michael's Road, Colombo 03. Added Defendant AND BETWEEN In the matter of an application, inter alia, under Section 757 of the Civil Procedure Code and Sections 5A (1) and 5A (2) of the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006 for leave to appeal from the Order made by the Learned Additional District Judge in DC Case No. 58123/MR and Delivered in open court on 24.10.2011. Union Assurance Limited of, No. 20, St. Michael's Road, Colombo 03. Added Defendant – Petitioner Kushan Ediriweera of, 40, Lake Gardens, Rajagiriya. Represented by his duly appointed next Friend Chandra Ediriweera of, 40, Lake Gardens, Rajagiriya. Plaintiff - Respondent 1. Sadhasivam Sivagankan, 442, High Street, Tooting, London, United Kingdom and 439, Galle Road, Colombo 06. 2. Tissaweerasingham Sundhararajan of, 439, Galle Road, Colombo 06 and of, 17, De Mel Road, Mount Lavinia. Defendant – Respondents AND NOW BETWEEN In the matter of an application for Special Leave to Appeal to the Supreme Court under and in terms of Article 128 of the Constitution. Kushan Ediriweera of, 40, Lake Gardens, Rajagiriya. Represented by his duly appointed next Friend. Chandra Ediriweera of, 40, Lake Gardens, Rajagiriya. Plaintiff – Respondent - Petitioner Vs. 1. Sadhasivam Sivagankan, 442, High Street, Tooting, London, United Kingdom and 439, Galle Road, Colombo 06. 2. Tissaweerasingham Sundhararajan of, 439, Galle Road, Colombo 06 and of, 17, De Mel Road, Mount Lavinia. Defendants – Respondents –Respondents 3. Fairfirst Insurance Limited (formerly known as Union Assurance General Limited) of, No. 33, St. Michael's Road, Colombo 03. Added Defendant – Petitioner – Respondent

10/09/20	SC Appeal No: 70/2018	Democratic Socialist Republic of Sri Lanka. COMPLAINANT -VS- Badde Liyanage Wasantha Kumara Fernando. No. 9, St Rita Mawatha, Dummaladeniya South, Wennappuwa. Presently at, Welikada Prison, Borella, Colombo 8. ACCUSED AND BETWEEN Badde Liyanage Wasantha Kumara Fernando. No. 9, St Rita Mawatha, Dummaladeniya South, Wennappuwa. Presently at, Welikada Prison, Borella, Colombo 8. ACCUSED-PETITIONER -VS- Hon. Attorney General, Attorney General's Department, Colombo 12. COMPLAINANT -RESPONDENT AND NOW BETWEEN Badde Liyanage Wasantha Kumara Fernando. No. 9, St Rita Mawatha, Dummaladeniya South, Wennappuwa. Presently at, Welikada Prison, Borella, Colombo 8. ACCUSED-APPELLANT-APPELLANT -VS- Hon. Attorney General, Attorney General's Department, Colombo 12. COMPLAINANT -RESPONDENT RESPONDENT
10/09/20	SC Appeal 88/2012	And Now between Udugamaralalage Walter Mendis No. 34C/45, Rukmalgama Housing Scheme, Pannipitiya. Accused-Appellant-Petitioner-Appellant Vs Hon. Attorney General Attorney General's Department, Hulftsdorp, Colombo 12. Complainant-Respondent-Respondent
09/09/20	SC Appeal No. 224/2017	Yahampath Arachchilage Niroshanee Nadumali, No.329/3, High Level Road, Meegoda. PLAINTIFF -VS- Damitha Nalinda Bamunusinghe. No.388/7, Baddegedara, Meegoda. DEFENDANT AND Damitha Nalinda Bamunusinghe. No.388/7, Baddegedara, Meegoda. DEFENDANT-PETITITONER -VS- Yahampath Arachchilage Niroshanee Nadumali, No.329/3, High Level Road, Meegoda. PLANTIFF - RESPONDENT AND BETWEEN Damitha Nalinda Bamunusinghe. No.388/7, Baddegedara, Meegoda. DEFENDANT-PETITITONER- PETITITONER -VS- Yahampath Arachchilage Niroshanee Nadumali, No.329/3, High Level Road, Meegoda. PLANTIFF-RESPONDENT RESPONDENT AND NOW BETWEEN Damitha Nalinda Bamunusinghe. No.388/7, Baddegedara, Meegoda. DEFENDANT-PETITITONER-PETITITONER- APPELLANT VS- Yahampath Arachchilage Niroshanee Nadumali, No.329/3, High Level Road, Meegoda. PLANTIFF-RESPONDENT RESPONDENT- RESPONDENT

08/ 09/ 20	SC/CHC/ Appeal 12/2012	Benedict Raja Philip De Silva 4970, Lansing Drive, North Olmsted, Ohio 44070, United States of America and Presently at No.7, Station Road, Pinwatta, Panadura. Plaintiff Vs Chris Peiris No. 518, Gale Road Colombo 3. Chamalee Deepthika Jayawardena No. 518, Gale Road Colombo 3. Haritha Munasin ghe No. 58B, Salmulla, Kollonawa. Anthony Joseph Mahinda De Silva No.27/3 , Chandralekha Mawatha, Colombo 8. Defendants In the matter of an Application under Sectio n 218, 343 and 349 of the Civil Procedure Code. Anthony Joseph Mahinda De Silva No. 27/3, Chandralekha Mawatha, Colombo 8 4 th Defendant Petitioner Vs Benedict Raja Philip De Silva 4970, Lansing Drive, North Olmsted, Ohio 44070, United States of America Plaintiff Respondent AND NOW In the matter of an Application for Leave to Appeal Under and in terms of Section 5(2) of the High Court of the Provinces (Special Provinces) Act No.10 o f 1996 read together with Chapter LVIII of The Civil Procedure Code. Benedict Raja Philip De Silva 4970, Lansing Drive, North Olmsted, Ohio 44070, United States of America and Presently at No.7, Station Road, Pinwatta, Panadura. Plaintiff Respondent Petitioner Appellant. Vs Anthony Joseph Mahinda De Silva No. 27/3, Chandralekha Mawatha,Colombo 8 4 th Defendant Petitio ner Respondent Respondent.
08/ 09/ 20	SC/CHC/ Appeal 34/2011	Benedict Raja Philip De Silva 4970, Lansing Drive, North Olmsted, Ohio 44070, United States of America and Presently at No.7, Station Road, Pinwatta, Panadura. P laintiff Vs Chris Peiris No. 518, Gale Road Colombo 3. Chamalee Deepthika Jayawardena No. 518, Gale Road Colombo 3. Haritha Munasinghe No. 58B, Salmulla, Kollonawa. Anthony Joseph Mahinda De Silva No.27/3, Chandralekha Mawatha, Colombo 8. Defendants In the matter of an Application under Section 218, 343 a nd 349 of the Civil Procedure Code. Anthony Joseph Mahinda De Silva No. 27/3, Chandralekha Mawatha, Colombo 8 4 th Defendant Petitioner Vs Benedict Raja Philip De Silva 4970, Lansing Drive, North Olmsted, O hio 44070, United States of America Plaintiff Respond ent AND NOW In the matter of an Application for Leave to Appeal Under and in ter ms of Section 5(2) of the High Court of the Provinces (Special Provinces) Act No.10 of 1996 read together with Chapter LVIII of The Civil Procedure Code. Benedict Raja Philip De Silva 4970, Lansing Drive, North Olmsted, Ohio 44070, United States of Ameri ca and Presently at No.7, Station Road, Pinwatta, Panadura. Plaintiff Respondent Petitioner Appellant. Vs Anthony Joseph Mahinda De Silva No. 27/3, Chandralekha Mawatha, Colombo 8 4 th Defendant Petitioner Respondent Respondent.

08/ 09/ 20	SC Appeal 208/2017	Obawath Kanka namage Jinadasa No.18, Bowala Road, Mulgampola, Kandy Plaintiff Vs 1. Malwa Waduge Bandusoma 2. Manic Pura Hewage Seetha, Both of No. 385, 12/1, Shanthi Mawatha, Kirillawala. Defendants AND 1. Malwa Waduge Bandusoma 2. Manic Pura Hewage Seetha, Both of No. 385, 1 2/1, Shanthi Mawatha, Kirillawala. Defendant Appellants Vs Obawath Kankanamage Jinadasa No.18, Bowala Road, M ulgampola, Kandy Plaintiff Respondent AND NOW 1. Malwa Waduge Bandusoma 2. Manic Pura Hewage Seetha, (Appearing by her Power of Attorney holder Malwa Waduge Bandusoma) Both of No. 385, 12/1, Shanthi Mawatha, Kirillawala. Defendant Appellant Petitioner Appellant s Vs 1. Obawath Kankanam age Jinadasa (deceased) No.18, Bowala Road, Mulgampola, Kandy 1A. Manic Pura Waduge Chulani No.18, Bowala Road, Mulgampola, Kandy Plaintiff Respondent Respondent Respondent
08/ 09/ 20	SC Appeal 179/2014	1. Niriellage J ayamini Keerthisheeli No.106/2, Wattegedera Road, Maharagama. 2. Niriellage Dhammadevamittha Upasena alias Devamittha Upasena Niriella. No.174/9, Balika Nivasa Road, Rukmale Pannipitiya. 3. Niriellage Aruna Kumara Upasena alias Kumara Upasena Niriella. No.662/A, Eeriyawatiya Road, Kiribathgoda Plaintiff Vs Niriellage S hanthi Mangalika Upasena alias Shanthi Mangalika Upasena Niriella. No.130/8, Wijeya Mawatha, Wattegedera Road, Maharagama. Defendant AND NOW Niriellage Shanthi Mangalika Upasena alias Shanthi Mangalika Upasena Niriella. No.130/8, Wijeya Mawatha, Wattegedera Road, Maharagama. Defendant Appellant Vs 1. Niriellage Jayamini Keerthisheeli No.106/2, Wattegedera Road, Maharagama. 2. Niriellage Dhammadevamittha Upasena alias Devamittha Upasena Niriella. No.174/9, Balika Nivasa Road, Rukmale Pannipitiya. 3. Niriellage Aruna Kumara Upasena alias Kumara Upasena Niriella. No.662/A, Eeriyawatiya Road, Kiribathgoda Plain tiff Respondent s AND NOW BETWEEN Niriellage Shanthi Mangalika Upasena alias Shanthi Mangalika Upasena Niriella. No.130/8, Wijeya Mawatha, Wattegedera Road, Maharagama. Defendant Appellant Petitioner Appellant Vs 1. Niriellage Jayamini Keerthisheeli No.106/2, Wattegedera Road, Maharagama. 2. Niriellage Dhammadevamittha Upasena alias Devamittha Upasena Niriella. No.174/9, Balika Nivasa Road, Rukmale Pannipitiya. 3. Niriellage Aruna Kumara Upasena alias Kumara Upasena Niriella. No.662/A, Eeriyawatiya Road, Kiribathgoda Plaintiff Respondent Resp ondent Respondent s

07/09/20	SC (FR) Application No. 73/2009	1. Chief Inspector W.A.J.H. Fonseka 125/41, Pannipitiya Road, Baththaramulla. 2. Chief Inspector W.K.J.R. Dias No. 126, Piyadasa Sirisena Mawatha, Colombo 10. 3. Chief Inspector R.A.R.N. Rajapaksha No. 1/2, Police Flats, Colombo 10. 4. Chief Inspector Prasad Siriwardana [now deceased] No. 230, Goonawella, Kelaniya. PETITIONERS -Vs- 1. Neville Piyadigama, Chairman, National Police Commission, 3rd Floor, Rotunda Building, No. 109, Galle Road, Colombo 3. 1(a) Senaka Walgampaya, P.C. – Chairman, NPC 1(a)(i) Prof. Siri Hettige – Chairman, NPC 1(a)(ii) Tilak Kollure – Chairman, NPC 1(a)(iii) P.H. Manatunga – Chairman, NPC 1(a)(iv) K.W.E. Karaliyadde – Chairman, NPC 1(A) Vidyajothi Dr. Dayasiri Fernando – Chairman 1(A)(i) Jus. Sathya Hettige, P.C. – Chairman 1(A)(ii) Dharmasena Dissanayake – Chairman 1(B) Palitha M. Kumarasinghe, P.C. – Member 1(B)(i) Kanthi Wijetunga – Member 1(B)(ii) A. Salam Abdul Waid – Member 1(B)(iii) Prof. Hussain Ismail – Member 1(B)(iv) Mrs. Sudharma Karunaratne – Member 1(C) Sirimavo A. Wijeratne – Member 1(C)(i) Sunil S. Sirisena – Member 1(C)(ii) Ms. D.S. Wijeythilake – Member 1(C)(iii) G.S.A. De Silva, P.C. – Member 1(D) S.C. Mannampperuma – Member 1(D)(i) Dr. Pradeep Ramanujam – Member 1(E) Ananda Seneviratne – Member 1(E)(i) Mr. V. Jegarasasingam – Member 1(F) S. Thillandarajah – Member 1(F)(i) Santi Nihal Seneviratne – Member 1(G) M.D.W.Ariyawansa – Member 1(G)(i) Dr. I.N. Zoysa – Member 1(G)(ii) S. Ranugge – Member 1(H) A. Mohamed Nahiya – Member 1(H)(i) Sarath Jayathilake – Member 1(I) T.M.L.C. Senarathne – Secretary 1(I)(i) H.M.G. Seneviratne – Secretary 1(I)(ii) M.A.B. Daya Senerath – Secretary 1(J) H.S. Pathirana – Member 1(J)(i) D.L. Mendis – Member 1(A) to 1(J)(i) Respondents are of; The Public Service Commission, No. 177, Nawala Road, Colombo 5 2. Ven. Elle Gunawansa – Member, NPC 2(a) P.H. Manatunga – Member 2(a)(i) Prof. Siri Hettige – Member 2(a)(ii) Gamini Nawaratne – Member 3. Justice Chandradasa Nanayakkara – Member, NPC 3(a) Mr. D. Dissanayake – Member 3(a)(i) Mrs. Savithri Wijesekera – Member 4. S.P. Bandusena – Member, NPC 4(a) Nihal Jayamanna P.C. – Member 4(a)(i) Mr. M.M.M. Mowjood – Member 4(a)(ii) Mr. Thilak Collure – Member 5. Dr. Kopala Sundaram – Member, NPC 5(a) Mr. R. Sivaraman – Member 5(a)(i) Mr. Anton Jeyanadan – Member 5(a)(ii) Asoka Wijethilaka – Member 6. Chamani Munasinghe – Member, NPC 6(a) Mr. Frank De Silva – Member 6(a)(i) Mr. G. Jeyakumar – Member 7. Javard Joseph – Member, NPC 7(a) Newton Gooneratne – Member 7(a)(i) Y.L.M. Zawahir – Member 8. K.C. Logeshwaran – Secretary, NPC 8(a) Ariyadasa Cooray – Secretary 8(a)(i) Saman Dissanayake 9. H.A.J.S.K. Wickramaratne Inspector General of Police, Department of Police, Colombo 1. 9(a) Mahinda Balasuriya – Inspector General of Police 9(b) N.K. Illangakoon – Inspector General of Police 9(c) Pujitha Jayasundara – Inspector General of Police 9(d) C.D. Wickramaratne – Act. Inspector General of Police 10. Sunil Sirisena, Secretary Ministry of Foreign Employment and Welfare Denzil Kobbekaduwa Mawatha Baththaramulla. 11. Mrs. Jayantha Rukmani Siriwardena, Additional Secretary, Ministry of Trade, Marketing Development, Co-operative and Consumer Services 12. D.W. Prathapasinghe Senior Deputy Inspector General

06/08/20	SC Appeal 52/2014	Petitioner Vs 1. Commissioner General of Labour, Labour Secretariat, Narahenpita, Colombo 05. 2. Free Trade Zones & General Services Employees Union, 141, Ananda Rajakaruna Mawatha, Colombo 10. 3. G.M. Shiromala Gajanayake, Kapila Sevana, Ihala Dimbulwewa, Welimada. and 49 others Respondents AND NOW Sascon Knitting Company (Pvt) Ltd. No: 752, Baseline Road, Colombo 09. Petitioner-Petitioner/Appellant Vs. 2 1. Commissioner General of Labour, Labour Secretariat, Narahenpita, Colombo 05. 2. Free Trade Zones & General Services Employees Union, 141, Ananda Rajakaruna Mawatha, Colombo 10. 3. G.M. Shiromala Gajanayake, Kapila Sevana, Ihala Dimbulwewa, Welimada. and 49 others Respondents-Respondents
06/08/20	SC Appeal No. 123 2012	Dehigaspe Patabandige Nishantha Nanayakkara, No 34/3, 1st Lane, Egodawatte Road, Boralesgamuwa. ACCUSED - RESPONDENT - APPELLANT -Vs- 1. Kyoko Kyuma, No 92/2A, Lauries Road, Colombo 04. AGGRIEVED PARTY APPELLANT - RESPONDENT 2. Officer-In-Charge, Police Station, Piliyandala. COMPLAINANT - RESPONDENT - RESPONDENT 3. Hon. Attorney General, Attorney General's Department, Colombo 12. RESPONDENT - RESPONDENT
03/08/20	SC.FR.No. 40/2019	1. Iresha Dulashini Dangolla, Mo.10A, Meegahawatta Road, Gangodawila, Nugegoda. 2. Kandabadage Don Nadeera Wijenayaka, Mo.10A, Meegahawatta Road, Gangodawila, Nugegoda. For an on behalf of Kandabadage Dona Nelisa Manuldi Wijenayaka. PETITIONER Vs. 1. Sandamali Aviruppola, Principal, Visaka Vidyalaya, Colombo-05 2. N.H.M.Chithrananda, Secretary, Ministry of Education, 'Isurupaya', Battaramulla 3. S.M. Keerthirathna, Ananda College, Colombo- 10 4. Hon. Attorney General, Attorney General's Department, Colombo-12. RESPONDENTS
30/07/20	SC Appeal 25/2017	K. Sivasamy C/o Nikapotha Kanda, Kithalella Road, Bandarawela Applicant Vs. D.L.Hema Malini de Silva of Uva, Dikara Watta, Kithalella Road, Heeloya Road, Bandarawela Respondent AND BETWEEN D.L.Hema Malini de Silva of Uva, Dikara Watta, Kithalella Road, Heeloya Road, Bandarawela Respondent/Appellant Vs. K. Sivasamy C/o Nikapotha Kanda, Kithalella Road, Bandarawela Applicant/Respondent AND NOW BETWEEN D.L.Hema Malini de Silva of Uva, Dikara Watta, Kithalella Road, Heeloya Road, Bandarawela Respondent/Appellant/Appellant Vs. K. Sivasamy C/o Nikapotha Kanda, Kithalella Road, Bandarawela Applicant/ Respondent/Respondent

30/ 07/ 20	SC/FR APPLICATION 551/2012	P.U.P.K. De Silva, No. 65, Railway Station Road, Balapitiya. PETITIONER Vs 1. Public Service Commission, No.177, Nawala Road, Narahenpita, Colombo 05. 2. Dayasiri Fernando, Chairman, 2A. Dharmasena Dissanayaka, 3. Palitha M. Kumarasinghe, P.C. 3A. Prof. Hussain Ismail, 4. Sirimavo A. Wijeratne, 4A. Dr. Prathap Ramanujam, 5. S.C. Mannapperuma, 5A. V. Jegarasasingham, 6. Ananda Seneviratne, 6A. S. Ranugge, 7. N.H. Pathirana, 7A. D. Laksiri Mendis, 8. S. Thillanandarajah, 8A. Sarath Jayathilaka, 9. M.D.W. Ariyawansa, 9A. Sudharma Karunarathna, 10. A. Mohamed Nahiya, 10A. A.G.S.A. De Silva PC, (All of them of Public Service Commission, No.177, Nawala Road, Narahenpita, Colombo 5.) 11. L.C. Senaratne 11A. M.A.B. Daya Senerath, Secretary, Public Service Commission, No. 177, Nawala Road, Narahenpita, Colombo 05. 12. Southern Province Provincial Public Service Commission, 6th Floor, District Secretariat Office, Galle. 13. H.W. Wijerathne, 13A. H.W. Wijerathna Chairman. 14. K.K.G.J.K. Siriwardena, 14A. K.K.G.J.K. Siriwardena 15. D.W. Vitharana, 15A. Daya Vitharana 16. Munidasa Halpandeniya, 16A. D.K.S. Amarasiri, 17. Srimal Wijesekara, 17(a) A.L.K Ariyarathna, All of them are Members of the Southern Province Provincial Public Service Commission, 6th Floor, District Secretariat Office, Galle. 18. S.D. Pandikorala, 18A. K.L Dayananda, Secretary, Southern Province Provincial Public Service Commission, 6th Floor, District Secretariat Office, Galle. 19. R.M.D.B. Meegasmulla, 19A. R.C. De Soyza, Chief Secretary, Southern Province Provincial Public Service Commission, S.S. Dahanayake Wm, Galle 20. H.K.R.J. Edirisinghe, 20A. A. Ranasinghe, Deputy Chief Secretary (Engineering Service), Southern Provincial Engineering Service Office, Fort, Galle. 21. Director – Engineering Services, Office of the Engineering Services Board, Independence Square, Colombo 7. 22. P.B. Abeykoon, Ceased to hold office. 22.A. Mr. S. Hettiarachchi, Secretary, Ministry of Public Administration and Home Affairs, Colombo 7. 23. Hon. Attorney – General, Attorney – General’s Department, Hultsdorp Street, Colombo 12. RESPONDENTS
28/ 07/ 20	SC FR Application No. 451/2016	Batuwana Dewage Lionel Hemakumara, No. 681 2/2, Hospital Place, New Town, Embilipitiya. Petitioners -Vs- 1) Ruwan Gunasekara, Superintendent of Police, Director, Discipline and Conduct Division, Police Headquarters, Colombo 01. 2) Ajith Rohana, Deputy Inspector General, Discipline and Conduct Division, Police Headquarters, Colombo 01. 3) Pujitha Jayasundara, Inspector General of Police, Police Headquarters, Colombo 01. 4) P.H. Manatunga, Chairman 5) S.T. Hettige, Member, 6) Savithree D. Wijesekara, Member, 7) Y.L.M. Zawahir, Member, 8) B.A. Jeyanadan, Member, 9) Tilak Collure, Member, 10) Frank De Silva, Member, The 4th to 10th Respondents, all of National Police Commission, Block No.09, BMICH Premises, Bauddaloka Mawatha, Colombo 07. 11) Hon. Attorney General, Attorney General’s Department, Colombo 12. Respondents

28/ 07/ 20	SC/Appeal No. 59A/ 2006	Ravindra Sandresh Karunanayake of No. 1291/6, Rajamalwatta Road, Battaramulla. Plaintiff Vs. Wimal Weerawansa of No. 198/19, Panchikawatta Road, Colombo 10. Defendant AND BETWEEN Wimal Weerawansa of No. 198/19, Panchikawatta Road, Colombo 10. Defendant – Petitioner Vs. Ravindra Sandresh Karunanayake of No. 1291/6, Rajamalwatta Road, Battaramulla. Plaintiff – Respondent AND BETWEEN Ravindra Sandresh Karunanayake of No. 1291/6, Rajamalwatta Road, Battaramulla. Plaintiff – Respondent – Petitioner Vs. Wimal Weerawansa of No. 198/19, Panchikawatta Road, Colombo 10. Defendant – Petitioner – Respondent AND NOW BETWEEN Wimal Weerawansa of No. 198/19, Panchikawatta Road, Colombo 10. Defendant – Petitioner – Respondent – Petitioner Vs. Ravindra Sandresh Karunanayake of No. 1291/6, Rajamalwatta Road, Battaramulla. Plaintiff – Respondent – Petitioner – Respondent
22/ 07/ 20	S.C.F.R. APPLICATI ON NO: 400/2019	1. A.L.M Rushdhaan, No.27-1/2, Alfred Place, Colombo-3 2. R.W.D.L.H.Rajasekara, No: 23, Saparamadu Place, Weragoda, Kelaniya. 3. M.L.M. Nasly, No.686, Rajamalwatte, Malwana. 4. Dulanjana Nishamali de Silva, No.207, Peradeniya Road, Kandy 5. W.I Madhushani, Dayani, Kondadeniya, Dickwella presently at No.173/A, Araliya Patumaga, Bellanwila, Boralesgamuwa 6. Francis Vijitharan, No.175, Moor Street, Mannar. PETITIONERS 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, 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 Genreral’s Department, Colombo-12. RESPONDENTS

22/ 07/ 20	S.C.F.R.APPLICATION NO: 399/2019	1. M.R.N Silva, No.107/B/55, Mattegoda Estate, Mattegoda. 2. M.D.K.P.M.Bamunuge, No.4/7, 1ST Lane, Ananda Maithree Road, Maharagama. 3. V.G.H.E.K Gunarathne 4. , No.22, Chetiyagiri Vihara Lane, Kithulampitiya, Galle. 5. M.N.F.Nisadha, No.34, Galewatta Road, Katugastota Kandy 6. W.K.I Dharmasena, No.B31/1, Ewunugalla, Hettimulla, Kegalle. 7. M.S.M Dhanasekara No. 87, Kandy Road Danovita. 8. Selvathurai Gobika, Esway Vasam, South Puloli, Jaffna. 9. Emorian Fernando No.104, Elle House Road, Colombo-15 PETITIONERS 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, 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
22/ 07/ 20	S.C.F.R APPLICATION 459/2019	1. Denushi Vindya Kasthuriarachchi No.109, Kingswood Park, Maya Terrace, Kiribathgoda. PETITIONER 1. Sri Lanka Medical Council, No.31, Norris Canal Road, Colombo 10 2. Hon. Attorney General, Attorney General’s Department, Colombo-12 RESPONDENTS
22/ 07/ 20	Case No: SCFR 442/2019	Shamini Jayathilaka Dissanayake, Pathakada, Pelmadulla. Petitioner Vs 1. Sri Lanka Medical Council, 31, Norris Canal Road, Colombo 10. 2. Hon. Attorney General, Attorney General’s Department, Colombo 12. Respondents

19/ 07/ 20	S C (F R) Application No. 288 / 2017	1. Dr. W M P N Weerasinghe, No 9/11, Ranasinghe Mawatha, Hiripitiya, Pannipitiya. PETITIONER -Vs- 1. University of Colombo, College House, No. 94, Kumaratunga Munidasa Mawatha, Colombo 03. 2. Prof. Lakshman Dissanayake, Vice Chancellor, University of Colombo. 3. K A S Edward, Secretary / Registrar, University of Colombo. 4. Dr. R C K Hettiarachchi, Rector, Sri Palee Campus, University of Colombo. 5. Prof. M D A L Ranasinghe, Dean, Faculty of Arts, University of Colombo. 6. Prof. M V Vithanapathirana, Dean, Faculty of Education, University of Colombo. 7. Ms. Indira Nanayakkara, Dean, Faculty of Law, University of Colombo. 8. Dr. R Senathiraja, Dean, Faculty of Management and Finance, University of Colombo. 9. Prof. Jennifer Perera, Dean, Faculty of Medicine, University of Colombo. 10. Prof. K R R Mahanama, Dean, Faculty of Science, University of Colombo. 11. Prof. Nayani Melegoda, Dean, Faculty of Graduate Studies, University of Colombo. 12. Prof. Janaka de Silva 13. Prof. J K D S Jayanetti 14. Rajan Asiriwatham 15. Dr. Harsha Cabraal PC 16. Thilak Karunaratne 17. Nigel Hatch PC 18. Prof. Lakshman Ratnayaka 19. Dr. Mrs.Ranee Jayamaha 20. J M Swaminathan 21. Prof. Rohan Jayasekera, All of, the Council of the University of Colombo. 22. Ms. D D N N Dissanayake 23. Ms. S D P S Dissanayake Both, lecturers (probationary), Department of Mass Media, Sri Palee Campus, Wewala, Horana. 24. Dr. D Sri Ranjan, Senior Lecturer, Sri Palee Campus, Wewala, 25. Hon. Attorney General, Attorney General’s Department, Colombo 12. RESPONDENTS

16/ 07/ 20	SC FR Application No. 214/2017	1. Juan Badathuruge Anugi Sageethma, No. 78/23D, Samagi Mawatha, Bandaranayake Place, Galle. 2. Juan Badathuruge Janaka Prasad, No. 78/23D, Samagi Mawatha, Bandaranayake Place, Galle. Petitioners -Vs- 1. Sandhya Iranie Pathiranawasam, The Principal and member of the Interview Board to admit students to Grade 1, Southlands College. Galle. 2. S.K.S.D. Silva, The Vice Principal and member of the Interview Board to admit students to Grade 1, Southlands College, Galle. 3. Member of the Interview Board to admit students to Grade 1, Southlands College, Galle. 4. Member of the Interview Board to admit students to Grade 1, Southlands College, Galle. 5. Member of the Interview Board to admit students to Grade 1, Southlands College, Galle. 6. Ranjith Thilakasiri, Chairman of the Appeals and Objections Board to admit student to Grade 1, Southlands College, Galle. 7. S.K.S.D. Silva, Member of the Appeals and Objections Board to admit student to Grade 1, Southlands College, Galle. 8. D.L.Chithra, Member of the Appeals and Objections Board to admit student to Grade 1, Southlands College, Galle. 9. Upali Amaratunga, Member of the Appeals and Objections Board to admit student to Grade 1, Southlands College, Galle. 10. Devika Dodampegama, Member of the Appeals and Objections Board to admit student to Grade 1, Southlands College, Galle. 11. Ranga Mohotti, Member of the Appeals and Objections Board to admit student to Grade 1, Southlands College, Galle. 12. Director of National Schools, Ministry of Education, Isurupaya, Battaramulla. 13. Secretary, Ministry of Education, Isurupaya, Battaramulla. 14. Padmi Dilrushika, 317, Udugama Road, Galle. 15. Dimantha Kumara, Gangarama Cross Street, Magalle. 16. M.D.S. Roshan, Gangarama Cross Street, Magalle. 17. W.G.M. Sharaf, Magalle, Galle. 18. W.M.S. Senevirathne, Gangarama Road, Magalle, Galle. 19. Rasika Priyadharshana, Magalle, Galle. 20. Honorable Attorney General, Department of Attorney General, Colombo 12. Respondents

16/07/20	SC FR Application No. 244/2012	W.M. Namal Sanjeewa of No. 24/B, Deepankara Road, Medaketiya, Tangalle. Petitioner Vs. 1. Neville Gunawardena Director General of Customs, Customs House, No. 40, Main Street, Colombo 11. 1A. Jagath Wijeweera, Director General of Customs, Customs House, No. 40, Main Street, Colombo 11. 1B. R. Semasinghe, Acting Director General of Customs, Customs House, No. 40, Main Street, Colombo 11. 1C. Mr. Chulananda Perera, Director General of Customs, Customs House, No. 40, Main Street, Colombo 11. 2. Dr. P.B. Jayasundara Secretary Ministry of Finance and Planning, Ministry of Finance and Planning, The Secretariat, Colombo 01. 2A. Dr. R.H.S. Samaratunga Secretary, Ministry of Finance, Ministry of Finance, The Secretariat, Colombo 01. 3. W.M.N.J. Pushpakumara Commissioner General of Examinations, Department of Examinations, Sri Lanka. 4. Sathya Hettige Chairman 4A. Mr. Dharmasena Dissanayake Chairman 5. Kanthi Wijetunga Member 5A. Mrs. V. Jagarasasingam Member 6. Dr. N.I. Soyza Member 6A. Mr. Santi Nihal Seneviratne Member 7. S.I. Mannapperuma Member 7A. Mr. A. Salam Abdul Waid Member 7B. Prof. Hussain Ismail Member 8. Ananda Seneviratne Member 8A. Ms. D. Shirantha Wijayatilaka Member 9. S. Thelleinadaraja Member 9A. Mr. S. Ranugge Member 10. Sunil A. Sirisena Member 10A. Mr. Sarath Jayathilaka Member 11. S.A. Mohamed Nahiya Member 11A. Mr. D.L.Mendis Member 12. N.H. Pathirana Member 12A. Dr. Prathap Ramanujam Member 13. T.M.L.C. Senerathne Secretary 13A. H.M.G. Senevirathne Secretary, The Public Service Commission, No.177, Nawala Road, Colombo 05. 14. Sudharma Karunarathna Customs House, No.40, Main Street, Colombo 11. 15. P.A. Abeysekara Deputy Secretary to the Treasury, Ministry of Finance & Planning, The Secretariat, Colombo 01. 16. W.P. Karaunadasa Customs House, No. 40, Main Street, Colombo 11. 17. The Honorable Attorney-General Attorney-General Department, Colombo. Respondents
16/07/20	SC Appeal 32/2015	Rasingolle Weerasinghe Mudiyanselage Nandana Senerathbandara alias Chandi No. 21, New Mahasenpura Welikanda. Accused-Appellant-Petitioner Vs. The Hon. Attorney General Attorney General's Department Colombo 12. Complainant-Respondent-Respondent

15/07/20	SC (F/R) No. 29/2018	1. Locomotive Assistants Union, Department of Railways, Maligawatte, Colombo 10. 2. Pitigala Arachchige Danushka Perera President, Locomotive Assistants Union No. C 22 Railway House, Dematagoda, Colombo 09. 3. Rupasinghe Arachchilage Sanka Namal Secretary, Locomotive Assistants Union No. 28, Railway Quarters, Danister de Silva Mawatha Dematagoda, Colombo 09. 4. Dikmahadu Godage Gunapala, Treasurer, Locomotive Assistants Union, Liyanagedara, Nedurugoda, Elpitiya, Thelijjawila. 5. Hewa Heenipallage Ranaweera No. 208, Kirikurakkan Hena, Komangoda, Tihiyagoda. 6. Weerasinghe Arachchilage Ranga Prasad No. 1A/F1/014 Mihindusevanapura, Dematagoda, Colombo 09. 7. Hettiarachchilage Ananda Sarath No 22, Tissa Weerasinghe Square, Seema Road, Batticaloa. 8. Hittatiya Edirisooriyage Janaka Ranjan No. 706/1, Elhena Road, Madinnagoda, Rajagiriya. 9. Thuwan Nijam Tuwannoor No. 105/P/2, D.R. Wijewardana Mawatha, Colombo 10. 10. Mahabandarage Dishan No. B/4/3, Maligawatta, Railway Quarters, Colombo 10. 11. Maththumagoda Kankanamalage Samantha No. 765/314, National Housing, Maligawatta, Colombo 10. 12. Chathura Lakpriya Rambukpota No. 13/9, Martis Lane, Colombo 12. 13. Rajamunige Prasath Dhanuka No. 1A/F2/022, Mihindusenpura, Dematagoda, Colombo 09. 14. E.D.U.P. Vijithananda 64/30, Railway Quarters, Maligawatta. Petitioners Vs. 1. S.M. Abeywickrema Former General Manager, Sri Lanka Railways Department. 1A. M.J.D. Fernando, General Manager, General Manager's Office Sri Lanka Railways Department, P.O. Box 355, Olcott Mawatha, Colombo 10. 2. Nimal Siripala De Silva Former Minister of Civil Aviation and Transport, Ministry of Civil Aviation and Transport, 7th Floor, Sethsiripaya, Stage II, Battaramulla. 2A. Mahinda Amaraweera, Minister of Transport Services Management, 7th Floor, Sethsiripaya, Stage II Battaramulla. 3. G.S. Vithanage Former Secretary, Ministry of Civil Aviation and Transport. 3A. H.M. Gamini Seneviratne, Secretary, Ministry of Transport Services Management, 7th Floor, Sethsiripaya, Stage II Battaramulla. 4. Dr. Sarath Amunugama, Minister of Special Assignments, 6th Floor, Sethsiripaya, Stage II, Battaramulla. 5. Attorney General Attorney General's Department, Colombo 12. Respondents 6. Railway Locomotive Operating Engineers' Union No. 7, T.B. Jayah Mawatha, Colombo 10. 7. D.L.P. Paranavitharana President Railway Locomotive Operating Engineers' Union No. 35/3, Bandaranaike Mawatha, Katubedda, Moratuwa. 8. D.H. Indika Secretary Railway Locomotive Operating Engineers' Union No.29, Mount Mary, Colombo 10. Added-Respondents

13/ 07/ 20	SC Appeal No.134/14.	1. Handuwala Devage Simon Fernando Alias Handuwala Devage Simon Munasinghe, No. 144, Kelanitissa Mawatha, Wanawasala, Kelaniya. Original Debtor - Applicant. 1A. Handuwala Devage Sisira Munasinghe, No. 144, Kelanitissa Mawatha, Wanawsala, Kelaniya. Substituted Debtor - Applicant. -Vs- Ranepura Devage Hector Jayasiri, No. 542, Sudharmarama Road, Kelaniya. Respondent. And In the matter of Chairman and Members of the Debt Conciliation Board had requested the Court of Appeal under section 53 of the Debt Conciliation Ordinance in to seek the opinion of the Court of Appeal on section 19A (1A) of the Debt Conciliation (amendment) Act No. 29 of 1999. 1. Chairman and Members of Debt Conciliations Board, No. 80, Adhikarana Mawatha, Colombo 12. Requestor – Applicant seeking opinion from Appeal Court under Section 53 of the Debt Conciliation Ordinance. Requestor – Applicant. 2. Ranepura Devage Hector Jayasiri, No. 542, Sudharmarama Road, Kelaniya. Original Respondent - Respondent. -vs- 1A. Handuwala Devage Sirira Munasinghe, No. 144, Kelanitissa Mawatha, Wanawasala, Kelaniya. Substituted Debtor -Respondent. And Now Between Handuwala Devage Sisira Munashinghe, Of No.144, Kelanitissa Mawatha, Wanawasala, Kelaniya. Substituted Debtor–Applicant – Respondent – Petitioner -Vs- 1. Chairman and Members of Debt Conciliation Board, No. 80, Adhikarana Mawatha, Colombo 12. Requestor – Applicant – Respondent 2. Ranepura Devage Hector Jayasiri No. 542, Sudharmarama Road, Kelaniya. Original Respondent - Respondent - Respondent.
09/ 07/ 20	SC Appeal No. 26/2016	Kahandawala Arachchige Indrawansha No. 641, Kajuhena Road, Heiyanthuduwa. Plaintiff Vs. Kahandawala Arachchige Rupasiri No. 641/B, Kajuhena Road, Heiyanthuduwa. Defendant AND BETWEEN Mahakumbure Gedara Sandamali Thilakarathne No. 639/3, Kajuhena Road, Heiyanthuduwa. Petitioner Vs. Kahandawala Arachchige Indrawansha No. 641, Kajuhena Road, Heiyanthuduwa. Plaintiff-Respondent Kahandawala Arachchige Rupasiri No. 641/B, Kajuhena Road, Heiyanthuduwa. Defendant-Respondent AND BETWEEN Mahakumbure Gedara Sandamali Thilakarathne No. 639/3, Kajuhena Road, Heiyanthuduwa. Petitioner-Petitioner Vs. Kahandawala Arachchige Indrawansha No. 641, Kajuhena Road, Heiyanthuduwa. Plaintiff-Respondent-Respondent Kahandawala Arachchige Rupasiri No. 641/B, Kajuhena Road, Heiyanthuduwa. Defendant-Respondent-Respondent AND NOW BY AND BETWEEN Kahandawala Arachchige Indrawansha No. 641, Kajuhena Road, Heiyanthuduwa. Plaintiff-Respondent-Respondent- Petitioner Vs. Mahakumbure Gedara Sandamali Thilakarathne No. 639/3, Kajuhena Road, Heiyanthuduwa. Petitioner-Petitioner-Respondent Kahandawala Arachchige Rupasiri No. 641/B, Kajuhena Road, Heiyanthuduwa. Defendant-Respondent-Respondent- Respondent

		1. Mrs. D.W.D.E. Randeniya No. 394, Old Road, Kottawa, Pannipitiya. 2. Mrs. Thushari Anuruddhika No. 475c, Samudra Mawatha Arangala, Hokandara (North). 3. Mr. B.A.T. Balasooriya 53 K, Pahalagama, Gampaha. 4. Mrs. Nilanthi Perera 127/1C, 9, Jayawardana Mawatha, Pahala Karagahamuna, Kadawatha. 5. Mrs. Rupika Kannangara C A 7/3, Ranpokunagama, Nittambuwa. 6. Mrs. Deepa Priyanthi de Alwis “Senani” Kalawana, Minuwangoda. 7. Chithrani Abeygunawardana No. 25, Suwarnapura, Horana. 8. Mrs. G.A. Chandrani, 106, Nalluruwa, Panadura. 9. Mr. M.R.S. Bopage “Manel” Kahawathugoda, Ahangama. 10. Mr. Priyantha Wijegunasekera “Sahana” Samagi Mawatha, Godagama, Matara. 11. Mrs. Kamal Kanthi Weerathunga Kokmaduwa Niwasa, Paragahahena, Weralaliya, Welipitiya. 12. Mr. Ravindra Kumara Dias, Panetiyana, Weligama. 13. Mr. K.K.P. Padmasiri “Upali” Kithalagama East, Thihagoda. 14. Mr.T.H.J. Thilanath Kadagahawaththa, Eluwawala, Denipitiya. 15. Mr. E.L Bandularama “Akashi” Panamulla, Nihiluwa, Beliatta. 16. Mr. R.K. Wimalarathne “Sanudima” Pissubedda Walasmulla. 17. Mrs. P. Hema Malani 179/ A, Pallekanda, Walasmulla. 18. Mr. D.M. Gunawardana Waliwaththa, Yappannawa, Iwala, Bibile. 19. Mr. W.B.M.A. Wijekoon 397, Hamparawa, Bandarawela. 20. Mrs. K.A.S. Seelarathna “Danushka” Puranwela, Udubadana, Keppetipola. 21. Mr. R.K. Mugunuwal a “Sandamali”, Imbulgoda, Galapitamada. 22. Mr. D.K. Wanigathunga 182/1, Uthuru Uduwa, Kuda Uduwa, Horana. 23. Mr. E.V.G. Epitakumbura Univercity Road, Pambahinne, Belihuloya. 24. Mrs. W.R.M.N.S. Wijekoon No. 31/10, Manel Mawatha, Kurunegala. 25. Mrs. R.D. Hemalatha Aluthhena, Pahamune, Narammala. 26. Mrs. M.M.S.R. Pushpakumari C/o. Anura Wijethunga Mawila Road, Weerahena, Naththandiya. 27. Mrs. D.M.G. Vijitha Padmawathi 113, Arippu Road, Old City, Anuradhapura 28. Mr. R.P.P.Wimalasiri 436/1, RA Ela, Palin Ela, Polonnaruwa. 29. Mr. R.M.P.G. Ranasinghe Bandara 141/1, Yaya 6,Nawanagaraya, Medirigiriya.30. Mr. W.J.G. Wijesinghe 455, Yaya 4,Nawanagaraya, Medirigiriya. 31. Mr. Y.K.P. Tissa Nimal “Thilina” Bumalla, Rikillagaskada. 32. Mr. E.H. Priyantha Padmakumara 488, Kongaspitiya, Ampitiya. 33. Mr. I.M.D.A.B. Rathwita Ihala Rathwitha, Gokarella. 34. Mr. S.M.T. De Alwis 446 Matale Road, Alawathuwala. Petitioners Vs. 1. Prof. Dayasiri Fernando, Chairman Public Service Commission. Added 1A. Hon. Justice Sathya Hettige PC Chairman Public Service Commission. Added 1B Dharmasena Dissanayake Chairman Public Service Commission. 2. Palitha M. Kumarasinghe Member, Public Service Commission. Added 2A Kanthi Wijethunga Member, Public Service Commission. Added 2B Justice A.W.A. Salam Member, Public Service Commission. Added 2C Proff. Hussain Ismail 3. Sirimavo Wijeratne Member, Public Service Commission. Added 3A Sunil Sirisena Member, Public Service Commission. Added 3B V. Jegarajasingam Member, Public Service Commission. 4. S.C. Mannapperuma Member, Public Service Commission. Added 4A. Nihal Seneviratne Member, Public Service Commission. Added 4B Mrs. Sudharma Karunaratne Member, Public Service Commission. 5. Ananda Seneviratne Member, Public Service Commission. Added 5A. Dr. Prathap Ramanujam Member, Public Service Commission. 6.

		K.N. Kanthi Silva Batalanda, Ragama. (SC/FR/446/16) Dissanayake Mudiyanselage Udayasiri, No. 190/A-2, Bulugahawela Road, Panadura. (SC/FR/227/16) Petitioners Vs, 1. G. A. N. Jayantha, Former Commissioner of Provincial Revenue Service, Department of Provincial Revenue Service of the Western Province, No. 204, Denzil Kobbekaduwa Mawatha, Battaramulla. 1A. D.A.S. Dedigama, Commissioner of Provincial Revenue Service, Department of Provincial Revenue Service of the Western Province, No. 204, Denzil Kobbekaduwa Mawatha, Battaramulla. 2. H. T. Kamal Pathmasiri, Former Secretary, Ministry of Provincial Councils and Local Government, No. 330, Dr. Colvin R. de Silva Mawatha (Union Place) Colombo 02. 2A. S. D. A. B. Boralessa, Secretary, Ministry of Provincial Councils and Local Government, No. 330, Dr. Colvin R. de Silva Mawatha (Union Place) Colombo 02. 3. M. A. B. Daya Senarath, Former Chief Secretary of Western Province, Office of the Chief Secretary, “Saraswathi Mandiraya” No. 32, Sri Marcus Fernando Mawatha, Colombo 07. 3A. Pradeep Yasarathne, Chief Secretary of Western Province, Office of the Chief Secretary, Denzil Kobbekaduwa Mawatha, Battaramulla. 4. V. Rajapaksha, Former Secretary, Provincial Public Service Commission of the Western Province, No. 109, Main Street, Battaramulla. 4A. Hemantha Samarakoon, Secretary (Acting), Provincial Public Service Commission of the Western Province, No. 109, Main Street, Battaramulla. 5. K. Sarath Gunathilake, Former Chairman Provincial Public Service Commission of the Western Province, No. 109, Main Street, Battaramulla. 5A. Sunil Abewardena, Chairman Provincial Public Service Commission of the Western Province, No. 109, Main Street, Battaramulla. 6. Sunil Fernando, Former Member, Provincial Public Service Commission of the Western Province, No. 109, Main Street, Battaramulla. 6A. H. Sumanapala, Member, Provincial Public Service Commission of the Western Province, No. 109, Main Street, Battaramulla. 7. S. K. Liyanage, Former Member, Provincial Public Service Commission of the Western Province, No. 109, Main Street, Battaramulla. 7A. Kanthi Wijetunga, Member, Provincial Public Service Commission of the Western Province, No. 109, Main Street, Battaramulla. 8. K. Paranalingam, Former Member, Provincial Public Service Commission of the Western Province, No. 109, Main Street, Battaramulla. 8A. P. G. H. A. Mahendra Silva, Member, Provincial Public Service Commission of the Western Province, No. 109, Main Street, Battaramulla. 8B. Ziyath Gaffoor, Member, Provincial Public Service Commission of the Western Province, No. 109, Main Street, Battaramulla. 9. J. Paranamanna, Former Member, Provincial Public Service Commission of the Western Province, No. 109, Main Street, Battaramulla. 9A. M. I. M. Rezwie, Member, Provincial Public Service Commission of the Western Province, No. 109, Main Street, Battaramulla. 9B. Naganathan Sivahumaran, Member, Provincial Public Service Commission of the Western Province, No. 109, Main Street, Battaramulla. 10. K.C. Logeswaran, The Governor of the Western Province, The Secretariat of the Governor of the Western Province, 5th Floor, Rotunda Building, No. 119, Galle Road, Colombo 03. 10A. M. Asad S. Sally, The Governor of the Western Province, The Governor’s Office of the Western Province, 10th Floor, No. 628,

02/ 07/ 20	SC Appeal 20 /201 7	Lansage Basil Petitioner Petitioner Petitioner Appellant Vs Hon. Attorney General Respondent Respondent Respondent Respondent
02/ 07/ 20	SC Appeal 120/2012	Bank of Ceylon No.1, Bank of Ceylon Mawatha Colombo 1 Plaintiff Vs Flex Port (Pvt) Limited. No.127, Jambugasmulla Ma watha, Nugegoda. Defendant AND BETWEEN Bank of Ceylon No.1, Bank of Ceylon Mawatha Colombo 1 Plaintiff Appellant Vs Flex Port (Pvt) Limited. No.127, Jambugasmulla Mawatha, Nugegoda. Defendan t Responden t AND NOW BETWEEN Bank of Ceylon No.1, Bank of Ceylon Mawatha Colombo 1 Plaintiff Appellant Petitioner Appellant Vs Flex Port (Pvt) Limited. No.127, Jambugasmulla Mawatha, Nugegoda. Defendant Responden t Respondent Re spondent
25/ 06/ 20	SC(SPL) LA 184/2017	The Attorney General Attorney General's Department, Colombo 12. Complainant Vs. Punchiweddikarage Aruna Felix Perera No. 21/7, Dharmarathna Mawatha, Rawathawatte, Moratuwa. Accused AND BETWEEN Punchiweddikarage Aruna Felix Perera No. 21/7, Dharmarathna Mawatha, Rawathawatte, Moratuwa. Accused-Appellant Vs. The Attorney General Attorney General's Department, Colombo 12. Complainant-Respondent
25/ 06/ 20	SC (SPL) LA 145/2014	The Attorney General Attorney General's Department Colombo 12. Plaintiff Vs, 1. Herath Mudiyanselage Sarath Wijewardene, No. 35, Migunagama, Mahiyangana. 2. Algama Koralage Sumedha Perera, No. 270C, 14B, Dickland Estate, Hokandara Road, Talawatugoda. Accused And between Stanley Christoffel Asoka Obeysekere, No.11/5, Rajakeeya Mawatha, Colombo 07 Aggrieved Party -Appellant Vs. 1. Herath Mudiyanselage Sarath Wijewardene, No. 35, Migunagama, Mahiyangana. 2. Algama Koralage Sumedha Perera, No. 270C, 14B, Dickland Estate, Hokandara Road, Talawatugoda. Accused-Respondents The Attorney General Attorney General's Department Colombo 12. Respondent And Now Between 1. Herath Mudiyanselage Sarath Wijewardene, No. 35, Migunagama, Mahiyangana. 2. Algama Koralage Sumedha Perera, No. 270C, 14B, Dickland Estate, Hokandara Road, Talawatugoda. Accused-Respondents-Petitioners Vs, Stanley Christoffel Asoka Obeysekere, No.11/5, Rajakeeya Mawatha, Colombo 07 Aggrieved Party -Appellant-Respondent The Attorney General Attorney General's Department Colombo 12. Respondent- Respondent
25/ 06/ 20	SC Appeal 203/2015	Chandani Jayasinghe "Samagi", Kalupahana, Poruwadanda. Petitioner Vs, Neelahenndi Sisira Kumara De. Silva "Samagi", Kalupahana, Poruwadanda. Respondent And between Chandani Jayasinghe "Samagi", Kalupahana, Poruwadanda. Petitioner-Appellant Vs. 1. Neelahenndi Sisira Kumara De. Silva "Samagi", Kalupahana, Poruwadanda. Respondent-Respondent 2. The Attorney General Attorney General's Department Colombo 12. Respondent And Now Between Chandani Jayasinghe "Samagi", Kalupahana, Poruwadanda. Petitioner-Appellant-Petitioner Vs, Neelahenndi Sisira Kumara De. Silva "Samagi", Kalupahana, Poruwadanda. Respondent-Respondent-Respondent

25/ 06/ 20	SC. Appeal No. 114/2019	Commissioner General of Inland Revenue, Department of Inland Revenue, Sir Chittampalam A. Gardiner Mawatha, Colombo 02. Appellant vs, Janashakthi Insurance Company Limited,No. 47, Muttiah Road,Colombo 02. Respondent And between Janashakthi Insurance PLC (Previously Known as Janashakthi Insurance Company Limited and thereafter as Janashakthi Insurance Company PLC), No. 675, Dr. Danister de. Silva Mawatha, Colombo 09. (Previously of No. 47, Muttiah Road, Colombo 02) And also of, No. 55/72, Vauxhall Lane, Colombo 02. Respondent -Appellant 2 Vs. Commissioner General of Inland Revenue, Department of Inland Revenue, Sir Chittampalam A. Gardiner Mawatha, Colombo 02. Appellant-Respondent
25/ 06/ 20	SC Appeal 163/2017	Daintee Limited, No. 72C, Kandawala Road, Ratmalana Plaintiff Vs, Uswatte Confectionery Works Limited No.437, Galle Road, Ratmalana Defendant And Uswatte Confectionery Works Limited No.437, Galle Road, Ratmalana Defendant-Appellant Vs. Daintee Limited, No. 72C, Kandawala Road, Ratmalana Plaintiff-Respondent And Now Between Uswatte Confectionery Works Limited No.437, Galle Road, Ratmalana Defendant-Appellant-Appellant Vs, Daintee Limited, No. 72C, Kandawala Road, Ratmalana Plaintiff-Respondent-Respondent

17/ 06/ 20	Case No: SC/FR/ 222/2018	Alankarage Dona Chathurika Silva, No. 52, Pepiliyana Mawatha, Pepiliyana. Petitioner Vs. 1. Sunil Hettiarachchi, Secretary – Ministry of Education, 'Isurupaya', Pelawatta, Battaramulla. 1A. Pathmasiri Jayamanne Secretary – Ministry of Education, 'Isurupaya', Pelawatta, Battaramulla. 1B. N H M Chitrananda Secretary – Ministry of Education, 'Isurupaya', Pelawatta, Battaramulla. Added 1B Respondent 2. Hon. Akila Viraj Kariyawasm, Minister of Education, Ministry of Education, 'Isurupaya', Pelawatta, Battaramulla. 2A. Hon. Dallas Alahapperuma, Minister of Education, Ministry of Education, 'Isurupaya', Pelawatta, Battaramulla. Added 2A Respondent 3. W.M. Jayantha Wickramanayake, Director – National Schools, Department of Education, Ministry of Education, 'Isurupaya', Pelawatta, Battaramulla. 4. Judicial Service Association, Chief Magistrate's Court Premises, Colombo 12. 5. R.S.A. Dissanayake, President – Judicial Service Association, Chief Magistrate's Court, Colombo 12. 5A. Hasitha Ponnamperuma President – Judicial Service Association District Court, Matale. Added 5A Respondent 6. M. M. M. Mihal Secretary – Judicial Service Association Magistrate's Court, Mount Lavinia. 6A. Prasanna Alwis Secretary – Judicial Service Association Magistrate's Court, Kaduwela. Added 6A Respondent 7. Hon. Attorney General Attorney General's Department Colombo 12. Respondents AND Wellawalage Dakshika Chanima Wijebandara, No. 52, Pepiliyana Mawatha, Pepiliyana. Petitioner Vs. 1. Sunil Hettiarachchi, Secretary – Ministry of Education, 'Isurupaya', Pelawatta, Battaramulla. 1A. Pathmasiri Jayamanne, Secretary – Ministry of Education, 'Isurupaya', Pelawatta, Battaramulla. 1B. N H M Chitrananda Secretary – Ministry of Education, 'Isurupaya', Pelawatta, Battaramulla. Added 1B Respondent 2. Hon. Akila Viraj Kariyawasm, Minister of Education, Ministry of Education, 'Isurupaya', Pelawatta, Battaramulla. 2A. Hon. Dallas Alahapperuma Minister of Education, Ministry of Education, 'Isurupaya', Pelawatta, Battaramulla. Added 2A Respondent 3. W.M. Jayantha Wickramanayake Director – National Schools, Department of Education, Ministry of Education, 'Isurupaya', Pelawatta, Battaramulla. 4. Judicial Service Association, Chief Magistrate's Court Premises, Colombo 12. 5. R.S.A. Dissanayake President – Judicial Service Association, Chief Magistrate's Court, Colombo 12. 5A. Hasitha Ponnamperuma, President - Judicial Service Association, District Court, Matale. Added 5A Respondent 6. M. M. M. Mihal Secretary – Judicial Service Association Magistrate's Court, Mount Lavinia. 6A. Prasanna Alwis, Secretary – Judicial Service Association, Magistrate's Court, Kaduwela. Added 6A Respondent 7. Hon. Attorney General Attorney General's Department Colombo 12. Respondents
17/ 06/ 20	S C Appeal 60 / 2017	A Rajalingam, No. 102 / 2, Sri Rathanajothi Sarawanamuttu Mawatha, Colombo 13. RESPONDENT - RESPONDENT - RESPONDENT - APPELLANT -Vs- Dissanayake Mudiyanselage Udaya Ranjith, Municipal Engineers Department (planning),Colombo Municipal Council, Town Hall, Colombo 07. APPLICANT - PETITIONER - APPELLANT - RESPONDENT

16/ 06/ 20	SC Appeal 181 / 2016	Wewala Patabendige Somapala, Army Camp, Clappanburge, China Bay. Presently at E 13, Temple Road, Aranayake, Talgaspitiya. ACCUSED - APPELLANT - APPELLANT -Vs- 1. Hon. Attorney General, Attorney General's Department, Colombo 12. RESPONDENT - RESPONDENT 2. Officer-in-Charge, Traffic Branch, Police Station, Trincomalee. COMPLAINANT - RESPONDENT - RESPONDENT
15/ 06/ 20	SC FR APPLICATI ON 296/2014	Kandawalage Don Samantha Perera, Patapiligama, Hettipola. PETITIONER Vs 1. Officer In Charge, Police Station, Hettipola. 2. OIC Crimes of Police, Police Station, Hettipola. 3. Inspector General of Police, IGP Office, Police Headquarters, Colombo 01. Hon. Attorney General, Attorney General's Department, Hulftsdorp Street, Colombo 12. RESPONDENTS

08/06/20	SC/FR No. 520/2009	1. R. A. P. de C. Ranaweera 101/22-1/2, B Block Police Quarters, Kew Road, Colombo 02. 2. B. P. B. Ayupala, No. 35, Sri Medananda Mawatha, Panadura. 3. L.A.S. Lekamge 32/1, Gangadara Mawatha, Off Templars Road, Mt. Lavinia. Petitioners 1. Jayantha Wickramaratne Inspector General of Police, Police Headquarters, Colombo 01. 1(b). Pujitha Jayasundara Inspector General of Police, Police Headquarters, Colombo 01. 2. Gotabhaya Rajapaksha Secretary, Ministry of Defence, Public Security, Law and Order, Ministry of Defence, No.15/5, Baladaksha Mawatha, Colombo 03. 2(a). Karunasena Hettiarachchi Secretary, Ministry of Defence, Public Security, Law and Order, Ministry of Defence, No.15/5, Baladaksha Mawatha, Colombo 03. 3. Gamini Senarath Additional Secretary to the President, President House, Colombo 01. 4. Hasitha Kumari Balasuriya Additional Secretary, Ministry of Defence (Police), No. 15/5, Baladaksha Mawatha, Colombo 03. 5. K. C. Logeshwaran Secretary, National Police Commission, Rotunda Tower, Level 3, 109, Galle Road, Colombo 03. 5(a). N. A. Cooray, Secretary, National Police Commission, Rotunda Tower, Level 3, 109, Galle Road, Colombo 03. (Members of the interview board) 6. Fabiel Mitchel Deputy-Inspector-General-of-Police (Personnel), Personnel Division, Police Headquarters, Colombo 01. 7. H. S. Dayananda Deputy Inspector General of Police, DIG (Police) Office, Puttlam. 8. T. M. A. Senanayake Deputy Inspector General of Crimes, Police Headquarters, Colombo 01. 9. N. M. Munasinghe Deputy Inspector General of Police, Criminal Investigation Department, New Secretariat Division, 4th Floor, Colombo 01. 10. Y. R. W. Wijegunawardena Deputy Inspector General of Police, DIG (Police) Office, Vavuniya. 11. D. S. S. Lugoda Deputy Inspector General of Police, Senior Gazetted Officer's Quarters, 101/20/3/2, Kew Road, Colombo 02. 12. D. J. Gammanpila Deputy Inspector General of Police, Police Office, Nuwara Eliya. 13. S. A. D. T. N. Wijegunerwardena Deputy Inspector General of Police, Criminal Records Division, 526, Torrington Square, Colombo 07. 14. W.F.U. Fernando, Deputy Inspector General of Police, IT Division, Police Headquarters, Colombo 01. 15. L.M. Dayananda Bandara, Deputy Inspector General of Police, DIG (Police Office), Jaffna. 16. U.N.A.S. Rodrigo Deputy Inspector General of Police, 86A, Welikadamulla, Mabola, Wattala. 17. H.K.S. Pinidiya Deputy Inspector General of Police, Recruitment Division, Police Headquarters, Colombo 01. 18. P.S.K. Dayananda Deputy Inspector General of Police, DIG (Police) Office, Anuradhapura. 19. L.L.C. Perera Deputy Inspector General of Police, DIG (Police) Office, Mannar. 20. S.W.M.T.S. Samarakoon Deputy Inspector General of Police, DIG (Police) Office, Vavuniya. 21. M.P. Samaradivakara Deputy Inspector General of Police, Logistics Division, Police Headquarters, Colombo 01. 22. D.L.S.G.L. Pieris Deputy Inspector General of Police, DIG Traffic Headquarters Colombo. 23. Jayantha Kulathilaka Deputy Inspector General of Police, DIG (Police) Office, Fort, Galle. 24. Hon. Attorney General Attorney General's Department, Colombo 12. 25. Prof. Siri Hettige- Chairman 26. P.H. Manatunga 27. Mrs. Savithree Wijesekera 28. Y.L.M. Zawahir 29. Anton Jeyanandan 30. Thilak Collure 31. Frank De Silva 25th -31st Respondents: all of National Police Commission

08/ 06/ 20	SC Appeal No: 139/2017	W.K.S. Jayasundara, 309 A, Nedagamuwa (West), Katugoda. APPLICANT -VS- Next Manufacturing (Pvt) Ltd., Ring Road, Phase I, Investment Promotion Zone, Katunayake. EMPLOYER-RESPONDENT AND BETWEEN Next Manufacturing (Pvt) Ltd., Ring Road, Phase I, Investment Promotion Zone, Katunayake. EMPLOYER-RESPONDENT-APPELLANT -VS- W.K.S. Jayasundara, 309 A, Nedagamuwa (West), Katugoda. APPLICANT-RESPONDENT AND NOW BETWEEN Next Manufacturing (Pvt) Ltd., Ring Road, Phase I, Investment Promotion Zone, Katunayake. EMPLOYER-RESPONDENT-APPELLANT-APPELLANT -VS- W.K.S. Jayasundara, 309 A, Nedagamuwa (West), Katugoda. APPLICANT-RESPONDENT RESPONDENT
02/ 06/ 20	S C (F R) Application No. 288/ 2014	1. W G Gunarathna, No. 13, Randiya Uyana, Palapathwala. 2. M W M Shanika Karunarathna, ‘Sirikatha’, Udagama, Ulapane. 3. D M Pathma Kumari, Bamwaththa, Gokarella. 4. D C Sunethra Ariyasinghe, No. 145, Koskotuwa, Walawela, Matale. 5. S M I R Samarakoon, 38th Mile Post, Lenadora. 6. H M S K Herath, No. 104/ B, Magoda, Ruwan Eliya, Nuwara Eliya. 7. S A C S Kumarathna, 302/1, Aluthwela, Karalliyadda, Theldeniya. 8. I G H D Somasinghe, No. 25, Palapathwala, Wahakotte. PETITIONERS -Vs- 1. Secretary, Ministry of Public Administration and Home Affairs, Independence Square, Colombo 07. 2. Director-General Establishments, Ministry of Public Administration and Home Affairs, Independence Square, Colombo 07. 3. Retired Justice Hon. Sathya Hettige PC, Chairman. 4. S C Manapperuma, 5. Ananda Seneviratne, 6. N H Pathirana, 7. S Thillandarajah, 8. A Mohamed Nahiya, 9. Kanthi Wijetunge, 10. Sunil S Sirisena 11. Dr. I M Zoysa Gunasekera, All members of the Public Service Commission No. 177, Nawala Road, Narahenpita, Colombo 05. 12. T M L C Senaratna, Secretary, Public Service Commission, No. 177, Nawala Road, Narahenpita, Colombo 05. 13. S Premawansha, Chief Secretary of the Central Province, Chief Secretary’s Office, Kandy. 14. K Kekulandara, Secretary, Ministry of Health, Indigenous Medicine, Social Welfare, Probation & Child Care Services, Central Province Provincial Council, Sangaraja Mawatha, Kandy. 15. Dr. K A Shanthi Samarasinghe, Provincial Director of Health Services, Department of Health Services of the Central Province, Sangaraja Mawatha, Kandy. 16. Secretary, Ministry of Healthcare and Nutrition, ‘Suvasiripaya’, No. 385, Ven. Baddegama Wimalawansha Thero Mawatha, Colombo 10. 17. Director-General of Health Services, Department of Health, No. 385, Ven. Baddegama Wimalawansha Thero Mawatha, Colombo 10. 18. Hon. Attorney-General, Attorney General’s Department, Hulftsdorp Street, Colombo 12. RESPONDENTS

01/ 06/ 20	SC Appeal No. 34/2010	Yogananda Wickramasinghe Mohotti, No.76/2D, Paramulla Road, Paramulla, Matara. PLAINTIFF -VS- Nimal Bambarenda, No.20, Bandaranyake Pura, Medahittetiya, Matara. DEFENDANT AND BETWEEN Nimal Bambarenda, No.20, Bandaranayake Pura, Medahittetiya, Matara. DEFENDANT-APPELLANT -VS- Yogananda Wickramasinghe Mohotti, No.76/2D, Paramulla Road, Paramulla, Matara. PLANTIFF - RESPONDENT AND NOW BETWEEN Nimal Bambarenda, No.20, Bandaranayake Pura, Medahittetiya, Matara. DEFENDANT-APPELLANT-APPELLANT -VS- Yogananda Wickramasinghe Mohotti, No.76/2D, Paramulla Road, Paramulla, Matara. (Presently of No. 3/7, Samson Dias Mawatha, Polhena, Matara) PLAINTIFF-RESPONDENT- RESPONDENT
27/ 05/ 20	SC Appeal No: 13/2018	Faith Soysa. 2A, Torrington Place, Independent Avenue, Colombo 07. PLAINTIFF Wahala Thanthrige Dayananda Rupasoma Perera. No.15, Siripa Lane, Colombo 5. SUBSTITUTED PLAINTIFF -VS- Brian Michael Francis Muller Pereira. No.28, Torrington Avenue, Colombo 7. DEFENDANT AND Brian Michael Francis Muller Pereira. No.28, Torrington Avenue, Colombo 7. DEFENDANT- APPELLANT -VS- Wahala Thanthrige Dayananda Rupasoma Perera. No.15, Siripa Lane, Colombo 5. SUBSTITUTED PLAINTIFF-RESPONDENT (Deceased) Honarine Mary Evangeline Cristobel Rasiah (nee Dias). No. 2A, Torrington Place, Independent Avenue, Colombo 7. SUBSTITUTED PLAINTIFF-RESPONDENT AND BETWEEN Brian Michael Francis Muller Pereira. No.28, Torrington Avenue, Colombo 7. DEFENDANT- APPELLANT- PETITIONER -VS- Honarine Mary Evangeline Cristobel Rasiah (nee Dias). No. 2A, Torrington Place, Independent Avenue, Colombo 7. SUBSTITUTED PLAINTIFF-RESPONDENT- RESPONDENT AND NOW BETWEEN Brian Michael Francis Muller Pereira. No.28, Torrington Avenue, Colombo 7. DEFENDANT- APPELLANT- APPELLANT -VS- Honarine Mary Evangeline Cristobel Rasiah (nee Dias). No. 2A, Torrington Place, Independent Avenue, Colombo 7. SUBSTITUTED PLAINTIFF-RESPONDENT- RESPONDENT

26/ 05/ 20	SC Appeal No. 111/2015 with SC Appeal No. 113/2015 and SC Appeal No. 114/2015	1. Wijesiri Gunawardane No. 122/05, Indipokunagoda, Tangalle. 1st Respondent-Respondent-Petitioner-Petitioner-Appellant 2. Lanka Deepani Muthukumarana No. 129, Beliatta Road, Tangalle. 2nd Respondent-Respondent-Petitioner-Petitioner-Appellant 3. Mahanama Dissanayakalage Sumanalatha No. 117/23, Beliatta Road, Tangalle. 5th Respondent-Respondent-Petitioner-Petitioner-Appellant Vs. 1. Chandrasena Muthukumarana (deceased) Pearlin Hotel, Tangalle. 4th Respondent-Appellant-Respondent-Respondent-Respondent 1A. Asith Nimantha Muthukumarana No. 127, Beliatta Road, Tangalle. Substituted 4A Respondent-Appellant-Respondent-Respondent-Respondent 2. Officer-in-Charge Police Station, Tangalle. Plaintiff-Respondent-Respondent-Respondent-Respondent 3. Palliyaguruge Nandasiri No. 122/1, Indipokunagoda, Tangalle. 3rd Respondent-Respondent-Petitioner-Respondent-Respondent 4. Urban Council, Tangalle. Added 6th Respondent-Respondent-Respondent- Respondent 5. Hon. Attorney-General Attorney-General's Department, Colombo 12. Added 7th Respondent-Respondent-Respondent- Respondent Parties of: (SC Appeal No. 111/2015 SC/ (SPL) LA. No. 190/14 CA (PHC) APN No. 107/09 Provincial High Court of Hambantota Case No. HCA/13/2008 MC Tangalle Case No. 63486) Muththettuwagama-Athiralalage Jayarathna No 27/2, 3rd Lane, Rathmalana. Accused-Appellant-Petitioner-Petitioner-Appellant Vs. 1. Officer in Charge Special Crimes Investigations Unit, Mount Lavinia. 2. Hon. Attorney General Attorney General's Department, Colombo 12. Respondents-Respondents-Respondents-Respondents Parties of: (SC Appeal No. 113/2015 SC/ (SPL) LA. No. 185/14 CA (PHC) APN No. 185/2010 Provincial High Court of Colombo Case No. MCA/123/2009 MC Mount Lavinia Case No. 39758) Dr. (Mrs.) Ama Weeratunga No. 368/18, Pipeline Road, Thalangama North. Virtual Complainant-Petitioner-Petitioner-Appellant Vs. Sepala Ekanayake No. 369B, Pipeline Road, Thalangama North. Accused-Appellant-Respondent-Respondent-Respondent 1. Officer in Charge Police Station, Thalangama. 2. The Hon. Attorney General Attorney General's Department, Colombo 12. Respondents-Respondents-Respondents-Respondents Parties of: (SC Appeal No. 114/2015 SC/ (SPL) LA. No. 178/14 CA (PHC) APN. No. 204/2006) Provincial High Court of Avissawella Case No. 69/2005 MC Kaduwela Case No. 36421)

25/ 05/ 20	S.C. (F/R) 39/2019	1. Bamunu Arachchige Pasasna Abhinithi Bamunu Arachchi. Minor appearing through her Mother. 2. Wijayasinghe Arachchige Udyoga Sanwarani Wijayasinghe. (Mother of the 1st Petitioner) both of No. 215/R/6, Anderson Flats, Narahenpita Colombo. 05. Petitioners. Vs. 1. Mrs. S.S.K. Aviruppola Principal, Visakha Vidyalaya, 133, Vajira Road, Colombo 05. 2. Director – National Schools, Ministry of Education, “Isurupaya”, Pelawatte, Battaramulla. 3. Secretary, Ministry of Education, “Isurupaya”, Pelawatte, Battaramulla. 4. G.P Desandi Chiranthi (Minor) Appearing through her mother; 4A. K.M. Prabashini. Mother of the 4th Respondent. both of No. 41/14, Ekamuthu Mawatha, Puwakwatta, Meegoda. 5. Zonal Director of Education, Zonal Education Office, Hingurakgoda. 6. Hon Attorney General. Attorney General’s Department, Colombo 12. Respondents.
20/ 05/ 20	S C Appeal No. 138/2012	Sewgan Sivapakyam, No. 90, Mahakumbura, Nawalapitiya. Presently at 196/31, Pannaloka Mawatha, Peiris Road, Dehiwala. DEFENDANT - RESPONDENT - APPELLANT -Vs- Indrani Sinnaiah, No. 56, Kotmale Road, Nawalapitiya. (now deceased) PLAINTIFF - APPELLANT - RESPONDENT 1A. Sinnaih Muththalagu 1B. Sinnaih Manoharan Both of No. 92, Mahakumbura, Soysakele 6, Nawalapitiya. 1C. Ramachandran Haridas, Soysakele Road, Mahakumbura, Nawalapitiya. SUBSTITUTED PLAINTIFF - APPELLANT - RESPONDENTS
19/ 05/ 20	SC (F/R) No. 335/2018	Galkandage Sahasra Sandeepa Perera, No: 32, Chandra Place, Ja-Ela Petitioner Vs. 1. Mr. Harsha Guruge, District Scout Commissioner, “Geeth”, Station Road, Seeduwa. 2. Mr. Meril Gunathilake, Chief Commissioner-Scout Sri Lanka Scout Association, No: 65/9, Sir Chiththampalam A. Gardiner Mawatha, Colombo 02. 3. Secretary, Ministry of Education, “Isurupaya”, Battaramulla. 4. Principal, Christ King College, Thudella, Ja-Eela. 5. Mr. S. A. Amarasinghe, Assistant Chief Commissioner, Chief of the Interview Board. 6. Mr. G.B. Orcus, Leader Trainer, Secretary National Training Team, Member of the Interview Board. 5th and 6th above named Both of Sri Lanka Scout Association, No: 65/9, Sir Chiththampalam A. Gardiner Mawatha, Colombo 02. 7. Hon. Attorney General Attorney General’s Department, Colombo 12. Respondents 8. The Ceylon Scout Council, No: 65/9, Sir Chiththampalam A. Gardiner Mawatha, Colombo 02. Added Respondent

18/ 05/ 20	SC/FR APPLICATION 181/2016	1. M. Weerasinghe, No. 1200/4, Rajamalwatta Road, Battaramulla. 2. D.G.A Wijebandara, No. 972A, Pannipitiya Road, Thalangama South, Battaramulla. 3. R.K.M Dayananda, No. 25/7, Coranelis Mawatha, Thalapathpitiya Road, Nugegoda. 4. N.P.G. Karunathilaka, No. 190, Whitewell Estate, Paththalagedara, Veyangoda. PETITIONERS Vs 1. P.S.M Charles, Director – General of Customs, Sri Lanka Customs Department, No. 40, Main Street, Colombo 11. 2. A. Senanayake, Additional Director – General (Human Resource Management) Sri Lanka Customs Department, No. 40, Main Street, Colombo 11. 3. D. Dissanayake, Chairman, 4. Prof. Hussain Ismail 5. V. Jegarajasingham, 6. Nihal Seneviratne, 7. Dr. Prathap Ramanujan, 8. S. Ranugge, 9. D.L. Mendis, 10. Sarath Jayathilaka, 11. D. Wijayatileke, (All members of the Public Service Commission of No. 177, Nawala Road, Narahenpita, Colombo 05.) 12. A. Kulatunga , Secretary, Public Service Commission, No. 177, Nawala Road, Narahenpita, Colombo 05. 13. Secretary, Ministry of Finance, The Secretariat, Colombo 01. 14. Director – General of Establishments, Ministry of Public Administration and Home Affairs, Independence Square, Colombo 07. 15. M.M. Alwis, 16. A.J. Fernando, 17. B.C.L. Hewawitharana, 18. K.D.R. Perera, 19. W.M.T. Mahaulpatha, 20. U.K.A.S. Yapa, 21. A.N. Kurukulaarachchi, 22. R.P.D.R. Sandya, All acting Superintendents of Customs and all c/o. the Additional Director – General (Human Resource Management), Sri Lanka Customs Department, No. 40, Main Street, Colombo 11. 23. Hon. Attorney – General, Attorney – General's Department, Hultsdorp Street, Colombo 12. RESPONDENTS
11/ 03/ 20	S C Appeal No. 62 /2016	Hon. Attorney General, Attorney General's Department, Colombo 12. DEFENDANT - PETITIONER - APPELLANT -Vs- M S M Najimudeen and 02 others All of 93 2/4, Prince Street, Colombo 11, Carrying on a business in partnership under the name and style and firm of Artex Garments of 93 2/4, Prince Street, Colombo 11. PLAINTIFF-RESPONDENT-RESPONDENTS

10/03/20	SC Appeal 152/2012	1. Kulasinghe Mudiyanselage Silindu Menike 2. Kulasekera Mudiyanselage Godapele Gedara 3. Kulasekera Mudiyanselage Godapele Gedara Wasantha Kalyani Ekanayake 4. Kulasekera Mudiyanselage Godapele Gedara Prabhath Mangala Ekanayake 5. Kulasekera Mudiyanselage Godapele Gedara Pulasthi Kumara Raveendra Ekanayake All of Putuhapuwa, Watapana, Godapolawatta PLAINTIFFS Vs. 1. Kulasekara Mudiyanselage Abeyratne alias Abeysinhe Banda (Dead) 1A. Kulasekera Mudiyanselage Godapele Gedara Jayawardena 1st AND 2nd DEFENDENTS 3. Kulasekera Mudiyanselage Godapele Gedara Biso Menike 3rd DEFENDANT All of Putuhapuwa, Watapana, Godapolawatta AND 2. Kulasekera Mudiyanselage Godapele Gedara Jayawardena 2nd DEFENDANT-APPELLANT Vs. 1. Kulasinghe Mudiyanselage Silindu Menike 2. Kulasekera Mudiyanselage Godapele Gedara Sandya Kumari Swarnalatha Ekanayake 3. Kulasekera Mudiyanselage Godapele Gedara Wasantha Kalyani Ekanayake 4. Kulasekera Mudiyanselage Godapele Gedara Prabhath Mangala Ekanayake 5. Kulasekera Mudiyanselage Godapele Gedara Pulasthi Kumara Raveendra Ekanayake All of Putuhapuwa, Watapana, Godapolawatta PLAINTIFF-RESPONDENTS Kulasekera Mudiyanselage Godapele Gedara Biso Menike 3rd DEFENDANT-RESPONDENT And NOW BETWEEN 1. Kulasinghe Mudiyanselage Silindu Menike 2. Kulasekera Mudiyanselage Godapele Gedara Sandya Kumari Swarnalatha Ekanayake 3. Kulasekera Mudiyanselage Godapele Gedara Wasantha Kalyani Ekanayake 4. Kulasekera Mudiyanselage Godapele Gedara Prabhath Mangala Ekanayake5. Kulasekera Mudiyanselage Godapele Gedara Pulasthi Kumara Raveendra Ekanayake All of Putuhapuwa, Watapana, Godapolawatta PLAINTIFF-RESPONDENT-PRETIONER-APPELLANTS Vs, Kulasekera Mudiyanselage Godapele Gedara Jayawardena 2nd DEFENDANT-APPELLANT-RESPONDENT-RESPONDENT Kulasekera Mudiyanselage Godapele Gedara Biso Menike 3rd DEFENDANT-RESPONDENT-RESPONDENT-RESPONDENT
10/03/20	SC Appeal 151/2017	Kudaanthonige Rasika Damayanthi No. 106, FC02 Yaya 18, Agunakolapelessa. Applicant Vs, Hewa Walimunige Gamini Yaya 15, D3 Ela, Hakmanagedara, Yakawala, Agunakolapelessa. Respondent And then between Kudaanthonige Rasika Damayanthi No. 106, FC02 Yaya 18, Agunakolapelessa Applicant-Appellant Vs, Hewa Walimunige Gamini Yaya 15, D3 Ela, Hakmanagedara, Yakawala, Agunakolapelessa. Respondent-Respondent And Now between Hewa Walimunige Gamini Yaya 15, D3 Ela, Hakmanagedara, Yakawala, Agunakolapelessa. Respondent-Respondent- Appellant Vs, Kudaanthonige Rasika Damayanthi No. 106, FC02 Yaya 18, Agunakolapelessa Applicant-Appellant-Respondent

03/ 03/ 20	SC Appeal 185/14	In the matter an application for Special Leave to Appeal in terms of Article 128(2) of the Constitution Constitution of Sri Lanka. Subramaniam Asokan 15, 4th Cross Street, Colombo 11 But residing at No. 44, 36th Lane, Colombo 06. Appellant Vs. Alawala Dewage Premalal Siriwardana of No. 496/5, Ihala-Karagahamune Kaduwela. Respondent
02/ 03/ 20	SC Appeal 65/2014	1. Samsudeen Sithy Fareeda 2. Fathima Jiffriya Shafi Both of 7A, Thar alanda Road, Matale. Plaintiff s Vs 1. The Municipal Council Matale 2. The Mayor, The Municipal Council Matale 3. The Municipal Commissioner The Municipal Council Matale Defendants AND BETWEEN 1. Samsudeen Sithy Fareeda 2. Fathima Jiffriya Shafi Both of 7A, Tharalanda Road, Matale. Plaintiff Appellants Vs 1. The Municipal Council Matale. 2. The Mayor, The Municip al Council Matale. 3. The Municipal Commissioner, The Municipal Council Matale. Defendant Respondents AND NOW BETWEEN 1. The Municipal Council Matale. 2. The Mayor, The Municipal Council Matale. 3. The Municipal Commissioner, The Municipal Council Matale. Defendant Respondent Appellants Vs 1. Samsudeen Sithy Fareeda 2. Fathima Jiffriya Shafi Both of 7A, Tharalanda Road, Matale Plaintiff Appellant Respondents
27/ 02/ 20	Supreme Court Appeal No. 162/10	Pitihuma Ralalage Tennakone Banda, Maligatenna, Thunthota, Dedigama. Plaintiff. 1. Wickramasinghe Mudiyanselage Podi Menika alias Punchi Manika, Ihala Daswatte, Mawanella. 2. Pitihuma Ralalage Premaratne Menike, Ihala Daswatte, Mawanella. 3. Pitihuma Ralalage Kuda Menike, Wegiriya Veediya, Hondiya Deniya, Udunuwara. 4. Pitihuma Ralalage Illangaratne Menike, 320B, Menikagara Road, Korathota, Kaduwela. Defendants And Between Pitihuma Ralalage Tennakone Banda, Maligatenna, Thunthota, Dedigama. Plaintiff – Appellant. Vs. 1. Wickramasinghe Mudiyanselage Podi Menika alias Punchi Manika, Ihala Daswatte, Mawanella. 2. Pitihuma Ralalage Premaratne Menike, Ihala Daswatte, Mawanella. 3. Pitihuma Ralalage Kuda Menike, Wegiriya Veediya, Hondiya Deniya, Udunuwara. 4. Pitihuma Ralalage Illangaratne Menike, 320B, Menikagara Road, Korathota, Kaduwela. Defendants – Respondents. And Between. Pitihuma Ralalage Premaratne Menike, Ihala Daswatte, Mawanella. 2ND Defendant – Respondent – Petitioner. Vs. Pitihuma Ralalage Tennakone Banda, Maligatenna, Thunthota, Dedigama. Plaintiff – Appellant-Respondent 1. Wickramasinghe Mudiyanselage Podi Menika alias Punchi Manika, Ihala Daswatte, Mawanella. 2. Pitihuma Ralalage Kuda Menike, Wegiriya Veediya, Hondiya Deniya, Udunuwara. 3. Pitihuma Ralalage ILLangaratne Menike, 320B, Menikagara Road, Korathota, Kaduwela.

25/ 02/ 20	SC Appeal 91/2013	1. Leif Heling 2. Kristine Heling Both of No. 3070, Sanday , Norway Appearing through their power of Attorney holder Pothupitiya Kankanamge Udaya Gunabandu. “If” Thalpe, Galle. Plaintiffs Vs 1. Yasawathi Abeywickrama Weerasinghe. 2. Kumarapperuma Arachchige Carolis Gunapala Both of Liyanagewatta, Thalpe, Galle. Defendant s AND BETWEEN 1. Yasawathi Abeywickrama Weerasinghe. Liyanagewatta, Thal pe, Galle. 2. Kumarapperuma Arachchige Carolis Gunapala (2A. Kumarapperuma Arachchige Kumara. Liyanagewatta, Thalpe, Galle. Defendant A ppellants Vs 1. Leif Heling No. 3070, Sanday, Norway 2. Kristine Heling No. 3070, Sanday, Norway Appearing through their power of Attorney holder Pothupitiya Kankanamge Udaya Gunabandu. “If” Thalpe, Galle. Plaintiff Respondents AND B E TWEEN Yasawathi Abeywickrama Weerasinghe. Liyanagewatta, Thalpe, Galle. 1 st Defendant Appellant Petitioner Vs 1. Leif Heling No. 3070, Sanday, Norway 2. Kristine Heling No. 3070, Sanday, Norway Appearing through their power of Attorney holder Pothupitiya Kankanamge Udaya Gunabandu. “If” Thalpe, Galle. Plaintiff Respondent Respondents Kumara pperuma Arachchige Carolis Gunapala (Kumarapperuma Arachchige Kumara. Liya nagewatta, Thalpe, Galle. 2A Defendant Appellant Respondent AND NOW BETWEEN Yasawathi Abeywickrama Weerasinghe. Liyanagewatta, Thalpe, Galle. 1 st Defendant Appellant Petitioner Appellant Vs 1. Leif Heling No. 3070, Sanday, Norway 2. Kristine Heling No. 3070, Sanday, Norway Appearing through their power of Attorney holder Pothupitiya Kankanamge Udaya Gunabandu. “If” Thalpe, Galle. Plaintiff Respondent Respondent Respondents Kumarapperuma Arachchige Carolis Gunapala (Kumarapperuma Arachchige Kumara. Liyanagewatta, Thalpe, Galle. 2A Defendant Appellant Respondent Respondent
25/ 02/ 20	SC Appeal 74/2008	Geekiyanage V iyantha Vijithweera No.156, Kandy Road Nuwaraeliya . Plaintiff Vs 1. Mohamed Thuwan No.4, Old Bazar Nuwaraeliya Defendant AND Mohamed Thuwan No.4 , Old Bazar Nuwaraeliya Defendant Appellant Vs Geekiyanage Viyantha Vijithweera No.156, Kandy Road Nuwaraeliya Plaintiff Respondent AND NOW BETWEEN Geekiyanage Viyantha Vijithweera No.156, Kandy Road, Nuwaraeliya. Plaintiff Respondent Petitioner Appellant Vs Mohamed Thuw an No.4, Old Bazar. Nuwaraeliya Defendant Appellant Respondent Respondent

25/ 02/ 20	SC Appeal 205/2016	Pahalage Mane l Malkanthi Abeygunawardane “Rendagewatta”, Paiyagala Paiyagala. Plaintiff Vs 1. Hettiarachchige Podi Mahaththaya No.69, Samagi Mawatha, Nittambuwa. 2. Hettiarachchige Wijesundara No.10, Samagi Mawatha, Dangollawatta, Nittambuwa. Defendant s AND Hettiarachchige Wijesundara No.10, Samagi Mawatha, Dangollawatta, Nittambuwa. 2 nd Defendant Appellant. Vs Pahalage Manel Malkanthi Abeygunawardane “Rendagewatta”, Paiyagala Paiyagala. Plaintiff Respondent Hettiarachc hige Podi Mahaththaya No.69, Samagi Mawatha, Nittambuwa. 1 st Defenda nt Respondent AND NOW BETWEEN Hettiarachchige Wijesundara No.10, Samagi Mawatha, Dangollawatta, Nittambuwa. 2 nd Defendant Appellant Petitioner Appellant Vs Pahalage Manel Malkanthi Abeygunawardane “R endagewatta”, Paiyagala South, Paiyagala. Plainti ff Respondent Respondent Respondent Hettiarachchige Podi Mahatht haya No.69, Samagi Mawatha, Nittambuwa. (Deceased) 1 st Defend ant Respondent Respondent Respondent Hettiarachchige Wijesundara No.10, Samagi Mawatha, Dangollawatta, Nittambuwa. Substituted 1 st Defendan t Respondent Respondent Responden t
19/ 02/ 20	S.C. (F/R) Application No. 291/2016	Lt. Col. Samitha Manojith Hewa Imaduwage, 46/4, Senanayake Avenue, Nawala, Rajagiriya. Petitioner Vs 1. Lieutenant General A. W. J. C. De Silva, Commander of the Army, Army Headquarters, Colombo 03. 1A. Lieutenant General Mahesh Senanayake, Commander of the Army, Army Headquarters, Colombo 03. 2. Major General N. J. Walgama, Military Secretary, Army Headquarters, Colombo 03. 2A. Major General C. W. B. Wijesundera, Military Secretary, Army Headquarters, Colombo 03. 3. Brigadier K. B. R. De Abrew, Assistant Military Secretary, Army Headquarters, Colombo 03. 3A. Brigadier S. K. Eshwaran, Assistant Military Secretary, Army Headquarters, Colombo 03. 4. Brigadier A. L. S. K. Perera, Director Personal Administration, Premier Pacific Building, No. 28, R. A. De Mel Mawatha, Colombo 04. 5. Major General K. R. P. Rowel, Colonel Commandant, Sri Lanka Signal Corps, Regiment Centre, Army Cantonment, Panagoda. 5A. Major General B. H. M. A. Wijesinghe, Colonel Commandant, Sri Lanka Signal Corps, Regiment Centre, Army Cantonment, Panagoda. 6. Brigadier K. A. D. S. L. Perera, Director Pay and Records, Army Cantonment, Panagoda. 6A. Colonel L. Wijesundara, Director Pay and Records, Army Cantonment, Panagoda. 7. Lieutenant Colonel B. D. Fernando, 5th Commanding Officer, Sri Lanka Signal Corps, Regiment Centre, Army Cantonment, Panagoda. 8. Jagath Dias, Director General of Pensions, Department of Pensions, Colombo 10. 9. Karunasena Hettiarachchi, Secretary to the Ministry of Defence, Ministry of Defence, 15/5, Baladaksha Mawatha, Colombo 03. 9A. Kapila Waidyaratne PC, Secretary to the Ministry of Defence, Ministry of Defence, 15/5, Baladaksha Mawatha, Colombo 03. 10. Hon. Attorney General, Attorney General’s Department, Colombo 12. Respondents

17/ 02/ 20	SC Appeal No. 174/2014	Bulathsinhalage Edwin Cooray, No. 08, Mahinda Place, Kirulapona, Colombo 06. Plaintiff -Vs- Bulathsinhalage Harschandra Wasantha Cooray, No. 11/3, Vihara Mawatha, Narangoda Paluwa, Ambalama Junction, Ragama. Defendant AND Bulathsinhalage Harschandra Wasantha Cooray, No. 11/3, Vihara Mawatha, Narangoda Paluwa, Ambalama Junction, Ragama. Defendant-Appellant Vs Bulathsinhalage Edwin Cooray No. 08, Mahinda Place, Kirulapona, Colombo 06. Plaintiff-Respondent (Deceased) Tamara Indrani Cooray, No. 08, Mahinda Place, Kirulapona, Colombo 06. Substituted Plaintiff–Respondent AND NOW BETWEEN Bulathsinhalage Harschandra Wasantha Cooray, No. 11/3, Vihara Mawatha, Narangoda Paluwa, Ambalama Junction, Ragama. Defendant-Appellant-Appellant Vs. Tamara Indrani Cooray, No. 08, Mahinda Place, Kirulapona, Colombo 06. Substituted Plaintiff – Respondent - Respondent
17/ 02/ 20	S C Appeal No. 79/2012	1. Superintendent, Udaweriya Estate, Ohiya. 2. Agarapatana Plantations Limited, 53 1/1, Sir Baron Jayatilleke Mawatha, Colombo 01. 3. Lankem Tea and Rubber Plantation Limited, 53 1/1, Sir Baron Jayatilleke Mawatha, Colombo 01. RESPONDENT - RESPONDENT - APPELLANT -Vs- Lanka Wathu Seva Sangamaya, No. 06, Aloysee Mawatha, Colombo 03. (On behalf of K Jayaratne) APPLICANT - APPELLANT – RESPONDENT
12/ 02/ 20	SCFR 21/2019	1. Jayasekera Arachchige Senudhi Methanga, M23/3, Dabare Mawath, Narahenpita Colombo 05. (Minor) 2. Jayasekera Arachchige Chamila Prabath, M23/3, Dabare Mawath, Narahenpita, Colombo 05. Petitioners VS. 1. A.R.M.R. Herath, Principal and the chairperson of the Interview Board to admit students to Grade 1, Sirimavo Bandaranayake Vidyalaya, Stanmore Crescent, Colombo 07. 2. Rukmali Kariyawasam, Primary Principal and member of the Interview Board to admit students to Grade 1, Sirimavo Bandaranayake Vidyalaya, Stanmore Crescent, Colombo 07. 3. Jayantha Seneviratne Member of the Interview Board to admit students to Grade 1, Sirimavo Bandaranayake Vidyalaya, Stanmore Crescent, Colombo 07. 4. Oshara Panditharathna, Principal, Dharmapala Vidyalaya, Pannipitiya. 5. Padmasiri Jayamanne, Secretary, Ministry of Education Isurupaya, Pelawatta, Battaramulla. 6. Ranjith Chandrasekera, Director of National Schools , Isurupaya, Pelawatta, Battaramulla. 7. Honourable Attorney General, Attorney General’s Department, Colombo 12. Respondents

12/ 02/ 20	SC Appeal No: 138/2017	Prasanna Peiris, No. 114/14, Sri Wickrema Rajasinghe Road, 3rd Kurana, Negombo. APPLICANT -VS- Toroid International (Pvt) Ltd., P.O. Box 15, Phase II F.T.Z., Katunayake. RESPONDENT AND BETWEEN Toroid International (Pvt) Ltd., P.O. Box 15, Phase II F.T.Z., Katunayake. RESPONDENT-APPELLANT -VS- Prasanna Peiris, No. 114/14, Sri Wickrema Rajasinghe Road, 3rd Kurana, Negombo. APPLICANT-RESPONDENT AND NOW BETWEEN Noratel International (Pvt.) Ltd. (formerly known as Toroid International (Pvt) Ltd.), P.O. Box 15, Phase II, Export Processing Zone, Katunayake. RESPONDENT-APPELLANT-PETITIONER -VS- Prasanna Peiris, No. 114/14, Sri Wickrema Rajasinghe Road, 3rd Kurana, Negombo. APPLICANT-RESPONDENT- RESPONDENT
04/ 02/ 20	SC.Appeal No. 160/2010	Ceylon Grain Elevators Limited, 15, Rock House Lane, Colombo 15. Petitioner Petitioner Vs 1. Mahinda Madihahewa, Commissioner General of Labour, Department of Labour, Labour Secretariat, P.O.Box 575, Colombo 05. 2. D.M.S.Dissanayaka, Commiss ioner of Labour (Industrial Relations) Department of Labour, Labour Secretariat, P.O.Box 575, Colombo 05. 3. K.M.Silva (Retired) Deputy Commissioner of Labour (Industrial relations) Department of Labour, Labour Secretariat, P.O.Box 575, Colombo 05. 4. Ooi Eng Hooi No.10, Jalan Rk 6/12, Rasah Kemayan 70300 Seramban, Negeri Sembilan, Malaysia. Respond ents Respondents
28/ 01/ 20	SC APPEAL NO.204/20 15	Officer-in Charge, Police Station, Sewanagala. COMPLAINANT Vs. Mohamed Irupan Impar, No.30, Randola, Balangoda. 2nd SUSPECT AND BETWEEN Mohamed Irupan Impar, No.30, Randola, Balangoda. 2nd SUSPECT-APPELLANT Vs. 01. Officer-in Charge, Police Station, Sewanagala. COMPLAINANT-RESPONDENT 02. Attorney General, Attorney General's Department, Colombo 12. RESPONDENT AND NOW BETWEEN Mohamed Irupan Impar, No.30, Randola, Balangoda. 2ND SUSPECT-APPELLANT-APPELLANT Vs. 01. Officer-in Charge, Police Station, Sewanagala. COMPLAINANT-RESPONDENT- RESPONDENT 02. Attorney General, Attorney General's Department, Colombo 12. RESPONDENT-RESPONDENT
27/ 01/ 20	S.C. (F/R) Application No. 458/2012	Arangallage Samantha No 275/26, Arachchiwatta, Nedagamauwa, Kotugoda, Minuwangoda. Petitioner 1. The Officer-in-charge of the Police Station Police Station Biyagama 2. A.S.P. Nishantha Soyza A.S.P.'s Office, Police Station Mirihana, Nugegoda. 3. The Headquarter Inspector of Police Police Station, Mirihana, Nugegoda. 4. Police Constable 40841 Kumudesh Police Station, Mirihana, Nugegoda. 5. Police Constable 40937 Samaraweera Police Station, Mirihana, Nugegoda. 6. The Inspector-General of Police Police Headquarters Colombo 01. 7. Hon. Attorney-General Attorney-General's Department Colombo 12.
26/ 01/ 20	SC. Appeal No. 31/2011	Priyantha Lal Ramanayake No. 935, Siyambalakotte, Barawakumbuka. ACCUSED APPELLANT PETITIONER Vs. The Hon. Attorney General RESPONDENT RESPONDENT

22/01/20	SC.Appeal No. 39/2019	
21/01/20	SC Appeal No.115/2014	Democratic Socialist Republic of Sri Lanka Complainant Vs. 1. Hiniduma Dahanayakage Siripala alias Kiri Mahaththaya. 2. Henapita Gamage Shantha. 3. Kandabige Priyantha alias Appuhami. 4. Karivila Kandhage Upul Priyashantha. Accused And Now 1. Hiniduma Dahanayakage Siripala alias Kiri Mahaththaya. 2. Henapita Gamage Shantha. Accused-Appellants Vs. The Hon. Attorney General Attorney General's Department, Colombo12. Respondent And Now Between 1. Hiniduma Dahanayakage Siripala alias Kiri Mahaththaya. 2. Henapita Gamage Shantha. Both presently at Welikada Prison, Baseline Road, Borella. Accused- Appellants-Petitioners- Appellants Vs. The Hon. Attorney General, Attorney General's Department, Colombo 12. Complainant-Respondent-Respondent

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

In the matter of an Application under and in terms of Sections 224,225 and 521 of the Companies Act, No.07 of 2007, read together with the provisions of the High Court of the Provinces (special Provisions) Act No.10 of 1996.

SC APPEAL NO. 58/16

HC (Civil) 59/2014/CO

Institute of Data Management (Private) Limited No.13, Lauries Place, Colombo 04.

PETITIONER

VS.

1. IDM Nations Campus (Pvt) Ltd.
   No.23, Daisy Villa Avenue, Colombo 04.

2. Janagan Vinayagamoorthy
   No. 3, 4/4 Fredrica Road, Colombo 06.
   And
   No.16, 42nd Lane, Colombo 06.

3. Subyahewa Rathnasiri
   Paddawala Road, Madakumbura,
   Karandeniya
   And
   No.16, 42nd Lane, Colombo 06.

4. K. L. Management Consultants (Private) Limited
   No.15-1/1, Kirillapona Avenue,
   Kirillapona, Colombo 05.

5. IDM Nations Campus Lanka (Pvt) Ltd.
No.15 Lauries Place, Colombo 04.

RESPONDENTS

And now between

Institute of Data Management (Private)
Limited No.13, Lauries Place, Colombo 04.

PETITIONER-PETITIONER

VS.

1. IDM Nations Campus (Pvt) Ltd.
No.23, Daisy Villa Avenue, Colombo 04.

2. Janagan Vinayagamoorthy
No. 3, 4/4 Fedrica Road, Colombo 06.
And
No.16, 42nd Lane, Colombo 06.

3. Subyahewa Rathnasiri
Paddawala Road, Madakumbura,
Karandeniya
And
No.16,42nd Lane, Colombo 06.

4. K. L. Management Consultants (Private)
Limited
No.15-1/1, Kirillapona Avenue,
Kirillapona, Colombo 05.

5. IDM Nations Campus Lanka (Pvt) Ltd.
No.15 Lauries Place, Colombo 04.

RESPONDENTS-RESPONDENTS

BEFORE : **B.P ALUWIHARE, PC, J.**
L.T.B DEHIDENIYA J. AND
S. THURAIRAJA, PC, J

COUNSEL : Dr. Harsha Cabral, PC, with Kushan Illangathilake and Sasheen Arsecularatna for the Petitioner – Petitioner

Charaka Jayaratne and Amila Perera instructed by for the Respondent – Respondent

ARGUED ON : 7th August 2020.

WRITTEN SUBMISSIONS : Petitioner on 10th August 2020 and 28th March 2016.
Respondent on 10th August 2020 and 7th August 2020.

DECIDED ON : 18th December 2020

S. THURAIRAJA, PC, J.

Introduction

The Petitioner-Petitioner (hereinafter referred to as the "Petitioner") filed an application by Petition dated 15th December 2014 in the High Court of the Western Province Sitting in Colombo in the Exercise of Its Civil Jurisdiction (hereinafter referred to as the "High Court") against the Respondent-Respondent (hereinafter referred to as the "Respondent") for a claim of Oppression and Mismanagement under Section 224,

225 and 521 of the Companies Act No.07 of 2007(hereinafter referred to as the "Companies Act"), seeking *inter alia* the granting of Interim Orders requested as prayed for in paragraph 32 of the Petition dated 18th December 2015.

Upon the parties making written submissions and subsequent oral submissions, the learned Judge of the Commercial High Court delivered an Order on 3rd December 2015 refusing to grant the Interim Orders sought by Petitioner based on laches on the part of the Petitioner.

Being aggrieved by the decision of the High Court, the Petitioner appealed to the Supreme Court seeking *inter-alia* the following reliefs;

a) Grant the Petitioner Leave to Appeal against the Order of the Learned Judge of the High Court of the Western Province Sitting in Colombo in the Exercise of its Civil Jurisdiction dated 03rd December 2015, marked **'Y17'**;
b) Set aside the Order of the Learned Judge of the High Court of the Western Province Sitting in Colombo in the Exercise of its Civil Jurisdiction dated 03rd December 2015, marked '**Y17'**;
c) Issue Interim Orders as prayed for in prayers (j), (k), (l), (m), (n) and (o) of the Petition dated 15th December 2014 in the said action bearing No. HC (Civil) 59/2014 (Co).

Pursuant thereto, after hearing the Counsel for the parties on 11th March 2016 and 14th March 2016, leave to appeal was granted precisely on the questions of law set out in paragraphs 38(c), (h) and (j) of the Petition namely;

c) The Learned Judge of the Commercial High Court has misdirected himself by failing to recognize that a duty to approach Court for relief against the affairs of a company being conducted in a manner oppressive to a shareholder and/or mismanagement does not arise until the commission of a series of acts

h) The Learned Judge of the Commercial High Court has misdirected himself by failing to consider the series of acts of oppression and/or mismanagement, in addition to the removal of said Dr. Bandusena Ranasinghe from being a Director of the 1st Respondent Company, referred to in the Petition and the entitlement of the Petitioner for the grant of the interim orders prayed for in the Petition on the basis thereof:

j) The Learned High Court Judge has misdirected himself in failing to appreciate that the fundamental complaint of the Petitioner is that the affairs of the 1st Respondent Company have been conducted in a manner oppressive to the Petitioner and/or mismanaged and the interim orders are required for the protection of the interests of the 1st Respondent Company and the Petitioner as a minority shareholder thereof

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 questions of law before us.

Background to this application

The now Petitioner and now 2nd Respondent are the two shareholders of the now 1st Respondent Company and each holds 50% of the issued shares thereof. The 2nd Respondent and now 3rd Respondent are currently Directors of 1st Respondent Company and the 4th Respondent is the Company Secretary. As the Petitioner is an artificial person, its interests as a 50% shareholder were represented in the Board of Directors by Director Dr. Bandusena Ranasinghe, who happens to be the Chairman of the Petitioner Company.

It is the Petitioners allegation that Dr. Bandusena Ranasinghe was irregularly and unlawfully removed from the Board of Directors of the 1st Respondent Company by the 2nd Respondent. The Petitioner submits Form 20 dated 31st January 2014, marked as 'Y6', in order to demonstrate that the Registrar-General of Companies was informed of such removal by the 4th Respondent that the said Dr. Bandusena

Ranasinghe has resigned from the Board of Directors of the 1st Respondent Company on or around 10th October 2013. This document is signed by the 4th Respondent and mentions the 2nd and 3rd Respondents to be the remaining Directors of the company while the 4th Respondent remains as the Company Secretary. Form 20 is submitted as Section 223(2) of the Companies Act requires such document communicating the change of Directors.

However, The Respondents have failed to comply with the requirements of Section 223 as the Section states as follows:

(2) The company shall ensure that notice in the prescribed form of—

(a) a change in the directors or the secretary of the company..

is delivered to the Registrar for registration."

And further that:

"(3) A notice under subsection (2) shall—

(a) specify the date of the change;

(c) be delivered to the Registrar within twenty working days of—

(i) the change occurring, in the case of the appointment or resignation of a director or secretary;"

Additionally, Form 20 in itself, as evidenced by 'Y6', states at the end of the 2nd page the following:

"Notice should be delivered to the Registrar of Companies, within 20 working days of the change occurring"

'Y6' mentions the 10th of October 2013 to be the date Dr. Bandusena Ranasinghe ceased to hold office. Taking public holidays in the year 2013 into account, the 20 working days would elapse on or around the 8th of November 2013. Despite this, the document 'Y6' was only submitted to the registrar on

the 31st of January 2014, after well over 3 months of the purported date of Resignation. If Form 20 were to be an authentic document as the Respondent insists, the 1st - 4th Respondents would be liable to pay a fine upon conviction as stated in 223(3) as follows:

(4) Where a company fails to comply with this section—

(a) the company shall be guilty of an offence and be liable on conviction to a fine not exceeding one hundred thousand rupees; and

(b) every officer of the company who is in default shall be guilty of an offence and be liable on conviction to a fine not exceeding fifty thousand rupees.

The above inconsistency by the Respondents' negligence is rather ironic as it is the Respondent in this case that wishes to continue to emphasize the importance of delay and timeliness in following procedure. Further, there is no evidence before this court to believe that the Registrar of Companies has taken any action regarding the above violation of Section 223.

Further, it must be noted that despite Article 8 of Articles of Association requiring an appointment of a director to be made in replacement of Dr. Bandusena Ranasinghe in order to represent the interests of the Petitioner, the annexed Form 20 in itself does not make any replacement and there have been no further steps taken by the 2nd,3rd or 4th Respondent to make such replacement. For this reason, there are no directors representing the interest of the Petitioner in the 1st Respondent company as at present.

In order to contest Form 20, the Petitioner submits the Annual Return Form of the 1st Respondent Company filed as at 31st December 2013 (marked as 'Y3', signed by Dr. Bandusena Ranasinghe, the 2nd Respondent and 3rd Respondent.) Additionally, the Petitioner also files a cheque signed by Dr. Bandusena Ranasinghe dated 21st November 2013 marked 'Y7a' and the Bank Statement indicating the realization of

specified cheque, annexed as 'Y7b' in order to demonstrate that Dr. Bandusena Ranasinghe had not resigned as indicated by Form 20. Additionally, the Petitioner alleged the existence of a fraudulent letter, which was the basis of Form 20 in the instant case, however it must be noted that the Petitioner has not taken any steps to produce such a letter.

The Petitioner also submits a letter dated 1st July 2014 annexed as 'Y9', sent by the said Dr. Bandusena Ranasinghe and Mr. Darshana Srinath Ranasinghe (The second shareholder of the Petitioner company along with Dr. Bandusena Ranasinghe), denying that the said Dr. Bandusena Ranasinghe resigned as a Director of the 1st Respondent Company and without prejudice thereto, nominating three persons including the said Dr. Bandusena Ranasinghe, to be appointed to the Board of Directors of the 1st Respondent Company in terms of Article 8(B)(I) of the Articles of Association of the 1st Respondent Company (as indicated in document annexed as 'Y4(b)')

The 2nd Respondent has proceeded to incorporate a company (the 5th Respondent) under the name of "IDM Nations Campus Lanka (Pvt) Ltd" of business registration number PV98554, incorporated on 13th May 2014 (Form 18 annexed as 'Y10b'), with the 2nd Respondent as the sole shareholder, the 2nd and 3rd Respondent as Directors and the 4th Respondent as Company Secretary (as mentioned in Form 1 annexed as 'Y10a' and Form 18 annexed as 'Y10b' respectively).

Subsequently, the Petitioner has submitted a letter dated 6th June 2014 (annexed as 'Y11(a)') to the Registrar of Companies bringing to attention the concerns of the Petitioner in the incorporation of the 5th Respondent Company, requesting for the Registrar of Companies to not permit the incorporation of the 5th Respondent. Thereafter, the Registrar of companies has responded directing the Petitioner to file an action by letter dated 30th June 2014 annexed as 'Y11(b)', following which the Petitioner has preferred to the Commercial High Court by petition dated 15th December 2014, leading to the action bearing No. HC (Civil) 59/2014 (CO).

The learned Judge of the High Court discussed the matter of Form 20 as the act upon which the petition is based and issued an Order dated 03rd December 2015 refusing the grant of interim orders for the reason of laches on the part of the Petitioner, in having delayed approximately 5 months in approaching the court, deeming such delay to be unjustified and unreasonable.

The learned Judge also relies on the conduct of the Petitioner in failing to exercise the remedy available under Section 483 of the Companies Act, in not having made a complaint to the Police or the Registrar of Companies to obtain an order by a Magistrate for the inspection or production of the suspected document alleged by the Petitioner, when the Act expressly provides this remedy for such offence as is alleged by the Petitioner.

Thereafter, the Petitioner has made an application to the Supreme Court by way of petition dated 18th December 2015 and I hereby address the questions of law abovementioned as follows:

Oppression and mismanagement.

The Petitioner makes claims under Section 224 for Oppression, Section 225 for Mismanagement whilst seeking for relief under Section 521 of the Companies Act. In the matter of oppression, Section 224 of the Companies Act reads as follows:

> *"(1) Subject to the provisions of section 226, any shareholder or shareholders of a company who has a complaint against the company that the affairs of such company are being conducted in a manner oppressive to any shareholder or shareholders (including the shareholder or shareholders with such complaint) may make an application to court, for an order under the provisions of this section.*
>
> *(2) Where on any application made under the provisions of subsection (1), the court is of the opinion that the affairs of a company are being conducted in a manner oppressive to any shareholder or shareholders of*

the company, the court may with a view to remedying the matters complained of, make such order as it thinks fit.

(3) Pending the making by it of a final order, the court may on the application of a party to the proceedings, make an interim order which it thinks is necessary for regulating the conduct of the company's affairs, upon such terms and conditions as appear to it to be just and equitable. The provisions of section 521 shall apply to any interim order made hereunder."

The provisions for Oppression were introduced in order to allow for the protection of Shareholders and it entitled them as of a right, to be treated without oppression as a right, regardless of whether they are minority shareholders. The need for such a remedy was made apparent by the increasing number of claims for winding up based on prejudicial conduct against shareholders despite companies being solvent, as it was the only remedy available to shareholders when faced with such difficulty. It was observed that this position was detrimental to the interests of all parties involved given the finality in the recourse of winding up. Thus is 1948 it could be seen that the United Kingdom (UK) was compelled to introduce a satisfactory remedy that incorporated the long-term interests of both the shareholders and company by providing justice and continuity respectively despite the oppressive conduct in issue. Further, such remedy allowed a shareholder to approach the courts in the event the majority shareholders deviated from the best interests of the company

Section 210 of the UK Companies Act 1948 introduced a provision for Oppression whereby members of a company were to make an application to court in the event of oppressive conduct. This was less drastic and allowed courts to offer a large range of remedies as it was to be what was deemed just and equitable by the Courts. Upon its introduction in the United Kingdom, such remedy was considered to be novel, however, the judgements of the UK courts and the 1948 legislation laid the framework countries were to follow in the years to come. For instance, in the case of **Scottish Co-**

op Society v Meyers 1959 AC 324 it was considered that the question was not one of whether the shareholder had been oppressed, but rather whether the "affairs of the company had been conducted oppressively". This approach was adopted by both India and the Sri Lanka.

India not only recognized Oppression but introduced a provision for 'mismanagement' through the 1956 Act. This did not have a counterpart in the UK legislation. Sri Lanka followed suit by enacting the Companies (Amendment) Act No.15 of 1964 and introduced the provisions for Oppression and Mismanagement based on the Indian Companies Act, which was framed as alternative remedies to winding up. Subsequently, the Companies Act no. 17 of 1982 carried forward the provisions of oppression and mismanagement while approaching the remedies as a means of recognizing and addressing the rights of shareholders, granting general powers to Courts to remedy such conduct, as opposed to alternatives to winding up under the previous regime.

In this backdrop, when the Companies Act no.7 of 2007 came into being, the provisions were retained unaffected by the change in the UK as the Companies Act 2007 diverted from following the UK legislation. The alteration in phrasing of the provision for Oppression from the word "oppression" to "unfairly prejudiced" following the Companies Act 1980 under the UK law did not faze law makers in Sri Lanka in adopting the express words Oppression and Mismanagement as part of the Companies Act in 2007.

Thus, in light of the current position in the UK, it is appropriate to refer to the jurisdiction of India which retains the concept of *"Prevention of Oppression and Mismanagement*" in their current Companies Act of 2013.

Section 225 of the 2007 Companies Act in relation to Mismanagement reads:

" (1) Subject to the provisions of section 226, any shareholder or shareholders of a company, having a complaint—

(a) that the affairs of the company are being conducted in a manner prejudicial to the interests of the company; or

(b) that a material change (not being a change brought about by or in the interest of any creditors, including debenture holders or any class of shareholders of the company) has taken place in the management or control of the company, whether by an alteration in its board of directors or of its agent or secretary or in the constitution or control of the firm or body corporate acting as its agent or secretary or in the ownership of the shares of the company or in any other manner whatsoever, and that by reason of such change it is likely that the affairs of the company may be conducted in a manner prejudicial to the interests of the company, may make an application to court for an order under the provisions of this section."

It is important to note the distinction between Sections 224 and 225. Section 224 concerns acts oppressive towards shareholders whilst the focus of Section 225 is the Company itself. Further, there are two limbs to Section 225, namely whether the affairs of the company are being conducted in a manner prejudicial to the interests of the company as well as changes to board structure that affects or is likely to affect conduct in such a prejudicial manner.

The second subsection recognizes the power of court to make such order as may be suitable for the circumstances of each application if the court deems oppression exists.

However, the third subsection is of importance in terms of this instant case as it recognizes the power of courts to issue interim Orders in line with Section 521 in lieu of a pending decision, in order to regulate conduct "*upon such terms and conditions as appear to it to be just and equitable."* Thus, this Court is empowered to decide upon

this matter of the issuance of Interim Orders prayed for under Sections 224,225 and 521.

Further, it is uncontested that the Petitioner fulfills the requirement of Section 226 and is thereby entitled to make such application for claims of Oppression and Mismanagement in exercising his rights as a shareholder of the 1st Respondent Company.

While there is no specification in the provision, it is generally accepted practice that an isolated act of oppression does not entitle a shareholder to make an application to the Court for relief on the basis that the affairs of a company are conducted in a manner oppressive to a shareholder of a company. Rather, a series of such acts of oppression are required for a shareholder to be entitled to make such application to Court.

This is substantiated by the case of ***Needle Industries (India) Ltd v Needle Industries Newey (India) Holding Ltd. AIR 1981 SC 1298*** in which The Supreme Court of India took the view that:

> *"An isolated act, which is contrary to law, may not necessarily and by itself support the inference that the law was violated with a mala fide intention…But a series of illegal acts following upon one another can, in the context, lead justifiably to the conclusion that they are a part of the same transaction, of which the object is to cause or commit the oppression of persons against whom those acts are directed"*

In the United Kingdom, the interpretation afforded to Section 210 of the English Act of 1948, the final English Company Act to use the express word "oppression", was of a much narrower scope, as opposed to the broader phrasing "unfairly prejudicial" adopted in 1980 and used as at present in the Companies Act 2006 in Section 994 and 995. For an application for a claim of oppression under the former Act, it was insufficient to put forward a singular isolated incident.

Relying on the leading treatise of **Company Law by Dr. Kang-Isvaran and Wijayawardane**, that the Respondent themselves rely on in their written submissions, **page 517 reads thus,**

> *"Early decisions of court expressed the opinion that isolated acts or an act of the past cannot be challenged under the rubric of 'oppression'. This view was criticized both in England and India as being too "onerous"."*

This cannot be construed to mean that an isolated incident is sufficient. On the contrary, it is accepted in UK, India and Sri Lanka that whilst an isolated incident is insufficient, there must in the least, be sufficient events that may be considered as part of a continuing series of events, accumulating to a continuing story leading to the date of Petition, even if there are no multiple disconnected events.

This is supported in the case of ***S. P. Jain vs Kalinga Tubes Ltd on 14 January, 1965 AIR 1535*** in which Justice K Wanchoo held the following:

> *"There must be continuous acts on the part of the majority shareholders, continuing up to the date of the petition, showing that the affairs of the company were being conducted in a manner oppressive to some part of the members."*

It must be noted that unlike the jurisdictions of India or the United Kingdom, Sri Lanka does not have as an extensive or comprehensive guide of interpretation that may be followed in instances of Oppression and Mismanagement. Udalgama J in ***Ratnam and others v Jayathileka (2002) 1 Sri LR 409*** supported this stance. He went on to state that:

> *"when all the events are considered as part of the continuing story as opposed to an individual event in isolation, that on a balance of probability the affairs of the company appears to have been conducted in a manner oppressive to the respondent"*

Justice Udalgama arrived at this conclusion after being influenced by the definition of the term oppression as given in the case of **Re Harmer Ltd [1958] 3 All ER 689** where the courts held that the oppression includes acts or conduct which are 'burdensome', 'harsh' and 'wrongful'. Further it could also be seen that as proposed by the Australian courts in **Re Bright Pine Mills Pty Ltd [1969] VR 1002** oppression could also be by inertia. In this case it was seen that the directors ignored business opportunities the company could have taken up so that another business in which they were interested could take advantage of them.

The view taken by the Court of Appeal in the Ratnam case is correct as they have recognized that oppression could not be an isolated act but one that is part of a continuing story. It could also be seen that such an inactivity for it to be a considered as oppression as envisaged by the Companies Act. This ensures that all acts must be considered collectively and no act of oppression is disregarded based on a scale of importance relative to the other acts of oppression present, while allowing for a holistic view on the entirety of the circumstances surrounding any given case, as opposed to focusing on a singular act.

Thus, it is established law that a singular isolated occurrence does not always fulfill the threshold required for a claim of oppression and I will continue to uphold this view. The requirement is such that there must be a series of which are caused by acts at the very least which are burdensome, harsh, wrongful and/or due to an inactivity.

Upon examination of the facts and circumstances of this case, I am of the opinion that there exists a *prima facie* case established by the Petitioner, upon examination of evidence, based on a series of events amounting to oppression against the Petitioner as a Shareholder and this conduct appears to amount to multiple acts of Mismanagement of the company as provided for by Section 224 and 225 respectively.

As submitted, the Articles of Association of the 1st Respondent Company dated 27th June 2011 annexed as 'Y4(b)' was amended on 7th March 2013 by way of board

resolution on 5th March 2013, in regards to which the Registrar of Companies has been informed by Secretary of company, the 4th Respondent, by Form 39 on 14th March 2013. It is observed that while the resolution is titled as being "on 5th March, 2013 at 11:00 am", the Company Secretary has signed, filed and dated the document at the footer as "Colombo, Dated: 7th March, 2012". Following the amended Articles of Association and the Companies Act No.7 of 2007, breaches would arise, should the conduct be proven upon further investigation by the High Court.

Firstly, the matter of the alleged fraudulent Form 20, should it be so proven, would amount to an act of Oppression against the Petitioner as a shareholder. Secondly the non-appointment of a director following the removal of resignation in order to represent the interests of the 50% shareholder would amount to oppression against the Petitioner and Mismanagement prejudicial to the interests of the company. Further, this is a violation of Article 8(A)(I) of the amended Articles of Association as it requires for a Director of Group "A" to be appointed at the capacity of Chairman/Deputy Chairman of the 1st Respondent company. Non-compliance with this would, in essence, amount to a violation of Section 188 of the Companies Act by the 2nd and 3rd Respondent as well as violation of Section 16 of the Companies Act.

Additionally, it is a requirement of Article 8(G) (III) to promptly inform the bank of any changes to authorized signatures. If such requirement is complied with, the resignation is questionable given a cheque dated 11th November 2013, signed by both Dr. Bandusena Ranasinghe and the 2nd Respondent (annexed as 'Y7(a)') has been realized as according to the ordinary conduct of business (refer to document annexed as 'Y7(b)'), allowing for the impression that the signature continued to be an authorized signature.

Finally, the incorporation of the 5th Respondent Company bearing a name, logo and business activities largely similar to the 1st Respondent company, the diversion of business from the 1st Respondent company to the 5th Respondent company and the confusion caused by the above to the general public, must all be assessed as acts of

mismanagement given that each of the above is detrimental to the 1st Respondent Company.

For reasons inclusive of the above concerns, the Petitioner has sufficiently established a *prima facie* case based on multiple acts of alleged oppression and mismanagement, leaving reason for this court to consider the questions of law and interim orders as prayed for by the Petitioner.

In the judgement by the learned High Court judge, reference is only made to a single act of oppression of the alleged forceful removal of Dr. Bandusena Ranasinghe. Therefore, I direct the High Court to revisit this matter paying due attention to the existence of a series of claims of oppression and mismanagement.

Laches

The learned High Court judge has set aside the petition based on laches on the part of the Petitioner based on the delay of a period of approximately 5 months between the Petitioner being directed to approach the court by letter dated 30th June 2014 ('Y11(b)') and the Petition dated 15th December 2014 in the High Court. However, the source of any requirement of promptness or a period of time within which a claim must be made is not made clear in the judgement by the learned High Court judge.

In examining the Sections 224, 225 and 521 of the Companies Act, Section 224 and 225 merely state that an aggrieved shareholder or shareholders

> *"may make an application to court for an order under the provisions of this section."*

Section 521 does not specify a time frame within which a party must make an application for interim orders. Therefore, this claim of undue delay is not based on statutory grounds. In order to derive a time limit within which a claim must be brought, we must refer to the basis of the present Companies Act. As discussed in **Company Law by Dr. Kang-Isvaran and Wijayawardane** at **page 12,** one among the key objectives of the introduction of a new Companies Act in 2007 was in order to bring

clarity to the law regarding companies. Many of the processes were simplified and streamlined while minority shareholder rights were pertinently taken into account as the previous legislation had failed to do. In this process of bringing clarity, time limits for most processes have been introduced. For instance, in reference to the delay by the Respondents, the time limit of 20 working days for the notice of resignation of a Director, which the 1st-4th Respondents have failed to comply with as enumerated above, is an express statutory time limit imposed by the Company Act, this Section further stands evidence to the fact that the basis of the current Companies Act is to provide clarity and streamline the process of the functioning of a company. For this reason, it is not simple oversight by the legislators through which a time limit has not been imposed on applications for oppressions and mismanagement

Examining the jurisdiction of India which retains the Section on Oppression and upon judgements of which the Respondent bases a defense of laches on, the time limit is not imposed directly through the Indian Companies Act 2013 but is imposed by Section 137 of the Limitations Act of 1963. The section states applications must be made within a period of *3 years*. Such limit is to be considered "*as the case may be*" according to Section 433 of the Indian Companies Act 2013. Even in relation to the time bar of 3 years, there is therefore uncertainty as to its application as it is not directly through the Companies Act 2013 of India, and the same act allows for discretion in the application of this limitation and thus, in many cases this requirement is waived based on circumstances of the case.

Further, as demonstrated in the case of **A Brahmaraj vs. Sivakumar Spinning Mills Pvt. Ltd., Tirunelveli-6 & Others (1984) 1 MLJ 376**, it was considered in the Madras High Court that:

> "*There could, therefore, be no doubt that the oppression or the conduct of the affairs of the company in a manner prejudicial to the public interest has to be continuous and shall have persisted up to the date of the filling of the petition under s.397 and/or 398 of the Act. If the state of affairs existing on*

the petition is the main criterion for invoking the jurisdiction under Ss. 397 and 398 and the oppression complained of or the conduct of the affairs complained of, should be existent on the date of the petition as in the case of a continuing wrong and the relief asked for is only with a view to put an end the matters complained of, we are unable to see how any question of limitation could arise at all."

Thus, if the act of oppression and/or mismanagement complained of is continuing in the state of affairs to the date of the petition, there is no reason for a limitation to be imposed as the act of oppression has not concluded, despite isolated trigger events being discussed.

Additionally, even in the cases where laches was seen as a ground for applications to be barred by limitation, the laches were in the period of an extensive number of years, as opposed to a number of months as in the instant case.

In the case of **Shri Raj Kumar Gupta vs. D.P Gupta & Co. (P) Ltd. & others (2008) 84 CLA 390 (CLB)** the delay of 10 years was considered abnormal and such delay was to be considered important regardless of the Limitations Act. In the case of **S. Sukhdeep Singh Jhikka vs S. Ajit Singh Deogan And Others (2009) 93 SCL 212** a period of 9 years was considered to be too lengthy and the court upheld the limit of 3 years. Hence it could be see that the court in India have applied the laches rule subjectively after carefully considering each scenario.

In the United Kingdom, under the previous Act through which claims for Oppression could be brought forward, it was considered that while laches could act as a deterrent to claims, even a period of 4 years between the mentioned continuing act and the petitioner making an application would not amount to laches limiting the rights of the petitioner, as according to Peter Gibson J in **Re a company (No 005134 of 1986), ex parte Harries, [1989] BCLC 383.**

Therefore, considering the practical instances of delay or laches acting as a deterrent to applications of Oppression, the periods considered to amount to laches was in a span of a number of years as opposed to months while even the statutory limit entertains applications made within 3 years in other jurisdictions.

One must also keep in mind the detriments of imposing a strict time limit for applications under the provisions for Oppression and Mismanagement. A strict numerical time limit, should it be so imposed, discourages resolution of conflict outside of the system of courts as aggrieved shareholders would be inclined to resort to legal redress through claims, in place of exercising any other remedies available to them, both practically in the given circumstances and statutorily. It would not be feasible for shareholders to waste time attempting to resolve conflict outside court at the expense of the claim being time barred thereafter, should such attempts fail. It is not in the best interest of Companies, shareholders or even of court to promote such a view.

Additionally, any short period of time does not allow for the parties to further investigate matters, gather evidence, resort to negotiation or further substantiate their claim. It also creates the dilemma of the shareholders questioning the exact number of claims that should exist to make a claim under Oppression and mismanagement as one act is insufficient, but waiting for the commission of multiple or continuing acts may limit the claim due to delay. This would be contrary to the basis of the Companies Act in attempting to bring clarity to company law in Sri Lanka.

For this reason, it is my belief that the standard that must be adopted in assessing the period of time in which a party is expected to bring a claim must take into account the circumstances of each individual case, as opposed to a rigid numerical standard. A standard of "a reasonable period of time in the given circumstances" is more apt for the given purpose. This encompasses the standard of *"as the case may be"* while not accommodating for extensive delays in terms of years having elapsed following the commission of such activity in contravention of Section 224 or 225.

Thus, I am in no way refusing to acknowledge that laches and/or delay may be a ground to refuse remedy under Section 521, however, such refusal must only be resorted to where unjustifiable, unreasonable, or abnormal extensive delay exists. This is in line with the lack of a statutory guideline of a numerical value of time, upon which courts may take the facts of each case into account, in weighing reasonable circumstance against legal principles.

In examining the instant case, I am of the view that this delay in application is in no way an unjustifiable, unreasonable or abnormal extensive period of time, being of 5 months, and thus does not amount to laches or complicity on the part of the Petitioner.

Additionally, I am inclined to respectfully defer to the judgment by the learned Judge of the High Court on multiple grounds. Firstly, as discussed above, the Petitioner is not guilty of laches taking into account the period of delay in the instant case. Secondly, the learned High Court judge has referred only to one of the claims made by the petitioner and I am of the view that all relevant claims must be taken into consideration in assessing the interim orders to be granted as such series has been alleged and put forward by the Petitioner. Thirdly, the learned High court refers to "interim injunctions" in the Order dated 3rd December 2015 whereas the Petitioner expressly prays for Interim Orders, recognizing the distinction between the remedies.

Finally, I am of the view that the Petitioner's claims are supported by evidence additional to the claim of a forged letter which the Petitioner has failed to produce. While I am in agreement with the learned High Court Judge in the fact that the Petitioner has not sought redress through the remedies available under Section 483, I defer in that this is attributable the larger claim of laches in relation to the series of events claimed and the evidence produced in addition to Form 20.

Therefore, as enumerated above, I am of the view that the Petitioner is entitled to remedies available under Section 521 of the Act.

Jurisdiction to grant interim orders

As enumerated above, both Section 224(3) and 225(3) allow for the court to exercise its powers as provided for by Section 521 of the Companies Act, which states as follows:

> *"(1) Subject to the provisions of subsections (2) and (3), pending the making of a final order in any application or reference to court made under this Act, the court may on the application of a party to the proceedings, make such interim order, including a restraining order, as it thinks fit."*

In the instant case the Petitioner has made an application to the High Court requesting for the grant of interim orders, which was refused. However, in examining the present case, taking all above circumstances into account, I am of the view that certain interim Orders as prayed for are justified in the interest of justice, and in compliance with Section 225(3) in making an order that is "just and equitable".

However, I wish to clarify the standard of intervention given the concern of interference with the internal affairs of a company by a Court, being too intrusive. It is my understanding that courts are cautious, and rightfully so, in exercising its powers to intervene in the conduct of any Company. However, The Courts as a regulatory body and as of bearing the obligations of upholding justice, must exercise such powers where there is a lapse of such fairness or equity in such a manner that the Company itself and stakeholders are threatened, Mismanaged and oppressed for the personal benefit of those in control of the powerful tool that is a Company of a separate legal personality.

This contention that the court does not have jurisdiction to interfere with the internal affairs of the company has been addressed previously. For instance, in the case of **Burland and Others v. Earle and Others (1902) AC 83,** it was held that it is an elementary principle that a court has no jurisdiction to interfere with the internal management of companies acting within their powers. Another case is that of **Lee v.**

Chou Wen Hsein and Others (1985) B CLC 45, where a Director was expelled by his fellow Directors it was held that even if one or more Directors acted from ulterior motives the expulsion would be effective; presumably this is because the act of the other Directors if improperly motivated is voidable not void.

However, the stance in Sri Lanka was confirmed by the case of **Unipak Ltd. And Others V. Amarasena 2002 3 SLR 173** in which A. M. Somawansa, J. in the Court of Appeal were to decide on a case with the material facts bearing certain similarities to the instant case. The Learned Judge upon discussing the prior mentioned cases **Burland and Others v. Earle and Others** and **Lee v. Chou Wen Hsein and Others** further mentioned the case of **Re the Langham Skating Rink Company (1877) 36 CT 605** and stated as follows:

> *"However, it appears to me that another elementary principle originates from these decisions and that is that if the acts complained of are ultra vires its powers then the court will interfere. This principle was recognized in Re The Langham Skating Rink Company where it was observed that the power to manage the affairs of a company vests with the Directors and it is settled law that a court will not interfere with such power unless strong grounds are shown for doing so."*

In the Unipak case, it could be seen that the petitioner-respondent has shown strong grounds for the court to interfere. One being her unlawful removal from the Board of Directors on or about 27th December, 1984, by the 2nd and 3rd respondents-appellants. In the petition of appeal as well as in the written submissions filed by the respondents-appellants it is contended that the respondents-appellants acted well within the powers conferred on them by the Articles of Association in removing the petitioner-respondent from the Board of Directors. Unfortunately, except for the bare statement that they acted well within the powers conferred on them by the Articles of Association the respondents- no appellants have failed to adduce any evidence to establish this fact. No evidence as to the procedure adopted was in conformity with

the powers conferred on them by the Articles of Association or in fact that they adopted any procedure other than informing the Registrar of Companies that the petitioner-respondent has been removed from the Board of Directors. In fact, there is no evidence that the removal was communicated to the petitioner-respondent.

As in the above mentioned facts, there is no reasons upon examination of the *prima facie* case to believe that the Respondents proceeded to remove Director Dr. Bandusena Ranasinghe in an exercise of powers intra vires or for the best interests of the Company. There is no reason as at present, based on the arguments by the Respondents, to believe that the 2nd – 4th Respondents incorporated the 5th Respondent Company or continued to conduct business in competition with the 1st Respondent Company for the best interest of the 1st Respondent Company or the Petitioner. Thus, I am of the view that there exist strong grounds to grant Interim orders as necessary, upon such terms and conditions as appear Just and Equitable in the instant case, as required by sections 224(3) and 225(3).

Conclusion

With the aforementioned circumstances, I answer the question of law raised by the Petitioner affirmatively.

On careful analysis of the materials that was produced before the learned High Court Judge, I am of the view that the finding of the learned High Court in order dated 03.12.2015 in case no. 59/2014/Co is incorrect. Accordingly, I grant the following interim orders:

a) an Interim Order setting aside the resignation of Dr. Bandusena Ranasinghe from the position of Director of the 1st Respondent Company, as enumerated in the submitted Form 20.

b) an Interim Order restraining the 5th Respondent from engaging in any business activity in competition with the 1st Respondent Company except to the extent contractually obligated as at the date of this petition.

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 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 (as amended)

SC Appeal No: 138/2017
HC ALT No. 373/2013
LT Case No: 21/2570/2009

Prasanna Peiris,
No. 114/14,
Sri Wickrema Rajasinghe Road,
3rd Kurana, Negombo.

APPLICANT

-VS-

Toroid International (Pvt) Ltd.,
P.O. Box 15,
Phase II F.T.Z.,
Katunayake.

RESPONDENT

AND BETWEEN

Toroid International (Pvt) Ltd.,
P.O. Box 15,
Phase II F.T.Z.,
Katunayake.

RESPONDENT-APPELLANT

-VS-

Prasanna Peiris,
No. 114/14,
Sri Wickrema Rajasinghe Road,
3rd Kurana, Negombo.

APPLICANT-RESPONDENT

AND NOW BETWEEN

Noratel International (Pvt.) Ltd. (formerly known as Toroid International (Pvt) Ltd.),
P.O. Box 15,
Phase II, Export Processing Zone,
Katunayake.
RESPONDENT-APPELLANT-PETITIONER

-VS-

Prasanna Peiris,
No. 114/14,
Sri Wickrema Rajasinghe Road,
3rd Kurana, Negombo.
APPLICANT-RESPONDENT-RESPONDENT

BEFORE : **BUWANEKA ALUWIHARE, PC, J.**
L.T.B. DEHIDENIYA, J.
S. THURAIRAJA, PC, J.

COUNSEL : Ms. Manoli Jinadasa with Ms. Shehara Karunatne instructed by C. Suriyaarachchi for the Respondent – Appellant- Appellant.

Applicant – Respondent – Respondent is absent and unrepresented

ARGUED ON : 14th January 2020.

WRITTEN SUBMISSIONS : Respondent-Appellant – Appellant on the 25th of August 2017

DECIDED ON : 13th February 2020.

S. THURAIRAJA, PC, J.

The Employer, Noratel International (Pvt.) Ltd. formerly known as Toroid International (Pvt.) Ltd. is the Employer - Respondent – Appellant – Appellant (Hereinafter sometimes referred to as the Employer – Appellant.) The Employee, Mr. Prasanna Peiris is the Employee - Applicant – Respondent – Respondent. (Hereinafter sometimes referred to as the Employee – Respondent.)

It was revealed at the Labour Tribunal that the Employee – Respondent was a technical supervisor in the production maintenance division of the said Company. He was seen on the 15th of January 2001 at 0610 Hrs, pouring petrol from a white can into his motorcycle. A security officer Chrishantha Nallapperuma, who on seeing the incident questioned and confronted the Employee – Respondent. Being dissatisfied with the answers he received, he produced the Employee – Respondent to the senior security officer Bandusena, who after speaking to the applicant in private, had let him go. This entire incident was also witnessed by W. Karunawathie, a female security officer who then confronted the senior security officer and informed relevant authorities of the incident.

After a domestic inquiry the Employee – Respondent was found guilty of pilfering petrol belonging to the Employer – Appellant to his motorcycle and for committing the offence of theft of company petrol and his services were terminated. The Employee – Respondent then filed an application before the Labour Tribunal and the matter was inquired by the President of the Labour Tribunal, who found that the termination was unreasonable and awarded compensation as an alternative to reinstatement. Further, the Labour Tribunal had ordered compensation from the date

of termination up to the date of deciding this case as well as other additional payments (total amount to be paid being Rs. 732,424/-). Being aggrieved with the Order of the Labour Tribunal, the Employer – Appellant appealed to the Provincial High Court holden at Negombo. After hearing the appeal the High Court concluded that the decision of the Labour Tribunal was just and equitable. Hence the order was affirmed and the appeal was dismissed.

Being aggrieved with the High Court Order the Employer – Appellant preferred an appeal to this Court. Initially the notice was issued on the Employee – Respondent on the 01/03/2016 and it was fixed for support on the 14/06/2016. On that day the Employee – Respondent was absent and unrepresented. Notice was re-issued. On the 26/09/2016 the wife of the Employee – Respondent was present and informed the court that the Employee – Respondent was out of the island and also that they had retained an Attorney-at-Law to represent them. However the said Attorney – at - Law did not appear before Court. On the 06/12/2016 the matter was mentioned and the Employee – Respondent was absent and unrepresented. Once again notice was issued on the Employee – Respondent and on the 23/02/2017 a Counsel represented the Employee – Respondent and the matter was re-fixed for support on the 26/05/2017 as the Employee – Respondent was overseas and time was required to obtain a power of attorney and once again on that date the Employee – Respondent was absent and unrepresented. Notice was issued on the Respondent and matter was fixed for support on 07/07/2017. On said day he was absent and unrepresented. Since sufficient notices were given to the Employer – Respondent, the Counsel for the Appellant were allowed to support the application. The Court being satisfied, granted leave under paragraph 16 (c) of the petition. Subsequently this case was fixed for argument on the 02/03/2018, 29/10/2018, 08/07/2019 and finally on 14/01/2020. On all these days the Employee – Respondent was absent and unrepresented. Since notices were sent on several occasions, this court took up the appeal for argument and allowed Counsel to make her submissions.

I considered all the material before the Labour Tribunal, High Court and this Court. The question of law on which leave was granted is reproduced below for the purpose of easy reference;

> *16 (c) – Whether the orders of Provincial High Court and the Labour Tribunal are consistent with the principles of industrial law pertaining to the award of compensation and/or the calculation of compensation? In any event is the relief awarded to the applicant by the Provincial High Court and the Labour Tribunal just and equitable and/or consistent with the principles of law, considering the facts and circumstances of this case?*
>
> *Counsel for the Employer – Appellant submitted to court that she wished to address the standard of proof required to establish misconduct which was also allowed.*

It is well established that the Labour Tribunal has equity jurisdiction and the standard of proof necessary is on a balance of probabilities.

In ***Associated Battery Manufacturers (Ceylon) LTD vs. United Engineering Workers Union (77 NLR 541)*** it was held

> *Where in an inquiry before a Labour Tribunal it was alleged that the reason for the termination of employment was that the workman was guilty of a criminal act involving moral turpitude, the allegation* ***need not be established by proof beyond reasonable doubt as in a criminal case. Such an allegation has to be decided on a balance of probability,*** *the very elements of the gravity of the charge becoming a part of the whole range of circumstances which are weighed in the balance, as in every other civil proceeding.*
>
> *(Emphasis added)*

In the present case, the learned President of the Labour Tribunal had the privilege of hearing the evidence and observing the demeanor and deportment of all the witnesses.

It is on record that the Employee – Respondent had given evidence and had admitted that he had lied under oath. Specifically, he had submitted to the Tribunal that he was unemployed after the termination from the Appellant Company. However evidence was submitted before the Labour Tribunal that he was employed in another establishment on a higher pay than what he was receiving at the Appellant Company.

ප්‍රශ්නය : දැන් තමුන් මේ වනවිට රැකියාවක නිරත වෙනවාද?

උත්තරය: රැකියාවක් නෑ.

ප්‍රශ්නය : තමුන්ට මම ඉදිරිපත් කළා තමා පිළිගත්තා ආර්. 43 කියන ලෙඛනයෙන් අද දින ඉදිරිපත් කරපු ලෙඛනයෙන් වෙන්නපුවෙ පිහිටි මැක්සිස් පුද්ගලික සමාගමේ 2009.11.16 වෙනි දින සිට සූපරීක්ෂක තනතුරේ රැකියාව කළා කියා?

උත්තරය: එහෙමයි.

ප්‍රශ්නය : එතකොට ආර් 44 කියන ලෙඛනයෙන් එම තනතුරේ තමාව ස්ථිර කළා කියා තමා පිළිගත්තා?

උත්තරය: එහෙමයි ස්වාමීනි.

ප්‍රශ්නය : තමා තවමත් ඒ ආයතනයෙද සේවය කරන්නේ?

උත්තරය: එහෙමයි.

ප්‍රශ්නය : එසේ රැකියාවක් කරමින් ඉන්න තමා තමයි 2012.02.21 දින 7 වෙනි පිටුවේ කියා සිටින්නේ මෙම අධිකරණයේ දිවුරලා රැකියාවක් නැහැ කියා

උත්තරය: එහෙමයි ස්වාමීනි.

ප්‍රශ්නය : තමා එතකොට පිළිගන්නවද මෙම අධිකරණයේ තමා දිවුරලා බොරු කිව්වා කියා?

උත්තරය: එහෙමයි ස්වාමීනි.

ප්‍රශ්නය : තමා කියන ආකාරයට වගඋත්තරකාර ආයතනය තමාව සේවයෙන් පහ කරපු පලියට මේ අධිකරණයට ඇවිල්ලා ශුද්ධ වූ බයිබලයේ අත තියා බොරු කිව්වා කියා?

උත්තරය: එහෙමයි

When a President of a Labour Tribunal is exercising equity jurisdiction he should be mindful of a person who states falsehood under oath. In the present case, the Labour Tribunal has ignored all the deficiencies and presumed otherwise. When there was evidence to say that he was employed and the same was admitted by the Employee – Respondent the President of the Labour Tribunal assumed that he was unemployed.

The Labour Tribunal should hold the scale equal for both parties. They are not expected to run as a Philanthropic organization, which is required to show kindness when there is sufficient evidence to show otherwise. In the present case, I find that the President of the Labour Tribunal had acted unreasonably when evidence shows the contrary.

The awarding of compensation is governed under Section 33 of the Industrial Disputes Act No. 43 of 1950 (as amended) which is reproduced below for easy reference;

Section 33 (1) (d)

Without prejudice to the generality of the matters that may be specified in any award under this Act or in any order of a labour tribunal, such award or such order may contain decisions- as to the payment by any employer of 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;

Section 33 (5)

Where the arbitrator, industrial court or labour tribunal considers that a decision should be made, under paragraph (b) of subsection (1), for the reinstatement in service of any workman, then, if the workman so requests, the arbitrator, industrial court or labour tribunal may, in lieu of making that decision, make a decision, under paragraph (d) of that subsection, for the payment of compensation to that workman ; and in any such case, the provisions of subsection (2) shall apply as though the decision were for the payment of compensation as an alternative to reinstatement.

Section 33 (6)

The provisions of subsections (3) and (5) shall not be construed to limit the power of the industrial court or a labour tribunal or an arbitrator, under paragraph (d) of subsection (1), to include in an award or order a decision as to the payment of compensation as an alternative to reinstatement, in any case where the court, tribunal or arbitrator thinks fit so to do

However none of the provisions define the manner in which the quantum of compensation should be determined. The only parameter provided for in the Act concerning such granting of compensation is the just and equitable concept provided or in Section 31 C (1) which states;

'Where an application under section 31B is made to a labour tribunal, it shall be the duty of the tribunal in to make all such inquiries into that application and hear all such evidence as the tribunal may consider necessary and thereafter make, not later than six months from the date of such application, such order as may appear to the tribunal to be just and equitable'

In the case of ***Richard Peiris and Co. Ltd. v D.J. Wijesiriwardena*** *(62 NLR 233)* T.S. Fernando J stated;

" in regard to the power of the Tribunal to make such order as may appear to it to be just and equitable there is point in Counsel's submission that justice and

equity can themselves be measured not according to the urgings of a kind heart, but only within the framework of the law."

S.R. De Silva, a renowned writer on industrial law in **'The Legal Framework of Industrial relations in Ceylon'** (H.W Cave 1973) (at page 390) wrote that *the quantum of compensation is generally within the discretion of the court, and no definite rules can be laid down in regard to the assessment of compensation. The reason for the termination, the nature of the workman's employment, his length of service and the employer's capacity to pay would all be relevant to the quantum of compensation.*

In ***Moosajees Limited v Eksath Engineru Saha Samanya Kamkaru Samithiya*** *(79(1) NLR 285) the court took into consideration the very serious nature of the charge of which the firm had wrongfully found them guilty, the length of service, good conduct during service, the wages each workman last drew, the fact that four of them have failed to obtain employment for as long as fifteen months, the ability of the employer to pay and the need of the employee.* ***I have also borne in mind the fact that one of them has succeeded in getting employment elsewhere.*** [S.R. De Silva, *The Legal Framework of Industrial Relations in Ceylon,* (H.W. Cave 1973*)* at page 390]

(Emphasis added)

In the case of ***Saleem v Hatton National Bank*** *[(1994) SLR Vol 2 379]* Kulatunga J followed Sharvananda J's distinction of the words 'compensation' and 'damages' in ***The Caledonian (Ceylon) Tea And Rubber Estates Ltd. v J.S. Hillman*** *(79(1) NLR 421)* and stated *'Damage' always signifies recompense given to a party for the wrong that has been done to him. On the other hand 'compensation' includes recompense for pecuniary loss or damage which involves no breach of duty.*

There are general principles recognized by the Superior Courts when granting compensation. In ***Bank of America v Abeygunasekara*** *[(1991) SLR Vol 1 317]* it was

held that *the amount that should be awarded as compensation should not be mechanically calculated on the basis of the salary a workman should have earned till he reached the age of retirement. The relevant factors that should be taken into consideration in arriving at what is just and fair compensation are:-*

I. *The immediate monetary loss to the workman.*
II. *The prospective and future losses, and*
III. *The retirement benefits.*

It was also observed that the other aspect that is relevant to the computation of compensation is the prospects of future employment. In this case the Employee – Respondent had found new employment and this should have been a factor in the Labour Tribunal and High Court's decisions.

In ***Jayasuriya v Sri Lanka State Plantation Corporation*** *[(1995) SLR Vol 2 379]* it was stated;

> *Once the incurred losses have been computed, any wages or benefits paid by the employer after the termination as well as remuneration from fresh employment must be deducted.* ***If the employee had obtained equally beneficial or financially better alternative employment, he should receive no compensation at all for he suffers no loss.***
>
> *(Emphasis added)*

In ***Fentiman v Fluid Engineering Products Ltd.*** *(1991 IRLR 150)* it was held as follows;

> *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 ***Jayasuriya v Sri Lanka State Plantation Corporation*** *(Supra)* it was also stated that *for compensation the essential question is the actual financial loss caused by the unfair dismissal because compensation is an indemnity for the loss. What should be considered is financial loss and not sentimental harm.* It was further stated by Dr. Amerasinghe J that " *While it is not possible to enumerate all the circumstances that may be relevant in every case, it may be stated that the essential question, in the determination of compensation for unfair dismissal, is this: What is the actual financial loss caused by the unfair dismissal?, for compensation is an "indemnity for the loss". (Per Soza, J. in Associated Newspapers of Ceylon Ltd. v. Jayasinghe).* It was further stated that the burden is on the employee to adduce sufficient evidence to enable a Labour Tribunal to decide the loss. In this case the Employee – Respondent gave false information to the Labour Tribunal and lied under oath about his employment status this should be considered against the Employee and he should not have been granted an enhanced award of compensation.

Taking the abovementioned case law into consideration, I find that losses can be of various kinds; but the matter for deliberation in these circumstances is the financial loss, and not sentimental harm caused by the employer.

For the aforesaid reasons I answer the 1st question of law negatively. Answering the 2nd question of law I find that both parties should prove their case on a balance of probabilities.

Considering the materials and submissions, I find that the Order of the learned President of the Labour Tribunal namely the termination was unreasonable is acceptable and I affirm the same. However, the computation in awarding the compensation cannot be accepted. Under the Industrial Disputes Act and decided cases the actual financial loss during the period of unemployment will be considered for computation of compensation. Accordingly, I order compensation equivalent to

ten months' salary to be awarded to the Employee – Respondent (Rs. 26, 258 x 10 = Rs. 262,580/-). If the money had been already deposited before this appeal was filed, the aforementioned amount is to be deducted and the balance to be refunded to the Employer – Appellant together with relevant portion of interest accrued. Similarly, the Employee – Respondent should be paid Rs. 262,580/- with the relevant interest.

Appeal 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 to the Supreme Court from an Order of the Provincial High Court under and in terms of section 31DD of the Industrial Disputes Act (as amended)

SC Appeal No: 139/2017

SC/HC/LA No. 92/2016
HC Appeal No. 428/2012
Negombo LT No: 21/2596/2009

W.K.S. Jayasundara,
309 A, Nedagamuwa (West),
Katugoda.

APPLICANT

-VS-

Next Manufacturing (Pvt) Ltd.,
Ring Road, Phase I,
Investment Promotion Zone,
Katunayake.

EMPLOYER- RESPONDENT

AND BETWEEN

Next Manufacturing (Pvt) Ltd.,
Ring Road, Phase I,
Investment Promotion Zone,
Katunayake.

EMPLOYER-RESPONDENT-APPELLANT

-VS-

W.K.S. Jayasundara,
309 A, Nedagamuwa (West),
Katugoda.

APPLICANT-RESPONDENT

AND NOW BETWEEN

Next Manufacturing (Pvt) Ltd.,
Ring Road, Phase I,
Investment Promotion Zone,
Katunayake.

EMPLOYER-RESPONDENT-APPELLANT-APPELLANT

-VS-

W.K.S. Jayasundara,
309 A, Nedagamuwa (West),
Katugoda.

APPLICANT-RESPONDENT RESPONDENT

BEFORE : **VIJITH K. MALALGODA, PC, J.**
P. PADMAN SURASENA, J.
S. THURAIRAJA, PC, J.

COUNSEL : Ms. Manoli Jinadasa with Ms. Shehara Karunatne instructed by Pieris and Pieris for the Employer Respondent – Appellant-Appellant.

Thanuka Nandasiri for Applicant – Respondent – Respondent.

ARGUED ON : 10th February 2020.

WRITTEN SUBMISSIONS : Employer Respondent-Appellant –Appellant on the 28th of July 2017.

Applicant – Respondent – Respondent on the 26th February 2018.

DECIDED ON : 9th June 2020.

S. THURAIRAJA, PC, J.

The Employer, Next Manufacturing (Pvt) Ltd. is the Employer - Respondent – Appellant – Appellant (hereinafter sometimes referred to as the Employer – Appellant). The Employee, Ms. W.K.S. Jayasundara is the Applicant – Respondent – Respondent (hereinafter sometimes referred to as the Employee – Respondent).

It was revealed at the Labour Tribunal that the Employee – Respondent was a Senior Clerk in the Human Resources division of the said Company and was employed with the Employer- Appellant from 13.12.1993. Employee – Respondent claimed that her services were terminated along with other employees after paying of nominal compensation and obtaining signatures to the documents hence the said termination of services is unjust and inequitable. The Employee – Respondent filed an application in the Labour Tribunal and stated *inter alia* as follows.

(a) That Employee – Respondent joined the company on 13.12.1993 and was the Senior Clerk- Human Resources on or around 15.05.2009;

(b) That on or around 15.05.2009, 20-25 employees including her had been terminated from their employment in unjust and inequitable manner by getting them signed to a document and giving them a nominal compensation and obtaining signatures to documents;

Employer – Appellant filed their answer and stated that the services of Employee- Respondent had ended in consequence of a Voluntary Retirement Scheme which was formulated in a manner consistent with the provisions of the Gazette Extraordinary No. 1384/07 dated 15.03.2005 under the Termination of Employment of Workmen (Special Provisions) Act 45 of 1971.

The Employer- Appellant is a business establishment engaged in manufacturing of Apparel for export. Necessarily, the success of the business is contingent upon market forces, to be precise the 'demand' for apparel in the overseas markets. The learned counsel for the Employer- Appellant in the course of her submissions contended that it is the global economic recession in the apparel industry, which necessitated such reduction of staff.

The Employer- Appellant raised a preliminary objection at the Inquiry in the Labour Tribunal that when section 12(1) settlement entered between the Employer-Appellant and Employee- Respondent under the Industrial Disputes Act (IDA), this application cannot be maintained before the Labour Tribunal. The Employer-Appellant led the evidence of Mr. Somasiri Perera and the retired Assistant Commissioner of Labour who had who had entered the Section 12(1) settlement. The retired Assistant Commissioner of Labour gave evidence and produced the following documents.

a) Application made by the Employer – Petitioner to the Assistant Commissioner of Labour for retrenchment of employees (marked 'R1');
b) Section 12(1) order which is signed by the Employee – Respondent (marked 'R2');
c) The minutes of the meeting at which the said section 12(1) order was signed (marked 'R3');
d) The calculation of compensation (marked 'R4').

The retired Assistant Commissioner of Labour in his evidence stated that, both the emloyer and employees discussed and negotiated the terms of the settlement

prior to signing the settlement. Further, he confirmed that, the employees were well advised on the terms of settlement and were specifically and repeatedly advised that they do not have to sign the agreement, if they are not agreeable to the same. The General Manager Sumudu Kannangara confirmed in his evidence that the Section 12(1) settlement was entered into in the presence of both the Assistant Commissioner of Labour and the official from the Board of Investment (BOI) and the employees had the opportunity, if they so wished to withdraw from the settlement. Further, all payments to employees were duly made and only the Employee – Respondent had maintained this present Labour Tribunal action. The minutes of the meeting at which the settlement was signed (marked as 'R3') revealed that 21 employees had attended the meeting whilst the document 'R2' reveals that two employees namely, W.K.R. Jayasooriya and K.A.P Fernando who attended the meeting had not signed the settlement. This reveals that the employees had the freedom to refrain from entering into the settlement if they so wished. However, the Employee – Respondent had signed the settlement. Counsel for the Employee – Respondent vehemently denied the said position of the Employer- Appellant.

At the conclusion of the Labour Tribunal Inquiry, the learned President made the order dated 30.08.2011 and held that, the Employer- Appellant had not followed the due procedure in terminating the services of the Employee – Respondent and that Section 12(1) settlement has been entered upon against the will of the Employee – Respondent therefore the termination of her services is unjust and inequitable hence awarded a sum of Rs. 297,000/- as compensation.

Being aggrieved by the order of the learned President of Labour Tribunal the Employer- Appellant appealed to the Provincial High Court. By order dated 22.11.2016 the Provincial High Court affirmed the order of the Labour Tribunal and dismissed the appeal.

Being aggrieved by the order of the Provincial High Court the Employer-Appellant preferred an appeal to this court.

Court being satisfied, granted leave under paragraph 21 (a) and 21 (b) of the petition dated 20.12.2016 the same as reproduce below for the purpose of easy reference;.

(a) *Whether the Labour Tribunal lacks jurisdiction to disturb a settlement made under section 12(1) of the Industrial Disputes Act which amounts to a full and final settlement in law?*

(b) *Whether the Provincial High Court and Labour Tribunal erred in law in the in the analysis of the evidence and reached findings which are perverse?*

The Employer- Appellant submits to Court that, said agreement was reached under Section 12(1) (to be read with section 14) of the (IDA). Further submits that, if there is any dispute out of a settlement received under Section 12(1) of the IDA provides remedy under Section 15 of the said Act.

The major question of law raised by the Counsel for the Employer- Appellant is when the Commissioner of Labour had exercised his jurisdiction under Section 12(1) can the President of the Labour Tribunal have jurisdiction.

As per the submitted facts, due to the world economic recession, the Employer- Appellant Company namely, Next Manufacturing (Pvt) Ltd which is a BOI approved company had sought permission from the Commissioner of Labour to retrench some of their excess staff. The Commissioner of Labour in the presence of Board of Investment had officiated negotiation between the Employer and Employees including Employee – Respondent (refer 'R3 and R2') out of 21 employees 19 had opted to sign and obtained the compensation.

After obtaining the compensation on 15.05.2009 the Employee – Respondent complained to the President of Labour Tribunal on 20.08.2009 that she had been forced to sign a document which she could not read and understand. When the matter was taken up Employer- Appellant raised a preliminary objection about the

jurisdiction (at page 118-121 of the brief) but Labour Tribunal decided to take up the matter for inquiry. Inquiry commenced and evidence led including Assistant Commissioner of Labour. Both parties made submissions, produced documents as evidence before the President of Labour Tribunal.

The main submission by the Employee- Respondent before the Labour Tribunal was that she was forced to sign an unread document. The placing of signature had occurred in front of the Commissioner of Labour and representatives of the Board of Investment. When the Assistant Commissioner of Labour gave evidence this was never questioned nor suggested to him.

Counsel for the Employer- Appellant made submissions before this Court and confined a question of law that Section 12 (1) gives jurisdiction to the Commissioner of Labour which is a parallel jurisdiction to the Labour Tribunal. Therefore, the President of Labour Tribunal cannot hear and determine this issue. Further submits the affirmation of the order of the Learned President of Labour Tribunal by affirming the High Court is bad in law.

Conciliation process is dealt in Section 12(1) of the IDA. When the employer and employee enters into settlement on any industrial dispute with the assistance of the Commissioner of Labour or any officer acting on his behalf, the Commissioner of Labour is empowered to draw up a memorandum setting out the terms of settlement and the said settlement shall be signed by both parties.

In section 12(1) and 12(2) of the IDA the said settlement was described as follows.

> *12. (1) If the Commissioner or an authorized officer succeeds in settling an industrial dispute, a memorandum setting out the terms of settlement shall be drawn up by the Commissioner or the officer and shall be signed by both the parties to the dispute or by the representatives of each party thereto.*

(2) Reference shall be made in every memorandum of settlement drawn up under subsection (1) to the parties and trade unions to which, and employers and workmen to whom, such memorandum relates.

In terms of section 14 of the IDA reads as,

14. Every settlement which is for the time being in force shall, for the purpose of this Act, be binding on the parties, trade unions, employers and workmen referred to in that settlement in accordance with the provisions of section 12(2) and the terms of the settlement shall be implied terms in the contract of employment between the employers and workmen bound by the settlement.

The remedy to set aside a section 12(1) settlement is dealt with section 15 of the IDA where there is a provision to make an application to withdraw from such a settlement.

15. (1) Any party, trade union, employer or workman, bound by a settlement under this Act, may repudiate the settlement by written notice in the prescribed form sent to the Commissioner and to every other party, trade union, employer and workman bound by the settlement:
Provided that : -

(a) it shall not be necessary for any employer or any workman who is a member of a trade union which is, or is included in, a party bound

by the settlement to be so notified independently of his trade union; and

(b) any employer or workman, who is a member of a trade union which is, or is included in, a party bound by the settlement, shall not be entitled to repudiate the settlement independently of such Trade Union, and any notice of repudiation given independently by any such employer or workman shall not be a valid notice for the purposes of this Act.

Section 12 to 15 of the IDA lay down the procedure to be followed where a settlement has been concluded or in cases where the parties (or either of them) do not accept the settlement arrived at. In cases where the settlement arrived at is acceptable to both parties, a Memorandum setting out the terms of settlement is drawn up and signed by both parties or their representatives, and such Memorandum is transmitted with the least amount of delay to the Commissioner of Labour. Where the Commissioner is of the view that such settlement relates to a major issue, he is obligatory by Section 12 (6) of the IDA to cause such Memorandum of Settlement to be published in the Government Gazette, and notice of such publication is sent to both parties.

The Memorandum of Settlement so published comes into effect on the date of such publication, or on a date which may be specified in the Memorandum of Settlement. It is important to note that the legal effect of this procedure is that the settlement is binding on both parties, and any decisions recorded in the Memorandum of Settlement becomes part of the Contract of Employment between the parties bound by the settlement.

In Law of Dismissal by S.R. De Silva at page 3 stated that,

"Every settlement which is a memorandum within the meaning of Section 12 of the Industrial Disputes Act and which is for the time being in force is binding on the parties, trade unions, employers and workmen referred to in the settlement and its terms become implied terms in the contracts of employment between the employers and workmen bound by the settlement. Such a settlement has the same effect as a Collective Agreement or an award of an Arbitrator or Industrial Court, in relation to those bound by the settlement. "

Where the settlement recommended by the Memorandum is not accepted by the parties or one of them, but where the Commissioner is of the opinion that such Memorandum should be published, it will be published in the Sri Lanka Government Gazette with a statement that the settlement recommended has not been accepted nor deemed to have been accepted by either party or both.

Section 15 of the IDA lays down the procedure for repudiation of a settlement. Section 15 (1) specifically states that where repudiation or termination of a Memorandum of Settlement is envisaged, such party repudiating the settlement must send notice of repudiation in the prescribed form to the Commissioner of Labour and every other party bound by the settlement, though not individually. Regulation No. 3 made under the IDA published in the Government Gazette of 12 March 1959 in this respect states that such notice of repudiation must be on Form A set out in the First Schedule to the Regulations. Thus it will be seen that any settlement to be repudiated by either party must follow the prescribed procedure.

Once the Commissioner of Labour receives a notice of repudiation, he will cause such notice to be published in the Government Gazette, and the settlement will cease to be effective from the end of the month immediately proceeding the month in which the notice is received. It must also be understood that the repudiation or termination of such a settlement will apply only to those parties who

give such notice of repudiation or termination and not to others who have been parties to the settlement.

In my view the process of conciliation in the settlement of labour disputes of the greatest importance, specially in present context, when the process of mediation is being resorted to solving larger problems, both legal and otherwise.

Considering all I find that, when the matter is settled under section 12(1) of the IDA as discussed above, the Labour Tribunal has no jurisdiction. I answered the question of law raised affirmatively. Accordingly I set aside the order of the Learned President of the Labour Tribunal and Learned Judges of the High Court and allow this appeal.

Appeal allowed.

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

SC.Appeal No. 160/2010

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 from Judgment dated 28th August 2009 of the Court of Appeal in CA.Writ Application No. 159/2006.

SC.Appeal No. 160/2010

SC.Spl.LA.No. 225/2009

CA. Writ Application No. 159/2006

Ceylon Grain Elevators Limited,
15, Rock House Lane,
Colombo-15.

Petitioner-Petitioner

-Vs-

1. Mahinda Madihahewa,
Commissioner General of Labour,
Department of Labour,
Labour Secretariat,
P.O.Box 575,
Colombo-05.

2. D.M.S.Dissanayaka,
Commissioner of Labour (Industrial Relations)
Department of Labour,
Labour Secretariat,
P.O.Box 575,
Colombo-05.

3. K.M.Silva (Retired)
Deputy Commissioner of Labour
(Industrial relations)

Department of Labour,
Labour Secretariat,
P.O.Box 575,
Colombo-05.

4. Ooi Eng Hooi
No.10, Jalan Rk 6/12,
Rasah Kemayan
70300 Seramban,
Negeri Sembilan,
Malaysia.

Respondents-Respondents

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

Priyantha Jayawardena, PC, J &

L.T.B.Dehideniya, J

Counsel: Kushan D' Alwis PC with Ms. Kaushalya Molligoda and Rajiv Wijesinghe for the Petitioner-Appellant.

Sanjay Rajaratnam PC, Acting SG with Rajitha Perera SSC for the 1st to 3rd Respondents.

Indra Ladduwahetti with Anuradhi Wickramasinghe for the 4th Respondent-Respondent.

Argued &
Decided on: 05.02.2020

Sisira J.de Abrew, J

Heard both counsel in support of their respective cases. In this case the 4th Respondent was employed in the Petitioner-Appellant's Company. The Commissioner of Labour by its letter dated 08.11.2005 directed the Petitioner-Appellant Company to pay gratuity to the 4th Respondent on the basis that he was employed in the Petitioner-Appellant's Company from 01st of June 1988 to 25th of July 2004 and he was drawing a salary of US$ 5600 per month.

Being aggrieved by the said decision of the Commissioner of Labour, the Petitioner-Appellant's Company filed a writ application in the Court of Appeal challenging the said decision of the Commissioner of Labour. The Court of Appeal by its judgment dated 28.08.2009 refused the writ application of the Petitioner-Appellant's Company. Being aggrieved by the said Judgment of the Court of Appeal, the Petitioner-Appellant's Company filed this appeal in this Court.

This Court by its order dated 18.11.2010, granted leave to appeal on the following questions of law. The said questions of law are set out below in verbatim.

1) Whether the Court of Appeal has erred in its complete failure to consider the patent illegality of its order in stating that the last drawn salary of the 4th Respondent to have been US$ 5600 which is arbitrary and utterly unsupported and contradicted by the material placed before the 3rd Respondent ?

2) Whether the Court of Appeal has erred in not considering the impact on the impugned order of complete failure of the 1st and/or 2nd Respondents to give reasons for the said order, despite a written request for the same by the Appellant Company ?

The main submissions of learned President's counsel for the Petitioner-Appellant's Company is that the 4th Respondent was not drawing a salary of US$ 5600 per month. I now advert to the said argument. Although the learned President's counsel contented so, the document marked 'B', (page 322 of the brief) indicates that the 4th Respondent was receiving a basic salary of 3825 US$ and monthly pensionable allowance of 1775 US$. Thus he was drawing a salary of 5600 US$ per month. When I consider the said document, I am unable to agree with the contention of learned President's Counsel. I therefore reject the said contention.

I also note that in the document marked 'D' (page 324 of the brief) , the 4th Respondent has worked in the Petitioner-Appellant's Company from 01st of June 1988 to 25th July 2004. Learned President's Counsel for the Petitioner-Appellant's Company next contended that the Commissioner of Labour has failed to give reasons . Although the learned President's counsel contended so, I note in the document marked '2R1 ' and the document marked 'X17'(page 332 of the brief), the Commissioner of Labour has given sufficient reasons for his decision. Therefore I am unable to agree with the said contention of the learned President's Counsel.

As I pointed out earlier the 4th Respondent has worked in the Petitioner-Appellant's Company from 01st of June 1988 to 25th of July 2004 and he was drawing a monthly salary of 5600 US$ per month . Vide document marked 'B' (page 322 of the brief). When I consider all the above matters, I hold that the decision taken by the Commissioner of Labour is correct. When I consider all the above matters, I hold that the Court of Appeal was correct when the Court of Appeal dismissed the writ application filed by the Petitioner-Appellant's Company.

For the aforementioned reasons, I answer the above two questions of law in the negative. For the aforementioned reasons, I affirm the Judgment of the Court of Appeal dated 28.08.2009 and dismiss this appeal with costs.

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

kpm/-

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

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

SC/FR APPLICATION 369/2013

Nandasenage Lalantha Anurdha,
Nandasena,
Pahalagama,
Mahabulankulama.

PETITIONER

Vs

1. Head Quarter Inspector of Police,
   Police Station,
   Anuradhapura.
2. C.I Gallage,
   Officer in Charge - Crime Branch,
   Police Station,
   Anuradhapura.
3. S. I. Amarasingha,
   Police Station,
   Anuradhapura.

4. P.C. Dias,
   Police Station,
   Anuradhapura.
5. Inspector General of Police,
   Police Headquarters,
   Colombo 01.
6. Hon. Attorney General,
   Attorney –General's Department,
   Colombo 12.

RESPONDENTS

BEFORE : **B.P. ALUWIHARE, PC, J.**
MURDU N.B. FERNANDO, PC, J. and
S. THURAIRAJA, PC, J.

COUNSEL : Thanuka Nandasiri for the Petitioner.
Sadamal Rajapaksha for the 2nd and 3rd Respondents.
Yuresha De Silva, SSC for the 5th and 6th Respondents

ARGUED ON : 29th June 2020.

WRITTEN SUBMISSIONS: Petitioner on 16th July 2020

DECIDED ON : 22nd October 2020.

S. THURAIRAJA, PC, J.

Nandasenage Lalantha Anurdha Nandasena (Hereinafter sometimes referred to as the Petitioner) claims that he was arrested on the 25th of September 2013 by the 2nd and 3rd Respondent. He states that thereafter he was hung on the rear door of the police jeep and assaulted by the 3rd Respondent, 4th Respondent and 4 other police Officers. The assault resulted in a fracture of his left hand and losing consciousness. When the Petitioner subsequently regained consciousness he noticed that he was at a Ayurvedic centre in Wijayapura. Thereafter he was taken to the Anuradhapura Police Station and was kept in a room adjacent to the Crime Branch. The Petitioner states that while detained in the police station, he was subjected to torture by police officers attached to the Anuradhapura Police Station including the 1st – 4th Respondents (1st Respondent is the Headquarter Inspector of Police of the Anuradhapura Police station, 2nd Respondent is the OIC – Crime Branch of the Anuradhapura Police station, 3rd Respondent is a Sub- inspector of the Anuradhapura Police station and the 4th Respondent is a Police Constable of the Anuradhapura police station.) The Petitioner states that on the following day (26/09/2013) he was taken out of the Police station by several police officers including the 2nd, 3rd and 4th Respondents. The Petitioner was put into a police jeep to set out allegedly to recover the stolen goods. While in the police jeep the 2nd Respondent had taken out his revolver and threatened to shoot the Petitioner if he reveals any information about the assault by them and further threatened to arrest relatives of the Petitioner if he speaks to them of said assault. The Petitioner was produced before the Magistrate Court of Anuradhapura on the 27th of September 2013 in Case No. B2797/2013.

The Respondents, particularly the 2nd and 3rd Respondent maintain that the Petitioner was arrested on the 26th of September by the 2nd Respondent. The

Respondents further state that a complaint was made by one Magal Bandalage Gunasena on 24/08/2013 to the Anuradhapura police station stating that his house was broken into, while he and his family members were away and gold jewelry worth Rs. 120, 000/- was stolen. After an investigation, the Petitioner and two others were arrested on 26/09/2013 in connection with the theft. The Respondents maintain that as the jeep approached the main road from the junction while taking the suspects by jeep to the police station due to a steep incline the wheels skidded and this resulted in the rear doors of the jeep springing open. The Respondents assert that the Petitioner in his attempt to escape in that moment jumped out and tripped, landing heavily on his left shoulder thereby injuring himself and deny the use of any force.

The Counsel for the Petitioner informed court that he will be confining this Application to Article 11, namely torture.

The pleadings and submissions before us establish the facts that are set out below which are pertinent to this case.

While both parties acknowledge the arrest and injury on the petitioner's left shoulder, they have opposing views on how the aforementioned injury occurred. The Petitioner submits that he was arrested on the 25th of September and that he was not informed of the reasons for his arrest. He further states that he was tied up and hung on the rear door of the jeep and assaulted as a result of which he broke his left arm. The Petitioner was arrested in the Nelumkulama area and was taken to an indigenous Ayurvedic medical practitioner (Vedha mahaththaya) at Wijayapura. Taking into consideration the place the petitioner was arrested and the area where the ayurvedic dispensary is located, it seems that the police vehicle in which the Petitioner was taken for treatment travelled passing the Anuradhapura Teaching Hospital.

The Petitioner states that he was produced before the Magistrate Court of Anuradhapura on the 27/09/2013 and at that time his Attorney – at – Law informed court that he had been assaulted by the police. The learned Magistrate cancelled the identification parade and directed that the Petitioner be admitted to the Anuradhapura Teaching Hospital for treatment. The Petitioner states that Magistrate called for a report regarding the assault however the Respondents though accepting that the Magistrate Court cancelled the identification parade and directed the Petitioner to be admitted at the Anuradhapura Teaching Hospital, they deny that a report was called for. The Petitioner was subsequently admitted to the Anuradhapura Teaching Hospital and he was released without being subjected to a medico legal examination by the Judicial Medical Officer (JMO) of the Anuradhapura Teaching Hospital.

It is evident from the information submitted to this Court by the Respondents that the police officers made entries in the relevant information books that the Petitioner received his injuries as a result of his attempt to escape. It is also further revealed that he was taken to an Ayurvedic medical practitioner.

When the Petitioner was admitted to the Anuradhapura Teaching Hospital, he had informed the doctors including the consultant of his assault by the police and they had made entries in the Bed Head Ticket (BHT). As there is no Medico Legal Report (MLR) available to us, I carefully perused the BHT and observed the following injuries; swelling, fracture of the left humerus and left wrist drop.

The Respondents submit that the petition and affidavit bear incorrect dates. According to the petition and affidavit the date mentioned is the 24th of September 2013. I perused the said petition and affidavit and find that to be correct but I observed that the affidavit was sworn by the Petitioner in front of the jailer of the Anuradhapura prison. He said that the affidavit was affirmed on 10/10/2013 and it

was filed before the Supreme Court on the 24/10/2013. Considering the nature of this allegation I am inclined to give the Petitioner the benefit of the doubt. I presume that the affidavit was signed on the 10/10/2013. The dates mentioned in the petition and affidavit maybe a typographical error as claimed by the counsel for the Petitioner.

If we were to hypothetically accept the Respondents' version of events that the Petitioner fell off the jeep while he was trying to escape, then why did the Respondents fail to produce the Petitioner to the government hospital which they are bound to do by law.

There is no material submitted before this Court that the 2nd and 3rd Respondents have reported this matter to the higher authorities of the Police Department, namely the ASP and higher. The two main factors namely the escape and the injury must be brought to the attention of the higher officials (at least up to the Divisional SSP). There are a number of Departmental Orders and circulars that set out the proper manner and procedure on how a person in police custody must be treated. The relevant provisions for this matter from the Departmental Order Bearing No. A 20, the Departmental order bearing No. E 6 and the IG circular No. 2328/2011 will be reproduced for ease of reference.

Departmental Order Bearing No. A 20 states as follows;

> *Responsibilities of Police and the rights of the persons under arrest-*
>
> ***Every police officer should keep in mind that a person who is under the custody of police is not in the state of a prisoner convicted and his protection should be considered in every aspect.*** *If a person being held in the police custody made a special request on: food or bed and seat etc. special attention should be paid on such a request and the instructions of the Duty*

officer should be sought in that regard. The Duty Officer shall facilitate such amenities unless it causes a prejudice to the custody.

*2. A. - Arrest**: when a person is arrested it should be done without the acts of violence as much as possible.** In a case of arresting a violent person the police powers should be used only to the extent it is required to suppress powers.*

(Emphasis added)

Departmental Order Bearing No. E 6 sets out the procedure to be followed by the police when a prisoner escapes from the custody of the police. This same procedure is applicable where a suspect attempts to escape from the custody of the police. It states as follows;

*2. **At every occasion when a prisoner escapes, such should be informed to the Assistant Superintendent of Police, Superintendent of Police and to the information room of the Headquarters through a telephone call or email** along with a complete description of the person or persons who have escaped.*

*5. If an escaped accused is taken in to the custody of the Police and when he is taken into custody, **it should be informed to all who had been informed earlier that he is taken back to the custody of the police.***

(Emphasis added)

The IG circular No. 2328/2011 sets out the manner in which the suspects who are under the custody of the police should be protected. This circular states as follows;

02. in making an arrest of a suspect, the police should comply with Section 23 of the Code of Criminal Procedure Act No. 15 of 1979 and whereas –

IV. ***When an arrested person has injuries, he should be referred to a Judicial Medical Officer and a report should be obtained thereby.*** *If the suspect does not hesitate to provide a statement, a statement should be taken over the injuries.*

X. The said telephone message should be inclusive of: the place, time in which the suspect is arrested, the reason for the arrest, and ***details which describe whether special incidents happened when the suspect is arrested.*** *When such a telephone message is received, the Gazetted Officer in charge of the District shall promptly ascertain the information of the said arrest from the relevant police station whereas the said officer should provide all the instructions required over the further investigation of the suspect and producing him to the courts to the Officer -in- Charge and the Investigation Officer. When it is felt that the arrested suspect should have to be examined, he should visit the relevant Police Station and instructions required for examining the suspect and for the investigations should be provided.*

XI. ***All the Officers- in - Charge are liable to work in a manner which ensure the rights and protection of all persons who are being arrested. The officers in charge of the District who are monitoring such places should strictly monitor the rights and protection of the people who are under arrest.***

03.

III. All records of moving the suspect to another place should be duly noted in the information book

04. It shall be the duty of all the officers in charge of the Districts cum Divisions and the Deputy Inspector Generals who are in charge of Ranges to execute

constant monitoring process as to whether the said instructions are properly carried in to effect and rights of the arrested suspects are properly ensured.

(Emphasis added)

Thus, on examination of the aforementioned provisions it is evident that the Respondents involved in this matter had not complied with the necessary procedure as set out above. It is also unheard of that when a person is injured when trying to escape from the police custody for him to be taken to an ayurvedic medical physician to be treated.

In the given circumstances as per the Code of Criminal Procedure Act No. 15 of 1979 the police officer is compelled to produce him before a Government Medical Officer and must obtain a report (MLR) and submit the same to the Magistrate and the recoveries made by the police officer must be checked and itemized.

When taking into comparison the duties and responsibilities of the Petitioner and the Respondent Police Officers, it is evident that the petitioner is just an ordinary citizen of the country. However, the Respondents as police officers are expected by virtue of the colour of their uniform to be more accountable in their duty than an ordinary citizen of the country. A police officer is a repository of State duties, who has been prescribed with law enforcement duties. When a fundamental rights application of this nature is filed, Court expects reasonable explanation with documents and evidence and not just a mere denial. A denial in itself will not suffice. In the case of ***Ansalin Fernando v Sarath Perera, Officer – In – Charge, Police Station Chilaw and Others [(1992) SLR Vol. 2 411)*** Kulatunga J stated as follows;

I do not consider it proper to reject such an allegation merely because the police deny it or because the aggrieved party cannot produce medical evidence of injuries. Whether any particular treatment is violative of Article 11 of the

Constitution would depend on the facts of each case. The allegation can be established even in the absence of medically supported injuries.

The mission of the Sri Lanka Police Department reads as *"Sri Lanka police is committed and confident to uphold and enforce the law of the land, to preserve the public order, prevent crime and terrorism with prejudice to none – equity to all"* equity generally means what is fair and just, moral and ethical. Consequently, it can be stated that by committing acts that constitute acts of torture a police officer would be acting against the mission and vision on which the Sri Lanka Police was founded. Additionally, he or she would also be acting beyond the colours of his or her uniform.

Article 1 of The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines torture as follows;

For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Act No.22 of 1994 defines torture as follows;

Section 12 -

"torture" with its grammatical variations and cognate expressions, means any act which causes severe pain, whether physical or mental, to any other person, being an act, which is;

(a) done for any of the following purposes that is to say

(i) obtaining from such other person or a third person, any information or confession; or

(ii) punishing such other person for any act which he or a third person has committed or is suspected of having committed; or

(iii) intimidating or coercing such other person or a third person; or

(b) done for any reason based on discrimination,

and being in every case, an act which is done by, or at the initiation of, or with the consent or acquiescence of, a public officer or other person acting in an official capacity.

Article 5 of the Universal Declaration of Human Rights provides for the protection of persons from torture. It states that *No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.*

The right to freedom from torture is enshrined in various human rights instruments and protects all individuals from being intentionally subjected to severe physical or psychological distress by, or with the approval or acquiescence of, government agents acting for a specific purpose, including to inflict punishment or to obtain information. Torture is a crime under international law. According to the relevant instruments it is prohibited and it cannot be justified under any circumstances. The right to freedom from torture is one of the most universally

recognized human rights and as such the protection from torture has attained status as a *jus cogens*. Dr. Jayampathy Wickramaratne in his book Fundamental Rights in Sri Lanka (1996, at page 114) writes that the intentional and wanton infliction of pain and suffering is one of the most shameful acts that one human can perpetrate on another. Torture is one of the vilest acts perpetrated by human beings on their fellow creatures. It annihilates human personality and denies the inherent dignity of a human being and should not be condoned under any circumstances.

Article 11 of our Constitution guarantees that no person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. This is an unqualified non – derogable right and every person is entitled to it. This unqualified nature of the right and the fact that this provision is entrenched makes it abundantly clear that the Constitution envisages 'zero tolerance' towards cruel, inhuman or degrading treatment which is the anti-thesis of 'Human Dignity'.

In the case of ***Amal Sudath Silva v Kodituwakku Inspector of Police and Others [(1987) Vol. 2 SLR 119]*** Atukorale J stated as follws;

> *"Article 11 of our Constitution mandates that no person shall be subjected to torture, or to cruel, inhuman or degrading treatment or punishment. It prohibits every person from inflicting torture some, cruel or inhuman treatment on another. It is an absolute fundamental right subject to no restrictions or limitations whatsoever. Every person in this country, be he a criminal or not, is entitled to this right to the fullest content of its guarantee. Constitutional safeguards are generally directed against the State and its organs. The police force being an organ of the State is enjoined by the Constitution to secure and advance this right and not to deny, abridge or restrict the same in any manner and under any circumstances. Just as much as this right is enjoyed by every member of the police force, so is he prohibited from denying the same to others,*

irrespective of their standing, their beliefs or antecedents. It is therefore the duty of this court to protect and defend this right jealously to its, fullest measure with a view to ensuring that this right which is declared and intended to be fundamental is always kept fundamental and that the executive by its action does not reduce it to a mere illusion. This court cannot, in the discharge of its constitutional duty, countenance any attempt by, any police officer however high or low, to conceal or distort the truth induced perhaps, by a false sense of police solidarity. The facts of this case have revealed disturbing features regarding third degree methods adopted by certain police officers on suspects held in police custody. Such methods can, only be described as barbaric, savage and inhuman. They are most revolting to one's sense of human decency and dignity particularly at the present time when every endeavor is being made to promote and protect human rights. Nothing shocks the conscience of a man so much as the cowardly act of a delinquent police officer who subjects a helpless suspect in his charge to depraved and barbarous methods of treatment within the confines of the very premises in which he is held in custody. Such action on the part of the police will only breed contempt for the law and will tend to make the public lose confidence in the ability of the police to maintain law and order. The petitioner may be a hard-core criminal whose tribe deserve no sympathy. But if constitutional guarantees are to have any meaning or value in our democratic set up, it is essential that he be not denied the protection guaranteed by our Constitution"

In ***Velmurugu v Attorney General and Another [(1981) Vol. 1 SLR 406]*** it was held that;

Article 11 which gives protection from torture and ill-treatment is the only fundamental right that is entrenched in the Constitution in the sense that an amendment of this clause would need not only a two-third majority but also

a Referendum. ***It is also the only right in the catalogue of rights set out in Chapter III that is of equal application to everybody and which in no way can be restricted or diminished. This right occupies a preferred position and it is the duty of this court to give it full play and to see that its provisions enjoy the maximum application***.

(Emphasis added)

In the case of ***Bandula Samarasekara v Vijith Alwis, OIC Ginigathhena Police Station and Others [(2009) Vol. 1 SLR 213]*** Dr. Shirani Bandaranayake stated as follows;

"It is the duty of a police officer to use his best endeavour and ability to prevent all crimes, offences and public nuisances and more importantly to preserve the peace. In order to carry out his duties efficiently and effectively, it would be necessary to have the trust and respect of the public. It is not easy to command that from the public and in order to earn such trust and respect, the police officers must possess a higher standard of moral and ethical values than is expected from an average person.

In ***Senthilnayagam and Others v Seneviratne and Another [(1981) Vol. 2 SLR 187]*** Justice Colin Thome noted that;

"The Courts have been jealous of any infringement of personal liberty and care is not to be exercised less vigilantly, because the subject whose liberty is in question may not be particularly meritorious"

In the Indian case of ***State of Uttar Pradesh vs Ram Sagar Yadav and others (*****1985 AIR 416)** it was held;

"It is necessary that the Government amends the law appropriately so that ***policemen who commit atrocities on persons who are in their custody are not allowed to escape by reason of paucity or absence of evidence****. Police Officers alone and none else can give evidence as regards the circumstances in which a person in their custody comes to receive injuries while in their custody. Bound by ties of a kind of brotherhood, they often prefer to remain silent in such situations and when they choose to speak they put their own glass upon facts and pervert the truth.* ***The result is that persons, on whom atrocities are perpetrated by the police in the sanctum sanctorum of the Police Station, are left without evidence to prove who the offenders are. The law as to the burden of proof in such cases may be re-examined by the legislature so that hand-maids of law and order do not use their authority and opportunities for oppressing the Innocent citizens, who look to them for protection."***

(Emphasis added)

It must also be noted that when this application initially came before this court the Attorney general appeared for all the Respondents however once leave to proceed was granted the Attorney general did not appear for the 2nd and 3rd Respondents.

Considering the available material, I find the complaint made by the Applicant to be factual, that he was subject to torture at the hands of the 2nd and 3rd Respondent. Therefore, I find that the right of the Applicant enshrined under Article 11 of the Constitution was violated.

There are several cases decided by this court time and time again that declare that the state should take strict measures to prevent abuse of authority

by government officials, especially the police but there is no report or action plan before this court that the government has taken adequate measure to curb these situations from arising continuously.

I find the Fundamental Right of the Applicant enshrined in Article 11 of the Constitution to have been violated by the 2nd, 3rd Respondents and the State. Hence, I order the 2nd and 3rd respondents to pay Rs. 50,000/- each from their personal funds and the 5th respondent to pay compensation amounting to Rs. 100,000/- to the Applicant, Nandasenage Lalantha Anurdha Nandasena.

Application Allowed.

JUDGE OF THE SUPREME COURT

B.P. 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 under and in terms of Articles 17 and 126 of the Constitution.

SC/FR APPLICATION 181/2016

1. M. Weerasinghe,
   No. 1200/4, Rajamalwatta Road,
   Battaramulla.

2. D.G.A Wijebandara,
   No. 972A, Pannipitiya Road,
   Thalangama South,
   Battaramulla.

3. R.K.M Dayananda,
   No. 25/7, Coranelis Mawatha,
   Thalapathpitiya Road,
   Nugegoda.

4. N.P.G. Karunathilaka,
   No. 190, Whitewell Estate,
   Paththalagedara,
   Veyangoda.

PETITIONERS

Vs

1. P.S.M Charles,
   Director – General of Customs,
   Sri Lanka Customs Department,
   No. 40, Main Street,
   Colombo 11.

2. A. Senanayake,
   Additional Director – General
   (Human Resource Management)
   Sri Lanka Customs Department,
   No. 40, Main Street,
   Colombo 11.

3. D. Dissanayake,
   Chairman,

4. Prof. Hussain Ismail

5. V. Jegarajasingham,

6. Nihal Seneviratne,

7. Dr. Prathap Ramanujan,

8. S. Ranugge,

9. D.L. Mendis,

10. Sarath Jayathilaka,

11. D. Wijayatileke,

(All members of the Public Service Commission of No. 177, Nawala Road, Narahenpita, Colombo 05.)

12. A. Kulatunga ,
    Secretary,
    Public Service Commission,
    No. 177, Nawala Road,
    Narahenpita, Colombo 05.

13. Secretary,
    Ministry of Finance,
    The Secretariat,
    Colombo 01.

14. Director – General of Establishments,
    Ministry of Public Administration and Home Affairs,
    Independence Square,
    Colombo 07.

15. M.M. Alwis,

16. A.J. Fernando,

17. B.C.L. Hewawitharana,

18. K.D.R. Perera,

19. W.M.T. Mahaulpatha,

20. U.K.A.S. Yapa,

21. A.N. Kurukulaarachchi,

22. R.P.D.R. Sandya,

    All acting Superintendents of Customs and all c/o. the Additional Director – General (Human Resource Management), Sri Lanka Customs Department, No. 40, Main Street, Colombo 11.

23. Hon. Attorney – General,

    Attorney – General's Department,

    Hultsdorp Street,

    Colombo 12.

    RESPONDENTS

BEFORE : **L.T.B. DEHIDENIYA, J.**
S. THURAIRAJA, PC, J. and
E.A.G.R AMARASEKARA, J.

COUNSEL : Nishantha Sirimanne with Uween Jayasingha for the Petitioners.
Ms. Sureka Ahmed, SC, for the 1st – 14th and 23rd Respondents.

ARGUED ON : 11th February 2020.

WRITTEN SUBMISSIONS : 1st – 14th and 23rd Respondents on 6th February 2020

Petitioners on 21st June 2017

DECIDED ON : 19th May 2020.

S. THURAIRAJA, PC, J.

The Petitioners were attached to Sri Lanka Customs. They were all appointed to the post of Assistant Superintendent – Grade II with effect from 1st April 1990 and were all promoted to the post of Deputy Superintendent with effect from 25/08/2010.

The next promotion available to the Petitioners is to the post of Superintendent of Customs. The Petitioners state that promotions to the said post are effected solely on the basis of seniority which is ascertained at an oral interview. The Petitioners state that this has been the practice that has consistently been followed by the Sri Lanka Customs when selecting officers for promotion to said post.

It is alleged that the authorities have promoted seventeen officers without following the proper procedure. Namely, there was no proper advertisement calling for applications and that there was no interview. Therefore their Fundamental Rights enshrined under Article 12(1) of the Constitution had been infringed upon.

Available facts reveal that the Sri Lanka Customs had sought approval from the Public Service Commission to fill the existing 15 vacancies. It was submitted that the calling for applications was displayed at the Human Resources Directorate of Sri Lanka Customs on 20/01/2016. Further, it was circulated through the Customs Union on which the Petitioners are members. The Petitioners deny seeing such an advertisement and receiving any information through the Customs Union. Officials of the said union also by letter dated 22/06/2016 (R5a) confirmed that the Petitioners

are their members and they were informed of the vacancies and the date and time of the interviews.

The above proves that the notice was properly displayed and communicated to the Petitioners.

The Counsel for Petitioners and Respondents submit that after filing this application the Petitioner and other Officers were promoted following the due process. Presently the grievance of the Petitioners is that their seniority be restored by back dating their appointments over and above the Officers who were promoted in June 2016.

I carefully perused the material before us. It appears that pursuant to Cabinet Decision No. ඇමඇ/14/07.09/504/079 dated 11 July 2014, the Public Service Commission had amended the Scheme of Recruitment (SOR) applicable to Sri Lanka Customs from the original one. Accordingly, promotions to the post of Superintendent of Customs from that of Deputy Superintendent of Customs is granted on the basis of seniority. Officers serving as Deputy Superintendents of Customs, have to face a formal interview prior to such promotions being effected. The interviews are held by an interview Board approved by the Public Service Commission and at said interview the qualifications and other details of the candidates are verified. The interview is mainly to consider the seniority of the applicants.

The Petitioners are presently not challenging the interviews and promotions given in January 2016, their challenge is only on the appointment given to eight officers in June 2016. It is observed that the Public Service Commission had approved the promotion of fifteen people originally and another two thereafter. Subsequently, the Sri Lanka Customs by letter dated 27/05/2016 sought approval from the Public Service Commission through the Secretary to the Ministry of Finance to appoint eight officers from the list of officers who had faced interviews held on the 21st of January 2016. The Public Service Commission by letter dated 23/06/2016, granted approval

to make the appointments as suggested by the Sri Lanka Customs and accordingly the eight vacancies were filled according to seniority from the list of officers who had faced interviews on 21st January 2016. Therefore it was not necessary for the Sri Lanka Customs to re-advertise and re- interview when there was an approval from the Public Service Commission.

The Respondents submit that the fact that the Petitioners were not interested in applying or obtaining the promotions is evident from the conduct of the Petitioners. Despite promotions being given to Officers who were ranked below the Petitioners in the list of seniority in January 2016, the Petitioners made no complaint or appeal and only submitted a belated appeal in May 2016.

The Respondents reiterated the aforementioned fact by submitting that, it was further confirmed by the fact that this is not the first occasion where the 1st Petitioner failed to apply for promotion despite being eligible to apply. He failed to apply for the interview held on 24/04/2015, despite being eligible to be promoted according to the merit order of the seniority list applicable to the rank of Deputy Superintendent of Customs as at 24/04/2015 (1R13), the 1st Petitioner was ranked at No. 50. The officer ranked at No.51 in the list, applied for the promotion, attended the interview held on the aforesaid date and was promoted to the rank of Superintendent with effect from 14/10/2015. Hence it is evident that if the 1st Petitioner had applied for promotion and attended the interview, he would have been eligible to be promoted with effect from 14/10/2015

The Respondents submit that it is imperative that all officers seeking promotions to submit an application and be present at an interview. It is admitted fact that Petitioners have not submitted their applications for promotion. Therefore, they are not entitled to get any promotion, despite being eligible to be promoted based on the ranking in the seniority list.

In the case of ***Devasinghe v Jayaratne*** ***SC/FR 516/95 (S.C.M. dated 19/02/1997)*** Justice Shirani Bandaranayake, J stated as follows;

> *"The question that has to be considered is whether the petitioners and the respondents were equals under the above mentioned circumstances. There is no doubt that equals will have to be treated equally without any discrimination. However, the equal protection of the law cannot be postulated among unequals; people who are differently circumstanced.* ***While the Respondents applied for the said post, the petitioners for reasons of their own, had decided not to apply. No one had denied the petitioners their right to apply for the advertised positions****…If the petitioners were interested in the said post the least they could have done was to have sent an application. Their decision not to apply for the post, clearly shows that they were, for some reason or other not interested in the post.* ***The decision not to send applications was not forced on them by anyone but was a self- imposed decision.*** *Since the petitioners failed to apply, I cannot see how we could treat the petitioners and respondents as persons who belong to the same class. The Petitioners and 8th – 11th respondents, in my opinion cannot be regarded as persons similarly circumstanced."*
>
> *(*Emphasis added)

The Petitioners allege violation of their Fundamental right guaranteed under the constitution. Article 12(1) of the Constitution states that all persons are equal before the law and are entitled to the equal protection of the law. The non – promotion of the Petitioners occurred due to them not applying for the promotion. However I am of the view that in these circumstances there has not been a violation of their Fundamental Rights

Considering all material available before us, I find that all steps with regard to the promotion process have been correctly made with the approval of the Public

Service Commission which is the appointing authority. I find no reason to backdate the promotions of the Petitioners due to the fact that the non - promotion of the Petitioners in the first instance was not due to any fault of the Respondent but instead occurred due to their failure to apply for promotion at the relevant time. I am of the view that the Fundamental Rights of the Petitioners enshrined in the Constitution, particularly Article 12(1) has not been violated.

After careful consideration I dismiss the application with cost. I fix cost at Rs. 10,000/- on each of the Petitioners.

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

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

Plaintiff

-Vs-

S.C. Appeal 04/2015
SC/HCCA/LA NO: 239/2012
SP/HCCA/TA/12/2007 (F)
SP/HCCA/MA/49/2007 (F)
D.C. Tissamaharama DR/01/97

Mahavidanage Simpson Kularatne
No:622, Tangalle Road,
Meddewatta, Matara.

Defendant

AND

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

Plaintiff-Appellant

-Vs-

Mahavidanage Simpson Kularatne
No:622, Tangalle Road,
Meddewatta, Matara.

Defendant-Respondent

AND NOW BETWEEN

Mahavidanage Simpson Kularatne
No:622, Tangalle Road,
Meddewatta, Matara.

Presently at

No.6B 1-1
Colonel Sunil Senanayake Mawatha,
Pitakotte.

Defendant-Respondent-Petitioner/ Appellant

-Vs-

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

Plaintiff-Appellant-Respondent

Before: Buwaneka Aluwihare, PC. J,
Priyantha Jayawardana, PC. J, and
Murdu N.B.Fernando, PC. J.

Counsel: W.Dayaratne, PC with Ms. D.N. Dayaratne for the
Defendant-Respondent -Appellant.
Rasika Dissanayake for the Plaintiff-Appellant-Respondent

Argued on: 02.04.2018

Decided on: 15.09.2020

Murdu N.B. Fernando, PC. J.

The Defendant–Respondent–Petitioner ("the defendant/appellant") came before this Court being aggrieved by the Judgement of the Civil Appellate High Court of the Southern

Province Holden in Tangalle (the "High Court"). By the said Judgement the High Court upheld the appeal of the Plaintiff-Appellant-Respondent ("the plaintiff bank/respondent") and set aside the Judgement entered by the District Court of Tissamaharama dismissing the plaint filed against the defendant.

This Court on 12-01-2015 granted Leave to Appeal on three questions of law. The said questions of law are as follows: -

(i) Have their Lordships of the Civil Appellate High Court failed to address their minds to the fundamental issue of whether the Plaintiff-Respondent's plaint was in conformity with the mandatory provisions of section 4(1) of the Debt Recovery (Special Provisions) Act No 2 of 1990 as amended by Act No 9 of 1994 which was raised as a preliminary objection by the Defendant-Petitioner?

(ii) Have their Lordships of the Civil Appellate High Court also failed to consider that the Defendant-Petitioner had been given overdraft facilities on the undertaking given by the Plaintiff-Respondent that he would be given a pledge loan and that the monies due on the overdraft would be set off against the pledge loan?

(iii) Have their Lordships of the Civil Appellate High Court failed to consider that the said pledge loan was not given due to the fault of the Plaintiff-Respondent and therefore, a cause of action has not accrued to the Plaintiff-Respondent to institute action against the Defendant-Petitioner?

Let me, now advert to the facts of this case in brief.

The defendant was a customer and an account holder at the Tissamaharama branch of the plaintiff bank. The defendant operated a current account and in the course of banking transactions presented cheques and deposited money to this account. The plaintiff bank honoured the cheques presented by the defendant and the current account became over drawn.

The defendant failed to pay back the over drawn sum and the plaintiff bank on 11-09-1997 instituted action against the defendant in terms of the Debt Recovery (Special Provisions) Act No 02 of 1990 as amended by Act No 09 of 1994 ("the Act") and annexed two cheques issued by the defendant and the statement of account to its plaint.

On 24-02-1998 the learned District Judge being satisfied of the conditions referred to in section 4(2) of the Act, issued decree nisi as prayed for by the plaintiff bank and directed the defendant to appear before court on 08-07-1998 and show cause as to why the said decree nisi should not be made absolute.

The defendant did not file a statement of objections on the said date but moved for time and thereafter on 08-12-1998, filed a statement of objections and raised the following preliminary objections namely, (i) the sum stated in the plaint did not fall within the definition of "debt" as set out in section 30 of the Act, (ii) there was no written agreement, (iii) in any event overdraft facilities were obtained in anticipation of obtaining a pledge loan. Thus, the defendant pleaded that he had a clear and concise defence and sought unconditional leave to appear in the case and/or to file an answer under section 6(2) (c) of the Act. The defendant also stated that the provisions of section 6(2)(a) and 6(2)(b) of the Act need not be resorted to and only prayed that the decree nisi issued by court should not be made absolute. It is observed that the defendant did not move for dismissal of the plaint at this juncture.

Thereafter an inquiry was held and the parties made submissions. On 25-11-1999, the learned District Judge made Order granting the defendant unconditional leave to appear and file answer upon the basis that there was a matter to be considered. In the said Order the learned District Judge categorically stated that no order is made on the preliminary objections raised since the defendant did not move for dismissal of the plaint and only sought unconditional leave to appear and defend this action and therefore granted the defendant unconditional leave to appear and show cause and gave a date to file answer as prayed for by the defendant.

The journal entries indicate that subsequent to the said Order, an application made to amend the plaint was not permitted and the case proceeded as a regular action upon the consensus of the parties. On 11-10-2001, two years after obtaining leave to appear and show cause, the defendant filed answer with a cross claim for damages and the case was set down for trial as a regular action. Thereafter, the application made to file replication by the plaintiff bank was disallowed by court and trial was taken up, admissions recorded, issues raised and the evidence of a bank official and the defendant were led. On 17-09-2007, the District Court

delivered judgement dated 08-08-2007 and dismissed the plaint and the cross claim of the defendant.

Being aggrieved by the said judgement the plaintiff bank appealed to the High Court. On 17-05-2012 the High Court delivered its judgement in favour of the plaintiff bank and set aside the judgement of the District Court and made absolute the decree nisi dated 24-02-1998 issued by the District Court.

The defendant is now before this Court against the said judgement of the High Court having obtained leave to appeal on three questions of law referred to earlier.

In the said background, let me now advert to the 1st question of law to be determined by this Court with regard to the plaint filed being not in conformity with the mandatory provisions of section 4(1) of the Act.

In the first instance I wish to advert to the provisions of the relevant law, the Debt Recovery (Special Provisions) Act of No 2 of 1990 as amended by Act No 9 of 1994 since the case in issue revolves around recovery of a 'debt' and the 'due process' to be adhered to, under the relevant law. In my view, the provisions of the above referred section 4(1) cannot be looked at or considered in isolation or in a vaccum and should be viewed from the perspective of the Act in its entirety.

This Act in its preamble states that it is an Act to provide for the regulation of the procedure relating to debt recovery by lending institutions. This legislation was brought into operation together with many other laws and amendments to existing laws in the early 1990s, for the manifestation of the economic development of the country and for the financial stability and efficient working of the lending institutions and also for the expeditious recovery of debts due and owing to a lending institution.

Thus, the key word in this legislation is 'lending institution' and 'debt'. A lending institution may resort to the provisions of the Act, if the lending institution could satisfy court that the transactions referred to in the plaint, falls within the definition of 'debt'.

Undoubtedly, People's Bank, the plaintiff bank in this appeal, is a lending institution which has recourse to the Act and filed this action against the defendant, a defaulting borrower, for recovery of money due and owing to the bank.

The next matter to be ascertained is whether the transaction referred to in the plaint falls within the definition of 'debt'. The main contention of the defendant before the District Court and the first issue raised by the defendant at the trial was with regard to the definition of the term 'debt'.

This action was filed in the District Court of Tissamaharama in 1997, after the Debt Recovery (Special Provisions) Amendment Act No 9 of 1994 was enacted which brought in significant amendments to the principal enactment, specifically to sections 4 and section 30, the interpretation section of the principal enactment.

Section 4 (1) of the Act as amended reads as follows:-

> "The institution suing shall on presenting the plaint, file with the plaint an affidavit to the effect that the sum clamed is lawfully due to the institution from the defendant, a draft decree nisi, the requisite stamps for the decree nisi and for service thereof and shall in addition, file in court, such number of copies of the plaint, affidavit, instrument, agreement or document sued upon, or relied on by the institution, as is equal to the number of defendants in the action."

In section 30, the word "debt" as amended is defined as follows:-

> "debt" means a sum of money which is ascertained or capable of being ascertained at the time of institution of the action and which is in default, whether the same be secured or not or owed by any person or persons jointly or severally or as principal borrower or guarantor or in any other capacity, and alleged by a lending institution to have arisen from a transaction in the course of banking, lending, financial or other allied business activity of that institution, but does not include a sum of money owed under a promise or agreement which is not in writing.

The term 'debt' as defined above is very wide and covers many situations, the material factor been that the sum of money should be 'ascertainable' at the time of institution of the action and alleged by a lending institution to have arisen from 'a banking, lending, financial or other allied business activity' of the institution. This term 'debt' has been

considered by the Appellate Courts on many an instance and given a wide meaning to include ‘overdrafts’ and ‘guarantees’ as well.

In **Kiran Atapattu Vs Pan Asia Bank Ltd [2005] 2 SLR 276** at page 279 the Court of Appeal held whether one calls the sum borrowed ‘an overdraft or a loan’ if it is capable of being ascertained it falls within the meaning of ‘debt’ under section 30 of the Debt Recovery (Special Provisions) Act preponing the theory that what is material is the sum being capable of being ascertained at the time of institution of the case.

Similarly, in **Dharmaratne Vs People’s Bank [2003] 3 SLR 307** a case filed under the Debt Recovery Act, the Court of Appeal held that an ‘overdraft’ falls within the definition of ‘debt’ as the overdraft arises from a transaction relating to banking. In that case the contention of appellant, that the ‘overdraft’ was not a ‘debt’ or a ‘loan’ was rejected by the Court of Appeal.

In **Eassuwaran and others Vs Bank of Ceylon [2006] 1 SLR page 365** a case decided by this Court, Raja Fernando J (with S.N. Silva, CJ and Thilakawardena, J. agreeing) held that a ‘guarantee’ provided by the appellants falls within the definition of ‘debt’ and a lending institution could have recourse to the provisions of the Debt Recovery (Special Provisions) Act No 2 of 1990 as amended. In this case the contention that the provisions of the Act applies only to a ‘fixed term loan’ and not to any ‘credit or overdraft facility’ and that if the ‘debt’ was a ‘credit facility or an overdraft facility’, the provisions of the Debt Recovery (Special Provisions) Act No 2 of 1990 as amended does not apply was overruled by this Court.

Thus, from the above referred judicial decisions, it is amply clear that an ‘overdraft’ falls within the four corners of the Act subject to the other pre-requisites therein been fulfilled.

In the instant appeal, there was no dispute and indeed it was an admission recorded that the defendant operated a current account and enjoyed banking, including ‘overdraft facilities’ of the People’s Bank. The position of the plaintiff bank was that the defendant failed to re-pay the money due and owing to the bank on the ‘overdraft facility’ obtained and therefore the bank resorted to recover the said ‘debt’, the unpaid and dishonoured facilities

granted to the defendant, expeditiously, by filing plaint under the Debt Recovery (Special Provisions) Act.

Institution of an action under this Act (vide section 3) is by presenting a plaint. section 4(1) provides that the plaint should be filed together with

(i) an affidavit to the effect that the sum claimed is lawfully due to the lending institution from the defendant;

(ii) a draft decree nisi; and

(iii) requisite stamps for the decree nisi and for service thereof.

In the instant appeal it is apparent that the plaintiff bank filed a plaint, an affidavit sworn to the effect that the sum was lawfully due, a draft decree nisi and requite stamps for service, in accordance with the provisions of section 4(1) of the Act.

The said sub-section goes onto state, that the institution suing **in addition file in court, such number of copies of the plaint, affidavit, instrument, agreement or document sued upon or relied upon by the institution, as is equal to the number of defendants in the action.**

In the instant appeal, the plaint indicates that an affidavit, two cheques, a statement of account of the defendant's current account among other documents were annexed to the plaint.

The submission of the defendant before this Court, on the first question of law raised was that 'an instrument, agreement or document' was not annexed to the plaint and thus the mandatory provisions of section 4(1) of the Act had not been complied with by the plaintiff bank.

Thus, the crux of the issue to be determined is whether annexing 'an instrument, agreement or document' is mandatory and whether the 'instrument, agreement or document' annexed in the instant appeal i.e the two cheques and the statement of accounts, fulfills the requirement of section 4(1) of the Act and whether the sum claimed falls within the definition of 'debt', the latter been the principal contention of the defendant before the trial court and the High Court.

This question as stated earlier cannot be looked at in isolation or in a vacuum or in a water tight compartment. It cannot be considered by a piecemeal approach. It has to be visualized in the perspective of the Act in its entirety and taking the Act as a whole.

Hence prior to examining the said question in detail, I wish to advert to certain facts of this case and the provisions of the Act which are undisputed.

Vide section 4(2) of the Act, upon presentation of the plaint together with annexures before a court, if the court is satisfied, that the 'instrument, agreement or document' produced in court appears to be properly stamped, and not open to suspicion by any alteration or erasure or other matter on the face of it, and not be barred by prescription, **the court being satisfied of the contents contained in the affidavit shall enter a decree nisi**.

In the instant appeal the District Court being satisfied of the contents contained in the affidavit, the plaint and the annexures filed in court, issued an order nisi, which was duly served on the defendant in terms of section 5 of the Act.

Section 6(1) of the Act, goes on to state, that in an action instituted under this Act, the defendant shall not appear or show cause against the decree nisi, unless he obtains leave of the court to appear and show cause. Thus in this instance, the defendant filed a statement of objections and sought permission of court to appear and show cause.

Vide section 6(2) of the Act, the next step to be followed, upon the defendant filling an application for leave to appear and show cause supported by an affidavit which deals specifically with the plaintiff's claim and clearly and concisely state what the defence to the claim is and what facts are relied upon to support it and after giving the defendant an opportunity of being heard is for the Court to grant, leave to appear and show cause against the decree nisi, under three instances which are enumerated in section 6(2) of the Act as (a)(b) and (c).

Whilst sub-section (a) speaks of the defendant paying into court the full sum mentioned in the decree nisi; sub-section (b) speaks of the defendant furnishing such security as the court may consider reasonable and sufficient to satisfy the sum mentioned in the decree nisi in the event of it being made absolute. In both these instances, the defendant on its own volition takes the initiative to make good the sum prayed for and obtains leave to appear and show cause.

In **sub-section (c) of section 6(2) a court being satisfied on the contents of the affidavit filed that it discloses a defence which is prima facie sustainable and on such terms as to security, framing and recording of issues or otherwise as the court thinks fit**, the defendant is granted leave to appear and show cause against the decree nisi issued by court.

In the instant appeal, the *District Court granted leave to appear unconditionally in terms of section 6(2)(c) of the Act which on the face of it is not in accordance with the provisions of the Act* and the plethora of judicial pronouncements made in respect of this subsection. These decisions would be discussed in detail later on in this judgement.

It is undisputed that the defendant in his statement of objections filed by virtue of section 6(1) of the Act, did not move for dismissal of the plaint. The defendant only moved court to grant leave under section 6(2)(c) unconditionally and to file an answer. The defendant adverted to in his statement of objections that it is not necessary to resort to section 6(2)(a) and (b) of the Act and further adverted since the two cheques annexed to the plaint were issued by the defendant in the normal course of day to day banking transactions the defendant had with the plaintiff bank and the sums mentioned in the cheques had already been discounted against the defendant's account and honoured by the bank also in the normal course of banking transactions, the two cheques does not fall within the definition of a 'debt'. The District Court upon filling of the statement of objections granted the defendant leave to appear and show cause unconditionally against the decree nisi and also permitted the defendant to file an answer. This fact too is undisputed.

Vide **section** 7 of the Act, the next step to be followed upon granting of leave to appear is for a **defendant to show cause against the issuance of order nisi by court, by proceeding to trial under summary procedure as laid down in sections 384 to 387 and 390 to 391 of the Civil Procedure Code where the right to begin as well as the burden of proof is on the defendant and the plaintiff only has a right to reply**.

In the appeal before us, the said summary procedure where the right to begin as well as the burden of proof was on the defendant was not followed. It is undisputed that the trial court completely deviated from the stipulated provisions and resorted to regular procedure with the consent of the parties. The District Judge made order in the journal entry that the regular procedure would be adopted and directed the defendant to file an answer.

Upon filling answer, the trial was conducted under regular procedure and the learned District Judge pronounced judgement dismissing the plaint and holding that the instant case ought to have been determined not on the regular procedure but on summary procedure as laid down in the Act. The District Court also held that though the defendant obtained overdraft facility that the plaintiff bank had failed to discharge the burden of proof which was on the plaintiff bank that the 'overdraft' obtained by the defendant was based on a written agreement and that the sum prayed for was a 'debt' and therefore the plaint filed did not fall within the purview of the Debt Recovery (Special Provisions) Act.

Upon appeal, the High Court reversed the decision of the District Court placing reliance on numerous decisions of the Court of Appeal and the fact that the defendant in the statement of objections and in the answer admitted obtaining the 'overdraft facility' and such fact was recorded at the trial as an admission. The learned Judges of **the High Court held that the 'overdraft facility' falls within the definition of 'debt' and in this application the learned District Judge was in error in dismissing the plaint on a mere technicality after holding that the 'overdraft facilities' were obtained by the defendant.**

The High Court also held that the District Court has followed the correct procedure in issuing the order nisi, but by granting leave unconditionally and conducting the show cause inquiry as a trial in the regular procedure, the District Court has acted contrary to the provisions of the Act. The High Court went on to hold that the correct procedure to be followed under the Act was the summary procedure, where the burden of proof is on the defendant and set aside the judgement of the District Court and made absolute the decree nisi issued by the District Court in the first instance.

Upon the said background the defendant/appellant came before this Court. The 1st question of law raised as enumerated earlier is in respect of section 4(1) of the Act and the plaint filed. If I may advert to the 2nd and 3rd questions of law at this juncture, it is in respect of the defence raised by the defendant in the answer and the cross-claim i.e the 'overdraft' obtained by the defendant ought to have been set-off against another facility, requested by the defendant from the plaintiff bank, namely a 'pledge loan to purchase paddy' which the defendant a rice miller, in the normal course of his banking transactions obtained from the plaintiff bank.

The above stated 2nd and 3rd questions of law also highlighted the factual position i.e the defendant anticipating the pledge loan overdrew his account. In this instance, releasing of the pledge loan was delayed. Therefore, the defendant alleged that the account had to be overdrawn not due to his fault but due to the fault of the plaintiff bank and thus a cause of action had not accrued to the plaintiff bank to institute this action against the defendant.

It is observed that the defendant's main contention before the lower court was that the 'overdraft' obtained did not fall within the definition of 'debt' and therefore resorting to the provisions of the Debt Recovery Act was erroneous.

However, the main submission of the defendant before this Court, was that the mandatory provisions of section 4(1) of the Act were not followed. i.e there was no 'agreement' annexed to the plaint and the court ought to have rejected the plaint in limine. Thus, it appears that the defendant had abandoned the contention referred to above that an 'overdraft' does not amount to a 'debt'.

Notwithstanding the above, in the light of the facts of this case, I wish to look at section 4(1) of the Act once again. It envisages when presenting a plaint, to file with the plaint an affidavit, a draft decree nisi and relevant stamps for service of documents. It also envisages in addition, to file in court sufficient number of copies of the plaint, affidavit, 'instrument, agreement or document' sued or relied on by the lending institution as is equal to the number of defendants. Thus with the plaint only an affidavit, decree nisi and stamps, should be presented. The 'instrument, agreement or document' sued or relied upon should be filed in court with sufficient copies to serve on the defendants.

In the instant appeal, it is apparent that the provisions in section 4(1) of the Act were adhered to by the plaintiff bank. To the plaint filed before the District Court was annexed an affidavit, a decree nisi, required stamps, two cheques and a statement of the defendant's current account.

Vide section 4(2) of the Act the court has to be satisfied that the documents annexed to the plaint are properly stamped where it is required to be stamped and be not open to suspicion by reason of any alteration or erasure or other matter on the face of it and not be barred by prescription. It is observed that when presenting the plaint, the plaintiff bank had annexed to the plaint the required documents including the two cheques and the statement of

accounts of the defendant being the ‘instrument, agreement or document’ relied upon by the plaintiff bank to prosecute this case and prima facie complied with the said threshold provisions.

The learned District Judge being satisfied of the plaint presented and the contents of the affidavit that the sum claimed was a ‘debt’ lawfully due to the plaintiff bank and also that necessary copies of the annexed ‘documents’, namely the two cheques and the statement of account had been filed in court and the said documents did not have any infirmities referred to in section 4(2) of the Act as discussed earlier entered decree nisi against the defendant.

Thus, this Court cannot falter the District Court in entering decree nisi in the first instance. The plaintiff bank has filed the required documents referred to in section 4(1) of the Act. The affidavit filed by the plaintiff bank has clearly referred to the fact that the sum claimed was lawfully due to the plaintiff bank. There were no infirmities as stated in section 4(2) of the Act in the said documents. The learned Judge being satisfied of same has acted in terms of the provisions of section 4(2) of the Act. At this point of time, a defendant has no status before court and cannot object to issuance of a decree nisi which is a statutory duty cast on the court.

As discussed earlier the Appellate Courts have determined that an ‘overdraft’ falls within the four corners of the Debt Recovery Act and an ‘overdraft’ falls within the definition of a ‘debt’. The plaint presented was upon the basis that the defendant overdrew his account and did not re-pay the overdrawn sum as signified by the two cheques and the statement of account. The said two cheques and the statement of account were the ‘instrument, agreement or document’ relied upon by the plaintiff bank to sue the defendant. At the point of presenting the plaint what is material is for a court to be satisfied upon the affidavit and the ‘instrument, agreement or document’ presented before it, that the sum claimed is a ‘debt’ lawfully due to the plaintiff bank and the ‘instrument, agreement or document’ annexed to the plaint is in conformity with the threshold provisions of section 4(2) of the Act for a court to issue a decree nisi, an ex-parte order against a defendant. The plaintiff bank had prima facie complied with the said provisions and due process had been followed. Hence, the submission of the appellant that the plaint was not in compliance with the mandatory provisions of section 4(1) as a written agreement was not annexed and thus should have been rejected in limine by the District Court cannot be accepted by this Court.

The next point I wish to consider is whether the District Court ought to have rejected the plaint at the next opportune moment, i.e. when the defendant challenged that the plaint was not in conformity with the provisions of section 4(1) of the Act. The defendant only gets an opportunity to challenge a decree nisi issued by court in the first instance, only when he receives summons and is granted permission and/or leave to appear and show cause against the decree nisi already issued.

As discussed earlier under section 6(2) of the Act, three avenues are open for a defendant to appear and show cause. In the instant case, the court upon the application of the defendant granted unconditional leave to appear and show cause under section 6(2)(c) of the Act.

Thus, the issue I wish to consider now is whether the procedure adopted by the learned District Judge, in granting unconditional leave to appear under section 6(2)(c) of the Act is in accordance with the law and whether the defendant has followed the due process to come before the trial court.

The learned Judges of the High Court in its judgement analysed in depth the course of action followed by the District Court under section 6(2) of the Act and came to the conclusion that granting unconditional leave to appear was not in accordance with the provision of the Act and the judicial pronouncements pertaining to same. I cannot see any reason to reject such proposition for the reasons that would be discussed later in this judgement.

In such a situation, **having obtained leave not in accordance with the law and contrary to the provisions of the Act, can a defendant challenge a plaint filed**? This question in my view is a fundamental issue that this Court will have to determine prior to answering the first question of law with regard to conforming to the mandatory provisions of section 4(1) of the Act. In my view, the defendant should first comply with the law and then only he could complain against violation of the due process of the law.

The learned Judges of the High Court in its judgement came to the finding that the learned District Judge correctly considered the threshold provisions of section 4(1) and 4(2) of the Act and issued the order nisi against the defendant. This was the first Order made by the trial court pertaining to this matter. The second order made by the trial court was granting

leave and the 3rd Order was dismissing the plaint. The High Court went onto hold that in respect of the second and third Orders the learned judge the learned trial Judge acted in violations of the provisions of the Act i.e when granting unconditional leave under section 6(2)(c) and dismissing the plaint on a mere technicality after holding that the defendant obtained overdraft facility and hence set aside the judgement of the District Court.

The learned Judges of the High Court in my view correctly relied on the dicta in the Court of Appeal case of **Perera Vs People's Bank 1994(2) SLR 344** and held in this instant case that granting of unconditional leave to appear and permitting the defendant to file answer was not in accordance with the provision of section 6(1) and 6(2)(c) of the Act. The said Judges after analysing the evidence led also held that in any event the defendant had not disclosed a defence which was prima facie sustainable or triable for a court to grant leave to appear and show cause against the decree nisi issued by court against him.

The learned High Court Judges went on to hold that the District Court by its judgement had frustrated the intention of the Legislature which enacted the Debt Recovery Act by relying on a mere technicality that the overdraft admittedly obtained by the defendant, did not fall within the definition of 'debt' and thus the defendant had got an opportunity of not repaying the 'debt' and the interest thereon legally due and owing to the bank.

The learned Judges of the High Court also adverted to the case of **Kiran Atapattu Vs Pan Asia Bank Ltd [**referred to earlier] wherein it was held whether one calls the sum borrowed an 'overdraft' or a 'loan' if it is capable of being ascertained, then it falls within the meaning of 'debt' and held that the 'overdraft' obtained by the defendant in the instant case amounted to a 'debt'.

The High Court in its judgement referred to three other cases of the Court of Appeal, namely, **People's Bank Vs Lanka Queen International (Pvt) Ltd [1999] 1 SLR 233; Ramanayake Vs Sampath Bank [1993] 1 SLR 145** and **Mercantile Credit Ltd Vs Jayathilake [1993]2 SLR 418** where the provisions of the Debt Recovery (Special Provisions) Act were critically analyzed. The principles laid down in the said cases discussed below, have evolved to form the backbone of debt recovery and trite law and I see no reason to depart from the ratio of the said cases.

In **People's Bank Vs Lanka Queen International (Pvt) Ltd** [supra], the court held that the Debt Recovery (Special Provisions) Act provides for a special procedure for recovery of debts by lending institutions and that according to section 4(1) of the Act, a plaint and an affidavit has to be filed and all that is required to be sworn or affirmed to in the affidavit are words to the effect that 'the sum claimed is justly due to the institution from the defendant'. The Court of Appeal analyzing section 6(2) as amended further stated, that it is mandatory for the defendant to file an application for leave to appear and show cause supported by an affidavit which would deal specifically with the plaintiff's claim and state clearly and concisely what the defence to the claim is and what facts are relied on to support it. Commenting further, the Court of Appeal held that the said section does not permit unconditional leave to defend a claim and the minimum requirement under section 6(2)(c) is for the furnishing of security.

In **Ramanayake Vs Sampath Bank** [supra], the Court of Appeal discussed the ambit of section 6 of the Act and specifically with regard to section 6(2)(c) of the Act the Court held it does not permit a defendant unconditional leave to appear on objections which are technical in nature and if a defendant is granted leave unconditionally to show cause against the decree nisi on these types of technicality and evasive denials then the purpose of the Act will be brought to naught. The Court also held that in order to obtain leave, a plausible defence with a triable issue should be disclosed by the defendant in its affidavit and if the defendant has failed to disclose such a defence and raised only a technical objection then leave to appear can be granted only on terms either under section 6(2)(a) and 6(2)(b) of the Act and not under section 6(2)(c) of the Act.

In **Mercantile Credit Ltd Vs Jayathilake** [supra], the Court of Appeal held that where the defendant fails to satisfy court that there is an issue in a question in dispute which ought to be tried as provided for in section 6(2)(c), the decree nisi should be made absolute.

Thus, I am of the view that the High Court having analysed the legal position pertaining to section 6 (2)(c) of the Act as discussed in the cases referred to above, correctly held that the District Judge was in error in granting unconditional leave to the defendant to appear and file answer. Similarly, the High Court was correct when it held that the technical objections raised by the defendant negates the intention of the Legislature.

It is observed that the dicta of the above refereed cases had been further developed and buttressed with the passage of time.

In **National Development Bank Vs Chrys Tea (Pvt) Ltd [2000] (2) SLR 206**, the legal principles referred to earlier were re-iterated and the Court of Appeal held that the Debt Recovery (Special Provisions) Act was specifically introduced by the Legislature to quicken the process of the recovery of 'debt' by lending institutions based upon a special procedure.

In **Zubair Vs Bank of Ceylon [2002]2 SLR 187** too the Court of Appeal held that in debt recovery matters, it would not be correct for the courts to hold against the intention of the Legislature on technicalities.

Similarly in a more recent case, **Seneviratne Vs Lanka Orix Leasing Co. Ltd [2006] (1) SLR 230** the Court of Appeal analysed the legal provisions pertaining to section 6(2)(c) of the Act and held that when the defendants have failed to raise a prima facie sustainable defence in its affidavit or a plausible defence which ought to be tried by court, the defendants are not entitled to unconditional leave on defences based on mere technical objections and evasive denials which have no strength to stand on their own. The court went onto hold that section 6(2)(c) does not permit unconditional leave to defend the claim and that the minimum requirement is furnishing security determined by court and the court can exercise its discretion in determining the amount of security, if the defendant discloses a sustainable defence.

The Debt Recovery Act as discussed is a Special Provisions Act designed and enacted comparatively recently by the Legislature for a particular purpose, namely to regulate and expedite the procedure relating to debt recovery of lending institutions and in my view a court should strive to achieve the said objects in interpreting the provisions of the Act. It is not right or correct for a court to hold against the intention of the Legislature in determining matters coming under the purview of the Act.

If I may repeat myself, whilst section 4(2) of the Act provides for a court being satisfied of the contents of the affidavit to mandatorily issue a decree nisi, section 6(1) of the Act provides that a defendant will not appear or show cause against the decree nisi unless he obtains leave in the manner provided for in section 6(2)(a), (b) or (c). Undoubtedly, in this appeal the defendant obtained leave unconditionally without furnishing any security and not

in the manner provided under section 6(2)(c) of the Act. Thus in my view, the defendant has obtained unconditional leave in violation of the due process of the law. Hence, he should not have been permitted to show cause against the decree nisi issued by the District Court. The defendant should first of all comply with the due process of the law. Thereafter he can complain against the breach of any provision of the law, mandatory or otherwise.

If I may put it in simpler terms, to show cause against the decree nisi, the defendant came before court with soiled fingers and without adhering to the proper procedure and I am of the view that the defendant is estopped and should not be permitted to challenge the plaint filed at a later stage with regard to a threshold issue. Similarly, the defendant who is before court having violated the due process rule, should not be permitted to raise technical objections pertaining to the provisions of the Act, particularly to section 4(1) which lays down a statutory function to be performed by a judge. The intention of the defendant in pursuing these objections is very clear. It is to defeat the very purpose of this piece of legislation brought into existence for a specific reason. Thus, I hold that the High Court correctly considered the objects of this Act when it set aside the judgement of the District Court which dismissed the plaint.

Further, I am inclined to accept that in the instant case, the Judges of the High Court have correctly analysed the legal provisions pertaining to a 'debt' and correctly held that a mere technicality should not defeat the purpose of the Act. I see no reason to disturb the said finding and the Order of the High Court in making 'absolute' the decree nisi already granted by the District Court.

For completeness, let me advert to the contention of the defendant that upon a plain reading of the provisions of section 4(1) of the Act it is mandatorily to file an 'agreement, instrument or document' with the plaint in the District Court. The submission of the defendant was essentially an 'agreement, instrument or document' pertaining to an overdraft sued upon or relied on by the plaintiff bank should be filed in court and the failure to file same in court would render the plaint prima facie defective on the basis that a mandatory requirement had not been followed and in such an instance where a written agreement is not annexed to a plaint, a District Judge cannot issue a decree nisi on a defendant.

However, in the instant appeal, to the plaint was annexed two cheques and a statement of account of the defendant was annexed to the plaint being the 'agreement, instrument or

document' which the plaintiff bank considered sufficient to prosecute this case. Thus, prima facie the provisions in section 4(1) were fulfilled. Whether the plaintiff bank would succeed in its claim upon the defences raised by a defendant is secondary. The section envisages the court to be satisfied that the said provisions have been fulfilled prior to issuance of a decree nisi. Hence, I cannot accept the contention of the defendant that essentially a "written agreement" should be filed and that the two cheques and the statement of account filed with the plaint (which the plaintiff bank considers to be sufficient to prosecute the case) cannot be construed or does not fall within the ambit of an 'agreement, instrument or document.

If the case of the defendant is that he has cause to show against the decree nisi issued or that the said 'agreement, instrument or document' annexed to the plaint does not disclose a cause of action against him, the defendant is free to do so after obtaining leave to appear from court in the manner provided and specifically following the due process of law stipulated in section 6(2) of the Act i.e. under sub-section (a) by paying to court the full sum mentioned in the decree or under sub-section (b) by furnishing security as to the court may appear reasonable and sufficient to satisfy the sum mentioned in the decree or **under sub-section (c) if the court is satisfied on the contains of the affidavit filed that they disclose a defence which is prima facie sustainable AND ON such terms as to security, framing and recording of issues or otherwise as the court thinks fit.**

The Legislature in no uncertain terms has laid down the procedure to be followed for a defendant to show cause against a decree nisi and I see no reason to deviate from the said provisions or to disregard such provisions. The Act does not permit 'unconditional leave' to appear. Leave to appear is always subject to conditions. The least being furnishing security as the court thinks fit. As discussed earlier the intention of the Legislature has to be fulfilled and the purpose of the Act should not be brought to naught by a court relying on technical objections to defeat the very purpose of the Act.

Vide-section 6(2) of the Act the defendant could adhere to one of the three avenues open to him and challenge the decree nisi issued by court stating that an 'agreement' was not annexed and/or the documents annexed does not come within the definition of 'debt' and/or any other defence he wishes to take up.

The challenge to the decree nisi by a defendant referred to above should be proved at a trial. Section 7 of the Act provides for the manner and mode of holding a trial. The relevant

procedure for the conduct of the trial is succinctly laid down in sections 384 to 387,390 and 391 of the Civil Procedure Code. According to the said provisions, summary procedure should be adhered to and the right to begin and the burden of proof is on the defendant to establish his defence, whether it pertains to a written agreement not annexed to the plaint or an overdraft does not come within the definition of 'debt' or any other defence, the defendant relies upon.

In the instant case, contrary to the provisions of the Act, the District Court granted the defendant unconditional leave to appear i.e leave to appear was granted without any conditions, not even following the minimum criterion rule laid down by judicial authority of furnishing security at the discretion of court. Furthermore, the court conducted a trial where the right to begin and the burden of proof was reversed. The plaintiff bank had to establish its case and the defendant was given a mere right to reply in violation of the specific provisions of the Act.

Thus in my view, the course of action followed by the District Court in granting unconditional leave and holding a trial under regular procedure was contrary to the due process and the provisions of the Act and especially sections 6(1), 6(2) and 7 of the Act, and the High Court quite rightly by its judgement set aside the said District court judgement and made absolute the decree nisi issued by the District Court. I see no reason to disturb the judgement of the High Court upon the said judgement too.

I would also wish to consider this matter from another perspective. Whether a defendant having obtained leave in accordance with the provision of the Act, could thereafter raise a preliminary objection pertaining to the legality of the plaint filed and thereby challenge the decree nisi issued by a learned District Judge. In my view a defendant cannot resort to such a course of action. Certainly, a defendant could show cause in accordance with the provisions of the Act. If the defendant succeeds in showing cause, vide section 11 of the Act the decree nisi will be discharged and the case dismissed. The defendant may be awarded compensation if it appears to the court that the decree nisi had been obtained by a plaintiff by willful suppression or non-disclosure of any relevant fact. Thus, the Debt Recovery Act in very clear terms provides relief for a defendant who has been unnecessarily brought before court by an over zealous plaintiff. Thus, if the defendant in the instant case succeeded in showing cause he could have got the decree nisi discharged and the case dismissed and may

have even be awarded compensation. Upon the said perspective too, I cannot see any reason to disturb the impugned judgement of the High Court.

In the instant appeal, the defendant when seeking recourse under section 6(2)(c) of the Act and did not move to dismiss the plaint. Having obtained leave to appear unconditionally in violation of the provisions of the Act, the defendant thereafter filed an answer together with a cross-claim for damages in a sum of Rs. 500,000/= against the plaintiff bank, successfully objected to a replication been filed by the plaintiff bank and proceeded to trial on the regular procedure also in violation of the provisions of the Act. The District Court as stated earlier dismissed the plaint and the cross claims of the defendant.

The learned Judges of the High Court in their judgement emphasized that the defendant having failed to move for dismissal of the plaint at the appropriate time thereafter acquiesced and participated at the trial and thus, the defendant cannot resort to challenge the course of action followed by the District Court in issuing the decree nisi on a mere technical ground.

If at the stage of moving court to obtain leave to appear, the defendant prayed for dismissal of the plaint in limine, based upon preliminary objections this case may have taken a different turn. Even having failed to move for dismissal of the plaint in the first instance, if the defendant went through a summary trial as provided under section 7 of the Act and satisfied the burden of proof that was on him, the defendant may have succeeded in obtaining an order in his favour. In such a background and having obtained leave unconditionally, I am not inclined to accept the submission of the defendant that in appeal having obtained leave to appear unconditionally the defendant could raise a preliminary objection pertaining to the mandatory provisions of section 4(1) of the Act, after acting in complete disregard of the due process of the law. Hence upon the said perspective too, I see no reason to interfere with the impugned judgement.

Therefore, in view of the reason more fully dealt above and annalysed in detail, the 1st question of law raised before this Court is answered in the negative.

The 2nd and 3rd questions of law raised before this Court are upon the factual basis that the High Court has failed to consider the defence relied on by the defendant, viz that the defendant was given overdraft facilities by the plaintiff bank on the understanding that the

defendant would be given a pledge loan and that the monies due on the overdraft would be set off against the pledge loan and that the pledge loan was not granted to the defendant by the plaintiff bank on time, and thus in such a background a cause of action had not accrued to the plaintiff bank to institute action against the defendant.

Upon reading of the judgement of the High Court it is manifestly clear, that the High Court correctly considered the defence pertaining to the pledge loan viz-a-viz the overdraft and came to the finding that the said defence was not a tenable, prima facie sustainable defence which a court could have considered in granting leave to appear under sub-section 6(2)(c) of the Act. I see no reason to interfere with the said finding. Further, the wording of the said two questions of law also give credence to the fact that the defendant in fact obtained an overdraft from the plaintiff bank which is the pith and substance and the root cause of action upon which this instant case was filed.

In the said circumstances, the 2nd and 3rd questions of law raised before this Court are also answered in the negative.

In deciding this appeal, I have been mindful of the intention of the Legislature and the judicial pronouncements of the Appellate Courts. The said pronouncements bear ample testimony to the fact that our courts have analyzed and applied the provisions of the Act and have strived to achieve the fundamental objects of the Act, especially the expeditious recovery of debts, without interfering with the procedure and stultifying or nullifying the purpose of the Act.

In the instant appeal, the plaintiff bank obtained decree nisi from the District Court in February 1998. The High Court made the decree nisi absolute in May 2012, 14 years after decree nisi was obtained. Thus, the procedure adopted by the District Court has stultified the objectives of the Debt Recovery (Special Provisions) Act and the intention of the drafters. In the process the defendant has been enriched and had reaped the benefit of the sum overdrawn for almost 25 years. The District Court granted unconditional leave for no apparent reason violating the provisions of the Act and the due process of the law. There was no plausible defence, nor a real or triable question for the District Court to grant leave to appear, leave alone unconditional leave. The technical objections raised by the defendant with regard to an ‘overdraft’ not falling within the definition of a ‘debt’ as well as the plaint not been in conformity with the mandatory provisions of section 4(1) of the Act is untenable.

The High Court correctly analyzed and considered the relevant judicial authorities and the law and set aside the judgement of the learned District Judge and directed that the decree nisi issued be made absolute.

For the forgoing, I see no reason to interfere with the said judgement of the High Court. I hold that the High Court correctly analyzed the legal provisions that an 'overdraft' comes within the term 'debt' as defined in section 30 the interpretation section of the Act and that the plaint filed by the plaintiff bank in the District Court of Tissamaharama is in conformity with the provisions of the Debt Recovery (Special Provisions) Act as amended.

For the reasons adumbrated, I answer all three question of law raised before this Court in the negative and dismiss the appeal.

I uphold the judgement delivered by the Civil Appellate High Court of the Southern Province holden in Tangalle dated 17-05-2012 setting aside the judgement of the District Court dated 08-08-2007 delivered on 17-09-2007 and also making absolute the decree nisi dated 24-02-1998 issued by the District Court of Tissamaharama.

The appeal of the Defendant-Respondent-Appellant is dismissed with costs fixed at Rs. 50,000.00

The appeal is dismissed.

Judge of the Supreme Court

Buwaneka Aluwihare, PC. J.

I agree

Judge of the Supreme Court

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

In the matter of an application under Articles 127 and 128 of the Constitution read with section 5C of the High Court of the Provinces (Special Provisions Act No. 19 of 1990 as amended by Act No. 54 of 2006, for Leave to Appeal against the judgment dated 17/05/2012 delivered by the High Court (Civil Appeal) of the Southern Province holden in Tangalle in Case No. SP/HCCA/TA/12/2007F

SC Appeal No. 04/2015

SC/HCCA/LA No. 239/2012

SP/HCCA/TA/12/2007(F)

SP/HCCA/MA/49/2007(F)

DC Tissamaharama DR/01/97

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

Plaintiff

-Vs-

Mahavidanage Simpson Kularatne
No. 662, Tangalle Road,
Meddewatta, Matara.

Defendant

AND

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

Plaintiff – Appellant

-Vs-

Mahavidanage Simpson Kularatne

No. 662, Tangalle Road,
Meddewatta, Matara.

Defendant – Respondent

AND NOW BETWEEN

Mahavidanage Simpson Kularatne
No. 662, Tangalle Road,
Meddewatta, Matara.

(Presently at)

No. 6B 1-1
Colonel Sunil Senanayake Mawatha,
Pitakotte

Defendant – Respondent – Appellant

-Vs-

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

Plaintiff – Appellant – Respondent

Before: Buwaneka Aluwihare PC, J
Priyantha Jayawardena PC, J
Murdu N. B. Fernando PC, J

Counsel: W. Dayaratne, PC with D. N. Dayaratne for the defendant – respondent – appellant
Rasika Dissanayake for the plaintiff – appellant – respondent

Argued on: 02nd April, 2018

Decided on: 15th September, 2020

Priyantha Jayawardena PC, J

I have had the advantage of reading the draft judgment of my sister judge M.N.B. Fernando, PC, J. and I regret that I am unable to agree with her that the instant appeal should be dismissed.

Facts of the case

This is an appeal filed by the defendant – respondent – appellant [hereinafter referred to as the "appellant"] to have the judgment of the Civil Appellate High Court of the Southern Province holden in Tangalle [hereinafter referred to as the Civil Appellate High Court] held in favour of the plaintiff – appellant – respondent [hereinafter referred to as the "respondent bank"] set aside on the basis, *inter alia,* that the respondent bank has failed to comply with section 4(1) of the Debt Recovery (Special Provisions) Act No. 2 of 1990 as amended by Act No. 9 of 1994 [hereinafter referred to as the "Debt Recovery Act"] and that the sum set out in the plaint did not come within the definition of "debt" in section 30 of the said Act.

The respondent bank had instituted the action in the District Court of Tissamaharama (hereinafter referred to as the "District Court") by filing a plaint and an affidavit of the Manager of the Tissamaharama branch of the respondent bank under the Debt Recovery Act.

Further, the following documents had been filed in the District Court with the plaint at the time of instituting the action:

(i) photocopy of cheque (bearing no. 078296) of Rs. 207,000/-
(ii) photocopy of cheque (bearing no. 078299) of Rs. 23,450/-
(iii) statement of account of the Current Account bearing No. 2404
(iv) copy of the letter of demand dated 30th April, 1997, and
(v) registered postal article receipt

In the said plaint, the respondent bank had prayed for a decree *nisi* in a sum of Rs.2,275,571.30/-, together with 30% interest per annum on the principal sum of Rs. 1,426,482.20/- and 2% turnover tax and 4.5% defence levy on the interest as at 15th August, 1997.

The District Court had entered a decree *nisi* as prayed for in the plaint by the respondent bank, and had served the said decree *nisi* on the appellant.

Thereafter, the appellant had filed an application for leave to appear and show cause together with an affidavit and sought leave of court to appear in the case unconditionally and show cause.

In the said application, the appellant *inter alia* had stated that the action could not be instituted and maintained in terms of the Debt Recovery Act due to the following reasons:

a) the plaint was contrary to section 4 of the said Act as the instrument, agreement or document on which the action was instituted was not filed in court along with the plaint, and
b) the sum set out in the plaint did not fall within the definition of 'debt' as set out in section 30 of the said Act.

Further, the appellant had contended that he was entitled to obtain unconditional leave to appear and show cause in terms of section 6(2)(b) of the Debt Recovery Act.

Having considered the said application for leave to appear and show cause, the learned District Judge had made an order granting the appellant leave to appear unconditionally and show cause against the decree *nisi* issued by the court.

Thereafter, the respondent bank had sought to amend the plaint by adding a new paragraph and filing two additional documents with the amended plaint. The said documents were two letters sent by the appellant to the respondent bank.

The said new averment had stated, *inter alia,* that:

(a) on 06th May, 1994 the appellant forwarded an application to obtain a pledge loan for a sum of Rs. 1, 200,000/- for the purpose of purchasing paddy,
(b) the respondent bank agreed to grant the said loan and therefore, the appellant signed a bond for the value of Rs. 1, 200,000/- in favour of the respondent bank,
(c) the appellant requested for time to obtain the insurance policy required to obtain the said loan,
(d) during the period until the said pledge loan was granted, the appellant overdrew the said Current Account No. 2404 to purchase paddy,
(e) the said overdraft monies were released to the appellant on the understanding that the said monies would be recovered from the pledge loan when it was granted,
(f) as the appellant failed to produce insurance as security, **the respondent bank refused to grant the said pledge loan to the appellant**,

(g) the appellant requested the respondent bank to calculate the interest on the said overdraft monies at the rate of the pledge loan interest, and

(h) as it refused to accede to the said requirement, the appellant defaulted the payment of the said monies.

However, the appellant had objected to the said proposed amendments to the plaint on the basis that it sought to introduce a new cause of action. By order dated 3rd May, 2001, the learned District Judge had upheld the said objection and rejected the amended plaint.

The journal entry No.29 dated 6th September, 2001 in the appeal brief states that the parties agreed to allow the defendant to file the answer and conduct proceedings under the regular procedure stipulated by the Civil Procedure Code, Ordinance No.02 of 1889, as amended [hereinafter referred to as the "Civil Procedure Code"].

Thereafter, the appellant had filed his answer praying for the dismissal of the plaint and a cross claim of Rs. 500,000/- as damages from the respondent bank for the losses he suffered due to the failure of the respondent bank to release the pledge loan on time.

Subsequently, the respondent bank had sought to file a replication and the District Court had allowed the filing of the said replication subject to a pre-paid cost of Rs.3,500/-. Upon the respondent-bank's failure to pay the said pre-payment within the stipulated time, the District Court had made an order refusing to accept the replication of the respondent bank.

During the course of the trial, the respondent bank had suggested that the said two cheques and a document produced by the appellant marked as 'V1' which was an agreement to grant a Pledge Loan to the appellant constituted the written agreement of the impugned overdraft facility. However, as stated above, the said Pledge Loan was not granted by the respondent bank.

Further, after the conclusion of the trial, in its written submissions filed in the District Court, the respondent bank had submitted that the 'mandate' that the appellant had signed at the time of opening the said current account constituted the written agreement upon which the overdraft facility had been provided to the appellant.

The District Court, delivering the judgment, had held that the action which was filed under the procedure set out in the Debt Recovery Act cannot be converted to an action under the regular procedure, as the respondent bank had invoked the jurisdiction of the court under the Debt Recovery Act.

The learned judge of the District Court had further held that the respondent bank failed to prove that an overdraft facility was granted based on a written request or a written agreement. Thus, the sum claimed by the respondent bank in the plaint does not qualify as a "debt" defined in section 30 the Debt Recovery Act.

Moreover, the District Court had held that the respondent bank failed to comply with section 4(1) of the said Act as it failed to file with the plaint the instrument, agreement or document sued upon or relied on by the respondent bank.

Therefore, the District Court had dismissed the action filed by the respondent bank. Further, the appellant's cross claim had also been rejected by the court.

Being aggrieved by the said judgment of the District Court, the respondent bank had preferred an appeal to the Civil Appellate High Court on the ground, *inter alia*, that the said judgment of the District Court was wrong and contrary to law.

Having heard the parties, the Civil Appellate High Court had allowed the appeal of the respondent bank setting aside the judgment of the District Court and had directed the District Court to make the decree *nisi* absolute.

The Civil Appellate High Court had held that the overdrawn monies and its interest can be calculated based on the two cheques produced along with the plaint and that the 'mandate' between the respondent bank and the appellant at the time of opening the account can be considered a written agreement between the parties.

Therefore, the learned Judge of the Civil Appellate High Court had held that the overdrawn monies fell within the definition of 'debt' under section 30 of the said Act.

Further, the Civil Appellate High Court had held that the granting of unconditional leave to appear and defend the claim was contrary to the provisions of the Debt Recovery Act.

Being aggrieved by the said judgment of the Civil Appellate High Court, the appellant filed an application for leave to appeal and after hearing the parties, leave to appeal was granted by this court on the following substantial questions of law:

"a) Have their Lordships of the Civil Appellate High Court failed to address their minds to the fundamental issue of whether the respondent bank was in conformity with the mandatory provisions of section 4(1) of the Debt Recovery (Special

Provisions) Act No. 2 of 1990 as amended by Act No. 9 of 1994, which issue was raised as a preliminary objection by the appellant?

b) Have their Lordships of the Civil Appellate High Court also failed to consider that the appellant had been given overdraft facilities on the undertaking given by the respondent bank that he would be given a pledge loan and the monies due on the overdraft facility would be set off from the pledge loan?

c) Have their Lordships of the Civil Appellate High Court failed to consider that the said pledge loan was not given due to the fault of the respondent bank and therefore, a cause of action has not accrued to the respondent bank to institute this action against the appellant?"

Submissions of the appellant

The appellant relied on section 4(1) of the Debt Recovery Act and submitted that the Civil Appellate High Court had not considered whether the learned District Judge was correct to dismiss the plaint based on the objection of non-compliance with the requirements in section 4(1) of the said Act.

Further, the appellant submitted that the documents that were filed with the plaint did not disclose a written agreement or promise relating to "debt" as defined under section 30 of the said Act.

It was the contention of the appellant that the respondent bank took several different positions in respect of the objection raised by the appellant stating that the sum of money claimed by the respondent bank does not fall within the definition of "debt" as set out in section 30 of the said Act.

The appellant submitted that the respondent bank took up the following different positions at the trial:

(a) The preliminary objections raised by the appellant were premature,
(b) The respondent bank attempted to introduce a new cause of action by filing an Amended Plaint and annexing two letters written by the appellant in respect of the proposed pledge loan agreement between the parties which was not materialized,
(c) Overdraft facilities were not granted based on written agreements,

(d) The document, produced by the appellant marked as 'V1', was the agreement upon which the action was instituted as required under section 4(1) of the said Act.

(e) 'Mandate' signed by the parties at the time of opening the bank account is the relevant agreement as required under section 4(1) of the said Act.

The appellant submitted that the Civil Appellate High Court had failed to consider that even if the respondent bank treated such mandate as the relevant written agreement, it was not filed with its plaint as required by section 4(1) of the said Act.

It was further submitted that the finding of the Civil Appellate High Court that an overdraft comes within the definition of 'debt' according to section 30 is *per incuriam* in view of the Determination made in respect of the Debt Recovery (Special Provisions) (Amendment) Bill [SC Special Determination No. 23/2003 dated 26.08.2003] which stated:

> "Section 2(1) of the original Act empowers a lending institution to have recourse to the special procedure to recover a debt due to such institution. The term 'debt' is defined in section 30 as amended by Act No. 9 of 1994. In terms of this definition a debt would include any sum of money which is due to a lending institution arising from a transaction had in the course of its business. It is significant that the definition has a clear reservation that a debt "does not include a sum of money owed under a promise or agreement which is not in writing".
>
> [Emphasis Added]

Citing the above determination, the appellant submitted that overdrawing money from a current account without a promise or agreement in writing does not fall within the definition of 'debt' set out in section 30 of the said Act.

In the circumstances, the appellant moved this court to set aside the impugned judgment of the Civil Appellate High Court dated 17th May, 2012 and affirm the judgment of the District Court dated 06th August, 2007.

Submissions of the respondent bank

The respondent bank submitted that the appellant maintained a current account bearing No. 2404 at the Tissamaharama branch of the respondent bank. It was submitted that the appellant had overdrawn monies from the said current account on the understanding that the same will be settled when a pledge loan, for which he had applied, was granted by the respondent bank.

However, the said pledge loan could not be finalised as the appellant had failed to furnish the insurance policy required to obtain the said pledge loan.

The respondent bank submitted that *"[t]hough there was no written agreement between the parties for an overdraft facility as required in section 30 of the Debt Recovery Act No. 02 of 1990, the debtor should not be allowed to escape from liability of repayment of the same*" based on technical objections as the appellant had benefitted from the overdrawn monies.

The respondent bank further submitted that the two cheques filed with the plaint showed that the appellant had withdrawn money from the said current account despite having insufficient funds. Thus, the respondent bank contended that the presenting of the said cheques whilst having insufficient funds in the current account necessarily became an agreement between the parties.

Moreover, the Counsel for the respondent bank submitted that the documents produced at the trial by the appellant, marked as 'V1'to 'V4', constitute the written agreement referred to in section 4(1) of the Debt Recovery Act.

The respondent bank cited the cases of *Dharmarathne v. Peoples Bank* (2003) 3 SLR 307 and *Kiran Atapattu v. Pan Asia Bank Corporation* (2005) 2 SLR 276, to support its contention that the overdraft facility obtained by the appellant falls within the meaning of 'debt' as stipulated in section 30 of the said Act. Further, the respondent bank submitted that the Civil Appellate High Court had correctly held in favour of the respondent bank.

Moreover, the respondent bank submitted that the appellant in his application to the District Court for leave to appear and show cause had admitted that he has overdrawn his current account while failing to establish a prima facie defence against the claim of the respondent bank. Thus, it was submitted that the Order of the District Court granting unconditional leave to the appellant was erroneous and that the decree *nisi* should have been made absolute.

The respondent bank further submitted that when the parties have agreed to dispose the matter under the regular procedure, the learned District Judge cannot decide the case under the Debt Recovery Act.

Issues to be considered in the instant appeal

The two main issues that need to be considered in the instant appeal in respect of the first question of law stated above are as follows:

(a) whether it is mandatory or directory to file the instrument, agreement or document sued upon or relied on by the institution along with the plaint under section 4(1) of the Debt Recovery Act, and

(b) if mandatory, whether the respondent bank failed to comply with the said requirement to file the instrument, agreement or document sued upon or relied on by the institution along with the plaint.

In order to consider the said two issues, it is useful to examine the legislative history, the scope and applicability of the Debt Recovery Act.

Legislative History of the Debt Recovery Act

The substantive laws relating to banking are governed by, *inter alia,* the Banking Act No.30 of 1988 (as amended), Monetary Laws Act No.58 of 1949 (as amended), Bank of Ceylon Ordinance No. 53 of 1938 (as amended), People's Bank Act No. 29 of 1961 (as amended), and State Mortgage and Investment Bank Law No. 13 of 1975 (as amended). The said Acts stipulate the substantive laws in respect of the rights, duties and powers of parties who are subject to the law of banking.

Prior to 1990, actions for recovery of debts by lending institutions could be instituted under the regular procedure or the summary procedure provided for in the Civil Procedure Code.

However, taking into consideration the delays encountered by lending institutions in recovering debts and the impact of such delays, legislation such as Debt Recovery (Special Provisions) Act No.02 of 1990, Mortgage (Amendment) Act No. 03 of 1990, Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990 etc. were enacted to expedite the recovery procedure.

Scope and Application of the Debt Recovery Act

The preamble to the Debt Recovery Act states:

> "An act to provide for the regulation of <u>the procedure relating to debt recovery</u> by lending institutions and for matters connected therewith or incidental thereto."
>
> [Emphasis Added]

Further, the said Act states that, *inter alia,* sections 384, 385, 386, 387, 390 and 391 in Chapter XXIV stipulating the summary procedure of the Civil Procedure Code are applicable to actions filed under the Debt Recovery Act. Moreover, by section 16 of the said Act, section 758(7) of

the Civil Procedure Code which is applicable to procedure in respect of applications for leave to appeal was amended. Further, section 19 of the said Act contains a *casus omissus* clause whereby the legislator has made provision to apply the procedure laid down in the Civil Procedure Code if the Debt Recovery Act has not provided for any matter or procedure.

A careful consideration of the Debt Recovery Act shows that it does not contain substantive law. In fact, it only stipulates a special procedure to expedite the recovery of debts due to lending institutions.

Procedural law v. Substantive law

Procedural law enables a dispute to be brought to court and it prescribes the procedure that is to be followed in litigation. Further, it contains not only the procedure that the court should follow but also the procedure that should be followed by the parties including what requirements must be satisfied by a party to commence legal proceedings. Thus, the underlying purpose of any procedural law is to ensure the fairness of the legal process for all parties involved in the case.

Substantive law governs the facts and the law applicable to a case and it does not provide a legal procedure to adjudicate on the dispute between the parties. The procedural law is ancillary to the substantive law. However, procedural law and substantive law work together in the administration of justice.

Thus, the requirements stipulated under procedural law should not be disregarded as less important as it ensures the validity of the legal process as a whole. However, it is important to note that whilst certain provisions in procedural law are mandatory, the others are discretionary.

Hence, it is necessary to consider whether the procedure stipulated under section 4(1) of the Debt Recovery Act is mandatory or directory.

Requirements stipulated in section 4(1) of the Debt Recovery Act

Section 4(1) of the Debt Recovery Act states as follows;

> *"The institution suing shall on **presenting the plaint**, file with the plaint an affidavit to the effect that the sum claimed is lawfully due to the institution from the defendant, a draft decree nisi, the requisite stamps for the decree nisi and for service thereof **and shall in addition**, file in court, such number of copies of the plaint, affidavit,*

instrument, agreement or document sued upon, or relied on by the institution*, as is equal to the number of defendants in the action."* [Emphasis Added]

Hence, according to the said section, any institution filing action for the recovery of a debt under the said Act is required to file a plaint along with an affidavit stating that the sum claimed in the plaint is lawfully due to the institution from the defendant.

Further, it states that the institution should file a sufficient "number of copies of the plaint, affidavit, instrument, agreement or document sued upon, or relied on by the institution" at the time of presenting the plaint to be served on the defendants.

Is compliance with section 4(1) of the Debt Recovery Act mandatory or directory?

In order to consider the above, the intention of the legislator has to be ascertained by examining not only the language used in the said section but also the nature and object of having such a provision in the Act, the consequences of non-compliance and similar provisions used in other legislation etc.

The above view was expressed in '*N.S. Bindra's Interpretation of Statutes'*, 9th ed. at page 913 which states:

"In determination of the question, whether a provision of law is directory or mandatory, the prime object must be to ascertain the legislative intent from a consideration of the entire statute, its nature, its object and the consequences that would result from construing it in one way or the other, or in connection with other related statutes, and the determination does not depend on the form of the statute. It appears to be well settled that in order to judge the nature and scope of a particular statute or rule, i.e., whether it is mandatory or directory, the purpose for which the provision has been made, its nature, the intention of the legislature in making the provision, the serious general inconvenience or injustice to persons resulting from whether the provision is read one way or the other, have all to be taken into account in arriving at the conclusion whether a particular provision is mandatory or directory". [Emphasis Added]

Accordingly, the following are considered to determine whether section 4(1) of the Debt Recovery Act is directory or mandatory.

(a) The duty cast on the District Judge under section 4(2) of the Debt Recovery Act

As stated above, section 4(1) of the said Act states that the instrument, agreement or document sued upon or relied on by the lending institution has to be filed along with the plaint.

Section 4(2) of the Debt Recovery Act states:

> "(2) *If any instrument, agreement or document is produced to court and the same appears to the court to be* ***properly stamped*** *(where such instrument, agreement or document is required by law to be stamped) and* ***not to be open to suspicion*** *by reason of any alteration or erasure or other matter on the face of it,* ***and*** *not to be barred by* ***prescription****,* ***the court being satisfied*** *of the contents contained in the affidavit referred to in subsection (4),* ***shall enter a decree nisi*** *in the form set out in the First Schedule to this Act in a sum not exceeding the sum prayed for in the plaint* ***together with interest*** *up to the date of payment and such costs as the court may allow at the time at making the decree nisi together with such other relief prayed for by the institution as to the court may seem meet and the decree nisi shall be served on the defendant in the manner hereinafter specified*" [Emphasis Added]

Accordingly, the said section casts a duty on the court to be "satisfied" that the instrument, agreement or document produced in terms of section 4(1) of the said Act is properly stamped, not "open to suspicion by reason of any alteration or erasure or other matter on the face of it" and the action is not barred by "prescription" before entering the decree *nisi*.

The words "court being satisfied", in section 4(2) of the said Act, require an independent judicial mind to examine not only the facts stated in the affidavit but also the instrument, agreement or document presented by the lending institution with the plaint in order to determine whether the aforementioned requirements that are stipulated in section 4(1) have been complied with and a *prima facie* case has been established by the lending institution against the defendant, before entering a decree *nisi* in terms of the said Act.

In addition to the above, in terms of section 4(2) of the Debt Recovery Act, the decree *nisi* entered should state "*a sum not exceeding the sum prayed for in the plaint together with interest up to the date of payment and such costs as the court may allow".*

However, the Debt Recovery Act does not stipulate the method by which a court could ascertain the sum claimed as interest. Thus, in terms of section 19 of the said Act, section 192 of the

Civil Procedure should be applied to calculate the interest prayed for by the lending institution, if any.

Section 192(1) of the Civil Procedure Code states:

> *"(1) When the action is for a sum of money due to the plaintiff, the court may in the decree order interest according to the rate agreed on between the parties by the instrument sued on,* ***or*** *in the absence of any such agreement at the legal rate, to be paid, on the principal sum adjudged from the date of action to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the action, with further interest at such rate on the aggregate sum so adjudged from the date of the decree to the date of payment, or to such earlier date as the court thinks fit*". [Emphasis Added]

Thus, in terms of the said section 192(1), "the court may in the decree order interest according to the rate agreed on between the parties by the instrument sued on, or in the absence of any such agreement at the legal rate, to be paid, on the principle sum …."

In respect of the method of calculating interest, Justice Weeramantry in '*Law of Contracts'* Vol. II at page 933, states:

> "The proper method of calculating interest is to work it out up to the date of commencement of action and from thence to the date of decree at the rate agreed. From the date of the decree, the interest may be awarded on the aggregate amount at the legal rate". [Emphasis Added]

When section 192(1) is read with the definition of "debt" in section 30 of the Debt Recovery Act, unless the interest rate is agreed on by the parties under a promise or agreement which is in writing, a court cannot determine the interest that is due to the lending institution by the debtor under the Debt Recovery Act.

Hence, in order to calculate the agreed interest that is required to be included in the decree *nisi*, the lending institution should file the written instrument, agreement or document along with the plaint.

Thus, I am of the view that section 4(2) of the Debt Recovery Act has imposed a duty on the court to be "satisfied" that not only the principal sum but also the interest claimed thereon are

lawfully due to the lending institution from the defendant before entering the decree *nisi* based on the documents filed with the plaint in terms of section 4(1) of the Debt Recovery Act.

(b) Rights of a Defendant under the Debt Recovery Act

If the court enters a decree *nisi* in terms of section 4(2) of the said Act, it requires the decree *nisi* to be served on the defendant along with the documents that are filed in terms of section 4(1) of the Act.

In view of the above it is necessary to consider, whether non-compliance with the said requirement of serving the defendant the instrument, agreement or document sued upon or relied on by the institution along with the decree *nisi* deprives the defendant of his/her rights or causes any injustice and/or prejudice to the defendant in presenting his/her defence.

'*N.S. Bindra's Interpretation of Statutes'*, 9th ed. at page 909 states:

> *"One of the most important tests that must always be employed in order to determine whether a provision is mandatory or directory in character is to consider whether the non-compliance of a particular provision causes inconvenience or injustice, and if it does, then the court would say that the provisions must be complied with and that it is obligatory in its character. Mandatory provisions of a statute cannot be ignored merely on the ground of hardship or as merely procedural".* [Emphasis Added]

Once the decree *nisi* is served on the defendant, the defendant is entitled to make an application under section 6(2) of the said Act for leave to appear and show cause as to why the decree *nisi* should not be made absolute. Such an application requires the defendant to state "clearly and concisely what the defence to the claim is and what facts are relied upon to support it".

Principles of procedural law and natural justice require the parties to be given an opportunity to present their case properly and sufficient time to refute the claims of the opposing party. Thus, applying the maxim of *lex non cogit ad impossibilia* (law does not require to do the impossible), if the instrument, agreement or document sued upon or relied on by the institution is not filed with the plaint and served on the defendant along with the decree *nisi*, it would not be possible for him/her to present his/her defence in accordance with the requirements stipulated in section 6(2) of said Act.

(c) Similar legislations

Section 705(1) of the Civil Procedure Code applicable to summary procedure on liquid claims which is similar to the provisions set out in the Debt Recovery Act states as follows:

> *"The plaintiff who sues and obtains such summons as aforesaid must on presenting the plaint, produce to the Court, the instrument on which he sues, and he must make affidavit that the sum which he claims is justly due to him from the defendant thereon."* [Emphasis Added]

In view of the above, it is evident that the procedural law has made it imperative to produce the instrument, agreement or document upon which a plaintiff sues to be filed along with the plaint when instituting action.

(d) Literal interpretation of section 4(1) and other relevant provisions in the Debt Recovery Act

Section 4(1) of the Debt Recovery Act states that the institution "*shall in addition, file in court, such number of copies of the plaint, affidavit, instrument, agreement or document sued upon, or relied on by the institution, as is equal to the number of defendants in the action."*

Thus, the word "shall" has been used by the legislator when specifying the documents that are required to be filed with the plaint when instituting action under the said Act.

The general meaning of the word "shall" is imperative in nature unless the context in which the word "shall" has been used suggests otherwise or any provision stipulated in the Act is contrary to the said meaning.

Thus, it is necessary to consider the context in which the word "shall" is used in the said section by examining other provisions in the said Act to determine the intention of the legislator.

In terms of section 2(1) of the Debt Recovery Act, a lending institution can recover a "debt" due to it from a debtor by instituting an action in terms of the procedure laid down by the said Act. The word "debt" has been defined in section 30 of the said Act as follows:

> *""debt" means a sum of money which is ascertained* ***or*** *capable of being ascertained at the time of the institution of the action, and which is in default, whether the same be secured or not, or owed by any person or persons, jointly or severally or as principal borrower or guarantor or in any other capacity, and alleged by a lending*

> *institution to have arisen from a transaction in the course of banking, lending, financial or other allied business activity of that institution, but* ***does not include*** *a sum of money owed under a promise or agreement* ***which is not in writing****."*
>
> [Emphasis Added]

Thus, the Debt Recovery Act enables a lending institution to recover a "*sum of money which* ***is ascertained or capable of being ascertained at the time of the institution of the action***". Further, it excludes "*a sum of money owed under a promise or agreement* ***which is not in writing***.

In view of the above, it is evident that in order to institute an action under the Debt Recovery Act, the "debt" owed to the lending institution must be ascertainable or capable of being ascertained, at the time of the institution of the action, from a promise or agreement which is in writing.

Thus, in order to ascertain the "sum of money" due to a lending institution from the defendant, prior to entering the decree *nisi* under section 4(2) of the said Act, the said institution is required to produce the said written document in court. In this regard, it is pertinent to note that the words "at the time of the institution of the action" used in the said section means at the time the plaint is filed in court.

When interpreting the provisions of the Debt Recovery Act, it is useful to consider the Determinations made by this court pertaining to the Bills of the said Act.

Clause 30 of the ***Debt Recovery (Special Provisions) Bill of 1990*** defined a debt as follows:

> *"debt" means a sum of money which is ascertained or capable of being ascertained at the time of the institution of the action, whether the same be accrued or not, or owed jointly or severally, but does not include a promise or agreement which is not in writing"*

In *S.C. Special Determination No. 1/90* [*Debt Recovery (Special Provisions) Bill of 1990*], consequent to an objection raised by the Counsel for the petitioners, the learned Additional Solicitor-General had agreed to amend the said Clause 30 to restrict its application to "debts arising from transactions in the ordinary course of the banking, lending, financial or allied business activities of lending institutions".

Accordingly, this Court has determined, *inter alia,* that the definition of "debt" in the said Bill in Clause 30 is inconsistent with Article 12 of the Constitution as it contained a wide scope and that the said definition "upon being amended in the manner stated by the Additional Solicitor-General would cease to be inconsistent therewith".

Thereafter, the definition of "debt" in Clause 30 of the Bill was amended and section 30 of the Debt Recovery Act was enacted restricting the scope of "debt" in accordance with the said Determination of this court.

Subsequently, in 2003, an amendment to the Debt Recovery Act was proposed. Clause 8 of the said ***Debt Recovery (Special Provisions) (Amendment) Bill of 2003*** intended to repeal the current definition of "debt" in section 30 of the Debt Recovery Act and proposed to substitute a definition which excludes the limitation given to the meaning of debt by repealing the words: "include a sum of money owed under a promise or agreement **which is not in writing**".

In *SC(SD) No. 23/2003* [*Debt Recovery (Special Provisions) (Amendment) Bill of 2003*], this court has determined that the suggested amendment to the definition of "debt" by the said Bill was inconsistent with Article 12(1) of the Constitution and stated as follows:

> *"Section 2(1) of the original Act empowers a lending institution to have recourse to the special procedure to recover a debt due to such institution. The term 'debt' is defined in section 30 as amended by Act No. 9 of 1994. In terms of this definition a debt would include any sum of money which is due to a lending institution arising from a transaction had in the course of its business. It is significant that the definition has a clear reservation that a debt "does not include a sum of money owed under a promise or agreement which is not in writing".*
>
> *In view of the reservation, the special procedure could be resorted to only in instances where there is a written promise or agreement on the basis of which the sum due is claimed. This is broadly similar to the provision in the summary procedure on liquid claims. The amendment in clause 8 of the Bill, repeals the definition of the term "debt" in section 30. The substituted definition excludes the words referred to above which limits its applicability to money owed under a promise or agreement which is in writing. The resulting position is that* ***the court would not have any written evidence of the commitment on the part of the debtor when it issues decree nisi in the first instance.***

> *We are inclined to agree with the submission of the Petitioners that the (amendment) referred to above would extend the application of the special procedure which is more stringent from the point of the debtor to a wider category of persons and to any transaction had with the lending institution, even in the absence of a written promise or agreement".* [Emphasis Added]

Thus, this court has consistently held that actions instituted under the Debt Recovery Act to recover a debt must be based on a promise or agreement in writing so that "written evidence of the commitment on the part of the debtor" could be *prima facie* established before entering the decree *nisi.*

Moreover, in terms of section 8 of the Debt Recovery Act, the court is conferred with the power to order "*the original of the instrument, agreement or other document, copies of which were filed with the plaint or on which the action is founded, be made available*", [emphasis added], for its perusal at the time the action is being supported. Accordingly, section 8 facilitates the requirement of court being satisfied that the lending institution has complied with the requirements set out in section 4(1) of the Act when the action is supported to obtain a decree *nisi*.

Thus, the legislator in its wisdom has enacted the Debt Recovery Act to expedite the procedure of recovering debts due to lending institutions whilst safeguarding the rights and interests of the debtors by, *inter alia,* making it essential for the lending institution to file the written instrument, agreement or document sued upon or relied on by the institution at the time of presenting the plaint to the District Court.

In actions filed under the Debt Recovery Act, there are at least two parties to the transaction of debt. In such circumstances, the law should not be interpreted to strengthen the interests of one party and deny safeguards provided in the said Act to the other. Thus, in the interests of justice and in accordance with the precepts of procedural law and natural justice, the procedure stipulated in the Debt Recovery Act must be strictly complied with by all parties and stringently interpreted to protect the rights of all parties.

Due to the foregoing reasons, I am of the view that the legislator intended the strict compliance with the requirements stipulated in section 4(1) of the Debt Recovery Act and hence, the requirements set out in the said section are mandatory.

Thus, if there is no written instrument, agreement or document sued upon or relied on by the institution, a lending institution is not entitled in law to institute action under the procedure stipulated in the Debt Recovery Act to recover a debt due to the institution.

In the foregoing circumstances, I am further of the opinion that the filing of the instrument, agreement or document sued upon or relied on by the institution along with the plaint as required by section 4(1) of the Debt Recovery Act is a condition precedent to invoke the jurisdiction of the court.

Did the appellant bank comply with section 4(1) of the Debt Recovery Act?

It is common ground that the respondent bank has filed certified copies of two cheques, the appellant's statement of account and the letter of demand, along with the plaint and the affidavit of the Manager of the Tissamaharama Branch, at the time of instituting the action in the District Court.

In the instant appeal, the two cheques filed with the plaint only amount to a sum of Rs.230,450/- whereas the principal sum claimed is Rs.1,426,482.20/-. Further, no written promise or agreement was produced to prove the rate of interest agreed upon by the parties. Hence, the total amount of cheques does not add to the total sum of money claimed as "debt" under the Debt Recovery Act by the respondent bank.

Further, the respondent bank has filed the statement of account in respect of the appellant's current account bearing no.2404 along with the plaint. A lending institution may submit a statement of account in court in terms of section 90C of the Evidence Ordinance, No.14 of 1895, as amended [hereinafter referred to as the "Evidence Ordinance"] for the purposes specified in the said section, but *"not further or otherwise*".

According to the rule of interpretation *expression unius est exclusion alterius* (inclusion of one is the exclusion of the other), a statement of account cannot be used for any other purpose other than the purpose stipulated in the said section, particularly in view of the words "*not further or otherwise*" in the said section.

Thus, the statement of account prepared under and in terms of section 90C of the said Ordinance cannot be considered an instrument, agreement or document within the meaning of section 4(1) read with section 30 of the Debt Recovery Act.

Moreover, Justice Weeramantry in 'Law of Contracts', Vol. I, at page 84 states:

> *An agreement is a manifestation of mutual assent by two or more persons to one another. In simpler terms, therefore, an agreement would mean a state of mental harmony regarding a given matter between two persons, as gathered from their words or deeds. Contract generally connotes among other things an actual or notional meeting of minds, for in general without such a meeting of minds a contract does not come into being. Agreement on the other hand, primarily denotes such acts of parties, is an agreement, while it is, if at all, only one of the requisites of a valid contract.* [Emphasis Added]

In preparation of the statement of account, there is no agreement or consensus between the parties which is an essential element of an agreement. Accordingly, a statement of account issued under section 90C of the Evidence Ordinance cannot be considered an instrument, agreement or document within the meaning of section 4(1) of the Debt Recovery Act.

Further, in the instant appeal, it is pertinent to note that the interest rate for overdrawn monies in the statement of account filed by the respondent bank is referred to in certain places as 32% and in other places as 34%. Further, it is not clear from the said statement of account, the interest rate applicable to some other entries relating to overdrawn monies. However, the respondent bank has claimed interest at an interest rate of 30% in the prayer to the plaint. Thus, in any event, the interest claimed by the plaint by the respondent cannot be ascertained by examining the statement of account filed with the plaint.

The appellant had consistently contended throughout the proceedings before the District Court, High Court and this court that there was no written promise or agreement regarding the alleged overdraft facility. However, the respondent bank has taken up different positions in respect of the same which were referred to earlier in this judgment. Some of the said submissions are reproduced below:

(a) an overdraft facility comes under the scope of "Debt" as defined by section 30 of the Debt Recovery Act,
(b) the 'mandate' signed by a customer with the bank when opening an account constitutes a written agreement,
(c) the two cheques together with the documents produced by the appellant marked as 'V1'-'V4' during the proceedings of the trial constitute the written agreement,

(d) even in the absence of a written agreement, the debtor should not be allowed to escape from his liability to repay the overdrawn monies.

The respondent bank cited the cases of *Dharmarathne v. Peoples Bank* (2003) 3 SLR 307 and *Kiran Atapattu v. Pan Asia Bank Corporation* (2005) 2 SLR 276 and submitted that an "overdraft" facility is a "debt" as defined by section 30 of the Debt Recovery Act.

In the said case of *Dharmaratne v. People's Bank* (*supra*), cited by the respondent bank, the lending institution had filed, *inter alia,* a letter by which the debtor had agreed to pay the amount due from him to the institution along with the plaint. Similarly, in *Kiran Atapattu v. Pan Asia Bank Corporation*, the lending institution had filed with the plaint, *inter alia,* a letter by which the debtor, whilst admitting the borrowing of the principal sum, had requested the lending institution to reduce the rate of interest charged therewith. In the instant appeal, there is no instrument, agreement or document to the said effect. Hence, the said cases have no application to the instant appeal.

Further, the issue pertaining to the instant appeal is not whether an overdraft facility comes within the scope of "debt" as defined in section 30 of the said Act. Rather, it is the inability of the court to ascertain the "debt", as required by section 30 of the said Act, because of the failure of the respondent bank to file the written instrument, agreement or document referred to in section 4(1) of the said Act along with the plaint.

Moreover, the respondent bank had submitted in its written submissions filed in the District Court that the mandate signed by a customer with the bank when opening an account can be considered the written agreement required by section 4(1) of the Debt Recovery Act. However, a mandate is a general agreement between a bank and its customer, and thus, it cannot be construed as an instrument, agreement or document within the meaning of section 4(1) of the said Act.

The respondent bank further submitted that the documents produced at the trial by the appellant, marked as 'V1'to 'V4', constitute the written agreement referred to in section 4(1) of the Debt Recovery Act. However, the document marked as 'V1' is an agreement in respect of a pledge loan that was never finalised. The documents marked as 'V2'-'V4' were correspondence between the parties in respect of the said pledge loan. Thus, the said documents have no relevance to the "debt" in issue in the instant appeal. Further the failure to comply with section 4(1) of the said Act cannot be overcome by relying on the documents filed by a defendant in an action instituted under the Debt Recover Act.

The respondent bank, in its written submissions dated 10th July, 2015 filed in this court, submitted that *"[t]hough there was no written agreement between the parties for an overdraft facility as required in section 30 of the Debt Recovery Act No. 02 of 1990, the debtor should not be allowed to escape from liability of repayment of the same*" based on technical objections as the appellant had benefitted from the overdrawn monies.

Thus, the respondent bank has expressly admitted that there is no written agreement between the parties for an overdraft facility as required in section 30 of the Debt Recovery Act. In fact, the respondent bank failed to produce a written promise or agreement to prove that a sum of money is due from the appellant to the respondent bank even during the trial in the District Court.

Further, the material produced in the District Court only shows that the appellant had overdrawn his current account pending the finalisation of the pledge loan that was requested by him. The principal sum and the interest claimed by the respondent bank in the plaint are not ascertained and cannot be ascertained by the two cheques and the statement of account filed by the respondent bank along with the plaint.

Therefore, the respondent bank had failed to comply with the stipulated mandatory procedure in instituting action under section 4(1) of the Debt Recovery Act. Thus, the decree *nisi* should not have been entered by the learned District Judge in terms of section 4(2) of the said Act.

The respondent bank submitted that the District Court erred in law by granting unconditional leave to appear and show cause to the appellant. However, as stated above, since the respondent bank has failed to comply with the mandatory provision of section 4(1) of the Debt Recovery Act, I am of the view that the requirement of furnishing security stated in section 6(2)(a), (b) and (c) of the said Act has no application.

Further, the respondent bank in its petition of appeal to the Civil Appellate High Court has based the majority of its grounds of appeal on the failure of the District Court to deliver the judgment in terms of the regular procedure despite the agreement of the parties to proceed the case under the regular procedure.

Although some requirements in procedural law can be dispensed with upon the agreement of the parties, mandatory requirements in procedural law cannot be circumvented by the consent of the parties. Thus, a court has no power or discretion to convert an action filed under the summary procedure to a regular procedure. Similarly, a court has no power or authority to

disregard the special procedure stipulated under the Debt Recovery Act and follow the regular procedure in an action filed under the Debt Recovery Act. However, in the instant appeal, the District Court has converted the action filed under the procedure stipulated in the Debt Recovery Act to an action under the regular procedure which is contrary to law.

Further, as the trial has proceeded under the regular procedure, it is not possible to make the decree *nisi* absolute at the conclusion of the trial. Hence, the Civil Appellate High Court has erred in law by directing the District Court to make the decree *nisi* absolute. In any event, the Civil Appellate High Court, by directing the learned District Judge to make the decree *nisi* absolute, has also impliedly accepted the finding of the District Court that an action instituted under the Debt Recovery Act cannot be converted to a regular action which resulted in the dismissal of the action.

In view of the above, the learned District Judge is correct in holding that the plaint should be dismissed for non-compliance with the imperative requirements in section 4(1) of the said Act.

Accordingly, I am of the opinion that the following question of law should be answered in the affirmative, as follows:

> *"Have their Lordships of the Civil Appellate High Court failed to address their minds to the fundamental issue of whether the plaintiff/appellant/respondent's plaint was in conformity with the mandatory provisions of Section 4(1) of the Debt Recovery (Special Provisions) Act No. 2 of 1990 as amended by Act No. 9 of 1994, which issue was raised as a preliminary objection by the defendant/respondent/appellant?"*
>
> Yes

In view of the above, it is not necessary to consider the other questions of law to which leave to appeal has been granted by this court.

Accordingly, the instant appeal should be allowed.

In the circumstances, I am of the view that the High Court should have dismissed the appeal for the reasons stated above. Thus, I set aside the judgment of the High Court dated 17th May, 2012 and affirm the judgment of the District Court dated 06th August, 2007.

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) (Amendment) Act No.54 of 2006 read together with Article 127 of the Constitution.

SC Appeal No: 13/2018

SC/HC/LA No. 160/2015
WP/HCCA/COL/ No. 162/2006(F)
DC Colombo Case No: 16354/Land

Faith Soysa.
2A, Torrington Place, Independent Avenue, Colombo 07.

PLAINTIFF

Wahala Thanthrige Dayananda Rupasoma Perera.
No.15, Siripa Lane, Colombo 5.

SUBSTITUTED PLAINTIFF

-VS-

Brian Michael Francis Muller Pereira.
No.28, Torrington Avenue,
Colombo 7.

DEFENDANT

AND

Brian Michael Francis Muller Pereira.
No.28, Torrington Avenue,
Colombo 7.

DEFENDANT- APPELLANT

-VS-

Wahala Thanthrige Dayananda Rupasoma Perera.
No.15, Siripa Lane, Colombo 5.
SUBSTITUTED PLAINTIFF-RESPONDENT (Deceased)

Honarine Mary Evangeline Cristobel Rasiah (nee Dias).
No. 2A, Torrington Place,
Independent Avenue,
Colombo 7.
SUBSTITUTED PLAINTIFF-RESPONDENT

AND BETWEEN

Brian Michael Francis Muller Pereira.
No.28, Torrington Avenue,
Colombo 7.
DEFENDANT- APPELLANT-PETITIONER

-VS-

Honarine Mary Evangeline Cristobel Rasiah (nee Dias).
No. 2A, Torrington Place,
Independent Avenue,
Colombo 7.
SUBSTITUTED PLAINTIFF-RESPONDENT- RESPONDENT

AND NOW BETWEEN

Brian Michael Francis Muller Pereira.
No.28, Torrington Avenue,
Colombo 7.
DEFENDANT- APPELLANT-APPELLANT

-VS-

Honarine Mary Evangeline Cristobel Rasiah (nee Dias).
No. 2A, Torrington Place,
Independent Avenue,
Colombo 7.
SUBSTITUTED PLAINTIFF-RESPONDENT- RESPONDENT

BEFORE : **SISIRA J. DE ABREW, J.,**
S. THURAIRAJA, PC, J. AND
E.A.G.R. AMARASEKERA, J.

COUNSEL : Palitha Kumarasinghe, PC. With Priyantha Alagiyawanna for Defendant- Appellant- Appellant.
Nihal Jayamanne, PC with Dilhan De Silva for Substituted Plaintiff- Respondent- Respondent.

ARGUED ON : 16th January 2020.

WRITTEN SUBMISSIONS : Defendant- Appellant- Appellant on the 30th of January 2020.
Applicant – Respondent – Respondent on the 30th of January 2020.

DECIDED ON : 28th May 2020.

S. THURAIRAJA, PC, J.

The Defendant- Appellant- Petitioner- Appellant (hereinafter referred to as the 'Defendant- Appellant') preferred this appeal against the Substituted Plaintiff- Respondent- Respondent (hereinafter referred to as the 'Substituted Plaintiff- Respondent') to set aside the Judgment dated 26.03.2015 of the High Court of the Western Province holden in Colombo and to set aside the judgment dated 10.02.2006 of the Learned Additional District Judge of Colombo.

The Plaintiff (now deceased), namely Faith Soysa (hereinafter referred to as the 'Plaintiff') instituted this action and stated in her plaint that, Felix Pereira was the owner of the property (under and by virtue of Deed no.249 dated 17.12.1945 and under and by virtue of Deed no.303 dated 23.03.1946) described in the 1st schedule to the Plaint. He died leaving a Last Will No.387 and the said Will duly proved in the District Court of Colombo in case bearing No.18617/T. Thereafter the Plaintiff and her brother namely Joy Francis Pereira became owners of the property described in the 1st schedule to the Plaint by Deeds No.1338 dated 12.10.1960 and No.1340 dated 05.12.1960 both attested by A.R.N. De Fonseka Notary Public and by being rest and residual of the said Last Will No.387. In lieu of their undivided rights, the Plaintiff and the said Joy Francis Pereira caused the sub division of the property described in the 1st schedule to the Plaint by Plan No. 2298 dated 28.09.1971 made by D.C. Peiris, Licensed Surveyor into two lots. Thereafter, the Plaintiff became the owner of the property bearing Assessment No. 2A and 4 described in the 2nd schedule to the Plaint containing in extent of 27.2 Perches under and by virtue of Deed No.1726 dated 04.10.1971 attested by B.H. Amaradasan Notary Public.

The Defendant- Appellant (who is the son of the said Joy Pereira, the brother of the Plaintiff) claimed an undivided ½ share of the said property described in the 2nd schedule to the Plaint by Deed of Transfer No. 104 dated 20.07.1992 attested by

Ahamed Irfan Zaheed Notary Public executed by the Plaintiff and the same was registered in the Land Registry.

The Plaintiff claimed that, she did not intend to transfer the said undivided ½ share of the said property to the Defendant - Appellant and the said Deed is not an act and deed of the Plaintiff.

The Defendant- Appellant claimed an undivided ½ share of the said property described in the 2nd schedule to the Plaint by Deed of Gift No. 105 dated 20.07.1992 attested by Ahamed Irfan Zaheed Notary Public executed by the Plaintiff and the same was registered in the Land Registry.

The Plaintiff claimed that, she did not intend to gift the said undivided ½ share of the said property to the Defendant- Appellant and the said Deed is not an act and deed of the Plaintiff.

The plaintiff stated that, on 7th of July 1992 she had suffered a severe stroke and was entered to Nawaloka Hospital by the Defendant- Appellant under Dr. Puvimanasinghe. Plaintiff was 80 years old as per the diagnostic sheets marked as 'P7'/'V17'. After she was admitted, she was referred to Consultant Neurologist Dr. J.B. Pieris, Consultant Physician by Dr. Puvimanasinghe (V17ඇ). Plaintiff stated that, on 20.07.1992 her nephew Brian Michael Francis Muller Pereira (the Defendant-Appellant) came with four others and took her thumb impression, which she later came to know has been a deed of gift and deed of transfer of her property at Torrington Place, where she reside. Plaintiff prayed that it was not her intention to sell, gift or transfer her property to her nephew Brian Michael Francis Muller Pereira. The Plaintiff made a complaint to the CID against the Defendant- Appellant for fraud.

Then Plaintiff instituted this action in the District Court of Colombo by a plaint dated 30th July 1993 against the Defendant- Appellant *inter alia* praying for;

(a) For a declaration that,

(i) Deed No. 104 (marked 'V6') dated 20.07.1992 attested by Ahamed Irfan Zaheed Notary Public is null and void and has no effect and validity in law.

(ii) Deed No. 105(marked 'V7') dated 20.07.1992 attested by Ahamed Irfan Zaheed Notary Public is null and void and has no effect and validity in law.

(b) A declaration that the Plaintiff is the owner of the property described in the 2nd Schedule to the Plaint.

The Plaintiff as an alternative cause of action to the 1st cause of action had also prayed for;

(a) A declaration that Deed No. 104 dated 20.07.1992 attested by Ahamed Irfan Zaheed Notary Public is null and void and has no effect and validity in law and the said deed is liable to be set aside on the ground of leasio enormis;

(b) *A declaration that the Plaintiff is the owner of undivided ½ of the property described in the 2nd Schedule to the Plaint*.

At the trial the following witnesses called by the Substituted Plaintiff-Respondent gave evidence,

(i) Dr. Jayantha Bennet Peiris, Neurologist;

(ii) Dr. D.H. Victor Perera, Psychiatrist;

(iii) S.W. Prema De Silva, Administrative Officer of Nawaloka Hospital;

(iv) K. Kankanamlage Nandawathi, an Attendant;

(v) Dayananda Rupasoma Perera, the Substituted Plaintiff- Respondent.

At the conclusion of the said evidence, the Substituted Plaintiff- Respondent closed his case reading in evidence and documents were marked as "P1" to "P 10" and the Defendant- Appellant objected to the admitting of documents marked "P1" to "P4" as the said documents had not duly proved by the Substituted Plaintiff- Respondent.

At the trial, the Defendant- Appellant called following witnesses to give evidence.

(i) The Defendant- Appellant ;

(ii) Dr. Carl Emanual Puvimanasingham;

(iii) S.J. De Alwis, the valuer;

(iv) Jayaratne Mudannayake, the Manager- City Branch, Bank of Ceylon.

At the conclusion of the said evidence, the Defendant- Appellant closed his case reading in evidence document marked "V1" to "V 27".

At the commencement of the trial the parties admitted the jurisdiction of the Court and the averments in paragraph 2 to 10 and 19 and 20 of the plaint. In paragraphs 2 to 10 of the plaint the plaintiff pleaded her title to the allotment of land in respect of which the impugned deeds have been executed. The main issue for the learned District Judge to decide was whether the Plaintiff was in a proper mental condition to understand the nature and consequences of Deeds 104 and 105.

The learned Additional District Judge answered the issues raised in favour of the Substituted Plaintiff- Respondent and delivered his judgment on 10.02.2006 as prayed in the Plaint. Being aggrieved by the said judgment, Defendant- Appellant preferred a final appeal to the Provincial High Court of the Western Province (High Court). On 26.03.2015 learned Judges of the High Court dismissed the appeal preferred by the Defendant- Appellant with costs and held in favour of the

Substituted Plaintiff- Respondent in relying on contents of Medical Report dated 02.03.1993 produced in evidence marked "P6" by Dr. J.B. Peiris, Neurologist.

Then, Defendant- Appellant appealed to this Court. When this matter was supported on 9th February 2018, leave to appeal was granted on the following questions of law as set out in paragraph 28 of the Petition.

(2) Has the Plaintiff failed to discharge the burden of proof that the plaintiff did not have an intention to dispose of the property to the Petitioner on the basis that the Deed No. (s) 104 and 105 were not her act and deed?

(3) Has the earned High Court Judges erred in law answering Issues 1 to 4 in favour of the Plaintiff did not have mental capacity to execute the Deeds on 17th July 1992 when the Plaintiff's mental capacity is not in any of the issues?

(4) Have the Learned Judges of the High Court erred in law in failing to consider that the plaintiff has not established her case against the petitioner by cogent evidence and on the balance of probabilities?

(5) Have the learned Judges of the High Court erred in law in failing to consider that the plaintiff (deceased) had received the consideration of Rs.6 Million for the said Deed No.104 and as the Plaintiff (deceased) accepted the said consideration and utilize the said consideration, the plaintiff is estopped from denying the validity of execution of the said Deed No. 104 and the Deed of Gift No.105?

(6) Have the learned Judges of the High Court erred in failing to consider that the plaint of the plaintiff (deceased) itself had contradictory versions and the plaintiff (deceased) had not even pleaded of any absence of mental capacity by the said plaint?

(7) Has the plaintiff failed to establish the issues No(s) 1 to 4 by strong and cogent evidence, in the circumstances of this case?

Issues of law allowed by this Court mainly contemplate on what is mentioned below;

1. Whether the Plaintiff failed to prove her case (Issues of Law No 2,4, and 7)
2. Whether the learned High Court Judges erred in taking 'lack of mental capacity of the plaintiff' as a matter raised through issues when it is not so (issue of law no. 3) or failed to consider that such ground was not even averred in the plaint (issue of law No.6) These issues of law appears to have been raised to point out that case was proved on a different stance than that was taken in the plaint which is contrary to Civil Procedure Code and the case must be based on the issues raised at the trial.
3. Whether the Plaintiff is estopped from denying the validity of the deed after accepting and utilizing the consideration.

I carefully perused the evidence of Dr. J.B. Peiris, Consultant Neurologist at pages 127-174 and Dr. H.V. Perera, the Psychiatrist at pages 157-177. Dr. J.B. Peiris submitted his evidence and stated he had treated the plaintiff for Paralysis from 07.07.1992 -24.07.1992 and said alleged deeds were executed on 17th July 1992 during the period of plaintiff's hospital stay. As per submitted evidence at page 157 of the brief which is as follows.

ප්‍ර - මේ රෝගී තැනැත්තියට ඔප්පුවක් අත්සන් කිරීමට හැකි මානසික තත්ත්වයක් තිබුනේ නැහැ?

උ- ඔව්.

ප්‍ර-සාමාන්‍යයෙන් රෝගියාට වැටහීම් වලට මැදිව වගේ අසන දේ කියන්න අපහසුයි ?

උ- ඔව්.

Further, a Report by Dr. J.B. Peiris dated 02.03.1993 was marked as "P6" revealed that the Plaintiff had suffered a stroke involving the partial lope of the

dominant left cerebral hemisphere (this has been confirmed by the CT scan marked as "P4"). Dr. J.B. Peiris in "P6" specifically stated as follows.

> *"Documented specific abnormilities detected during her hospital stay included confusion, defective comprehension of the spoken word, disorientation in time and space (nominal dysphasia) inability to find the correct name for objects, dyslexia (inability to read) all related to the pathological involvement seen in the EEG and CT head scan.*
>
> *I did not consider her to be in a fit condition to comprehend questions, make decisions or express same verbally or in writing during her hospital stay. Her ability to do so was also assessed by Dr. R. Kulanayagam on 20 July 1992 at my request."*

Dr. J.B. Peiris carried out another test on 23.07.1992 soon after the execution of alleged deeds marked as "P7එ" and as per the said report the Plaintiff was unable to say after several attempts, what year it was, she couldn't say what month or date it was, when she was asked what day it was, she was aware that it was Wednesday and that tomorrow is Thursday. She had been able to recognize a pen, a watch and to show the left little finger. She had not been able to read headlines in a newspaper even letter by letter, she had not been able to say how much 5+5 is.

I perused the report marked "P8" produced by Dr. H.V. Perera, Psychiatrist dated 28.09.1992 after examining the patient and it was stated that the plaintiff's testamentary capacity is impaired. He stated in paragraph 2 of the "P8" as follows.

> *"Her memory is impaired to past and present events. She does not know her full name or age. She does not know the extent of her bounty nor the claims or strengths of their claims. She is disoriented in time and place."*

The evidence of Dr. J.B. Peiris and his report "P6" and his observations in the bed head ticket on the 19.07.1992 and the 23.07.1992 conclusively proves that the

Plaintiff had no *compos mentis*. The report of the Dr. H.V. Perera is also conclusive that even on the 28.09.1992 the Plaintiff had no testamentary capacity.

The evidence recorded at the trial does not carry material to indicate it is a perverse decision. There is no material to show that the plaintiff had physical or mental capacity to instruct the Notary or suggest amendments to what the notary said at the time of the execution and the evidence led indicates that the converse was more probable. Even the defendant's witness says that she nodded her head to the Notary. Though the said witness interprets it as consent, it may be anything. Thus, evidence was sufficient to prove the Substituted Plaintiff- Respondent's case.

It is true that there was no specific issue raised or averment in the plaint highlighting the mental capacity of the deceased plaintiff at the relevant time. What was stressed is whether the deceased plaintiff intended the execution of the deeds. To intend one should have the mental capacity. On the other hand, to express intention one must have the physical ability. As mentioned above there were sufficient material for the learned Additional District Judge to come to his finding as evidence indicate the physical inability as well as mental incapacity more probable.

As per the above, I find that Deed No.104 and 105 are not valid Deeds and are void in the eyes of the law for the reason that the execution of the said Deeds were not the acts and deeds of the Plaintiff and that she had no reason to gift or transfer her property to the Defendant- Appellant. For a valid contract there must be *concensus ad idem*. If one or both of them had no such intention or could not due to some inability to comprehend the transaction or was not capable of entering into such a transaction then there is no contract.

With regard to the proof of the case the Defendant-Appellant argues that the deceased plaintiff was not called to give evidence when she was alive at the beginning of the plaintiff's case. It seems the attempt is to question the validity of the findings of lower courts on the ground that the star witness was not called to state that she did not intend to execute the relevant deed. It appears that Defendant

- Appellant questions calling evidence for corroboration without calling the main witness. Further it raises the question whether the court shall consider the failure to call the star witness when she was available against the plaintiff's case.

However there seems to be no objection at the trial for not calling the deceased Plaintiff first. She was listed as a witness but died before calling her and the substituted Plaintiff who was not a witness to the incident of executing the deeds was called. The intention to call the plaintiff is visible since her name was there in the said list. Thus, she would have not been called due to her death and as such, not calling her as a witness shall not be considered against the plaintiff case. On the other hand, the other witnesses of the plaintiff, specially Dr. J.B. Peiris and the attendant are not mere witnesses call to corroborate. They speak of the factual situation relating to physical and mental condition of the plaintiff at the relevant time. After hearing the both sides, the learned Additional District Judge has come to the conclusion that the executions of impugned deeds were not intended by the plaintiff.

Defendant- Appellant claimed that, sum of Rs. 6,000,000/- was paid for the purported Deed of Transfer. I find that, deposit of a cheque does not validate a transaction since the Plaintiff did not have *compos mentis* to execute the said deeds and it cannot be an expression of her intention. It is my opinion that, such transactions are void and do not become valid because some person had deposited money in Plaintiff's account without her knowledge.

There is no evidence to show that the consideration was deposited in the bank by the deceased plaintiff or with her connivance or knowledge. It appears to be a Joint account. No material to show that the said money was withdrawn and utilized by the plaintiff or on her instruction while knowing it was the consideration for the relevant transfer deed.

In this case the findings are purely on facts. I am not inclined to interfere with the findings of facts arrived at by the trial courts unless they are perverse.

For the above mentioned reasons, I answer the questions of law raised in the negative. I agree with the findings of the learned Judge of the District Court and learned Judges of the High Court and hence I find no reason to interfere with the said judgments. I dismiss the appeal with cost of Rs.100, 000/-.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

SISIRA J. DE ABREW, 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.

In the matter of an Application for Leave to appeal in terms of Article 127(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka and under the provisions of Section 5(C) of the High Court of the Provinces (Special provisions) (Amendment) Act No. 54 of 2006.

SC/Appeal No. 20/2010
SC/HCCA/LA No. 321/09
Civil Appellate High Court Anuradhapura
Appeal No. NCP/HCCA/ARP/07/2007
D.C. Polonnaruwa case No. 2669/L

A.M. Lokubanda
Track No. 10 – No.3,
Mahaambagasweva,
Medirigiriya.

Plainitff.

Vs.

B.R. Chandrasena,
Track No. 10,
Mahaambagasweva,
Medirigiriya.

Defendant.

AND BETWEEN

B.R. Chandrasena,
Track No. 10,
Mahaambagasweva,
Medirigiriya.

Defendant- Appellant.

Vs.

A.M. Lokubanda (Deceased)
TracK No. 10 – No.3,
Mahaambagasweva,
Medirigiriya.

Plaintiff – Respondent.

Maradedde Gedara Ratnayake Mudiyanselage Bandara Menike,
Kirimetiya,
Galamuna,
Pollonnaruwa.

Substituted Plaintiff – Respondent.

AND NOW BETWEEN.

B.R. Chandrasena,
Track No. 10,
Mahaambagasweva,
Medirigiriya.

Defendant-Appellant-Appellant.

Vs.

A.M. Lokubanda (Deceased)
Marabedde Gedara Ratnayake Mudiyanselage Bandara Menike.
Kirimetiya,
Galamuna,
Polonnaruwa.

Substituted Plaintiff-Respondent-Respondent.

Before : Jayantha Jayasuriya, PC, CJ
P. Padman Surasena, J
E.A.G.R. Amarasekara, J

Counsel : Mr. S.N. Vijithsingh with Anuradha Weerakkody for the Defendant – Appellant – Appellant.
Thushani Machado for the Substituted Plaintiff-Respondent- Respondent.

Argued On : 02.08.2019.

Decided On : 18.12.2020.

E.A.G.R. Amarasekara J.

This is an Appeal made by the Defendant Appellant - Appellant (hereinafter referred to as the Defendant) against the Judgment made by the Learned High Court Judges of the Civil Appellate

High Court, Anuradhapura in case No. NCP/HCCA/ARP/07/2007. By that Judgment learned High Court Judges dismissed the appeal made against the Judgment of the Learned District Judge of Polonnaruwa in case No. 2669/L. This Court originally granted leave to appeal on the following questions of law.

1. Did the Civil Appellate High Court err in holding that an action for *rei vindicatio* can be maintained in the circumstances of this case if, as alleged by the Petitioner, the permit marked as P1 is a nullity?
2. Did the Civil Appellate High Court fail to consider the vital evidence given by the former Government agent based on the document tendered at the trial marked X and annexures thereto marked 1 to 9?

However, when the matter was taken up for argument, following question of law was also raised.

3. Has the Civil Appellate High court erred in law by placing reliance on the document marked P1 which was issued after the institution of the action in the District Court?

The Plaintiff-Respondent – Respondent (hereinafter sometimes referred to as the Plaintiff) in his plaint in the original Court had pleaded that;

1) Permit No.7 dated 16.10.1974 was issued to him by the Government agent of the Polonnaruwa to the land described in the schedule to the Plaint, which is paddy field No. 64 of yaya 16 of Ambagaswewa.
2) The property is occupied by the Defendant against his wish causing a damage of Rs.5000.00 per season.

The position taken in the amended answer by the defendant was that;

1. One Henaka Ralalage Punchimenika was the permit holder of the land, and she transferred the land to the defendant who has been in uninterrupted and continuous possession of the land since then.
2. The Defendant has made the relevant payments to the State and has made some improvements worth of Rs. 15000.00 to the land.
3. The possession of the land was given to one Ranbanda by the Magistrate Court when the Plaintiff filed an action in that court in January 1975 in terms of chapter 11 of the Administration of Justice Law and 9 years after the institution of that action the plaintiff has instituted this action against the defendant and even if there is a cause of action accrued to the plaintiff it is prescribed.
4. There is a misjoinder of parties.

5. If the Plaintiff has any permit, it must have been obtained through unlawful means and has no validity.
6. The Plaintiff transferred the land in dispute to the Defendant and hence, the Defendant's possession is not unlawful and further, the defendant never was in unlawful possession of the land.

Issues pertaining to the trial in the District Court raised by the Plaintiff indicate that the plaintiff has limited his action to claim that he is the permit holder to the land in dispute and the Defendant is in unlawful possession and has been causing damage of Rs.5000.00 per season. Issues raised by the Defendant indicate that he also has limited his case to claim that Henaka Ralalage Punchimenika was the permit holder and she transferred her rights to the Defendant who made the relevant payments to the State. It appears that the Defendant has relinquished his other stances taken in the answer such as improvements made to this paddy field, the cause of action of the Plaintiff is prescribed and the Plaintiff has transferred the land to him etc.

The first question of law raised before this court is based on the assertion made by the learned High Court Judges that the case at hand is a *rei vindicatio* action. Even though the learned High Court Judges have classified the action as a *rei vindicatio* Action, it can be observed that no issue was raised as to the title or ownership to the land in dispute at the beginning or during the trial. The learned High Court Judges would have come to the said conclusion due to the manner the paragraph 2 and the prayer in the plaint had been drafted.

The paragraph 2 of the plaint aforesaid reads as follows;

"නඩුවට විෂය වී ඇති පහත උපලේඛනයේ සවිස්තරව දක්වා ඇති ඉඩම සඳහා වර්ෂ 1974.10.16 පොලොන්නරුවේ දිසාපති තුමා අංක **7** දරණ බලපත්‍රය පැමිනිලිකරුට ප්‍රධානය කොට ඇති අතර මෙම ඉඩමේ හිමිකරු පැමිනිලිකරු වේ."

The Plaintiff's prayer for relief in his plaint reads as follows;

"1. පහත උපලෙඛනයේ සවිස්තරව දක්වා ඇති ඉඩමේ හිමිකරු තමා ලෙස හිමිකම් ප්‍රකාශයක්ද,

2. විත්තිකරුත් ඔහුගේ නියෝජිතයන්, සේවකයන්, නෙරපා හැර භුක්තිය ලබා ගැනීමට නියොගයක්ද,

3. කන්නයකට රුපියල් 5000/- බැගින් වර්ෂ 1980 සිට අලාභ ලබා ගැනීමට නියෝගයක්ද,

4. නඩු ගාස්තු සහ නොයෙකුත් සහන දීමනාද වේ."

The Sinhala word "**හිමිකම**" found in the prayer is generally used to connote title to a thing or property but on certain occasions it is used to connote 'entitlement' or 'right' one has over a thing or property. For example, if one says "**මට බදුකරු ලෙස ඉඩමෙහි සිටීමට හිමිකමක් ඇත**", it does not indicate that he has the title to the land but he has a right or is entitled to remain in the land as the lessee. The prayer in the Plaint has to be understood in accordance with what he has pleaded in the body of the Plaint. It is clear from what the Plaintiff has pleaded in the body of the plaint, that he filed this case to get his entitlement or right to the land in the schedule to the plaint asserted and enforced based on a permit that was issued to him on 16.10.1974.

Rei vindicatio action is generally an action based on the title or ownership to a property in issue. It is said that from the right of ownership springs the vindication of a thing, that is to say, an action *in rem* by which we sue for a thing which is ours but in the possession of another- vide Voet 6.1.2.[1] In **Pathirana V Jayasundara (1955) 58 NLR 169**, at **172**, Gratiaen J quoted Maasdorp to state that the Plaintiff's ownership of the thing is the very essence of the *rei vindicatio*. It was held in **Luwis singho and others v. Ponnamperuma (1996) 2 SLR 320** in a *rei Vindicatio* action the cause of action is based on the sole ground of violation of right of ownership. Accordingly, If the title holder is deprived of the possession of the property, he can file a *rei vindicatio* action to get the trespasser or one who has the possession of the property without his consent evicted. However, as per section 2 of the Land Development Ordinance (hereinafter sometimes referred to as the Ordinance) permit holder is considered as the owner only when he has paid all the sums which he is required to pay under subsection (2) of section 19 and has complied with all the other conditions specified in the permit. It appears that prior to the amendment made in 1981 by Act No.27 of 1981 it was only the grantee, who got title under a grant, was considered as the owner. One may argue until the permit holder fulfills such conditions he cannot be considered as the owner or title holder and as such he cannot file a *rei vindicatio* action. In ***Palisena v Perera 56NLR 407*** it was held as follows;

> "*It is very clear from the language of the ordinance and <u>of the particular permit P1 issued to the Plaintiff that a permit holder who has complied with the conditions of his permit</u> enjoys, during the period for which the permit is valid, a sufficient title which he can vindicate against a trespasser in Civil Procedure*" (emphasis by underlining is mine).

Thus, it appears that the right to file a vindicatory action was recognized in that case due to the nature of the particular permit considered in that action, as well as owing to the reason that the relevant permit holder had complied with the conditions of the relevant permit. Thus, ratio decidendi of that case is necessarily limited to the facts of that case even though the head note

[1] G. L. Peiris, The Law of Property in Sri Lanka, Volume one, second Edition 1983, page 295

of the said reported judgment indicate otherwise. Hence, one can argue that merely having a permit under Land Development Ordinance, is not *ipso facto* sufficient to file a vindicatory action. Hence in my view ***Palisena v. Perera*** is not a decision that identifies that any permit holder under the said Ordinance is eligible to file a *rei vindicatio* action.

However, in this case at hand no issue was raised in the original Court to come to a finding whether the Plaintiff had paid all the sums due as per section 19(2) or had fulfilled all the conditions of the permit to consider him as the owner as per section 2 of the Land Development Ordinance. Further there was no issue or admission as to the title or ownership. The issues were focused on who held the valid permit. Once the issues are raised the pleadings recede to the background **{Haniffi v. Nallamma (1998) 1 Sri LR 73, Dharmasiri vs. Wikrematuanga (2002) 2 Sri LR 218}**. The Plaintiff's issues in the original court were not raised on the premise that the Plaintiff has the ownership or title to the land but on the premise that the Plaintiff is the permit holder and the Defendant is in unlawful possession of the land. The Defendant's issues were raised on the premise that the permit holder is one Henaka Ralage Punchimanike and she has conveyed her rights to the defendant. As said before, no question was raised as to the title of the land and as such, the trial was based on a dispute that put in issue who had the valid permit to possess and enjoy the land in question and not on whether the Plaintiff is the title holder. Thus, with the issues raised, the scope of the action was limited to see whether the Plaintiff or the aforesaid Punchimanike is the permit holder and whether the Plaintiff is entitled to claim the land on such a permit and get the defendant evicted on the strength of the said permit. Thus, in my view, the trial commenced and proceeded on to find whether the Plaintiff has the right or entitlement to hold the property on the strength of the permit he relies on or whether it is the Defendant who has the right or entitlement to hold the property on the strength of a permit his predecessor appears to have been given.

Attanayake Vs. Aladin (1997) 3 Sri LR 386 was a case filed for recovery of possession of a certain paddy field, on the basis of it being granted on a yearly permit to the Plaintiff of the said case. The Court of appeal correctly identified that it did not fall within the scope of a possessory action but stating that our law conceives only two types of remedies that a dispossessed individual could seek, namely *rei vindicatio* action and possessory action, identified the said case as a *rei vindicatio* action and further relying on **Palisena v Perera** (supra) dismissal of the Plaintiff's action by the District Court was confirmed on the ground that there was no declaratory relief prayed as to the title and prayer for ejectment is only a consequential relief to the declaratory relief.

Hence, in the aforesaid case declaratory relief was considered as a must in a *rei vindicato* action. Further a case filed even on the basis of an annual permit was identified as a *rei vindicatio* action. However, as mentioned before, *Rei vindicatio* action is based on the title or ownership (dominion) to the property and violation of rights of ownership. The interpretation given to the term 'owner' in terms of section 2 of the Land Development Ordinance as well as limitations on

disposition imposed by the said Act, make it difficult to recognize a permit holder who does not fall within the section 2 of the Land Development Ordinance as an owner of the land given on a permit.

Since *rei vindicatio* is based on ownership and violation of rights of ownership, strict proof of title is needed in a proper *rei vindicatio* action. Even though, **Attanayake v. Aladin** (supra) held that our common Law recognizes two actions, namely *rei vindicatio* and possessory action as remedies that can be sought by an individual who is dispossessed, our law has developed and recognized a valid cause of action on certain occasions to a dispossessed individual when strict proof of title or ownership is not necessary to evict a person who is in unlawful possession; for example in an action for declaration of title to evict an overholding lessee by a lessor, strict proof of title like in a *rei vindicatio* proper is not necessary due to the estoppel taking place owing to section 116 of the Evidence Ordinance. Thus, if one comes to the property accepting the Plaintiff as landlord on a contractual relationship, he cannot put the plaintiff to strict proof of title. In **Pathirana V Jayasundara** (Supra) it was held, if the essential element of a *rei vindicatio* is that the right of ownership must be strictly proved, it is difficult to accept the proposition that an action in which the plaintiff can automatically obtain a declaration of title through the operation of a rule in estoppel should be regarded as a vindicatory action. Thus, our law has now recognized certain actions that may not fall within the ambit of *rei vindicatio* or possessory action where a dispossessed individual can file for the eviction of the wrongdoer. Similarly, in my view if one gets his right to possession by a statutorily proclaimed process, and when that right is violated by someone who enjoys and possess the property, and even if it does not fall within the scope of *rei vindicatio* action proper or possessory action, sections 5, 35, and 217 of the Civil Procedure Code are sufficient enough to recognize such violation as a cause of action, to recognize it as an action for recovery of property and to provide the remedy either by declaring the entitlement of the permit holder or commanding the person in possession to yield up the possession of the immovable property or both the said reliefs.

However, the statement of law made in the said **Attanayake v. Aladin** (supra), that when a declaratory remedy is not sought for the consequential relief for ejectment shall fail, does not seem to present the correct position of Law. It has not considered the decision of the same court made in **T.B. Jayasinghe v. Kiriwanegedara Tikiri Banda (1988) II CALR 24** in coming to the said conclusion which clearly held where title to the property is proved, mere failure to ask for a declaration of title to the property will not prevent one from claiming relief of ejectment. Even **Dharmasiri v. Wickramatunga (2002) 2 Sri LR 218** has held that the absence in the prayer for a declaration of title cause no prejudice, if in the body of the plaint, the title is pleaded and issues were framed and accepted by court on the title so pleaded. Thus, it is clear even in a *rei vindicatio* or a declaration of title action, if the issues are raised as to the title and it is proved, even though there is no prayer for declaration of title, the prayer for ejectment can remain as a standalone

valid relief. What is necessary is title (in relation to a *rei vindicatio* or declaration of title action) or entitlement (in relation to other matters praying for eviction) to be proved in relation to the property in issue by strict proof or otherwise as the case may be. Each relief given as decrees under section 217 of the Civil Procedure Code can standalone as a separate relief. This does not change the legal position that in a *rei vindicatio* action or a declaration of title action, if the title is not proved and/or declaratory relief as to the title is failed, no relief for ejectment can be given, since those actions are based on the title of the Plaintiff. But in an action filed by a permit holder under the Land Development Ordinance, who cannot be considered as an owner under section 2, it is my view that even if he fails in proving his ownership to the land or getting the declaratory relief to declare him as the owner or title holder, he is still eligible to eject the trespasser, if he can prove that he is the permit holder, since he has the right to possess due to the permit given through statutorily proclaimed process. It must be noted that a permit holder is not merely a licensee whose right to possess can be terminated by giving a notice. There is statutorily proclaimed procedure to cancel a permit. Till such process is taken place the permit holder is the one who has the right to enjoy and possess the property; It is a right given through a process asserted by statutory law but not as a right gained through in its real sense as an attribute of ownership which under common law acquires by *occupatio* (seizure- mainly in relation to movable property) , accession, prescription, delivery and transfer (*Traditio*) etc. In certain occasions of these modes of acquisition of property, such as prescription, one may commence the possession prior to the acquisition of the ownership to the property. However, one's right to claim possession as the owner begins with the acquisition of ownership to the property. Thus, right to possession as owner follows the acquisition of ownership. A permit may be given under the Land Development Ordinance anticipating a grant to be given in the future but right to possess starts as the permit holder; As such right to possession precedes the acquisition of the property as the owner. Hence, in my view, it is not proper to identify an action filed by a permit holder, who is not considered as an owner as per the interpretation given in section 2 of the said ordinance, to claim the property on the strength of a permit given under the Land Development Ordinance, as a proper *rei vindicatio* action. It is an action based on his right to possess on the strength of the permit given and the cause of action caused by the violation of that right. Thus, the classification of the case at hand by the learned High Court judges as a *rei vindicatio* action itself is questionable, especially when there was not a single issue raised at the trial before the District court claiming title or ownership to the land in dispute. At least, this case was not proceeded to trial as *rei vindicatio* action.

Anyhow, it is my considered view whether this action is termed as a *rei vindicatio* action or not the Plaintiff is entitled to file the action in the manner pleaded in the plaint for the reasons given below;

1. In term of Section 5 of the Civil Procedure Code (hereinafter sometimes referred to as CPC or the Code) an action means a proceeding for the prevention or redress of a wrong. Such an action is constituted when an application to court is made for relief or remedy obtainable through the exercise of the Court's power or authority, or otherwise invite its interference -vide Section 6 of the said code. Further a cause of action means the wrong for the prevention or redress of which an action may be brought, and includes the denial of a right, the refusal to fulfill an obligation, the neglect to perform a duty and the infliction of an affirmative injury – vide Section 5 of the said code. In ***Lowe vs Fernando 16 NLR 398*** it was held,

   '…….*the expression "cause of action" generally imparts two things, viz., a right in the Plaintiff and a violation of it by the Defendant, and "cause of action means the whole cause of action, i.e., all the facts which together constitute the Plaintiff's right to maintain the action" (Dicey's Parties to an Action Ch, X1., section. A), or, as it has been otherwise put, "the media upon which the Plaintiff asks the Court to arrive at a conclusion in his favour" (Lord Watson's Judgment in Chand Kaur v. Pratab Singh*)'.

2. In the case at hand, the Plaintiff prayed for a redress of a wrong caused by the possession of the defendant of the land which he indicates that he is entitled to possess and enjoy on the strength of a permit issued to him in 1974. Accordingly, he has shown a cause of action.

3. In terms of section 188 of Civil Procedure Code, after the judgment the court has to enter a decree specifying the relief granted or other determinations of the action, and in terms of Section 217 (c) and (g) respectively, such a decree among other things may include order of court commanding to yield up possession of immovable property as well as a declaration of a right or status. Thus, he has prayed for an obtainable relief from the Court.

4. Hence, it is clear the Plaintiff had complained to court of a cause of action and asked for relief that can be obtainable through courts since he has prayed for a declaration as one who has the '**හිමිකම**' (as said before which can be interpreted as title or an entitlement as the case may be) and to put him in possession by ejecting the defendant and his agents. Even if one gives the strict interpretation to the term '**හිමිකම**' limiting its meaning to title or ownership to the land, the court is not barred in giving the relief praying for ejectment when the permit of the Plaintiff is proved unless the Defendant proves a better entitlement to the land. It is true a court cannot grant relief which is not prayed for, but a court is not barred from granting a lesser relief encompassed in the main relief prayed for. If the Plaintiff is able to prove he

has a valid permit, he has the right to possess and enjoy. If he is deprived of that right by the Defendant, he has a cause of action against the Defendant unless the Defendant has a better entitlement. Therefore, what is important in this case is to decide whether the Plaintiff had a valid permit at the time of instituting the action, during the action and at the time of the Judgment.

Nevertheless, the last part of the 1st question of law, that queries whether the permit marked as P1 is a nullity or not, is relevant in relation to the maintainability of the plaintiff's action as well as in deciding his entitlements to the reliefs prayed in the plaint. P1 is a document dated 08.10.1986, issued in the form of a Permit in terms of Section 19(2) of the Land Development Ordinance. It appears that section 19(2) was introduced by the amendment made to the ordinance by Act no 27 of 1981.

Since the date of the plaint is 07.10.1983 and the plaintiff had averred that he is the permit holder for the land in dispute as per the Permit No.7 dated 16.10.1974, the third question of law mentioned above has been raised during the hearing.

To answer these two questions of law (questions of law 1 and 3) it is necessary to recognize what this P1 is; whether it is the original and only permit issued to the plaintiff or a document issued to the plaintiff in place of the original permit which appears to have been destroyed. If P1 is the original and only permit issued to the Plaintiff he had no status to file this action at the date of filing the action and his action should fail and on the other hand, if he was the permit holder as at the date of filing the plaint and till the date of the judgment, his status to file and maintain the action is established, and his action must succeed.

It can be observed that in deciding that the Plaintiff is the permit holder the learned High Court Judges seem to have mistakenly considered the evidence given by one T.M.M.C. Kumari Tennekoon, an officer from the office of the Government agent, whose evidence had been expunged from proceedings as per the proceedings dated 10.02.1993 in the District Court. Further, it appears the learned High Court Judges have only considered the validity of P1 but have not considered the date of P1 and whether the Plaintiff had a valid permit as at the date of the action or as averred by the Plaintiff from 1974. However, even if the learned High Court Judges erred or failed to consider the availability of a valid permit as at the date of the plaint or as averred by the Plaintiff, it does not mean that the learned District judge had come to a wrong conclusion. If the learned District Judge had come to the correct conclusion on the available evidence, this court need not interfere with the confirmation of the District Court judgment by the Learned High Court Judges.

It should be noted that, as per the plaint, the Plaintiff had relied on a permit issued to him in 1974 and not P1 which was issued in 1986. The issues raised by the Plaintiff pose the question whether

the Plaintiff is the permit holder for the land in dispute without reference to a date. However, rights of the parties have to be decided as at the date of the plaint.

The plaintiff had explained in his evidence that he got the original permit in 1974 and it was burnt in the process when he applied for a housing loan. He also had explained that earlier he was given a permit to a separate paddy field for which there was no proper water supply and after complaining to the authorities he was given the land in dispute. He further had admitted in evidence before the learned District Judge that, prior to him, the land in dispute had been given to one Senavirathne. Furthermore, Punchimenika was said Senavirathne's mother-in-law (නැන්දම්මා) and Ranbanda was Punchimenika's Son. As per the stance taken in the answer, Punchimenika is the permit holder who transferred the land to the defendant, and Ranbanda was the one whom the possession was given to, by the Magistrate Court. However, the Plaintiff had summoned a land officer, namely one Abraham Gunarathne, from the Regional Secretary's office who had brought the relevant ledgers to court and gave evidence in relation to the permit issued for the land in dispute. In his evidence in chief, he has confirmed that P1 is a permit issued to the Plaintiff in terms of the Land Development Ordinance on 08.10.1986 but he has referred to it as a certified copy. It appears from his evidence that it was issued as per the entries in the ledger. He has also confirmed that originally the Plaintiff was issued a permit for land no.30 and paddy field no.29. He further has explained that previous entries relating to paddy field no 64, which is the land in dispute, has been cancelled and changed legally and paddy field no.64 had been given to the Plaintiff who was earlier given land no.30. The previous entry that was cancelled appears to be the entry by which the land was given to Senavirathne in 1969. As per the report marked X by the defendant, and the witness U. G. Jayasinghe called by the defendant, this was done on 18.10.1973 after an inquiry since the said Senavirathne left the land in dispute. If this was done unlawfully, said Senavirathne would have challenged it. Since there is no such evidence it can be presumed that Land in dispute was allocated to the Plaintiff in 1973 after a proper inquiry.

The aforesaid official witness Abraham Gunarathna called by the Plaintiff, in his evidence-in-chief, had referred to another change made in the ledger, dated 06.05.1982 which was marked as P5. As per his evidence this also gave the land in dispute to the Plaintiff. This seems to have happened because the entries were again altered in the name of Punchimenika as per the said witness as well as X report marked by the Defendant in1981. However, the date the ledger was again altered in the name of the Plaintiff is a date prior to the date of the plaint. However, no valid permit given to Punchimenika has been marked.

In cross examination the said witness Abraham Gunarathna had further stated that there are two ledgers and the land in dispute, namely paddy field no.64, is in the name of the Plaintiff and the relevant date is 29.09.1972.

As per the evidence of the official witnesses summoned by the parties it has been revealed that previously, in 1969, Senavirathne was given the same land but later the entry was deleted legally in the ledger and was allocated to the Plaintiff and such change occurred in early part of nineteen

seventies. Even the letters marked as P2, P3 and P4, which were written in 1973 and 1974, confirms that there were complaints made by the Plaintiff to the relevant authorities with regard to the land in dispute and there were directions from the Government agent's office to put him in possession as he was the permit holder. Hence, those letters also support the plaintiff's version that he was the permit holder from 1974. The letter V2 had been shown to the said witness Abraham Gunarathna, the witness has stated that there is a note made in relation to the issuance of V2 but without a signature and a date. However, the letter marked V2 has been issued by one District Land Officer naming it as a temporary permit subject to the approval of land commissioner. It is questionable how the said officer issued the so-called temporary permit validly since there was change of the entries validly made to give the same block of land to the plaintiff. To cancel a permit issued, the authorities has to act in terms of chapter VIII of the Ordinance and no such evidence is available in relation to the permit issued to the Plaintiff. It is also observed that V2 is a letter issued after the temporary order of the learned magistrate in relation to the possession of the land in dispute. The Learned District Judge had correctly noticed that the said V2 had not been issued using the prescribed form (vide Section 25 of the Land Development Ordinance), and Punchimenika did not have a valid permit. The Defendant himself has admitted in his evidence that he is an unauthorized possessor. It must be noted that in terms of Section 2 of the Land Development Ordinance, a 'permit' means a permit for the occupation of State Lands issued under chapter IV of the ordinance and a 'permit holder' means any person to whom a permit is issued and includes a person who is in occupation of any land alienated to him on a permit although no permit has actually been issued to him. Hence, if the defendant is able to show that his possession is supported by a valid decision to issue him a permit, even if he is unable to prove the actual issuance of the permit, he could have proved a case against the stance taken by the Plaintiff. To prove a valid issuance of a permit to the Defendant, there shall be evidence to show that the permit originally issued to the Plaintiff was lawfully annulled. Nevertheless, it appears that no evidence has been placed before the learned District Judge to show that entries relating to the plaintiff's entitlement and the permit which appears to have been issued in early Ninteen Seventees were annulled legally. Even though, the defendant raised a question of law before this court to indicate that the permit issued to the Plaintiff is a nullity, no issue has been raised in that regard at least when it was revealed in evidence that Senevirathne's entitlement was cancelled and the land was given to the Plaintiff.

Anyhow, the evidence led at the trial show that entries relating to Senavirathne, who was the original permit holder as per the answer, was validly deleted after an inquiry and entries relating to the permit was changed in the ledger to name the Plaintiff as the permit holder for the relevant block of land. The position of the plaintiff that the original permit given to him was burnt and P1 was issued to him in 1986 is supported by the official witness indicating in his evidence that P1 was issued as a certified copy as per the entries in the ledger. The entries referred to by the official witness summoned by the plaintiff support the version of the Plaintiff.

The Defendant has led the evidence of Punchimenika who appears to be the purported predecessor in title as per the answer but she has neither marked any permit in her name other than the letter V2, nor marked any document to show that her rights were transferred to the defendant as per the stance taken in the answer. She seems to have relied on aforementioned V2, certain receipts marked V3 to V12 and the order of the magistrate court marked V14. As mentioned before, V2 is not a valid permit in the prescribed form. Without taking steps under chapter VIII of the Ordinance to cancel the permit issued to the Plaintiff, no other permit can be issued that affects the rights of the Plaintiff. V3 to V12 are for certain payments such as acreage levy and fees for maintenance of irrigation system, made by the Defendant Chandrasena. Some of them refer to the Defendant as unauthorized possessor (අනවසරකරු). V14 only confirms the possession of Ranbanda till the dispute is settled by a competent civil court. V2 to V14 along with the evidence of Punchimenika establish that the defendant has been in possession of the property in dispute but do not establish any superior right to possess that can negate the validity of the permit issued to the plaintiff or his right to possess the property on the permit given to him.

Even the Defendant in his evidence has not tendered any material to show that he or his purported predecessor Punchimenika has a valid permit to the land in dispute or to show that the permit issued to the Plaintiff was cancelled in terms of the provisions of the Land Development Ordinance.

It appears, the District Court has directed the Government agent of Pollnnaruwa to conduct an inquiry and report to court and U.G. Jayasinghe, who conducted the inquiry as per the said direction, has given evidence for the Defendant. The said witness U G Jayasinghe has marked the said report as X with its annexures 1 to 5. The 2nd question of law above was raised on the premise that the learned High Court Judges failed to consider the evidence of this witness and the said report and its annexures. It appears from the judgment of the Learned High Court judges, the learned judges considered the report X and refused to accept the contention of the Defendant on the ground that Defendant failed to prove that a valid permit was issued to Punchimenika when the Plaintiff was successful in proving that he has a valid permit. Even the learned District Judge has considered the evidence given by this witness and the report marked X. As per the evidence given by the said witness Jayasinghe and his report marked X, on a request made by the Plaintiff, on 18.10.1973, the ledger entries that indicated Senavirathne as the Permit Holder were changed to insert Plaintiff's name as the permit holder after an inquiry. Annexure no.2, 3and 4 to the report marked X clearly indicates that the Government Agent sought the intervention of the relevant officer and the police to hand over the possession to the plaintiff from unauthorized possessors. In fact, the annexure 4 has referred to the plaintiff as the permit holder. Thus, annexure 4 and the evidence of this witness confirms that a permit was issued to the Plaintiff in or about 1974. Evidence of the said witness and report X indicates that, meanwhile, the order of the magistrate court was issued reserving plaintiff's right to go to a civil

court. After the said decision of the magistrate court, irrespective of the fact that the Plaintiff has a right to go to a civil court for relief, the plaintiff had been asked to hand over the permit to amend it. As per annexure 6 and 11, the plaintiff has asked for paddy field no.29 and it has been handed over to him. Merely because the Plaintiff has asked for paddy field no.29 and it was handed over to him, one cannot come to the decision that he relinquished his rights on the permit given to the land in dispute as well as his right to go to a civil court as per the magistrate court's order. There is no evidence to show that a valid permit was given in relation to paddy field no.29. There was no bar for the plaintiff to ask for a different paddy field for his livelihood till he get his rights resolved in a civil court. What is important is whether there was an inquiry as per chapter VIII of the Ordinance and the permit given to the Plaintiff to the land in dispute was cancelled accordingly. There appears to be no such evidence emanating from report X and annexures. A permit once validly issued cannot be cancelled by recalling as done by annexure 6 to report X, merely because some unauthorized person has a dispute with the Plaintiff unless it is cancelled as aforesaid in terms of the provisions of the Ordinance. The said witness U.G. Jayasinghe had admitted in his evidence that he informed the defendant that the defendant has no right to the property. The said witness had further stated in his evidence as well as in his report that in 1981 it had been informed to the Commissioner of Land to issue a permit to Punchimenike and the Commissioner had approved the said recommendation but he has not explained how a permit can be issued to Punchimenike without lawfully revoking the permit given to the Plaintiff. However, this shows that there is no valid permit issued in the name of Punchimenika even though certain entries were made in the ledger in her name in 1981 as per the evidence led. In the report marked X, the said witness has stated that as per the ledger the land had been lawfully given to Punchimenika but no such entry or permit had been marked as an annexure or through the evidence. On the other hand, it is not shown, as said before, how such an entry can be made without lawfully cancelling the permit given to the Plaintiff from Nineteen Seventies. Hence, if any entry is there in the ledger in favour of Punchimenika, it cannot be considered as a lawful entry since the previous permit issued to the Plaintiff had not been cancelled as per the provisions of the Ordinance. Perhaps, this may be the reason for second entry giving the land in dispute to the Plaintiff again on 02.05.1982 referred to by the aforesaid witness Abraham Gunaratna. Whatever the reason may be, evidence led before the District Judge has established that a permit was given to the Plaintiff to the subject matter in or around 1973 or 1974 and there was no valid reason to believe that it was lawfully cancelled and further, due to some reason another permit P1 was issued to the Plaintiff in 1986 in terms of Section19(2) introduced by 1981 amendment to the ordinance. The Plaintiff's explanation was it was because his original permit was burnt during the process for a housing loan. No question was put to him in cross examination to show that original permit was not destroyed by fire. When the original document is destroyed one can lead secondary evidence in that respect and the evidence led shows that there was a permit issued to the plaintiff on or around 1974. No valid permit has been marked which is in the

name of the Defendant or his purported predecessor. As such the learned District Judge has correctly answered the issues raised at the trial. Hence, even though the Learned High Court judge has not considered certain relevant aspects and made certain mis-statements, confirmation of the Learned District Judge's judgment is correct in law.

For the reasons given above I answer the questions of law mentioned above as follows;

1. No, the permit marked P1 is not a nullity.
2. No. The consideration of X and its annexures cannot affect the findings of the Learned District Judge.
3. No. Even though P1 was issued after the institution of the Action the Plaintiff was the permit holder even prior to the institution of the action.

Hence, the appeal is dismissed with costs.

…….
Judge of the Supreme Court

Jayantha Jayasuriya PC, CJ.
I agree.

……
The Chief Justice

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

Lansage Basil

Petitioner-Petitioner-Petitioner-Appellant

SC Appeal 20/2017
SC (SPL) LA No.192/2016
Court of Appeal Application
No.CA/PHC/APN 20/2016
HC Panadura No. BA 39/2015

Vs-

Hon. Attorney General

Respondent-Respondent-Respondent-Respondent

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

Counsel: J.P. Gamage for the Petitioner-Petitioner-Petitioner-Appellant
Suharshi Herath SSC for the Attorney General

Argued on : 3.3.2020

Decided on: 3.7.2020

Sisira. J. de Abrew, J

This is an appeal against the judgment of the Court of Appeal dated 8.8.2016.

The Petitioner-Petitioner-Petitioner-Appellant (hereinafter referred to as the Petitioner-Appellant) filed an application for bail in the High Court of Panadura seeking to enlarge his son (the suspect) on bail. The suspect was remanded by the learned Magistrate. The allegation levelled against the suspect was that he was in possession of 42 grams of heroin. But according to the Government Analyst's report pure quantity of heroin was 3.89 grams of heroin. I must state here that the Government Analyst's report is not available in the brief. But their Lordships of the Court of Appeal in their judgment dated 8.8.2016 have observed that the pure quantity of heroin, according to the Government Analyst's report, was 3.89 grams.

The learned High Court Judge by his order dated 13.1.2016 refused the application of the Petitioner-Appellant for bail. Being aggrieved by the said order of the learned High Court Judge, the Petitioner-Appellant who is the father of the suspect filed a revision application in the Court of Appeal seeking to revise and set aside the said order of the learned High Court Judge. The Court of Appeal, by its judgment dated 8.8.2016 dismissed the said revision application. Being aggrieved by the said judgment of the Court of Appeal, the Petitioner-Appellant has appealed to this court. This court by its order dated 27.1.2017, granted leave to appeal on questions of law set out in paragraphs 10(a) and 10(b) of the Petition of Appeal dated 15.9.2016 which are reproduced below.

1. Did the Court of Appeal err in law in deciding that the Petitioner has no locus standi to maintain the Application for Revision?

2. Did the Court of Appeal err in law in not considering the fact since the Petitioner is the Petitioner in the Application for bail in the High Court, the Petitioner has locus standi to maintain the Revision Application in the Court of Appeal against the order of the High Court.

The Petitioner-Appellant is the father of the suspect in this case. When the matter was taken up for argument in the Court of Appeal, the learned Senior State Counsel who appeared for the Attorney General raised an objection to the effect that the Petitioner-Appellant had no locus standi to maintain the application for revision. Their Lordships of the Court of Appeal have relied on the judgment of the Court of Appeal (judgment of Justice Jayasuriya) in the case of Senathilaka Vs Attorney General [1998] 3 SLR 290. The head note of the said judgment states as follows. "The father of the accused has no locus standi to maintain the revision application."

In Senathilaka's case (supra) the accused who was convicted and sentenced did not appeal against the conviction and the sentence. The father of the accused filed a revision application against the conviction and the sentence. His Lordship Justice Jayasuriya observed that it was a belated application. The accused in Senathilaka's case (supra) who was granted bail did not face the trial and after an inquiry under Section 241 of the Criminal Procedure Code, the learned trial Judge proceeded with the trial and convicted the accused. His Lordship Justice Jayasuriya at page 293 observed as follows.

> *"The present application is an application in revision. This is an extraordinary jurisdiction which is exercised by the Court of Appeal and the grant of relief is entirely dependent on the discretion of the court. Here the accused's father is seeking discretionary relief from the Court of Appeal and*

> *in considering the grant of discretionary relief, the court will closely examine the conduct of the accused person. In the exercise of a discretion the court scrupulously looks into the conduct of the ultimate party who is deriving benefit from the orders to be made by the court in revision. Besides this application has been preferred with undue and unreasonable delay. The application is refused."*

Therefore, it is seen that in the above case, the Court of Appeal, after considering the conduct of the accused and belatedness of the revision application, refused to exercise the extraordinary jurisdiction and discretion of the Court of Appeal. His Lordship Justice Jayasuriya in the above case has not expressed a general view that the father of an accused in each and every case has no locus standi to maintain a revision application.

In the present case, the suspect has not been convicted and it was an application to revise the order of the leaned High Court Judge who refused to enlarge the suspect on bail. Thus, it is seen that the facts of the present case are quite different from the facts of Senathilaka's case (supra). After considering all the aforementioned matters, I feel that it was wrong for the Court of Appeal to act on the judicial decision in Senathilaka's case (supra) and dismiss the revision application.

The Court of Appeal has also based its judgment on Section 16 of the Judicature Act which reads as follows.

> *(1) A person aggrieved by a judgment, order or sentence of the High Court in criminal cases may appeal to the Court of Appeal with the leave of such court first had and obtained in all cases in which the Attorney-General has a right of appeal under this Chapter.*

(2) In this section "a person aggrieved" shall mean any person whose person or property has been the subject of the alleged offence in respect of which the Attorney-General might have appealed under this Chapter and shall, if such person be dead, include his next of kin namely his surviving spouse, children, parents or further descendants or brothers or sisters.

(3) Nothing in this section shall in any way affect the power of the Court of Appeal to act by way of revision in an appropriate case.

It must be noted that Section 16(1) of the Judicature Act contemplates the right of appeal given to an aggrieved person and Section 16(2) discusses about 'a person aggrieved'. These two subsections do not discuss about the revisionary power of the Court of Appeal. When Section 16(3) of the Judicature Act states that 'nothing in this section shall in any way affect the power of the Court of Appeal to act by way of revision in an appropriate case', it has to be understood that revisionary power of the Court of Appeal has not been taken away by the above two sub sections [16(1) and 16(2)]. Section 16(3) of the Judicature Act in fact retains the revisionary power of the Court of Appeal notwithstanding what is stated in sub sections 16(1) and 16(2) of the Judicature Act. Thus, it was the duty of the Court of Appeal to have considered the revision application of the Petitioner-Appellant. In this connection I would like to consider a passage of the judgment of Sharvananda CJ in the case of Sudharman de Silva Vs Attorney General [1986]1 SLR 9 at page 15 wherein His Lordship observed as follows.

"It is the court's duty to ensure that the statutory right of a person is not lost to him except in strict accordance with the statute. The first duty of a judge is to administer justice according to law, the law which is established for us

by an Act of Parliament. The judges in their anxiety to uphold the dignity of courts should not fail to do justice according to enacted law. Dislike of the effect of a statutory provision does not justify departing from its plain language."

In Rasheed Ali Vs Mohamed Ali [1981] 1SLR 262 this court held as follows.

"The powers of revision vested in the Court of Appeal are very wide and the Court can in a fit case exercise that power whether or not an appeal lies."

The revision application of the Petitioner-Appellant was dismissed on the ground that the Petitioner-Appellant had no locus standi. It must be noted that revisionary power of the Court of Appeal is exercised in order to correct the errors or mistakes of judgments or orders of the courts of first instance. When an illegality or error of a judgment/order of the court of first instance is brought to the notice of the Court of Appeal, the Court of Appeal can, on its own motion, call for the record of the court of first instance and give directions to correct such errors or set aside such illegal judgments/orders. This view is supported by the judicial decision of this court in the case of Attorney General Vs Gunawardena [1996] 2 SLR 149 wherein five judges of this court held as follows.

"Revision like an appeal is directed towards the correction of errors but it is supervisory in nature and its object is the due administration of justice and not primarily or solely the relieving of grievances of a party.

The provision that the Court may upon Revision make such order, as it might have made had the matter been brought up in due course of appeal may have been enacted because of the recurring discussion in Courts, whether powers of revision can or should be exercised where the matter might have

been brought up in appeal, had S.354 stood alone the argument that, by reason of the Provision relating to the orders which a Court may make in revision, the remedy by way of revision may be exercised only in a case where an appeal lay may have been valid. S.354 being an enabling provision it does not have the effect of impliedly excluding the exercise of the wide powers of Revision given by other provisions in cases where no appeal lies. In exercising the powers of Revision this Court is not trammelled by technical rules of pleading and procedure. In doing so this Court has power to act whether it is set in motion by a party or not and even ex mero motu".

The expression 'ex mero motu' according to 'Wharton's Law Lexicon' 14th edition page 393 means 'of his own accord'.

For the above reasons, I hold that in the present case, dismissing the revision application of the Petitioner-Appellant on the basis that he had no locus standi is wrong and the judgment of the Court of Appeal dated 8.8.2016 should be set aside. For the above reasons, I answer the above-mentioned 1st question of law in affirmative. In view of the answer given to the 1st question of law, it is not necessary to answer the 2nd question of law.

At the hearing of this appeal when court sought clarification whether the suspect in this case has been released on bail, learned counsel for the Petitioner-Appellant submitted that he had no knowledge on the matter.

For all the aforementioned reasons, I set aside the judgment of the Court of Appeal dated 8.8.2016 and direct the Court of Appeal to hear the revision application of the Petitioner-Appellant on its merit.

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

SC Appeal 25/2017

SC/HCCA/LA/27/2015

HCALT/23/2014

LT 36/2394/2012

In a matter of an appeal after leave to appeal being granted.

K. Sivasamy
C/o Nikapotha Kanda, Kithalella Road,
Bandarawela

Applicant

Vs.

D.L.Hema Malini de Silva of Uva,
Dikara Watta, Kithalella Road, Heeloya Road, Bandarawela

Respondent

AND BETWEEN

D.L.Hema Malini de Silva of Uva,
Dikara Watta, Kithalella Road, Heeloya Road, Bandarawela

Respondent/Appellant

Vs.

K. Sivasamy
C/o Nikapotha Kanda, Kithalella Road,
Bandarawela

Applicant/Respondent

AND NOW BETWEEN

D.L.Hema Malini de Silva of Uva,
Dikara Watta, Kithalella Road, Heeloya Road, Bandarawela

Respondent/Appellant/Appellant

Vs.

K. Sivasamy
C/o Nikapotha Kanda, Kithalella Road,
Bandarawela

Applicant/Respondent/Respondent

BEFORE: **Priyantha Jayawardena, PC, J.**

L. T. B. Dehideniya, J.

Murdu N. B. Fernando, PC, J.

COUNSEL: Ranga Dayananda for the Respondent-Appellant-Appellant

Kamal Suneth Perera for the Applicant-Respondent-Respondent

ARGUED ON: 25th of October, 2018

DECIDED ON: 31st of July, 2020

Priyantha Jayawardena, PC, J.

This is an appeal filed to have the judgment of the High Court of Uva Province holden in Badulla (hereinafter referred to as the 'High Court') dated 27th of March, 2015 set aside. The High Court has affirmed the Order of the Labour Tribunal holding that the termination of services of the Applicant-Respondent-Respondent (hereinafter referred to as 'the workman') was unlawful and unjustified.

The issue that needs to be considered in this appeal is whether awarding a sum of Rs.390,000/- being five years' salary, as compensation in lieu of reinstatement to the workman is contrary to the evidence led before the Labour Tribunal.

Factual Background

The workman had been employed at the estate of the Respondent-Appellant-Appellant (hereinafter referred to as 'the employer') from the year 1977. While the workman was working as a '*Kankani*' in the said estate, his services had been terminated by the employer on or about the 10th of December, 2004. The workman was 45 years of age and had 27 years of service at the time of the said termination.

The services were terminated on the basis that the workman had set fire to the storeroom which contained property worth Rs. 102,725/- and had stolen property worth Rs. 7,800/- belonging to the employer on the 4th of October, 2004. The workman had filed an application in the Labour

Tribunal on the 7th of March, 2005 stating that the said termination was unlawful and unjustified and sought reinstatement with back wages.

Subsequent to a complaint made to the Police by the employer on the 4th of October, 2004, the workman had been charged for the offences of causing mischief by fire or explosive substance with intent to cause destruction of the storeroom, theft of property in possession of employer and dishonestly receiving stolen property under sections 419, 370 and 394 of the Penal Code, respectively.

The Labour Tribunal had suspended the application filed by the workman under section 31B (3)(b) of the Industrial Disputes Act, No.43 of 1950 (as amended) (hereinafter referred to as "the Industrial Disputes Act") until the final determination of the case against the workman in the Magistrate's Court. Subsequently, the Magistrate's Court, after the trial, had acquitted the workman on the 24th of November, 2011 of all the aforesaid charges.

Thereafter, the Labour Tribunal had proceeded with the inquiry and by its Order dated 8th of March, 2014 held that the employer did not prove the allegations against the workman on a balance of probabilities and as such it was held that the termination under reference was unjust and unlawful. Accordingly, the Labour Tribunal ordered the employer to pay a sum of Rs. 390,000/- as compensation in lieu of reinstatement being five years' salary computed on the basis of Rs. 250/- average daily wages received by him.

The Labour Tribunal had considered the age of the workman, average daily wages drawn by the workman, and the lack of evidence or at least a suggestion that the workman had secured alternative employment since 2005, when computing compensation in lieu of reinstatement.

Being aggrieved by the said Order of the Labour Tribunal the employer had appealed to the High Court against the said Order. The High Court, after hearing the said appeal, had dismissed the same by judgment dated 27th of March, 2015 on the basis that the employer had failed to show that there were grounds to set aside the Order of the Labour Tribunal.

The employer being aggrieved by the judgment of the High Court had preferred an application for Special Leave to Appeal to this court. This court, having heard the parties, granted leave to appeal on the following question of law:

> ***"Did the Honourable Judge of the High Court fail to consider that the Labour Tribunal awarded compensation contrary to the evidence on record?"***

Submissions of the Employer

The learned Counsel for the employer submitted *inter alia* that, the workman continuously changed his position pertaining to his daily wages and that the Labour Tribunal had erred in considering that the workman received a sum of Rs. 250/- as daily wages.

It was further submitted that even though the learned President of the Labour Tribunal and the learned High Court Judge had decided that the workman had drawn a monthly salary of Rs.6,500/-, he had only drawn a monthly salary in the range of Rs.1,500/- to Rs.2,000/-.

Further, the Counsel for the employer submitted that the learned Judge of the High Court had failed to consider the previous acts of misconduct of the workman which should have been taken into consideration when computing the quantum of compensation.

In support of his submission, the Counsel for the employer cited the case of ***Ceylon Transport Board v Wijeratne*** **[1975] 77 NLR 481** where it was held that the past conduct of the workman is a factor to be considered when determining the quantum of compensation and that it should not exceed a maximum of three years' salary.

Submissions of the Workman

The learned Counsel for the workman submitted that when evidence was led before the Labour Tribunal, the workman had clearly answered the questions regarding his daily wages stating that he received a sum of Rs. 250/- for each day of work. It was further submitted that the said evidence of the workman was not challenged by the employer during cross-examination.

Moreover, the learned Counsel for the workman submitted that, in computing the amount of compensation, it was necessary to consider the fact that litigation in the Labour Tribunal was prolonged for nearly nine years.

In view of the fact that the workman had at least eleven more years to work until his retirement, the learned Counsel for the workman further submitted that the compensation granted by the Labour Tribunal is grossly inadequate.

Has the correct 'daily wage' been considered when computing compensation in lieu of reinstatement?

Evaluation of evidence

The Counsel for the employer contended that the Labour Tribunal had erred in considering that the workman received a sum of Rs. 250/- as daily wages. Further, he submitted that there are discrepancies in the evidence of the workman as to the monthly salary that he received from the employer.

The evidence led at the inquiry before the Labour Tribunal shows that when questioned with regard to the monthly salary in the course of evidence-in-chief, the workman had been unable to state his monthly salary with precision. Nevertheless, in response to several questions posed by his Counsel, the workman has stated that at the time of the termination of employment he earned a daily wage ranging from Rs.175/- to Rs.300/-.

Upon perusal of the evidence on record, it is evident that questions put to the workman by his Counsel with regard to his monthly salary and daily wages were vague and unintelligible, and thus, the answers given in response to the said questions cannot be understood and do not have a specific meaning because of the way in which the questions were framed. Further, it is pertinent to note that one such question contained multiple questions within the same question.

In the circumstances, the President of the Labour Tribunal should have ruled out such questions and requested the Counsel to reframe the questions to be more specific or to split the question into several questions depending on the complexity of the questions put to the witness.

The Labour Tribunal or a court has the power to question a witness in order to ascertain proper facts in a case.

Section 31C (1) of the Industrial Disputes Act states that:

> *"31C. (1) Where an application under section 31B is made to a labour tribunal, it shall be the duty of the tribunal to make all such inquiries into that application and hear all such evidence as the tribunal may consider necessary, and thereafter make not later than six months from the such order as may appear to the tribunal to be just and equitable".* [Emphasis Added]

The Labour Tribunal's power to make inquiries was considered in the case of ***Merril J. Fernando & Co. v. Deiman Singho*** **[1988] 2 SLR 242**, where the Court of Appeal has stated, **at page 245-246**:

> *"…there is a significant difference between the duties and powers of a Labour Tribunal under Section 31C (1) of the Industrial Disputes Act as amended by Section 6 of Act. No. 74 of 1962 and the original provisions as contained in Act No. 62 of 1957. Whereas the original Section required the Tribunal to "hear such evidence as may be tendered....", the amended Section makes it the duty of the Tribunal to "hear all such evidence as the tribunal may consider necessary". The latter indeed is a very salutary provision which the Tribunal should not have lost sight of".*

Thus, in terms of section 31C (1) of the Industrial Disputes Act, the Labour Tribunal is conferred the power to inquire into the daily wages of the workman.

In the instant appeal, the President of the Labour Tribunal has exercised his power under the said section and inquired as to the daily wages of the workman as the questions put to the workman by his Counsel were vague, unintelligible and contained multiple questions.

In response to the said question posed by the President of the Labour Tribunal, the workman had stated twice that the average daily wages received by him was a sum of Rs. 250/- with precision. Accordingly, the learned President of the Labour Tribunal has used the answers given by the workman to his questions to determine the wages of the workman.

It is pertinent to note that the said answers given by the workman therewith had not been challenged during cross-examination of the workman. Moreover, the employer has failed to produce any document to prove otherwise.

In the circumstances, it is necessary to consider the party who had the burden of proof in establishing the wages of the workman.

Section 36(4) of the Industrial Disputes Act states that the Labour Tribunal "*shall not be bound by any of the provisions of the Evidence Ordinance*". However, in the case of ***Ceylon University Clerical and Technical Association v. University of Ceylon*** **[1968] 72 NLR 84 at page 90** it was held that "*….although Labour Tribunals are not bound by the Evidence Ordinance it would be well for them to be conversant with the wisdom contained in it and treat it as a safe guide*".

Section 103 of the Evidence Ordinance, No.14 of 1895 as amended states as follows;

> "*The burden of proof as to any particular fact lies on that person who wishes the court to believe its existence unless it is provided by any law that the proof of that fact shall lie on any particular person*".

Thus, the burden of proof in establishing that the workman received a daily wage of Rs.250/- was on the workman as it is the workman who wishes the tribunal to believe that he was paid a daily wage of Rs.250/-.

In a civil case or an inquiry before the Labour Tribunal a fact is considered to be proven if a prudent man on a balance of probabilities believes that the facts before it exists. However, once the said evidence is led with regard to the wages of the workman, if the employer wishes to contradict the said sum, the burden of proof shifts to the employer to rebut the evidence given by the workman as to his daily wage.

In the instant appeal, the employer had stated that the documents pertaining to the workman's salary were destroyed by the fire in the storeroom that was allegedly set by the workman. However, under cross-examination the employer had admitted that she failed to mention any damage to documents in the complaint that she made to the Police against the workman with regards to the fire.

Further, even if the said documents were destroyed by the fire, the employer could have obtained the details of the wages paid to the workman from other relevant authorities such as EPF, ETF, etc. to prove the details of the salary paid to the workman.

In the circumstances, I am of the view that the employer has failed to rebut the evidence given by the workman as to his daily wage.

Moreover, I am of the view that in evaluating evidence, the whole of the testimony must be considered together. Further, when considering discrepancies on a specific fact, the entire evidence on the said fact should be considered. When considering evidence, one should not consider part of the evidence given by a witness in isolation from the rest of the evidence given by him/her. Thus, minor variations in evidence shall not be relied upon in the evaluation of the evidence given by the witness.

In the instant appeal, the workman has given evidence after about nine years from the date of the termination of his employment. That leads to the only inference that he had received his

last wages at least nine years prior to the date of giving evidence before the Labour Tribunal. In such circumstances, one cannot expect a witness to have a photographic memory of the facts that had taken place nine years ago. A Labour Tribunal or a Court should take contextual circumstances into consideration when evaluating evidence of a witness that contains minor discrepancies.

Hence, I am of the opinion that the President of the Labour Tribunal has acted in terms of the law in accepting the answer given to him by the workman and disregarding the minor discrepancies in the evidence of the workman in computing the daily wage of the workman. Particularly, in view of the fact that the employer neither challenged the evidence of the workman nor led evidence to contradict the evidence of the workman with regard to his wages. In fact, the evidence of the workman with regard to the said fact of the daily wages has been led at the inquiry before the Labour Tribunal without any contest.

Thus, the Labour Tribunal had not erred in law by accepting the totality of evidence given by the workman with regard to his daily wages and in considering Rs. 250/- as the average daily wages received by the workman.

The criterion applicable for the computation of compensation in lieu of reinstatement

Section 33(1)(d) of the Industrial Disputes Act stipulates the awarding of compensation in lieu of reinstatement.

> "33. (*1) Without prejudice to the generality of the matters that may be specified in any award under this Act or in any order of a labour tribunal, such award or such order may contain decisions-*
>
> *.....*
>
> *.....*
>
> *(d) 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, section 33(6) of the Industrial Disputes Act confers power on the Labour Tribunal "*to include in an award or order a decision as to the payment of compensation as an alternative to reinstatement, in any case where the court, tribunal or arbitrator thinks fit so to do.*"

Even though the Industrial Disputes Act confers power on the Labour Tribunal to order payment of compensation as an alternative to reinstatement, it does not stipulate the manner in which the quantum of compensation should be computed.

I am of the view that the amount of compensation should be computed based on the facts and circumstances of each case by evaluating the financial loss that has been caused to a workman by unjust and unlawful termination.

In the case of ***Ceylon Transport Board v Wijeratne* (*Supra)* at page 498**, Vythialingam, J. discussed the factors that could be considered when determining the quantum of compensation. It was held:

> *"Account should be taken of 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 levelled against the workman, the extent to which the employee's actions were blameworthy and the effect of the dismissal on future pension rights and any other relevant considerations. Account should also be taken of any sums paid or actually earned or which should also have been earned since the dismissal took place"*

Moreover, the Labour Tribunal is required to make a "just and equitable" order in terms of section 31C (1) of the Industrial Disputes Act in determining the quantum of compensation. However, the said duty of the Labour Tribunal to make a just and equitable order is not cast only towards the workman but also towards the employer as well.

A similar view was expressed in ***Manager, Nakiadeniya Group v. Lanka Estate Workers' Union* [1969] 77 CLW 52 at page 54**, whereby it was held, "*[i]n the making of a just and equitable order one must consider not only the interest of the employees but also the interest of the employers*".

Further in ***Ceylon Tea Plantations Co. Ltd. v. Ceylon Estates Staffs' Union* (SC 211/72, SCM 15/5/74)** [cited in the *'Commentary on the Industrial Disputes Act of Sri Lanka'* published by *Friedrich-Ebert-Stiftung (1989) at page 277*] the court held that "*a just and equitable order must be fair by all the parties. It never means the safeguarding of the interests of the workman alone*".

In the circumstances, I am of the view that the evidence led before the Labour Tribunal should be examined in order to determine the quantum of compensation that should be paid to the workman in lieu of reinstatement.

Has the Labour Tribunal granted an excessive amount of compensation?

The learned High Court Judge has affirmed the Order of President of the Labour Tribunal dated 8th of May, 2014 which awarded the workman a salary amounting to five years as compensation in lieu of reinstatement.

The Counsel for the employer relied on the case of ***Ceylon Transport Board v Wijeratne*** **(supra) at page 498-499**, where Vythialingam, J. held: *"the amount however should not be calculated mechanically on the basis of the salary [a workman] would have earned till he reached the age of superannuation and should seldom if not never exceed a maximum of three years' salary*".

However, I am of the view that the determination of compensation should be based on the facts and circumstances of each case without being restricted to a specific number of years as a ceiling when computing compensation.

A similar view was expressed in ***Hatton National Bank v Perera*** **[1996] 2 SLR 231 at page 237,** where the court considered the said judgment in ***Ceylon Transport Board v Wijeratne*** **(supra)** but, notwithstanding the limitation of three years imposed on the quantum of compensation, awarded the salary amounting to five years as compensation in lieu of reinstatement to the workman.

I am also of the view that the Labour Tribunal was not bound to follow the restriction of three years when computing the quantum of compensation that was imposed by the said judgment ***Ceylon Transport Board v Wijeratne*** **(supra)**.

Now I will consider whether the criteria adopted by the Labour Tribunal and the award of compensation by the Labour Tribunal is just and equitable in terms of section 31C (1) of the Industrial Disputes Act.

Is the awarding of five years' salary to the workman just and equitable?

The employer had made the complaint to the police on the day of the alleged incident, i.e. on the 4th of October 2004, and the workman had made the application to the Labour Tribunal on the 7th of March, 2005.

The delay in concluding the proceedings before the Magistrate's Court

The Labour Tribunal has suspended the application of the workman on an application made by the employer in terms of section 31B (3)(b) of the Industrial Disputes Act which states as follows:

> "*31B (3) Where an application under subsection (1) relates -*
>
> *(a) ……..*
>
> *(b) to any matter the facts affecting which are, in the opinion of the tribunal facts affecting any proceedings under any other law,*
>
> *the tribunal shall make order suspending its proceedings upon that application until the conclusion of the said inquiry or the said proceedings under any other law, and upon such conclusion the tribunal shall resume the proceedings upon that application and shall in making an order upon that application, have regard to the award or decision in the said inquiry or the said proceedings under any other law*".

The delay in concluding the Labour Tribunal inquiry as a result of the application made by the employer to suspend the application of the workman until the conclusion of the proceedings before the Magistrate's Court should not be held against the employer. Further, the employer is entitled in law to make such an application to suspend the workman's application in terms of the abovementioned section of the Industrial Disputes Act.

Hence, the employer cannot be penalized for the delay caused by suspending the application of the workman in accordance with the procedure stipulated in the Industrial Disputes Act.

Nevertheless, it appears that grave injustice and financial loss have been caused to the workman because of the undue delay in concluding the case filed in the Magistrate's Court against him. Particularly, pending criminal proceedings against the workman will make it difficult for the workman to find alternative employment.

In the circumstances, I am of the view that the legislature should consider the implications of the delay caused due to the suspension of applications pending before the Labour Tribunal under section 31B (3) of the Industrial Disputes Act as amended until the conclusion of similar, identical or relevant matters which are pending before other courts or institutions.

In passing, I wish to note that the legislature has taken steps to address the injustices caused to workmen due to delays caused in obtaining relief when employers exercise their right to appeal. Accordingly, section 31D of the Industrial Disputes Act was amended by the Industrial Disputes Act (Amendment) No. 32 of 1990 thereby requiring employers who intend to appeal against the orders of the Labour Tribunal to furnish security in cash before an appeal is lodged.

Thus, I am of the view that new legislation should be enacted to address the delay caused due to suspension of applications in terms of section 31B (3) of the Industrial Disputes Act and to expedite the conclusion of such matters pending before other courts or institutions.

The need to mitigate losses

A workman whose services were terminated is under a duty to mitigate his losses by finding alternative employment. S.R. De Silva in *'**The Legal Framework of Industrial Relations in Ceylon**'* at page 389 states:

> "*No question of compensation properly arises where the termination has caused no loss to the employee, as where the employee has found alternative employment of equal or better prospects soon after termination*".

Further, discussing the duty of a dismissed workman to mitigate damages, it cited the Indian case ***Shri Chatrapati Shivaji Sahakari Ltd. v. Bhokare*** **[1966] ICR 86** where it was held:

> *"Under the general law of master and servant, a servant wrongfully discharged should do all in his power to mitigate damages and endeavour to get other employment and to the extent to which he has got wages elsewhere damages can be reduced."*

However, I am of the view that the adverse implications of pending criminal proceedings before the Magistrate's Court makes it difficult for the workman to secure alternative employment.

Thus, although the delay caused by criminal proceedings should not be held against the employer, it has an adverse impact on the workman in finding alternative employment. This is

especially the case in the instant application, as the workman has worked as a *"Kankani*" which is an employment which naturally requires the trust and confidence of an employer.

A similar position was held in ***Silva v. Kuruppu***, **(SC 182/69, SC Minutes dated 14/10/71),** cited in the *'Commentary on the Industrial Disputes Act of Sri Lanka'* published by *Friedrich-Ebert-Stiftung (1989) at page 375*. In the said case, the court held that the failure of the workman to obtain employment of a suitable nature due to the false allegations of theft made by the employer was relevant in the assessment of compensation.

Further, the Labour Tribunal has also considered the age of the workman in the computation of compensation. The workman had been 45 years old at the time of termination and had been 54 years old at the time the Order of the Labour Tribunal was delivered. Hence, obtaining employment similar to the status of a *Kankani* which is heavily dependent on physical strength is difficult for the workman as he was nearing his age of retirement.

Moreover, in the instant appeal, the workman had worked with the employer for approximately 27 years in total, which is a significant period of service. The employer contended that the workman had, on several occasions during the said service period, cut trees belonging to the employer without obtaining prior permission. In support of the said contention, the employer had produced letters to the Labour Tribunal in which the signatory, that the employer claims to be is the workman, admits the cutting and selling of trees.

However, the said letters have not been considered as the employer had failed to prove the said letters before the Labour Tribunal.

Hence, I am of the view that the Labour Tribunal was correct in not acting on facts in respect of prior misconduct on the part of the workman that have not been proved at the inquiry before the Tribunal.

Conclusion

In the circumstances, considering the implications of having pending criminal proceedings before a Magistrate's Court in securing alternative employment, the age of the workman at the time of termination of employment and the impact it has on securing alternative employment, the type of employment that the workman engaged in, the number of years of service that the workman had provided to the employer, and the age of the workman at the time the inquiry

before the Labour Tribunal concluded, I am of the view that awarding five years' salary as compensation in lieu of reinstatement at an average daily wage of Rs.250/- is not excessive.

Hence, I answer the following question of law in the negative:

> *"Did the Honourable Judge of the High Court fail to consider that the Labour Tribunal awarded compensation contrary to the evidence on record?"*

In the circumstances, I dismiss the appeal with costs.

I order Rs.100,000/- as costs to be paid within three months from today.

The Registrar of this court is directed to forward a copy of this judgment to the Commissioner General of Labour to act in terms of the law.

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 for leave to Appeal under and in terms of Section 5 of the High Court of the Provinces (Special Provisions) (Amendment) Act, No. 54 of 2006.

SC Appeal No. 26/2016
SC LA No. SC/HCCA/LA/41/2015
HC (Western Province) No. WP/HCCA/GAM/09/2014 Rev
DC Gampaha Case No. 42392/P

Kahandawala Arachchige Indrawansha
No. 641, Kajuhena Road, Heiyanthuduwa.

Plaintiff

Vs.

Kahandawala Arachchige Rupasiri
No. 641/B,
Kajuhena Road, Heiyanthuduwa.

Defendant

AND BETWEEN

Mahakumbure Gedara Sandamali Thilakarathne
No. 639/3, Kajuhena Road,
Heiyanthuduwa.

Petitioner

Vs.

Kahandawala Arachchige Indrawansha
No. 641, Kajuhena Road, Heiyanthuduwa.

Plaintiff-Respondent

Kahandawala Arachchige Rupasiri
No. 641/B, Kajuhena Road,
Heiyanthuduwa.

Defendant-Respondent

AND BETWEEN

Mahakumbure Gedara Sandamali
Thilakarathne
No. 639/3, Kajuhena Road,
Heiyanthuduwa.

Petitioner-Petitioner

Vs.

Kahandawala Arachchige Indrawansha
No. 641, Kajuhena Road, Heiyanthuduwa.

Plaintiff-Respondent-Respondent

Kahandawala Arachchige Rupasiri
No. 641/B, Kajuhena Road,
Heiyanthuduwa.

Defendant-Respondent-Respondent

AND NOW BY AND BETWEEN

Kahandawala Arachchige Indrawansha
No. 641, Kajuhena Road, Heiyanthuduwa.

Plaintiff-Respondent-Respondent-Petitioner

Vs.

Mahakumbure Gedara Sandamali
Thilakarathne
No. 639/3, Kajuhena Road,
Heiyanthuduwa.

Petitioner-Petitioner-Respondent

Kahandawala Arachchige Rupasiri
No. 641/B, Kajuhena Road,
Heiyanthuduwa.

Defendant-Respondent-Respondent-Respondent

Before:	Buwaneka Aluwihare, PC. J. Priyantha Jayawardena, PC. J. Murdu N.B. Fernando, PC. J.
Counsel:	Erusha Kalidasa for the Plaintiff-Respondent-Respondent-Appellant. Ananda Kasthuriarachchi for the Petitioner-Petitioner-Respondent.
Argued on:	03. 06. 2019
Written submissions:	17. 06. 2019
Decided on:	10. 07. 2020

JUDGEMENT

Aluwihare PC. J.,

Introduction

1. This case concerns a challenge to an order made by the High Court of Civil Appeals-Gampaha where the Court, exercising its revisionary jurisdiction in terms of Article 138 of the Constitution read with Section 5A of the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990 as amended by Act No. 54 of 2006, had set aside the interlocutory decree and the final decree of a partition action and granted right of way, on an application made by the Respondent to the instant application **who was neither a party to the said partition action, nor had any claim to the corpus, at the time the partition action was instituted.**

Factual Background

2. The Plaintiff-Respondent-Respondent-Appellant (hereinafter referred to as the Plaintiff) filed an action in the District Court against the defendant-Respondent-Respondent-Respondent Kahandawela Archchige Rupasiri, seeking to partition the subject matter of this case, which was more fully described in the 3rd schedule to the plaint.

3. The matter proceeded to trial and the learned District Judge delivered the judgement on 24.07.2001 and the final decree had been entered on 30.09.2002.

4. When the plaintiff took steps to have the writ executed (on 26.01.2003) a few parties, however, had resisted the execution. Consequently, the plaintiff had had to institute contempt of Court proceedings against ten persons who had so resisted the execution of the writ.

5. After four years, on 23.05.2007, the disputing parties reached a settlement. The parties who had resisted the execution of the writ had agreed to pay the plaintiff a sum of Rs.16, 800/=, the cost the Plaintiff had incurred due to the said resistance and the parties had been warned by the Court to abide by the settlement.

6. Accordingly, the Court, on 08.07.2007 had ordered that the writ be reissued, which had been executed on 08.08.2007. On this occasion too, several other parties had resisted the execution of the writ and contempt of Court proceedings had been filed for the second time on 10.09.2007. Subsequent contempt proceedings too had been settled between the parties on 08.07.2014 and peaceful possession had been handed over to the Plaintiff and the Defendant of the partition case.

7. During the pendency of those proceedings, but independent to and unconnected with them, one Ranjith Priyantha, who happened to be the predecessor in title of the property of the Petitioner-Petitioner-Respondent to the proceedings before us (hereinafter referred to as the Respondent), had instituted an action against the Plaintiff in the District Court seeking a right of way over the subject matter of this case. When the present matter was taken

up for argument before us, it was brought to the notice of this court on behalf of the Plaintiff that the said matter concerning the right of way is still pending before the District Court.

8. In the meantime, the Respondent to the proceedings before this Court, who was never a party to the partition action referred to, filed an application dated 21.07.2014 in the District Court in terms of **Section 325(4) of the Civil Procedure Code**, (hereinafter the CPC) claiming several reliefs in connection with the partition action, which had come to an end by then. They were *inter alia*;

    a. To dismiss and set aside the writ issued, whereby the Plaintiff was to be given possession of the subject matter of the partition case.
    b. A declaration to the effect that the Respondent was entitled to a right of way either by prescription and/or as a servitude over the land referred to in the 3rd Schedule to the plaint (the land that was subjected to partition);
    c. That the Respondent be given the possession of the land referred to in the 3rd Schedule.

    Section 325(4) of the CPC reads as follows;

    "Any person claiming to be in possession of the whole of the property or part thereof as against the judgment- creditor may file a written statement of his claim within fifteen days of the publication of the notice on such property, setting out his right or interest entitling him to the present possession of the whole property or part thereof and shall serve a copy of such statement on the judgment-creditor. **The investigation into such claim shall be taken up along with the inquiry** into the petition in respect of the resistance, obstruction, hindrance or ouster complained of, after due notice of the date of such investigation and inquiry has been given to all persons concerned. Every such investigation and inquiry shall be concluded within sixty days of the publication of the notice referred to in subsection (2)" [emphasis is mine].

9. The learned District Judge in a considered order, quite rightly dismissed the application *in limine* on 28.07.2014 on the grounds that the Respondent's

application had no legal basis and that consequently, even the need to issue notice on the parties did not arise. The learned District Judge held;

"ඉහත කී පරිදි එකී පෙත්සම්කාරිය මෙම නඩුවේ පාර්ශවයක් නොවන අතර, නඩුවක කරනු ලබන ඉල්ලීමක් පවත්නා නෙතික ප්‍රතිපාදන මත සිදු කරනු නොලබන්නේනම්, එවැනි ඉල්ලීමක වගඋත්තරකරුවන්ට නොනීසි නිකුත් කිරීමේ නෙතික අවශ්‍යතාවයක් පැන නොනගී."

10. Aggrieved by the order of the Learned District Judge, the Respondent moved the High Court of Civil Appeal by way of revision, seeking to revise the partition judgment on the basis that the Final Decree was contrary to law and against the weight of the evidence placed before the Court and *inter alia* seeking the following reliefs;
    (1) To have the partition judgment dated 24.07.2001 set aside
    (2) To have the Final Decree dated 30.09.2002 set aside and
    (3) That the Respondent be granted the relief sought by her in her application to the District Court in terms of Section 325(4) of the Civil Procedure Code.

11. After consideration of the revision application, by its order dated 13.01.2015 the Judges of the High Court of Civil Appeal held that the order of the learned District Judge was erroneous and granted all the reliefs prayed by the Respondent;

"ඒ අනුව පෙත්සම්කාර පාර්ශවය විසින් 2014.07.31 වන දින **දීසා අධිකරණයට ඉදිරිපත් කරන ලද පෙත්සමේ ආයාචනයේ ඉල්ලා ඇති සියලු සහන** ලබා දෙමින් මෙම ප්‍රතිශෝධන ඉල්ලීමට ඉඩ ලබා දෙමු".

(It should be noted here that the DC Application is dated 21.07.2014 and not 31.07.2014 as erroneously mentioned in the order of the High Court of Civil Appeal.)

Order of the High Court of Civil Appeal

12. It is the considered view of this court that, if the learned judges of the High Court thought that there was merit in the Respondent's application, the only order that the learned High Court Judges were legally empowered to deliver was to direct the learned District Judge to issue notice on the parties to inquire into the matter which he had dismissed *in limine*.

13. The above view is expressed by this court on the basis that;

(a) Section 325(4) requires an investigation in to a claim under that provision be taken up along at an inquiry before the District Court. No inquiry was held by the learned District judge in the instant case.
[Please see the cases of **Sikander Abdul Samadh v. M. M. Musajee** (1998 (2) C.A.L.R. 147) and **Setunga v. Fernando** 1982 (2) SLR 584]

(b) Article 138 which confers appellate powers on the Court of Appeal which are now exercised by the High Court of Civil Appeals as well, by virtue of section 5A of the High Court (special provisions) Act, No. 19 of 1990 (as amended in 2006). Section 5A reads as follows:
"5A(1) 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)

(c) In the instant case there could not have been any ***errors of fact*** to be corrected for the reason that the learned District Judge had not gone in to or considered the facts.
In the case of **Andradie v. Jayasekera Perera** (1985) 2 SLR 204, at page 209, it was held by Siva Selliah J. as follows:
"All these are questions of fact as is the question of fraud on which evidence will appear necessary and the petitioner herself should be made available for cross-examination and **consequently the (District) judge must make his findings on questions of fact before this court can be invited on inferences and conduct to hold that there has been fraud… it is only where**

the finding of the District Court on such application is not consistent with reason or the proper exercise of the judge's discretion or where he has misdirected himself <u>on the facts or law will this court grant extraordinary relief by way of Revision</u> **or Restitutio in Integrum** which are extraordinary remedies." [emphasis is mine]

14. Contrary however to all legal norms and betraying total ignorance of rudimentary procedure, the judges of the High Court, whilst sitting in appeal have arrogated to themselves the functions of a court of first instance and inquired into matters concerning property rights, both prescriptive and servitutal, on the basis of a bare affidavit. In one sweeping sentence, in a two-page judgement, the learned High Court Judges had granted all the reliefs sought by the present Respondent who was the petitioner to the application before the District Court in terms of Section 325(4) of the CPC.

15. This misdirection, in my view, is grievous enough for this court to set aside the order of the High Court on that ground alone.

16. This Court, however, when the matter was supported, granted leave to appeal on the questions of law set out in sub paragraphs (a) to (f), (h), (i), (j), (k) and (0) of paragraph 23 of the Petition of the Petitioner and as such this Court is obliged to consider and answer the said questions of law.

17. The reliefs sought by the Respondent before the High Court of Civil Appeal are referred to in paragraph 10 of this judgement, however, before I set down the questions of law on which leave was granted, for clarity, I wish to set down the **reliefs prayed for** by the Respondent before the learned District Judge for the reason that, in its order, the High Court has stated that, it is *<u>granting</u>* **'all the reliefs sought by the petitioner** (the present Respondent) **in her petition before the District Court'**. Thus, reference to the reliefs prayed before the District Court by the present Respondent would be necessary, to appreciate the full impact of the order made by the High Court. The reliefs prayed before the District Court were ('P12'):

- To set aside the order sought (in the partition action) by the Plaintiff (Appellant in the instant case) to have the writ executed to obtain possession of the land referred to in the second Schedule to the plaint.

- A judgment declaring that the Respondent has a right of way by prescription and/or through necessity (servitude) over the land referred to in the Third Schedule to the Petition.

- A judgment bestowing the Respondent possession of the land referred to in the Third Schedule to the Petition.

18. In filing her application under section 325(4) of the CPC before the District Court, the main grievance of the Respondent was that she was not made a party to the Partition action. From the case record, it appears, that the Partition action was filed in 1998, the interlocutory decree had been entered on 24.07.2001 and the final decree on 30.09.2002. The deed (No. 813) by which the Respondent claims title to the property had been executed only in 2012 which was ten years after the final decree was entered. [As stated by the Respondent in paragraph 3 of the affidavit she filed, along with the Petition before the District Court.]

    It is also to be noted that the Respondent's predecessor in title, Liyanage Ranjith Priyantha was cited as the 10th Respondent when the first contempt of Court application was filed by the Appellant. [vide paragraph 4 of this judgement]

    If I am to summarize, by its order, the High Court had **granted the following reliefs** to the Respondent, in allowing her application for revision.

    i. Dismissed the application of the Plaintiff (present Appellant) for the execution of the writ of possession.
    ii. Granted the Respondent a right of way over the property described in the Third Schedule, by prescription and/or necessity.
    iii. The Respondent was granted possession of the property referred to in the Third Schedule.

19. The High Court Judges by their order dated 13.01.2015, had formed the view that the Plaintiff had made an application to have the writ (of possession) executed on 11.07.2014, which the High Court Judges held, was after a lapse of 10 years after the decree was entered. They had further held that the law does not provide for the execution of a writ of possession, after a lapse of 10 years from the date of the decree and that Section 337 of the Civil Procedure Code expressly prohibits granting of a writ after the expiration of ten years from the date of a decree.

20. The High Court Judge had relied on the decision of **Kamanie Alles de Silva v. Wijewardane** (2002) 3 SLR 236. Considering the facts of the present case which are totally at variance with those of the case that was cited above, I am at a loss to understand as to how the High Court Judges came to this conclusion. **The plaintiff (the present Appellant) had sought to have the writ executed by his application filed on 28.07.2003 (Journal entry No. 46 of 28.07.2003) which was less than a year after the final decree (dated 30.09.2002).** The execution was resisted (Journal entry No. 47 dated 26.09.2003). The journal entry clearly shows that the fiscal had reported, that he could not hand over possession to the Plaintiff as a crowd of people resisted it (Journal entry No. 47 dated 26.09.2003). This was settled between the parties on 23.05.2007 (Journal entry No. 77 dated 23.05.2007). Thereafter, the Plaintiff sought to have the writ of possession executed for the second time on 09.07.2007 (Journal entry No. 81 of even date) which had been executed on 08.08.2007 (Journal entry No. 82 dated 17.08.2007). It appears from the proceedings of 10.09.2007 that on the very day the writ was executed, some people had removed the fencing and had disturbed the peaceful possession of the impugned property of the Plaintiff. This had led to the filing of contempt proceedings and those had ended only in July 2014. Thus, it is clear from the sequence of events referred to, that the writ had been originally sought within a year of the final decree.

21. I am compelled to conclude that the Learned Judges of the High Court had either neglected to refer to the case record or were oblivious of it or failed to consider matters of such crucial importance.

22. Ironically, referring to the case of **Kamanie Alles de Silva v. Wijewardane** (supra) the High Court Judges have stated that there is nothing to indicate that the execution of the writ had come to a halt, due to any fraud or force of the kind referred to in the case cited. The judges, however have not stated the nature of the fraud or force contemplated in the case of **Kamanie Alles**, they relied on.

23. It would be relevant at this point to make reference to subsection 2 of Section 337 of the Civil Procedure Code;

(2) Nothing in this section shall prevent the Court from granting an application for execution of a decree ***after the expiration of the said term of ten years,*** *where the* ***judgment-debtor has by*** *'fraud or* ***force'*** *prevented the execution of the decree at some time within ten years immediately before the date of the application. (Emphasis is mine)*

24. In the instant case, the writ has been taken out on three occasions between 2002 and 2014. On two of the such occasions, there had been resistance to the execution of the writ and according to the fiscal report ('P9') when he went to execute the writ on 08.08.2007, there had been a crowd of people at the location, who had resisted the execution, but after explaining the consequences of such resistance, the fiscal had been allowed to carry on with his tasks. It was on this occasion that the Plaintiff had erected barbed wire posts. According to the Plaintiff, on the same night, the persons who were cited as Respondents in the contempt proceedings, had damaged the fence he had so erected.

25. Before I deal with the questions of law, I wish to consider both the oral and written submissions made on behalf of the **Respondent**:

(i) In fairness, it must be said that, the learned Counsel for the Respondent, at the outset conceded, that the filing of the application before the District Court (invoking jurisdiction under Section 325(4) of the Civil Procedure Code) was not the correct remedy or the procedure the Respondent ought to have adhered to.

(ii) It was submitted that the High Court in the exercise of its revisionary jurisdiction held that fraud had been perpetuated, and set aside the

judgement, but there is no mention of "fraud" anywhere in the impugned order. As such the said contention on behalf of the respondent is bereft of any merit.

(iii) It was also contended on behalf of the Respondent that the learned trial judge erred in not following the mandatory pre-trial steps. The application filed by the Respondent before the District Court does not refer to any such non-compliance, nor does it appear to be a matter considered by the High Court.

(iv) It was also contended that the judgement and the interlocutory decree made in the case is not final as the entitlement of the parties was contingent upon the production of a deed marked and produced as 'V1'. It was argued that, as the said deed has not been produced up to date, both the judgment and the decree are conditional and not conclusive. This again was not a matter urged before the High Court and the application filed by the Respondent makes no reference whatsoever to any of these matters.

(v) Interestingly the Respondent takes up the position (which is elaborated in paragraphs 2.7 and 2.8 of the written submissions) that her predecessor-in-title, Ranjith Priyantha in fact had instituted the action (No.1307/ZL) in the District Court of Gampaha claiming a roadway.

(vi) The Respondent also takes up the position that, during the Contempt of Court proceedings, one Magilin giving evidence, had admitted the fact that a case was pending before the District Court (No.1370) to claim a roadway, and the Respondent's position is that she did not take part in those proceedings.

(vii) It is to be observed that, it was not a case of the Respondent not taking part in the proceedings. The Respondent *could not* have had any claim to the property at the time the action (relating to the roadway) was filed in the District Court, as she had gained title to the property from her father M. Tillakaratne by way of a gift only in 2012, which was four years after the commencement of the contempt proceedings.

(viii) The father of the Respondent had acquired three properties (lands), one in 2005 (Deed No. 15466) another in 2006 (Deed No. 2490) and the third one in 2011 (Deed No. 4759).

(ix) In 2012, by Deed No. 813, ten perches had been gifted to the Respondent and this extent of land, it appears from the schedule to the said deed, has been carved out from and out of the amalgamated and consolidated lands referred to in the schedules of the deeds referred to [in (vii)] above.

(x) Other than the Deed No. 15466, the other two deeds have not been made available to this Court. A list of documents pleaded by the Respondent before the High Court is given on page 3 of the application, but neither of those two deeds are referred to in that list. Thus, it appears that the Respondent had suppressed those two deeds when she made the application before the High Court.

(xi) What is significant is that, Deed No. 15466 does not make any reference to a roadway, however, the Deed of Gift No. 813 refers to a roadway as per Survey Plan No. 3640 dated 04.02.2005, which was after both the Judgement (2001) and the Final Decree (2002) of the partition case in the District Court.

Questions of Law

26. I shall now set down the questions of law on which leave to appeal was granted in this matter. (Questions of law set out in sub paragraphs (a) to (f), (h), (i), (j), (k) and (0) of paragraph 23 of the Petition are re-produced verbatim below)

(a) The said order is contrary to the law relating to Revision.

(b) The learned High Court Judges by their order has granted final reliefs sought in the Petition filed in the District Court without any evidence thus has erred in law.

(c) The learned High Court judges have granted prescriptive rights to a purported road access without leading any evidence and without any demarcation of the road.

(d) The learned High Court Judges have erred in law by granting main reliefs as well as alternative reliefs sought by the Respondent by their order.

(e) By the impugned order the learned judges have set aside the judgement, interlocutory decree and final decree and now the case stands as there is no decree, thus has erred in law.

(f) By the said impugned order the Petitioner's and the Defendant's right to the property had been taken away without any reason whatsoever.

(h) The learned High Court Judges have erred in law by their finding that the writ has been executed after a lapse of ten years, whereas there was no executable decree for a period of 10 years.

(i) The learned High Court Judges erred in law by their finding that the Respondent had not been made a party to the partition action, whereas she was not the owner of the property at the time of the institution of the action.

(j) The learned High Court Judges have erred in law by allowing the Respondent's application for revision and granting reliefs thereof.

(k) The learned High Court Judges have failed to consider that the fact that the Respondent has an adequate alternative remedy provided by statute, therefore not entitled to invoke the revisionary power.

(o) The said judgement violates the Partition Law, No. 21 of 1977 and affect the finality attached to the partition decree thus could have serious impact on the law of partition.

27. The question of law embodied in sub-paragraph (a) of paragraph 23 of the Petition is a general question of law; '*the order is contrary to the law relating to revision*'. I shall not endeavour to answer this question as it will be automatically answered in deciding the other specific questions of law on which leave had been granted.

28. I wish to consider questions of law referred to in sub-paragraphs (b) and (c) jointly, for the reason that these two issues are interwoven. Both questions raise the issue as to whether the High Court erred in granting final relief, namely, granting prescriptive rights to a roadway without any evidence being led.

(i) It is settled law that both servitutal rights and prescriptive rights are required to be established through evidence. In their text, **"Servitudes"**

[1942] **Hall & Kellaway** on 'onus of proof' state that [at page 145] *"The onus is upon the person affirming the existence of a servitude to prove it. Evidence that one person has acquired a real right over the property of another must in all cases be perfectly clear, whether acquisition is claimed by virtue of a grant or prescription".*

(ii) In the case of **De Soysa v. Fonseka** (1957) 58 N.L.R 501, Chief Justice Basnayake said *"Servitudes are onerous and the law does not favour them, and it is incumbent on a person who claims a servitude to establish his claim by clear and satisfactory evidence of the* ***strongest kind."*** (emphasis is mine)

(iii) By the impugned order of the High Court dated 13.01.2015, the High Court granted the Respondent **"all the reliefs"** claimed by her, in her application filed before the District Court dated 21.07.2014 and one such relief claimed was 'a judgement to the effect that she is entitled for a servitutal right of way by prescription and/or of necessity'.

(iv) In the backdrop of the legal burden cast on the Respondent referred to above, even though no evidence was placed before the High Court, it's important to consider the material the Respondent placed before the Court. She based her case on a single affidavit supported by certain documents that she pleaded as part and parcel of the said affidavit.

(v) There is no ambiguity whatsoever that the Respondent got the title to this property only in 2012 [Deed No. 813], just two years prior to the filing of the District Court application. As such, it is clear that she could not have claimed prescriptive rights to a roadway. The Respondent had neither produced any affidavits from her predecessors-in-title to establish that they had used the roadway, nor has she produced any affidavit from any of the villagers by whom this road was used, as the Respondent claimed, to justify prescriptive rights. Hence her assertion is reduced to a bare statement.

(vi) Although these aspects were starkly clear, the judges of the High Court, it appears, have wantonly and deliberately shut their eyes to these factors and had decided that the Respondent is entitled to a judgement to the effect that she has a right to use the roadway both by prescription and/or by necessity, even though there was no proof to support it. Furthermore, there was no material to say that the road claimed by the Respondent and the purported roadway depicted in the commission plan produced in the partition action is one and the same roadway that is claimed by the Respondent.

(vii) Thus, I hold that High Court erred in holding that the Respondent was entitled to a servitutal right of way without any evidence, and as such answer the questions of law referred to in paragraphs (b) and (c) in the affirmative.

29. The next question of law on which leave was granted was that the High Court erred in granting both the main relief as well as the alternative relief. [Question of law in paragraph (d)] It was contended that; a party is not entitled to be granted a servitutal right both by way of necessity and prescription and that they are necessarily alternative remedies.

30. To my mind, the above contention appears to be a logical argument; to claim a servitutal right by necessity, a claimant is not required to prove possession or that he used a particular roadway over the servient property. But what needs to be established is, that the geography of his land is such that the only route, without having to undergo difficulty or unreasonable inconvenience, to access a public road or another road that connects to a public road, is by traversing over the servient property.

31. **Hall and Kellaway**, in their text **"Servitudes"** [1942 at page 65-66] state; *"A way of necessity (via necessitates, or noodweg) is a right of way granted in favour of a property over an adjoining one, constituting the only means of ingress to an egress from the former property to some place with which it must be of necessity have a communication link.".*

32. Commenting on the right of way by necessity and by prescription, Justice Prasanna Jayawardena P.C. in the case of **Maddumage Sulochana Perera v. Maddumage Nimal Gunasiri Perera and other** [SC Appeal 59/2012 SC minutes 18.01.2018 at page 12] held that *"It is clear from the aforesaid description that, the basis on which a plaintiff may claim a cause of action for right of way by prescription, is* ***quite different*** *to the basis on which a plaintiff may claim a cause of action for a right of way of necessity. The first claim founded on undisturbed and uninterrupted possession and use, which* is adverse to and independent of the rights of the owner of the *servient tenement. The latter claim is based only on necessity and does not require any prior possession and use of the right of way."*

33. I note with regret that the High Court judge has not paid any attention to any of these fundamental matters, before holding that the Respondent is entitled to what she claimed before the District Court; a *declaration, that the Respondent has a right of way by* ***prescription and/or through necessity*** *(servitude) over the land referred to in the Third Schedule of the Petition.* Thus, the High Court clearly erred when it held that the Respondent was entitled to right of way both by prescription as well as by necessity. Considering the above, I answer the question of law referred to paragraph (d) in the affirmative.

34. It was also urged before this Court that the judges of High Court erred when the Court set aside both the judgement and the interlocutory decree and it resulted in the Plaintiff losing his property rights. (Questions of law referred to in sub paragraphs (e) and (f)).

It was argued on behalf of the Plaintiff that the revision application before the High Court was a collateral challenge to the partition judgement and the Decree, which defeats the very objective of the Partition Law, namely the conclusive effect of the partition decree embodied in Section 48 of the Partition Law, No. 21 of 1977.

I am mindful of the decision in the landmark case of **Somawathie v. Madawela and Others** (1983) 2 SLR 15, where the Supreme Court held that the legality of

an interlocutory decree can be challenged by way of revision to prevent a miscarriage of justice.

I do not think the factual situation in the said case has a parallel to the case before us. Narrative of facts, to an extent, of the case of **Somawathie** (supra) might be necessary, not only to distinguish the said case *vis a vis* the one at hand, but also to highlight the grave error made by the judges of the High Court. As this is a landmark case in our jurisprudence relating to partition, I presume that the judges of the High Court were very much alive to the rationale of the judgement in **Somawathie v. Madawela** (supra).

> One Ensina Perera by Deed No. 2124 (1942) became owner of the entire land sought to be partitioned which comprised several allotments of land amalgamated and consolidated as one land depicted as Lots 1 to 10 of a total extent of 18 acres 3 roods 05 perches in plan No. 2646. Said Ensina Perera by Deed No. 2828 (1943) conveyed to Madawela "all that divided and defined allotment of land in extent three acres **from and out of all those lots marked 10 and 9 in plan No. 2646".**
>
> Lot 10 was an extent of 2 acres 3 roods 22 perches and lot 9 was in extent of 2 roods 12 perches. Therefore, an extent of land had to be carved out from lot 9 so as to make up the three acres conveyed on the Deed No. 2828. In these circumstances, the extent conveyed by Deed No. 2828 (to Madawela) had to be regarded as **undivided and undefined, despite the asseverations of the grantor to the contrary**.
>
> In the partition action filed by the heirs of Ensina, no notice was taken of the claim of Madawela and he was lost sight of. The trial was held and on 5.5.1972 interlocutory decree was entered. When the surveyor went to the land to partition it in accordance with the interlocutory decree, Madawela found lot 4 (of the commission plan) which was possessed by him and which had been excluded at the first survey, being treated as part of the corpus to be partitioned.

On the very day on which the final plan of partition was filed of record, namely, 6.11.1972, Madawela's proxy was filed by his Attorney-at-Law and an application for permission to intervene in the action was made on his behalf. Although the judge did not order him to be added, Madawela's name was entered on the caption of the case as the 7th defendant under date 6.11.1972.

On 23.3.1977 the court made order dismissing the application (of Madawela) for intervention and entered final decree.
The Court observed: "In the instant case, Madawela the original intervenient was a "person concerned". He was a necessary party. The deed in his favour would have come to the plaintiff's notice when the Land Registry was searched before plaintiff's purchase from some of Ensina Perera's heirs. She would have come to know of it had she caused a search to be made, as any prudent plaintiff should have done, before she filed the present case." The Court holding the lapse as a fundamental error observed further that, *"This glaring blemish taints the entire proceedings. It amounts to what has been called 'fundamental vice'. It transcends the bounds of procedural error."*

While concluding that a miscarriage of justice had resulted, the Court held: *"If as a result of such persistent and blatant disregard for the provisions of the law a miscarriage of justice results as here, then this Court will not sit idly by. Indeed, the facts of this case cry aloud for the intervention of this Court to prevent what otherwise would be a miscarriage of justice."*

The Court, however, was mindful of the fact that the trial had proceeded and the case had reached a finality, as such the intervention of the Supreme Court was only to the extent required to rectify the error. Thus, the Court observed;

> ***But in the circumstances of this case the extent to which the Court should intervene in the exercise of its revisionary powers should be given some thought. To set aside all the proceedings would be too sweeping and cause unnecessary hardship, inconvenience and delay.*** *The substantial relief which R. B. Madawela wanted when he first intervened was the exclusion of lot 4 in plan No.3392 ot 17.8.1970 made by S. T. Gunasekera Licensed Surveyor marked X9…Accordingly, it would meet the ends of justice* ***if without setting aside the interlocutory decree it is only amended by excluding from the corpus decreed to be partitioned.***

In the instant case, however, it was unfortunate that the judges had paid scant attention to the relief prayed, which was only a roadway. The High Court, however, in one sentence wiped out both the interlocutory decree and the judgement. In the present case, for the reasons stated earlier in this judgement, the Respondent could not have been made a party to the partition action and as such the learned District Judge could not be faulted. Even applying the rationale of the case of **Somawathie v. Madawela** (supra), the Respondent was not entitled to any relief.

I also wish to cite with approval the observation made by Justice Vythialingam in the case of **Gunatillake v. Muriel Silva and Others** (1974) 79 NLR 481, at page 496, where in his dissenting judgment, his Lordship observed:

".. ***Nor can a stranger to a partition action move the Supreme Court in revision to set aside an interlocutory decree*** *which has already been entered, on the ground that his claim has not been investigated or on the ground that the title of the parties to the action has not been adequately investigated, because, if there has been an investigation of title though it is inadequate the decree is final and conclusive. The difference is that where there is an appeal "nothing in the partition action can be final or conclusive." Section 48(1) of the Partition Act makes this quite clear when it sets out that "the interlocutory decree entered under section 26 and the final decree of partition entered under section 36 shall, subject to the decision on any appeal which may be preferred therefrom, be good*

and sufficient evidence of title..." This is not so where there is an application in revision. The interlocutory decree remains final and conclusive where there has been no appeal, and the interlocutory decree cannot be set aside in such a case on the ground that there has been an inadequate investigation of title."

As far as the partition case in question was concerned, the Respondent was nothing but a stranger. The High Court erred in setting aside the judgement and the interlocutory decree, and considering the reasons set out above, I answer the questions of law referred to in sub paragraphs (e) and (f) of paragraph 23 of the Petition in the affirmative.

35. The main ground on which the High Court granted relief to the Respondent was that the writ was executed after a lapse of 10 years from when the decree was entered, and the Plaintiff argued that the High Court judges erred in holding so, when there was no executable decree for a period of ten years. [Question of law referred to in sub-paragraph (h)]. I have dealt with this issue extensively in paragraphs 19 to 24 of this judgement and it is very clear that the High Court has misdirected itself in coming to such a conclusion. I regret to say that the High Court had paid scant regard to the material produced before it, but had conveniently overlooked the most relevant material on that issue. I do not wish to reiterate those facts here, but suffice it to say that, after the decree was entered in 2002, on three occasions in 2003, 2007 and 2014 the Plaintiff had applied for a writ of execution, but succeeded only in 2014 as on the two previous occasions there had been resistance to the execution of the writ of possession. As such I hold the said question of law referred to in sub-paragraph (h) also in the affirmative.

36. It was also contended on behalf of the Plaintiff that the High Court erred in holding that the Plaintiff had failed to make the Respondent a party to the Partition action, whereas she had had no title to the purported dominant property when the action was instituted. The High Court had observed in the order that the Plaintiff had failed to cite the people who used the roadway as Defendants, and **no reference was made to the Respondent, not being made a party to the partition action.** Considering the above, I answer the question of law

referred to in sub paragraph (i) of paragraph 23 of the Petition in the negative. I wish to state, however, that even the observation made by the High Court, of not having made the villagers parties to the action, is based on conjecture and that there was no material whatsoever before Court to make such an observation, other than the sole affidavit of the Respondent.

37. Although leave to appeal was granted on the question of law referred to in sub paragraph (j) of paragraph 23 of the Petition, I do not endeavour to answer the said issue as there is no question of law raised in the said paragraph, but a general statement; that the High Court judges erred in law *"by allowing the Respondent's application for revision and granting relief thereof"*.

38. It was also argued on behalf of the Plaintiff that the High Court erred in failing to consider the fact that ***the Respondent has an alternative remedy provided by statute*** and as such the Respondent was not entitled to invoke the revisionary jurisdiction of the Court [question of law referred to in subparagraph (k) of paragraph 23 of the Petition].

(a) In the course of the submissions it was contended on behalf of the Plaintiff that the High Court erred in exercising revisionary jurisdiction vested with the Court, as revisionary powers can be exercised only in instances where exceptional circumstances exist and in instances where no other remedy is available to an aggrieved party.

(b) The Plaintiff relied on the case of **Laxman Senevirathne v. Sri Jayewardenepura Kotte Municipal Council and others** CA 1212/2003 CA minutes 12.11.2003, where their Lordships observed that where the party had a right of appeal, the reasons must be urged in the application as to why he did not exercise his right to appeal, and why he has chosen instead to invoke the exceptional jurisdiction of the revisionary powers of the Court. The Court also observed [in the case referred to] *"…In considering the application of the Plaintiff-Petitioner, it is clear that several matters which were of material importance in this case has not been disclosed in this application."*

(c) The question of law, however, that was raised in these proceedings was, **as to whether the Respondent is entitled to invoke the revisionary jurisdiction, when she had an alternative remedy**. It is a fact that the impugned revision application was filed 12 years after the final decree in the partition action was delivered, and it is also correct that the revision application does not disclose the fact that an action before the District Court of Gampaha was pending over the disputed road way. I shall, however, confine myself to answering the issue, purely from the perspective of the question raised.

(d) The learned counsel for the Plaintiff (Appellant) relied on the decision in the case of **Rustom v. Hapangama & Co.** (1978/79) 2 SLR 225 where the court held that "*in a case where the Appellant had not indicated to Court that any special circumstances exist which would invite Court to exercise its powers of revision, particularly since the Appellant had not availed himself of the right of appeal under Section 754(2) which was available to him, no relief could be granted by way of revision*".

(e) It was also pointed out that the only remedy available to the Respondent is in terms of Sections 48(1) and Section 48(5) of the Partition Act.

(p) The Respondent on the other hand submitted that the present trend of the recent decisions is that, the Court of Appeal has the power to act in revision if the existence of special circumstances are urged, even though the procedure by way of appeal was available but was not availed of, and relied on the decision in **Rustom v. Hapangama & Co.** (supra). It was also argued on behalf of the Respondents that where delay would render the ultimate decision futile, that would be an exceptional circumstance calling for interference of the court by way of revision even in instances where appeal is available. [**Rasheed Ali v. Mohamed Ali and Others** (1981) 2 SLR 29.]

Considering the above, I am of the view that a party cannot be shut out from invoking revisionary jurisdiction purely on the ground that an alternative remedy is available to that party by virtue of statute. Accordingly, I answer the

question of law referred to in sub-paragraph (k) of Paragraph 23 of the Petition in the negative.

39. The final question of law that this Court is called upon to answer is, as to whether the impugned order violates the Partition Law, No. 21 of 1977 and affects the finality attached to the partition decree [question of law referred to in subparagraph (o) of paragraph 23 of the Petition].

Section 48 of the Partition Law of 1977 refers to the finality and conclusiveness of an interlocutory decree and a final decree, subject, however, to certain exceptions and an appeal to a superior Court. In the case of **Somawathie v. Madawela** (supra) their Lordships considered the final and conclusive effect of partition (interlocutory) decrees and expressed the view that Section 48 of the Partition Act, No. 16 of 1951 (which is substantially same as Section 48 of the present Partition Law of 1977) had still failed to achieve the desired finality and conclusiveness for decrees under the Partition Act. In this regard their Lordships cited with approval the statement made by Sansoni C.J in the case of **Mariam Beebee v. Seyed Mohamed** (1965) 68 NLR 36 which is reproduced below;

> "The power of revision is an extraordinary power which is quite independent of and distinct from the appellate jurisdiction of this Court. Its object is the due administration of justice and the correction of errors, sometimes committed by the Court itself, in order to avoid miscarriages of justice. It is exercised in some cases by a Judge of his own motion, when an aggrieved person who may not be a party to the action brings to his notice the fact that, unless the power is exercised, injustice will result. The Partition Act has not, I conceive, made any changes in this respect, and the power can still be exercised in respect of any order or decree of a lower Court."

40. Thus, one cannot say that Section 48 of the Partition Law of 1977 makes an interlocutory decree final, per se, for all intents and purposes. In this regard, I wish to cite with approval the observation made by justice T.S .Fernando in the case of **Ukku v. Sidoris** (1957) 59 NLR 90;

"While that section (i.e. section 48 of the Partition Act) enacts that an interlocutory decree entered shall, subject to the decision of any appeal which may be preferred therefrom, be final and conclusive for all purposes against all persons whomsoever, I am of opinion that it does not affect the extraordinary jurisdiction of this Court exercised by way of revision or *restitutio-in-integrum* where circumstances in which such extraordinary jurisdiction has been exercised in the past are shown to exist."

In the instant case however, in my view, there were no illegalities or no circumstances whatsoever existed that warranted the exercise of the extraordinary jurisdiction to set aside the partition decree, and the impugned order made by the High Court which had the effect of setting aside the decrees, did impact upon the law of partition. Thus I answer the question of law referred to in sub paragraph (o), also in the affirmative.

41. For the reasons set out above I am of the view that the impugned order of the High Court cannot be sustained. As I have referred to earlier, servitudes are onerous and the law does not favour them. It is incumbent on the person who claims a servitude to establish the claim. In the instant case, there was only an affidavit sworn by the Respondent and several documents pleaded along with the affidavit. The Court did not have the opportunity to test the veracity of any of these materials. The High Court was put on notice of the fact that the very claim was pending for adjudication before a competent Court, where the matter could have been adjudicated after hearing the evidence and considering any other relevant material. The High Court for a reason inexplicable, overlooked it.

As I have referred to in this this judgement, save for the questions which I have not endeavoured to answer for the reasons stated [(a) & (j)] and the questions referred to in sub paragraphs (i) and (k), all other questions of law on which leave to appeal was granted, are answered in the affirmative. Accordingly the order of the High Court of Civil Appeal dated 13.01.2015 is hereby set aside.

The Plaintiff-Respondent-Petitioner-Appellant is entitled for costs in sum of Rs 275,000/= and in addition, the said party is entitled for costs in the Court below (High Court of Civil Appeal).

Appeal allowed.

JUDGE OF THE SUPREME COURT

JUSTICE PRIYANTHA JAYAWARDENA PC

I agree.

JUDGE OF THE SUPREME COURT

JUSTICE MURDU FERNANDO PC

I agree.

JUDGE OF THE SUPREME COURT

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

SC. Appeal No. 31/2011

SC. SPL. LA. 99/2010
HIGH COURT HAMBANTHOTA
CASE NO. HCA 13/2010
HAMBANTOTA CASE NO. 85662

IN THE MATTER OF AN APPLICATION FOR SPECIAL LEAVE TO APPEAL AGAINST THE ORDER OF THE HIGH COURT IN TERMS OF SECTION 09 OF THE HIGH COURT OF PROVINCES (SPECIAL PROVISIONS) ACT NO. 19 OF 1990.

Priyantha Lal Ramanayake
No. 935, Siyambalakotte,
Barawakumbuka.
ACCUSED-APPELLANT-PETITIONER

Vs.

The Hon. Attorney General

RESPONDENT-RESPONDENT

BEFORE : **SISIRA J. DE ABREW, J.**
S. THURAIRAJA, PC. J. &,
E.A.G.R. AMARASEKARA, J.

COUNSEL : Dr. Ranjit Fernando for the Accused-Appellant-Petitioner.

Yuresha de Silva, SSC. for the Hon. Attorney General.

ARGUED & DECIDED ON : 27.01.2020

SISIRA J. DE ABREW, J.

Heard both Counsel in support of their respective cases.

In this case, Accused-Appellant was convicted for the offence of robbery of a chain which is an offence punishable under Section 380 of the Penal Code. The value of the chain was Rs. 24,000/-. After trial, the learned Magistrate convicted the Accused-Appellant and sentenced him to a term of 01 year Rigorous Imprisonment and to pay a fine of Rs. 1500 carrying a default sentence of 01 month Rigorous Imprisonment. In addition to the said punishment, learned Magistrate ordered the Accused-Appellant to pay a sum of Rs. 100,000 as compensation to the victim carrying a default sentence of 01 year Rigorous Imprisonment.

Being aggrieved by the said judgment of the learned Magistrate, the Accused-Appellant appealed to the High Court. The learned High Court Judge by his judgment dated 06.05.2010 affirmed the conviction and the sentence and dismissed the appeal. Being aggrieved by the said judgment of the learned High Court Judge, the Accused-Appellant has appealed to this Court. This Court by its order dated 22.03.2011 granted Leave to Appeal on the following questions of law.

"1) Did the High Court err by affirming the conviction of the Magistrate's Court in the teeth of errors in law with regard to the Burden of Proof and consideration of the Defense.

2) Did the High Court err by affirming the operation of a suspended sentence by the Magistrate Court when considering the nature of

the previous conviction. (notwithstanding Section 13 of the Criminal Procedure Code [Amendment] Act No. 47 of 1999)

3) Did the High Court err by affirming the Order of the Magistrate's Court with regard to the compensation, by failing to consider the legality and/or propriety and justification for same."

The main point urged by the learned Counsel for the Accused-Appellant was that the learned Magistrate has made a grave error in law on the burden of proof. Learned Magistrate in his judgment dated 17.06.2009 stated that the Accused must prove his defence on a balance of probability. The Accused-Appellant who gave evidence under oath stated that he did not commit this offence. Then his defence was a denial of the offence. The Accused-Appellant has not relied on a general or special exception contained in the Penal Code. Was the learned Magistrate correct when he, in his judgment dated 17.06.2009, decided that the Accused must prove his defence on a balance of probability? In finding an answer to this question it is relevant to consider the judicial decision in the case of **Martin Singho Vs Queen 69 CLW 21 at page 22** wherein His Lordship Justice T S Fernando held as follows;

"As this Court has pointed out on many occasions in the past, where an accused person is not relying on a general or special exception contained in the Penal Code, there is no burden on him to establish any fact."

As I pointed out earlier, the Accused-Appellant in this case has not relied on a general or special exception contained in the Penal Code. His defence was a denial of the offence. If the above decision of the learned Magistrate is accepted

as correct then the Accused in this case will have to prove his defence of denial of the offence on a balance of probability.

According to the law of this Country, this decision of the learned Magistrate is completely erroneous and wrong in law. When we consider the said misdirection committed by the learned Magistrate, we are unable to affirm the conviction of the Accused-Appellant. We hold that the learned Magistrate was completely wrong on that point.

According to the facts of this case alleged by the prosecution when the victim *Nandani* was walking on the road the Accused-Appellant snatched her chain. Soon after the incident, the Accused-Appellant too went to the Police Station. The Accused-Appellant too gave evidence under oath in this case. The Accused-Appellant denied the charge. The learned Magistrate has neither rejected nor accepted the evidence of the Accused-Appellant. This position is accepted by Counsel for both parties. We must consider whether the learned Magistrate has made an error in law when he decided to convict the Accused-Appellant without deciding whether he accepts or rejects the evidence of Accused-Appellant. In ***Ariyadasa Vs. Queen*** (68 NLR page 66) also reported in 68 CLW page 97 His Lordship Justice T.S. Fernando held as follows;

> "1) If the Jury believed the Accused-Appellant, he was entitled to be acquitted.
>
> 2) Accused is also entitled to be acquitted even if his evidence though not believed was such that it caused the jury to entertain a reasonable doubt in regard to his guilt."

It is relevant to consider the judicial decision in ***Martin Singho Vs. Queen*** *(Supra)* His Lordship Justice T.S. Fernando in the said case made the following observation.

> "Even if the jury declined to believe the Appellant's version, he was yet entitled to be acquitted on the charge if his version raised in their mind of the jury a reasonable doubt as to the truth of the prosecution case."

In ***Queen Vs. Kularatn****e* 71 NLR 529 Court of Criminal of Appeal considering the question as to how to evaluate a dock statement of the Accused, held as follows:

1) If they believe the unsworn statement it must be acted upon.
2) If it raises a reasonable doubt in their minds about the case for the prosecution the defence must succeed.

For the benefit of the trial Judges and the legal practitioners of this Country, we make the following guidelines as to how the evidence given by an accused person should be evaluated.

1. If the evidence of the Accused is believed by Court it must be acted upon.

2. If the evidence of the Accused raises a reasonable doubt in the prosecution case, the defence of the accused must succeed.

3. If the Court neither rejects nor accepts the evidence of the Accused, the defence of the accused must succeed.

Learned Magistrate in this case neither rejected nor accepted the Accused-Appellant's evidence. Even on this ground alone, the Accused-Appellant is entitled to be acquitted. We have earlier pointed out that the learned Magistrate has made a grave error in law when he made the observation which was referred to above with regard to the burden of proof. Considering all these matters, we answer the 1st question of law in the affirmative. Questions of law Nos. 02 and 03 do not arise for consideration. For the above reasons, we hold that the prosecution has not proved its case beyond reasonable doubt.

For the aforementioned reasons, we set aside both judgments of the learned High Court Judge and the learned Magistrate and acquit the Accused-Appellant.

Accused-Appellant acquitted.

JUDGE OF THE SUPREME COURT

S. THURAIRAJA, PC. J.

I agree

JUDGE OF THE SUPREME COURT

E.A.G.R. AMARASEKARA, 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 Special Leave to Appeal.

SC Appeal 32/2015
SC SPL LA No. 159/14
CA Appeal No. 251/2007
HC Polonnaruwa 101/2006

Rasingolle Weerasinghe Mudiyanselage
Nandana Senerathbandara alias Chandi
No. 21, New Mahasenpura
Welikanda.

Accused-Appellant-Petitioner

Vs.

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

Complainant-Respondent-Respondent

Before	:	Jayantha Jayasuriya, PC, CJ S. Thurairaja, PC, J. E.A.G.R. Amarasekera, J
Counsel	:	Shanaka Ranasinghe, PC with Nisith Abeysuriya instructed by Chatura Dissanayake for the Accused-Appellant-Appellant Chethiya Gunasekera, DSG for the Complainant-Respondent-Respondent.
Argued on	:	03.02.2020
Decided on	:	17.07.2020

Jayantha Jayasuriya, PC, CJ

The Accused-Appellant-Petitioner (hereinafter who is referred to as the accused) was indicted along with his father in the High Court of Polonnaruwa. They were indicted for Murder and Attempted Murder. The accused was convicted on both counts and his father was acquitted from both counts after trial before a Judge. Death sentence was imposed on the accused for the count of Murder and a term of fifteen years rigorous imprisonment and a fine of five thousand rupees was imposed for the count of attempted murder. The accused appealed against the convictions and sentences and the Court of Appeal dismissed the said Appeal.

Although, this Court had granted Special Leave on eight questions of law raised in the Petition of Appeal, the learned President's Counsel during the hearing before this Court submitted that the only question of law that is pursued before this Court is the question, whether the judgment of the Court of Appeal is contrary to law and against the weight of evidence adduced at the trial. In this context the Learned President's Counsel submitted that the judges of the Court of Appeal misdirected themself and / or erred when they affirmed the conviction of the accused for murder. Further narrowing down the issue, he contended that if the trial judge as well as the judges of the Court of Appeal properly analysed the facts of this case, culpability of the 1st accused should have been reduced to Culpable Homicide not amounting to Murder on the basis of Grave and Sudden Provocation. The contention on behalf of the accused is, that he had acted due to "cumulative provocation".

Exception 1 in Section 294 of the Penal Code reads as follows:

"Culpable Homicide is not murder if the offender whilst deprived of the power of self control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident".

Further, the Explanation under this exception reads as:

"Whether the provocation was grave and sudden enough to prevent the offence from amounting to Murder is a question of fact"

For an accused to succeed a plea of "provocation" there are several factors that has to be proved on a balance of probability. First there has to be a 'provocation' that had taken place. However each and every instance of provocation would not bring a situation within the parameters of this exception. Such provocation needs to be 'grave and sudden'. As the explanation to Exception 1 of section 294 of the Penal Code clarifies, whether a particular instance of provocation is grave and sudden is a question of fact. The Court will have to determine this issue based on the facts of each case. In addition to the existence of such provocation, the accused should have been deprived of the power of self-control due to such provocation. One other important aspect is that the accused should either cause the death of the person who caused that provocation or should have caused the death of any other person due to a mistake or an accident.

The Privy Council in **Attorney-General v John Perera** (54 NLR 265) observed that

> "The defence of provocation may arise where a person does intend to kill or inflict grievous bodily harm but his intention to do so arises from sudden passion involving loss of self control by reason of provocation" (ibid at p 269).

The Privy Council in the same judgment further held that

> "In order to reduce the crime from murder to manslaughter the offender must show first that he was deprived of self control and secondly that that deprivation was caused by provocation which in the opinion of the jury was both grave and sudden". (ibid at p 269).

In **Jamis v The Queen** (53 NLR 401 at 404) the Court of Criminal Appeal held that

> "A mitigatory plea under Exception 1 to section 294 is not available to an accused person who can only satisfy the jury that, at the time when he intentionally killed a person who had provoked him, he was acting under the stress of that provocation. He must in addition establish that such provocation, objectively assessed, was "grave and sudden enough to

> prevent the offence from amounting to murder". That depends upon the actual effect of the provocation upon the person provoked "*and upon the probability of its producing a similar effect upon other persons".*

It is also pertinent to observe that the Court of Criminal Appeal in **K.D.J. Perera v The King** (53 NLR 193 at 202) held ,

> "that the provocation must be such as to bring it within the category termed sudden, that is to say, that there should be a close proximation in time between the acts of provocation and of retaliation – which is a question of fact. This element is of importance in reaching a decision as to whether the time that elapsed between the giving of provocation and the committing of the retaliatory act was such as to have afforded and did in fact afford the assailant an opportunity of regaining his normal composure, in other words, whether had been a "cooling" of his temper".

It is trite law that "the plea of grave and sudden provocation is required to be established by the accused on a balance of probability" ("Offences Under the Penal Code of Ceylon" G.L.Peiris , 2nd Ed, page 103).

Submissions of the Learned President's Counsel for the accused and of the learned Deputy Solicitor-General needs to be considered in the context of jurisprudence set out above, to decide whether the appellant should have been given the benefit of the plea of provocation and convicted for the offence of culpable homicide not amounting to Murder.

The deceased in this case is a thirty-three years old lady. According to the evidence of the Judicial Medical Officer, the death was caused due to brain damage following gun shot injuries. There had been four entry wounds on the face and two of them were on either of the eyes. The victim who received firearm injuries in the course of the same transaction was 20 years old at the time of the incident. Altogether there had been seven entry wounds on his body and two of them were on the chest area. They were identified as injuries that are sufficient in the ordinary course of nature to cause death. When the nature of the injuries and the nature of the weapon used to

commit such injuries are taken into account, there is a little difficulty to conclude that the person who caused these injuries had entertained a "murderous intention" as described under section 294 of the Penal Code.

The prosecution has presented evidence of three eye-witnesses to the incident. They were the injured victim (the brother-in-law of the deceased), the daughter of the deceased who was eleven years of age at the time of the incident and a neighbour of the accused.

According to the injured victim, on the day in question, he had cycled passing the house of the accused. At that stage the accused had questioned the victim regarding an issue over the employees who were initially working for the accused and had later joined the victim. The victim was assaulted and his cycle was pushed to a side by the accused. A scuffle had ensued between the two. However, the brother and the father of the victim had later on rushed to the scene after the victim ran away and the accused had handed over the victim's push cycle to them.

The victim who ran towards his house had met his brother, the sister-in-law and their daughter who were heading towards their paddy field. The Victim also had joined them. They've had to walk passing the house of the accused to reach their paddy field. When they were nearing the said house he had heard the father of the accused who stood trial as the 2nd accused verbally abusing them and thereafter asking the accused to open fire at them. Then the victim had seen the accused approaching them armed with a gun and opening fire at the deceased first. Thereafter a second shot had been fired at the victim. He sustained injuries and fell on the road. Later on the victim had seen the deceased lying with injuries and the daughter weeping near the deceased. The victim was admitted to the hospital and had been treated as an in house patient. These incidents had taken place around 7.30 in the morning.

The neighbour of the accused had corroborated the evidence of the victim on material points. She had witnessed both incidents. The witness says that she witnessed the accused bringing a gun from her house and later opening fire at the deceased and the victim. She confirmed that two shots were fired. Thereafter the accused had run away leaving the gun behind.

Police officers who visited the scene had taken charge of the gun and the witness had identified the gun at the trial. This witness said that there was a gap between the initial scuffle between the accused and the victim and the second incident of shooting.

The daughter of the deceased who witnessed the shooting also had testified at the trial and had corroborated the evidence of the other two witnesses.

Both, the accused and his father, the 2nd accused made dock statements. The accused in his dock statement admitted that there was an argument between him and the victim, initially. He said that the incident of shooting took place, thereafter. According to the accused, after the first incident he was attacked and he ran into a nearby house to hide. Then he saw the gun lying there. He claimed that the gun went off when he pointed it.

The 2nd accused claimed that he was not at the scene.

The learned trial judge having analysed the evidence had accepted the evidence of the prosecution. He had focused on the evidence of the neighbour of the accused and had concluded that she is an independent witness. The learned trial judge rejected the versions of the two accused. However, acquitted the 2nd accused on the basis that the evidence failed to prove a common intention between the two accused. The accused in his *allocutous* said that he did not intentionally shoot at the crowd. He claimed that he opened fire as he was assaulted.

The evidence transpired at the trial clearly proves the intention of the accused at the time of shooting. Furthermore, the evidence proves that there were two separate incidents on the day in question. There was a gap between the initial scuffle between the accused and the injured victim and, the incident of shooting. Evidence does not show any abusive or provocative behaviour of the victim or the deceased when they were approaching the place of the incident. The accused did not take up the position that either the deceased or the victim provoked him and he lost his self control due to such provocation. The version of the accused, namely, that a crowd of people assaulted him, was rejected by the trial judge. Even if the initial incident – the scuffle between

the victim and the accused - is taken as an act of provocation, there was a cooling off period between the said incident and the act of shooting. The jurisprudence discussed hereinbefore does not support the proposition that the accused is entitled to succeed in the plea of grave and sudden provocation.

However, an examination of the jurisprudence relating to the defence of provocation reflects that the scope of this defence had subsequently been expanded. The Court of Criminal Appeal in **Samithamby v The Queen** (75 NLR 49) a verbal abuse by the wife several hours ago which resulted in the subsequent stabbing that caused the death of the wife was considered in favour of the plea of grave and sudden provocation. The majority of the court was of the opinion that the accused was,

> "brooding over his wife's remark which was not only insulting, but also expressed the thought that she preferred him to be dead. This mood persisted and prevented him returning to work in the field".

The court was of the view that the fact that :

> "he had previously attempted to commit suicide supported the probability that he ultimately stabbed his wife at a time when his mind was still disturbed by his wife's remark" (at p 50).

Further the Court held that :

> " There was no doubt an interval of time between the giving of provocation and the time of stabbing, but the provocation given was sudden, in the sense that the accused must have been taken aback when he realised that his wife wished him to be dead. The evidence concerning the subsequent period made it quite probable that in fact the accused all the time suffered under a loss of self-control" (at p 50).

The Court of Appeal in **Gamini Silva v Attorney-General** [1998] 3 SLR 248 following the decision in **Samythamby** did set aside a conviction for murder and found the accused guilty of

Culpable Homicide not amounting to Murder on the basis of grave and sudden provocation. The court was of the view that :

> "although the accused appellant was not justified in killing the deceased, that he was entitled to have succeeded in the defence of grave and sudden provocation although an interval of time had lapsed between the time of the provocation and the acts that led to the killing" (at p 252).

In **Premlal v Attorney-General** [2000] 2 SLR 403, the Court of Appeal cited with approval the following passage from the judgment of Lahore High Court in **Jan Muhammed v Emperor**, AIR 1929 – Lahore 861 at page 862 -

> "Each case must depend upon its own facts and circumstances. In the present case, my view is that, in judging the conduct of the accused, one must not confine himself to the actual moment when the blow, which ultimately proved to be fatal, was struck, that is to say, one must not take into consideration only the event which took place immediately before the fatal blow was struck. We must take into consideration the previous conduct of the woman. Her evil ways were the common scandal of the village and must have been known to the husband, causing him extreme mental agony, shame and humiliation".

The Court of Appeal in **W.A. Gamini v Attorney-General**, C.A. No. 142/2009, decided on 30 August 2016 set aside the conviction of Murder and convicted the appellant for the offence of Culpable Homicide not amounting to Murder on the basis that the facts of the case establishes the plea of continuing or cumulative provocation on a preponderance of evidence. The Court observed that

> "the chain of stressful events in the troubled relationship of the accused and the deceased culminating in the aforesaid unfortunate incident, are probable reasonably sufficient to entertain a plea of continuing or cumulative provocation because the accused retaliated at the spur of the

> moment and that he could reasonably show that he was deprived of his self control".

Jurisprudence referred to above demonstrate that in considering the plea of grave and sudden provocation an accused is entitled to rely upon a series of prior events that ultimately led to the incident at which the death was caused. A court should not restrict its focus to an isolated incident that resulted in the death, in considering a plea of grave and sudden provocation. The aforementioned jurisprudence has widened the scope of this plea by expanding the limitations recognised in its statutory form. Thereby, the concept of 'Continuing' or 'Cumulative' provocation has been recognised as a plea coming within the purview of the plea of grave and sudden provocation recognised under Exception – 1, section 294 of the Penal Code. Therefore, the proximity of time between the "*actus reus"* of the accused and the "provocative act" of the victim should be considered in the context of the nature and circumstances in each case, in deciding whether an accused is entitled to the benefit of the plea of Grave and Sudden Provocation.

The Madras High Court in **Marimuthu v State**, Crl.A.(MD) No 29 of 2018, judgment dated 05.11.2019, cited with approval the following passages from the judgment of a Division Bench of the same court in **Poovammal v State**, 2012 (2) MLJ (Crl.) 482, in explaining the concept of 'Sustained Provocation' recognised and developed by the courts in India.

> "30. Under the English Criminal Law, the provocation must be grave and also sudden. But, by way of judicial thinking, the Indian Criminal Law has gone ahead. (**K.M.NANAVATHI Vs. STATE OF MAHARASTRA** [A.I.R. 1962 S.C. 605]) In our system, there is the concept of "sustained provocation". It is concerned with the duration of the provocation. There may be incidents/occurrences, which are such that they may not make the offender suddenly to make his outburst by his overt act. However, it may be lingering in his mind for quite sometime, torment continuously and at one point of time erupt, make him to lose his self control, make his mind to go astray, the mind may not be under his control / command and results

in the offender committing the offence. The sustained provocation / frustration nurtured in the mind of the accused reached the end of breaking point, under that accused causes the murder of the deceased."

.....

"34. In **SUYAMBUKKANI v. STATE OF TAMIL NADU** [1989 LW (Crl.) 86], it is held as under:- "Though there has been here and there attempts in those decisions to bring the sustained provocation under Exception 1 to Section 300, I.P.C., there is a cardinal difference between provocation as defined under Exception I and sustained provocation. The only word which is common is 'provocation.' What Exception 1 contemplates is a grave and sudden provocation, whereas the ingredient of sustained provocation is a series of acts more or less grave spread over a certain period of time, the last of which acting as the last straw breaking the camel's back may even be a very trifling one. We are, therefore, far from grave and sudden provocation contemplated under Exception 1 to S. 300, I.P.C. Sustained provocation is undoubtedly an addition by Courts, as anticipated by the architects of the Indian Penal Code."

Certain common features in the factual circumstances can be observed in the cases where the similar concept was adopted by courts in Sri Lanka (**Samythamby**, **Gamini Silva, Premalal** and **W.A.Gamini).**

In **Samythamby,** the accused husband caused the death of the wife. They were married for nearly twenty-five years and were blessed with seven children. A few months prior to the fatal attack, the wife was discovered in an act of intimacy with another person. Thereafter the wife had been constantly scolding him and even ordered him out of the house. Further there had been an attempt of suicide by the accused. On the day in question the wife had verbally abused him. Few hours later the fatal attack by the accused took place. In **Gamini Silva,** the accused husband caused the death of an eighty-two year old person who made improper advances towards his wife. The accused husband was living at his in-laws with his young wife and their infant child. The accused in the early hours of the day of the incident came to know about an

instance where the deceased in the previous evening had made improper advances and suggestions to his wife. Thereafter the fatal attack by the accused took place around 11.00 am when the deceased came near his house. The accused in **Premalal,** was a University student. He caused fatal injuries to a female colleague. There had been a love affair between the two and later on the deceased had broken the relationship off and contracted a marriage with a person from her village. However, the accused continued to be intimate with her and was pleading not to leave him. Thereafter, the fatal attack took place at the University premises when the deceased came to sit for the examination. In **W.A.Gamini,** the accused who was a soldier caused the death of a corporal attached to the same camp. The latter had made undue advances towards a girl with whom the accused had fallen in love with. The deceased had ignored accused's plea not to interfere with the relationship. Fatal attack had taken place at a time where the deceased ridiculed the accused in front of the girl.

In all these instances, the fatal attack had taken place after a series of events that caused disturbance to matrimonial and or intimate relationship that existed between the accused and another person. In these cases the accused have gone through severe mental agony or distress up to the point where the fatal attack takes place, due to such series of events. Courts therefore had held that the accused should receive the benefit of the plea of grave and sudden provocation, even though a time gap exists between the act of provocation and the fatal attack. During the time between these two points there had not been a "cooling off" of the mind, but a state of continued mental stress and trauma due to the nature and the gravity of the provocative conduct of the deceased did exist. Therefore, for an accused to succeed in the plea of Grave and sudden provocation on the basis of continuing or cumulative provocation, the court on a balance of probability should be satisfied that the accused had gone through a state of continued mental stress and agony during the time gap between the provocative conduct and the fatal attack.

The Indian Supreme Court in **Nanavati v State of Maharashtra**, AIR 1962 SC 605 at page 629 having analysed decisions of the High Court in which the accused succeeded in the plea of grave and sudden provocation observed that,

> "All the said four decisions dealt with a case of a husband killing his wife when his peace of mind had already been disturbed by an earlier discovery

> of the wife's infidelity and the *subsequent act of her operated as a grave and sudden provocation on his disturbed mind*" (emphasis added).

In determining on the issue of provocation, the court should be mindful of the parameters to which the defence of grave and sudden provocation should be expanded in the context of continued or cumulative provocation. In this regard it is pertinent to note the following dicta of the High Court of Delhi, in **Suresh Kumar v State of Delhi** CRL. A 182/2002, judgment dated 19 February 2018.

> "(e) Sustained provocation' will be recognised only if the last straw' or the immediate act that led to the killing is in the spur of the moment and has a nexus to the past acts of sustained provocation. The Court will have to be cautious in adding further exceptions of that kind to Exception 1 to Section 300 IPC."

An examination of the facts of the case under consideration clearly indicates, that the series of events revealed therein cannot be brought within the parameters of the defence of cumulative or continued or sustained provocation discussed hereinbefore. There had been no provocative conduct or any other type of an interaction between the accused and the deceased lady, when they were attacked by the accused. The only connecting factor is that she happened to be the sister-in-law of the injured victim with whom the accused had an altercation in the same morning. The altercation itself, the facts surrounding the altercation and the circumstances leading to the said altercation, in my view are not of such a nature and gravity resulting the accused to have gone through continued stress or agony resulting in the subsequent act of shooting. Therefore in my view the accused is not entitled to the benefit of the Exception – 1 to Section 294 of the Penal Code.

The fact that the accused opened fire twice, the range of fire and the location and nature of injuries on the deceased and the victim clearly demonstrate the intention to kill entertained by the accused.

In view of all the findings discussed hereinbefore, there is no basis to interfere with the decision of the learned trial judge to convict the accused for the offences of Murder and Attempted Murder.

Accordingly, the question "whether the judgment of the Court of Appeal is contrary to law and against the weight of evidence adduced at the trial ?" is answered in the negative and the learned trial judge's decision to convict the accused-appellant for murder and attempted murder and the sentences imposed on both counts are affirmed.

The appeal of the accused-appellant is dismissed.

Chief Justice

S. Thurairaja, PC, 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

In the matter of an application for Special Leave to Appeal in terms of Article 127 read with Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC Appeal 32/2020

SC SPL LA No. 232/2017

Court of Appeal Case No. CA 243/2013

HC Anuradhapura Case No. 177/2013

The Democratic Socialist Republic of Sri Lanka

Complainant

Vs.

Hattuwan Pedige Sugath Karunarathne

(Presently incarcerated in Welikada Prison)

Accused

AND

Hattuwan Pedige Sugath Karunarathne

Accused-Appellant

Vs.

Hon. Attorney General

Attorney General's Department

Colombo 12.

Complainant-Respondent

AND NOW BETWEEN

Hattuwan Pedige Sugath Karunarathne

Accused-Appellant-Petitioner

Vs.

Hon. Attorney General

Attorney General's Department

Colombo 12.

Respondent-Respondent

Before: Buwaneka Aluwihare PC J

P. Padman Surasena J

E. A. G. R. Amarasekara J

Counsel: Asthika Devendra with Kaneel Maddumage for the Accused-Appellant-Petitioner.

Lakmali Karunanayake DSG for the Attorney General.

Argued on: 28. 01. 2020

Decided on: 20.10.2020

Judgement

Aluwihare PC J.,

1. Although a judgement should restrict itself to the grounds urged in appeal, owing to the special circumstances, this court feels obliged to address another issue as well, namely the duty of a judge to ensure that an Accused is manifestly accorded a fair trial. This court notes with grave concern that in this fundamental duty, the learned High Court Judge has lamentably failed and reasons for arriving at this conclusion will be specified in the course of this judgement.

2. The Indian Supreme Court in the case of **Zahira Habibullah Sheikh and Others v. State of Gujarat** [Appeal (crl.) 446-449 of 2004] held that:
"*Right from the inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying existence of Courts of justice. The operating principles for a fair trial permeate the common law in both civil and criminal contexts. Application of these principles involve a delicate judicial balancing of competing interests in a criminal trial, the interests of the accused and the public.*"

3. The court went on to hold that; "*As will presently appear, the principle of a fair trial manifests itself in virtually every aspect of our practice and procedure, including the laws of evidence. There is, however, an overriding and, perhaps, unifying principle.*" The court went onto quote Justice Deane's statement to the effect that "*It is desirable that the requirement of fairness be separately identified since it transcends the context of more particularized legal rules and principles and provides the ultimate rationale and touchstone of the rules and practices which the common law requires to be observed in the administration of the substantive criminal law.*" Further, fair trial was delineated thus by the

court; "*…Fair trial obviously would mean a trial before an impartial Judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated.*"

4. There is an additional matter that this court was called upon to decide in the instant case. That is, as to whether the application for Special Leave to Appeal is out of time. The impugned judgement of the Court of Appeal is dated 22nd May 2017 and the formal Petition in conformity with the Supreme Court Rules had been filed on 17th October 2017, which is almost five months after the delivery of the judgement of the Court of Appeal. In that sense this application is clearly out of time.

5. The learned counsel for the Accused-Appellant, however, explaining the delay submitted, that the Bar Association of Sri Lanka (the BASL) conducted a 'clinic' at the Welikada prison as a part of a legal aid program to render legal assistance to its inmates. The learned counsel submitted that at this 'clinic', the Accused-Appellant had intimated to the BASL officials that, aggrieved by the Court of Appeal judgement, he had forwarded an appeal to the Supreme Court on 1st July 2017 through the Superintendent of Prisons. It appears that the Superintendent of Prisons had referred it to the prison headquarters to be forwarded to the Supreme Court. This court called for a report from the Superintendent of Prisons, Welikada regarding this matter and a report was duly furnished on 2nd August 2018, which is filed of record. According to the same, the Assistant Superintendent of Prisons M. M. B. Senevirathne has confirmed the fact that the Accused-Appellant had in fact handed over an appeal against the judgement of the Court of Appeal to be forwarded to the Supreme Court, which the Assistant Superintendent of Prisons says he forwarded to the Commissioner of Prisons (Establishments) at the Prison Headquarters. A copy of the entry made in the register maintained to record

requests by prisoners was also submitted to this court along with a copy of the hand-written appeal, addressed to the Supreme Court by the Accused-Appellant. The appeal is dated 1st July 2017, which is within the time stipulated under the Supreme Court rules to file a Special Leave to Appeal application.

6. The entry in the said register is dated 4th July 2017. In addition, a copy of the covering letter addressed to the Commissioner of Prisons (Establishments) stating that the appeal submitted by the Accused-Appellant is forwarded (with his recommendation) to be submitted to the Supreme Court, was also tendered to this Court, along with the report of the Assistant Superintendent of Prisons, aforesaid.

7. The point I wish to stress is that, the Accused-Appellant has expressed every intention to appeal against the judgement of the Court of Appeal and has done whatever possible within the limited means available to him, despite the constraints he faced.

8. The learned Deputy Solicitor General upholding the highest traditions of the Attorney General's Department, submitted that she would not, in the interest of justice, be raising the technical objection of the time bar.

9. I am also reminded of the words of Chief Justice Abrahams in the case of **Velupillai v. Chairman, Urban District Council** 39 N.L.R 464, where His Lordship referring to a procedural defect said, at page 465 "*I think that if we do not allow the amendment in this case we should be doing a very grave injustice to the plaintiff. It would appear as if the shortcomings of his legal adviser, the peculiarities of law and procedure and the congestion in the Courts have all combined to deprive him of his cause of action …*" In the case before us the Accused-Appellant did not have the benefit of a legal adviser. Chief

Justice Abrahams went on to emphasize, that "*this* [the Supreme Court] *is a court of justice, it is not an Academy of Law.*"

10. In the circumstances aforesaid, the matter was taken up for support on 28th January 2020 and the court granted Special Leave to Appeal on the question of law referred to in sub-paragraph (e) of paragraph 23 of the regularized petition dated 19th October 2017, which is reproduced below;

> *"(e) Did the learned High Court Judge and the judges of the Court of Appeal err in law and in fact by failing to consider the fact that imposing a term of rigorous imprisonment for 81 years for two types of offences included in six counts in the indictment, which alleged [sic] to have been committed by the Petitioner* ***(accused)*** *on the victim within a period of 3 months is excessive and against the well-accepted principles of sentencing and theories of punishment."* [emphasis added]

11. As the question of law is confined only to the issue of the imposition of an excessive sentence, both the learned counsel for the Petitioner as well as the learned Deputy Solicitor General agreed to make submissions on behalf of the respective parties on the aforestated question of law with a view to an early disposal of this matter. Accordingly, this court, acting under the proviso Rule 16(1) of the Supreme Court Rules, dispensing with the requirement of complying with the provisions of the Rules regarding the steps preparatory to the hearing of the appeal, heard the learned counsel on the very day that Special Leave to Appeal was granted.

The Sequence of Events

12. The Accused-Appellant (hereinafter referred to as 'the Accused') was indicted before the High Court of Anuradhapura on six counts. (As the victim was a girl below the age of 16, I shall refer to her as "SK").

13. Count Nos. 1, 3 and 5 on the indictment were counts of Kidnapping (SK) whilst count Nos. 2, 4 and 6 were counts of Rape. According to the indictment, these offences had been committed between 01st December 2011 and 20th February 2012, within a time span of roughly 3 months.

14. According to the proceedings of 25th September 2013, the Accused had been served with the indictment and the learned High Court judge had ordered bail and had granted the Accused time until 21st October 2013 to furnish bail.

15. On the 21st of October 2013 the indictment had been read over to the Accused and he had pleaded not guilty to all the counts. As the Accused had not been represented by a lawyer, the Court had assigned Attorney-at-Law Ms. Priyanthi Hettiarchchi (hereinafter referred to as the 'assigned counsel') and accordingly, the trial had been fixed for the 5th of November 2013.

16. At this point, I also wish to refer to the fact that the procedure adopted by the learned High Court Judge was erroneous. This matter was mentioned on the 21st of October 2013 only to ascertain as to whether the Accused had furnished bail. The learned High Court Judge (predecessor of the trial judge) however, caused the indictment to be read to the Accused and the Accused had been asked to plead to the charges. The arraignment of an Accused is specifically provided for in Section 196 of the Code of Criminal Procedure, which states that, ***"when the court is ready to commence the trial…..****the*

indictment shall be read and explained to him and he shall be asked whether he is guilty or not guilty of the offence charged." [emphasis added]

17. Thus, it's clear that the indictment should be read and explained to the Accused only when the case is fixed for trial.

18. The trial had commenced on 5th November 2013 and the Prosecution had led the evidence of SK, the Prosecutrix. The assigned counsel represented the Accused. In the course of the examination-in-chief SK had said that the Accused happened to be her mother's ex-husband [it is not clear from the evidence as to whether the Accused was legally married to SK's mother]. In relating her story, she had commenced her evidence by narrating the last incident referred to in the indictment. She had said that on 21st February 2012, [this date in fact is outside the period referred to in the indictment in which the prosecution alleges the incidents of kidnapping and rape took place] she came by bus to go to school and got off at Thambuththegama town and when she walked towards a shop (the purpose has not been disclosed) the Accused came on a motorcycle and forced her to get on to the bike and had brought her to a house. After taking her to a room there, the Accused had forcibly removed her clothes. She had said that she was wearing a skirt and a blouse at the time. When the State Counsel questioned her about the school uniform, she said that she brought a change of clothes as she was supposed to practice for the school sports meet. It was on the way to the said house, that the Accused had got her to change into the skirt and the blouse.

19. SK had said in her testimony that the Accused had had sexual intercourse with her forcibly and that she had observed blood stains on her underwear. She had also said that while she and the Accused were in the room, the Accused received a telephone call which SK presumed was from her mother.

After the incident the Accused had dropped SK at the house of one Keshani, a schoolmate of hers.

20. SK had been questioned by the State Counsel with regard to the other incidents alleged to have taken place prior to the incident of the 21st of February on which count Nos. 1 to 4 were based. SK's testimony was that she was previously taken to a lonely spot and that the Accused tried to remove her clothes, but she did not allow him to do so. Her answer was, "ඇඳුම් ගලවලා මේවා කරන්න හැදුවා, මුකුත් කරන්න දුන්නේ නැහැ මං."

21. In response to the question as to what the Accused did after her clothes were removed, SK's response was that there was no complete removal of clothes "සම්පූර්ණ ගැලෙව්වේ නැහැ". After each of these incidents, SK had been brought back to coincide with the time that the class she was due to attend was scheduled to be over. In the course of the examination-in-chief the learned State Counsel has asked a specific question as to what the Accused did after her clothes were removed.

Q. "එදා ඇඳුන් ගලවලා මොකක්ද කළේ? "

A. "එහෙම මොකුත් කළේ නැහැ, ඉඹින්න ආව"

22. SK had thereafter been questioned about the 1st incident referred to in the indictment, *vis-a-vis* the sequence of the counts [1 and 2] on the indictment. To appreciate the evidence given by SK in relation to this incident, I have reproduced the relevant portion of the evidence.

Q. "එක්ක ගිහිල්ල මොකක්ද කළේ?"

A. "එදත් ඒවගේම කළා"

Q. "ඒ කියන්නේ? කරපු දේ කියන්ඩ"

A. "ඉඹින්න හැදුව"

Q. “ඒ වෙලාවේ SK ඇඳුම් ඇඳගෙනද හිටියේ?”

A. “ඔව්”

Q. “ඉඹින්න හදනකොට ඇඳුම් ඇගේ තිබුනද?”

A. “ටී ෂට් එක ඉස්සුවා”

23. From the above testimony of SK, it is clearly established that the Accused had had sexual intercourse with SK only on the 21st of February but on the two previous occasions referred to in the indictments, on which counts 2 and 4 were based, SK appears to have been sexually harassed, but the evidence emanating from the Prosecutrix herself clearly rules out sexual intercourse on those occasions. At this point it would be pertinent to consider the medical evidence as well.

24. Dr. D. L. Waidyaratne, consultant Judicial Medical Officer, (JMO) Teaching Hospital, Anuradhapura had examined SK on 24th February 2013, which was three days after the alleged incident.
He has recorded his findings as follows:

“No external injuries seen.

Hymen: Fresh, partly healed 6 o’clock Hymenal tear was present.

Vulva and labia swollen, red and tender.

Opinion: Features of recent sexual penetration were present.”

The JMO in his testimony had affirmed what he had stated in his report (the Medico-Legal Report) and had said that the last incident referred to by SK, is compatible with his observations.

25. This confirms the version of SK, that she had been subjected to sexual intercourse only once. Had she been subjected to such acts previously it was

very likely for the JMO to have observed old hymenal tears or may not have observed a "*fresh*" hymenal tear.

26. With regard to the two incidents prior to the incident of the 21st of February 2013, only a solitary question had been put to the doctor by the Prosecution. Upon being asked whether it is his position that previous instances of penetration cannot be ruled out, Dr. Waidyaratne had answered "*yes*". The Prosecution has, however, failed to ask the consultant JMO, the reasons for him to entertain such an opinion, which was mandatory on the part of the Prosecution. To facilitate the evaluation of the evidence of an expert, the expert must furnish the court with the rationale and the reasoning of the expert for forming a particular opinion. The State Counsel should have elicited his reasons, the media and the grounds from the medical expert for him to express such an opinion. In terms of Section 45 of the Evidence Ordinance, the expert's opinion is only relevant and ***not conclusive***. The learned State Counsel has totally overlooked the fact that the burden is on the Prosecution to establish the charges beyond reasonable doubt. I regret to state that the manner in which the Prosecution had been conducted in this case is far from satisfactory.

27. SK's mother, Samanmali too had testified and had stated that at the time relevant to the incident, she was living with the Accused and his son at the Accused's house. In addition, her brother one Vijitha Kumara, also had given evidence. None of these witnesses had added much to the Prosecution case.

28. The Prosecution also called a witness by the name of Vishaka Priyadarshini who had testified to the effect that on the day in question (21st February) SK came to their place with the Accused, whom the witness referred to as SK's father. It appears that SK and the daughter of this witness were friends. When this witness questioned SK the reason for her coming, SK has said that

she came because she cannot live with her mother. This witness, however, had contacted SK's mother over the phone and had requested her to pick SK up.

29. It is significant to note that although the learned counsel assigned by the court to defend the Accused, had represented him on all trial dates, she had not put a single question in cross-examination and it is recorded at the end of the examination-in-chief of each Prosecution witness "*no cross examination*". In short, the Prosecution version went unchallenged.

30. On 18th December 2013, the case took a different turn. When the case was taken up before the court, the Accused was represented by a different counsel, Kalinga Ravindra, Attorney-at-Law. The proceedings recorded on that day, is confusing to say the least. The counsel Kalinga Ravindra had submitted to court that "if a counsel has been assigned [to the Accused] and if the assigned counsel has been instructed, the case be taken up later" implying that he does not want to represent the Accused and that the assigned counsel be permitted to continue defending the Accused. When the case was called for the second time on that day, only the assigned counsel represented the Accused. It is recorded that the charges on the indictment were read over to the Accused severally and that the Accused pleaded guilty to each of the counts severally.

31. The proceedings did not disclose the reasons as to why the indictment was read over to the Accused for a second time, almost at the tail end of the trial. This was a matter where, at the inception, the Accused had elected to plead not guilty. Neither does the record bear out whether the Accused had wished to withdraw his earlier plea of not guilty not whether he has subsequently expressed his desire to plead guilty (I have adverted to this aspect later in this judgment). In fact, there is nothing to indicate that the Accused had

withdrawn his previous plea of not guilty, without which the court could not have recorded a guilty plea.

32. The court, however, had proceeded to record a plea of guilty which was followed by the submissions by the learned State Counsel with regard to the imposition of an appropriate sentence on the Accused while the assigned counsel pleaded in mitigation. Thereafter, the learned High Court Judge proceeded to impose the following sentence.

33. In respect of the counts of kidnapping, under Section 354 of the Penal Code, (Counts 1, 3 and 5) a sentence of 7 years rigorous imprisonment on each count (to run consecutively), a total of 21 years was imposed on the Accused. 7 years is the maximum sentence that is prescribed for the offence of kidnapping, under Section 354 of the Penal Code.

34. In respect of the counts of Rape, under Section 364(2) of the Penal code (counts 2, 4 and 6) the Accused was imposed a sentence of 20 years rigorous imprisonment on each count (to run consecutively), amounting to a total of 60 years. The maximum term of imprisonment that is prescribed for the offence of Rape under Section 364(2) is also 20 years.

35. Cumulatively, a sentence of 81 years rigorous imprisonment was imposed on the Accused.

36. In addition, fines totalling to Rs.7500/= with a default sentence of 1 years simple imprisonment and compensation in a sum of Rs.150, 000/= payable to SK, with a default sentence of 3 years simple imprisonment was imposed on the Accused.

The Concept of Fair Trial

37. In the instant appeal, this court is only called upon to consider the issue as to whether the sentence imposed on the Accused is excessive. Before that issue is considered, I wish to express certain reservations regarding the manner in which this case was conducted before the High Court.

38. From the copies of the proceedings made available to this court, as referred to earlier, no reason was adduced as to why the indictment was read to the Accused for the second time. Furthermore, this had taken place almost at the tail end of the Prosecution case, after the evidence of all the lay witnesses and the expert witness were led. The investigating officer, probably, would have been the only witness that the Prosecution had had to lead to close its case. There is no record of the Accused withdrawing his earlier plea of "not guilty". No doubt, the Accused has a right to withdraw his initial plea of not guilty at any time before the judgement is delivered and a plea of guilty can be advanced. In such an instance the court has a duty to act cautiously; not only must the court be satisfied that the withdrawal of the plea is out of the Accused's own free will but must also satisfy itself that the withdrawal of the initial plea was only after having fully understood the consequences of his act. Further, it is the duty of learned High Court Judge to have it recorded that the Accused had retracted his earlier plea of not guilty and that the court is satisfied that the Accused did so having full knowledge of his actions and the consequences. As the decisions of the High Courts are subject to review by the appellate courts, it is vital that the procedural steps referred to above are followed. There are statutory safeguards put in place. One example is where an Accused is indicted with the offence of murder (Section 296 of the Penal Code). The court is required to proceed with the trial as if the Accused had pleaded not guilty, even if the Accused tenders a plea of guilty to the

charge [Proviso to Section 197(1) of the Code of Criminal Procedure Act of 1979, hereinafter also referred to as the (CPC)].

39. In terms of Section 183 of the CPC, an Accused is entitled to withdraw his plea of guilty any time before the sentence is passed, with the leave of the magistrate. These are safeguards provided by the legislature to prevent any injustice being caused to an Accused and they cannot be dismissed lightly. When an Accused pleads guilty, it is not to be taken at its face value, unless the plea is expressed in an unmistakable term with full appreciation of the essential ingredients of the evidence.

40. In the case of **R.J. Henderson v. T.G. Morgan** 426 U.S. 637 (1976), the US Supreme Court held; "*Since Respondent (the Accused) did not receive adequate notice of the offence to which he pleaded guilty, his plea was involuntary, and the judgment of conviction was entered* ***without due process of law.*** (emphasis added) *The plea could not be voluntary in the sense that, it constituted an intelligent admission that he committed the offence, unless the Respondent received* "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process. **Smith v. O'Grady** 312 U.S. 329, 334." *Where the record discloses that defence counsel did not purport to stipulate that the respondent had the requisite intent or explain to him that his plea would be admission of that fact, and he made no factual statement or admission necessarily implying that he had such intent, it is impossible to conclude that his plea to the unexplained charge of second-degree murder was voluntary."* (pages 2257-2259)

41. Albeit in dissent, Justice Rehnquist summarised the law on the point, referring to earlier decisions; *"Out of just consideration for persons accused*

of crime, Courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences." (at page 2261)

42. The question presented in the said case of **Henderson v. Morgan** (*supra*) was whether a Defendant may enter a voluntary plea of guilty to a charge of second-degree murder without (the Defendant) being informed that intent to cause the death of his victim was an element of the offence.

43. The Respondent was indicted for first-degree murder, but by agreement with the Prosecution and on counsel's advice, the Respondent pleaded guilty to second-degree murder and was sentenced. Subsequently, after exhausting his state remedies in an unsuccessful attempt to have his conviction vacated on the ground that his guilty plea was involuntary, the Respondent filed a *habeas corpus* petition in Federal District Court, alleging that his guilty plea was involuntary because, *inter alia*, he was not aware that intent to cause death was an element of second-degree murder. The District Court ultimately heard the testimony of several witnesses, including the Respondent and his defence counsel in the original Prosecution; and the transcript of the relevant state-court proceedings and certain psychological evaluations of the Respondent, who was substantially below average intelligence, were made part of the record. On the basis of the evidence thus developed, **the District Court found that the Respondent had not been advised by counsel or the state court** that an intent to cause death was an essential element of second-degree murder, and, based on this finding, held that the guilty plea was involuntary and had to be set aside. Both the Court

of Appeals and the Supreme Court affirmed the judgment of the Federal District Court.

44. Although one might argue that the case of **Henderson v. Morgan** (*supra*) may not be directly on the point that this court is called upon to answer, I am however, is of the view that, in a perspective, it has a significant bearing on the case before us.

45. At the commencement, the Accused had pleaded not guilty to the six counts on the indictment. In the course of the evidence the Prosecution was not able to establish two out of the three counts of rape. In fact, there is positive evidence emanating from the victim herself that sexual intercourse did not take place on two of the occasions referred to in the indictment. Furthermore, there is a paucity of evidence with regard to the two counts of kidnapping. One requisite element of the offence of kidnapping is taking a minor out of the keeping of the lawful guardian of such minor without the consent of such guardian. When SK's mother testified, she had not been asked a single question as to whether she did or did not consent to SK being taken anywhere by the Accused. The only question that was posed to the mother of SK in relation to the two previous instances (of kidnapping) was whether SK complained to her about any harassment by the Accused on any previous occasions, to which she had answered in the negative. With regard to the offences of kidnapping, apart from the question referred to above, not a single question was put to the mother of SK although she was the pivotal witness to establish the charge of kidnapping from lawful guardianship.

Application of the Concept of Fair Trial

46. It is evident from the proceedings that the trial in this case commenced and proceeded before the same judge who heard the entirety of the evidence placed before court and who convicted and sentenced the Accused on his guilty plea. Same was the case with the prosecuting State Counsel as well as the counsel assigned by the court for the Accused. Thus, all of them were fully aware of SK's version. Although this court did not have the benefit of observing her demeanour, when one scrutinises her evidence with other independent material placed, she had spoken truthfully and does not appear to have suppressed any material evidence. In the circumstances, the learned High Court judge, the State Counsel as well as assigned counsel, undoubtedly, were fully aware of the evidence that was before the court to substantiate the charges and furthermore, what exactly had taken place between the Accused and SK on the three distinct occasions referred to in the indictment.

47. As referred to earlier, the record gives no indication as to the circumstances that led to the indictment being read to the Accused for the second time (almost at the tail end of the case) and more importantly the record is bereft of the reasons or circumstances under which the Accused changed his mind and pleaded guilty to the charges which he pleaded not guilty at the inception. It is clear from the proceedings that the Accused was virtually undefended and a reasonable conclusion that can be drawn from the circumstances is, that the Accused may have acted in sheer desperation to avoid the inevitable at the conclusion of the trial.

48. It is in this backdrop that one needs to consider as to whether the Accused was afforded a fair trial.

49. As stated above, at the juncture the Accused pleaded guilty to the charges, not only the learned High Court Judge, but also both the state Counsel and the assigned counsel were fully aware of the fact, that not only were **two of the rape counts not established**, but that there was also positive evidence negating such incidents having taken place [evidence of SK supported by medical evidence]. The same could be said with regard to two of the kidnapping counts as well, due to the paucity of evidence.

50. From the proceedings, it is clear that the assigned counsel, on her part, was nothing but a passive figure throughout the proceedings and did not put a single question to any of the Prosecution witnesses in cross examination. Nothing appears from the record to indicate that she had brought to the attention of the court that the Prosecution had failed to establish two of the Rape counts and the kidnapping counts.

51. Naturally the question that comes up is; was the Accused advised by the assigned counsel that the Prosecution had failed to establish two of the Rape counts and two of the kidnapping charges before the Accused pleaded guilty? I do not wish to comment on the professional conduct of the assigned counsel here as I intend to make a recommendation in that regard, in terms of Section 43 of the Judicature Act read with the Supreme Court Rules, independently of this judgement. I wish, however, to make the following observation. No counsel is compelled by court to undertake the defence of

an Accused and it's a choice an Attorney-at-Law can exercise. Thus, for moral reasons or otherwise if a counsel is not comfortable in accepting an appointment to undertake the defence of an Accused as an "assigned counsel" they are free to refrain from undertaking such duties. Once appointed, however, they cannot shirk their responsibilities and are under a professional duty, not to act in a manner detrimental to or prejudicial to the rights of the Accused that, they are defending.

52. Rule 15 of the Supreme Court (Conduct of and Etiquette for Attorneys-at-Law) Rules of 1988 stipulates;

"On accepting any professional matter from a client or on behalf of any client, it shall be the duty of an Attorney-at-Law to exercise his skill with due diligence to the best of his ability and care in the best interests of his client in such a manner as he may decide and he should do so without regard to any unpleasant consequences either to himself or to any other person. Furthermore, he should at all times so act with due regard to his duty to the Court, Tribunal or any Institution established in the Administration of Justice before which he appears and to his fellow Attorneys-at-Law opposed to him."

53. No doubt the duty of a State Counsel is to present the Prosecution in an effective manner to the best of their ability in furtherance of securing a conviction, if the evidence can support the charge. The Prosecutor, however, is an officer of the court and their role is to assist the court to dispense justice. Thus, it is not for a Prosecutor to ensure a conviction at any cost, but to see that the truth is elicited, and justice is meted out. A Prosecutor is not expected to keep out relevant facts either from the court or from the Accused. If the

investigation has revealed matters which are favourable to the Accused and the Accused is unaware of the existence of such facts, it is the bounden duty of the Prosecutor to make those facts available to the court and to the defence. Rule 52 of the Supreme Court Rules (Conduct and Etiquette for Attorneys-at-Law) Rules 1988 requires "*an Attorney-at-law* ***appearing for the prosecution*** *to bring to the notice of the court any matter which if withheld may lead to a miscarriage of justice"* [emphasis added]. Although in the case before us nothing was withheld, the learned State Counsel had a professional obligation to bring to the attention of the court that the Prosecution had not established two of the Rape counts.

Constitutional Guarantees and the ICCPR Act

54. There is no question that the courts also must respect and give effect to the constitutional provisions in the conduct of court proceedings, as such Chapter III of our Constitution relating to fundamental rights is no exception. Article 4 of the Constitution which provides the form and manner by which the sovereignty of the people is exercised, in its paragraph (d) stipulates that *"the fundamental rights which are by the Constitution declared and recognised* ***shall be respected, secured and advanced by all organs of government and shall not be abridged restricted or denied,*** *save in the manner and to the extent hereinafter provided"* [emphasis added]. In my view, when one considers the wording of the sub article, the words **"government organs"** encompass **"the judiciary"** as well. Article 13(3) recognises the entitlement of a person charged with an offence to a "fair trial", a right which the state has an obligation to accord to an Accused through the courts.

55. In the case of **The Attorney-General v. Segulebbe Latheef and Another** (2008) 1 SLR 225, Justice J. A. N. de Silva, as he then was, stated (at page 228);

> *"The Constitution by Article 13(3) expressly guarantees the right of a person charged with an offence to be heard by person or by an Attorney-at-law at a* ***"fair trial"*** *by a competent court. This right is recognised obviously for the reason that a criminal trial (subject to an appeal) is the final stage of a proceeding at the end of which a person may have to suffer penalties of one sort or another if found guilty. The right of an accused person to a fair trial is recognized in all the criminal justice systems in the civilized world. Its denial is generally proof enough that justice is denied. The right to a fair trial was formally recognised in International law in 1948 in the United Nations Declaration of Human Rights. Since 1948 the right to a fair trial has been incorporated into many national, regional and international instruments. Like the concept of fairness, a fair trial is also not capable of a clear definition, but there are certain aspects or qualities of a fair trial that could be easily identified."*

56. His Lordship identifies 13 such rights, stated (at page 229) that the right to a fair trial amongst other things includes; "***The accused has a right to be informed of his rights; If the accused is in indigent circumstances to provide legal assistance without any charge from the accused, and the right of an accused not to be compelled to testify against himself or to confess guilt."*** [emphasis added]

57. This position is now statutorily fortified with the enactment of the International Covenant on Civil and Political Rights (ICCPR) Act No. 56 0f 2007 (hereinafter the ICCPR Act). Section 4(1) of the Act, which delineates the rights of a person accused of an offence lays down that;

"A person charged with a criminal offence under any written law, shall be entitled-… (f) not to be compelled to testify against himself ***or to confess guilt."*** [emphasis is mine].

58. Under the International Covenant on Civil and Political Rights (ICCPR) Act, No. 56 of 2007, an Accused now has a statutory entitlement for a counsel to defend him:
Section 4. (1) of the ICCPR Act stipulates;
"A person charged of a criminal offence under any written law, shall be entitled—
(c) to have legal assistance assigned to him in appropriate cases where the interest of justice so requires and without any payment by him, where he does not have sufficient means to pay for such assistance.

Role of the Judge

59. I am mindful of the fact that the judges in criminal courts are burdened with a heavy case load. That, however, does not excuse the trial judge to not follow the procedural steps stipulated by law or to disregard the need to ensure that the Accused is accorded a fair trial, guaranteed by the Constitutional provisions and other laws.

60. Judges have a duty and are required to control the proceedings adhering to the aforesaid requirements, and to intervene where necessary to ensure the proceedings are conducted in a fair manner to all parties concerned. In this respect the judges need to follow the proceedings closely and should be alive to the events unfolding before them. If that were the case, the judge ought to have asked both the assigned counsel and the State Counsel, as to the justification for the plea of guilty by the Accused in relation to the two rape

counts that had not been established by the Prosecution. The entirety of the evidence had been led on two days, on 5th November 2013 and 27th November 2013 which was within a span of two weeks. Thus, the evidence should have been fresh in the mind of the learned High Court judge as well as the other counsel. The passive role played by the assigned counsel ought to have been noticed by the learned High Court judge. If the concept of Fair trial encompasses the right to counsel, the counsel must be 'an effective counsel'. That component, which is considered as an element of a fair trial, was visibly missing in the proceedings in relation to this case.

61. William W. Schwarzer in **'Dealing with Incompetent Counsel- The Trial Judge's Role' UC Hastings College of the Law (1980)** states (at page 641);
"*The frequency with which the issue of ineffective representation has arisen in recent cases before reviewing courts should alert trial courts to the need to monitor counsel's performance. These cases clearly suggest that the trial courts have the duty and the authority to protect the right to effective counsel. That the trial judge should not hesitate to act to assure the competent performance of counsel seems to be precisely what the Supreme Court had in mind in* ***McMann v. Richardson*** 397 US 759 (1970)*, when it said:*

> *"[W]e think the matter [whether counsel acted within the range of competence demanded of attorneys in criminal cases], for the most part, should be left to the good sense and discretion of the trial courts with the admonition that* ***if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of the incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts."*** [emphasis is mine]

62. He observes further (at page 650), "*In presiding over any trial, the judge seeks to achieve fairness. Where the law affords him discretion in the application of substantive or procedural rules, fairness normally will guide its exercise. **Since the competence of counsel is an element of a fair trial, achieving fairness will require the monitoring of counsel's performance and intervention in appropriate circumstances.*** [emphasis is mine] *This does not require the judge to evaluate the relative efficacy of trial tactics or to determine whether counsel's performance should receive a passing grade. Nor is the trial judge called upon to rule whether counsel's performance satisfies one of the minimum standards formulated by the appellate courts or whether a party is being denied effective representation. Instead, his function is to remedy observed deficiencies before it is too late, resorting always to the least intrusive measure adequate to the need.*"

Article 127 of the Constitution

63. It would be a travesty of justice to allow the conviction on the two counts of Rape and two counts of Kidnapping which had not been established, to remain. No reasonable court, by any stretch of imagination could have convicted the Accused of those offences had the trial proceeded to a conclusion.

64. This court granted Special Leave to Appeal only on one issue relating to excessiveness of the sentence. In this backdrop, it would be necessary to consider the powers vested with this court to remedy the injustice caused to the Accused and to what extent the error could be rectified.

65. I am reminded of the words of his Lordship Justice Soza in the case of **Somawathie v. Madawela** (1983) 2 SLR 15, at page 31;
"If as a result of such persistent and blatant disregard for the provisions of the law a miscarriage of justice results as here, then this Court will not sit idly by. Indeed, the facts of this case cry aloud for the intervention of this Court to prevent what otherwise would be a miscarriage of justice."

66. I am of the opinion that Article 127 which states that the Supreme Court *".....shall be the* ***final court of ...criminal 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****, tribunal....."* [emphasis added] is wide enough for this court to intervene to prevent what otherwise would be a serious miscarriage of justice.

67. As pithily stated in **Jennison v. Backer** (1972 (1) All E.R. 1006), *"The law should not be seen to sit limply, while those who defy it go free and, those who seek its protection lose hope."*

68. The Supreme Court considered its Appellate powers under Article 127 of the Constitution, in the case of **Sri Lanka Ports Authority v. Pieris** (1981) 1 S.L.R 101. His Lordship Justice Sharvananda, as he then was, stated (at page108);

> "*Article 127 spells the appellate jurisdiction of this Court. The appellate jurisdiction extends to the correction of all errors in fact and/or in law which shall be committed by the Court of Appeal or any court of first instance.* ***There is no provision inhibiting this Court from exercising its appellate jurisdiction once that jurisdiction is invoked****. On reading Articles 127 and 128 together, it would appear that* ***once leave to appeal is granted*** *by the Supreme Court or the Court of Appeal and this Court is seized of the appeal,* ***the jurisdiction of this Court to correct all errors***

in fact or in law which had been committed by the Court of Appeal or court of first instance is not limited but is exhaustive.

Leave to appeal is the key which unlocks the door into the Supreme Court, and once a litigant has passed through the door, he is free to invoke the appellate jurisdiction of this Court "for the correction of all errors in fact and/or in law which had been committed by the Court of Appeal or any court of first instance". This Court, however, has the discretion to impose reasonable limits to that freedom, such as refusing to entertain grounds of appeal which were not taken in the court below and raised for the first time before this Court. This Court in the exercise of its discretion will, however, look to the broad principles of justice and will take judicial notice of a point which is patent on the face of the proceedings and discourage mere technical objections." [emphasis added]

69. In another case decided shortly after the decision of **Sri Lanka Ports Authority v. Peiris** (*supra*) the Supreme Court said, in the case of **Albert v. Veeriahpillai** (1981) 1 SLR 110, at page 113):

"Articles 118 [sic] of the constitution provides that "the Supreme Court shall be the highest and final court of record in the Republic and shall, subject to the provisions of the Constitution, exercise, inter alia final appellate jurisdiction." Appellate jurisdiction may be exercised by way of appeal or revision. Article 128 of the Constitution prescribes how the appellate jurisdiction of this Court is invoked by way of appeal. The leave of this Court or of the Court of Appeal is a sine qua non for a party to come to this Court by way of appeal. But once leave is granted, on whatever ground it be, the appeal is before this court and this Court is seized of the appeal. Its appellate jurisdiction extends to 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 (vide Art. 127 of the Constitution). Therefore, it is competent for this Court to permit parties to bring to its notice

errors of law or of fact and raise new contentions or new points of law, or ***sue motu to raise them if there is proper foundation for them in the record. Thus, this Court will allow an appellant to urge before it grounds of appeal not set out in the application for leave if the material on record warrants the determination of same.*** *This Court is not hamstrung by the fact that the Court of Appeal had not granted leave to appeal on the ground urged before the Supreme Court."* [emphasis added]

70. Thus, it is evident that there are clear precedents for this court to act uninhibited *suo motu* in the interest of justice where the Court of Appeal or the court of first instance has clearly misdirected itself which has resulted in a serious miscarriage of justice, as in the present case.

71. In the circumstances, exercising the powers vested in court by Article 127 of the Constitution, the conviction of and sentences imposed on the Accused, on counts 1, 2, 3, and 4 are hereby quashed. The conviction of the Accused on counts 5 and 6 is hereby affirmed.

72. What was challenged in these proceedings, was the quantum of the sentence imposed. What appears from the evidence is that SK had been distraught due to a strained relationship with her mother and the Accused had taken advantage of the situation by developing an intimate relationship with SK. It is also evident that SK had accompanied the Accused on these jaunts willingly. Although consent is not a material factor as far as establishing the charge of rape is concerned, the Accused does not appear to have used force, although SK has said in her evidence that her clothes were removed forcibly. From the standpoint of the Accused, his conduct cannot be condoned by any

measure. As the stepfather, he had a duty to protect SK but he had acted otherwise.

73. The High Court Judge, however, had imposed the maximum sentence on both counts and to run consecutively. Under the circumstances they are manifestly excessive. As such I set aside the sentences imposed on the Accused by the learned High Court judge on counts 5 and 6 and substitute the same with a sentence of 4 years R.I on count 5 (Kidnapping) and a sentence of 14 years R.I on count 6 (Rape). Both terms of imprisonment to run concurrently. The fines and compensation imposed by the High Court Judge and the default sentences imposed, to remain intact. As the Accused had been in incarceration since the date of conviction, the prison authorities are directed to compute the commencement of the term of imprisonment, from the date of incarceration.

Appeal allowed

Judge of the Supreme Court

E. A. G. R. Amarasekara J.

I agree.

Judge of the Supreme Court

P. Padman Surasena J.,

I had the previledge of reading in draft form, the judgment of His Lordship Buwaneka Aluwihare PC J. I regret my inability to agree with the course of action taken in the judgment by His Lordship.

Hon. Attorney General had indicted the Accused - Appellant - Appellant in the High Court of Anuradhapura on six counts.

The said six counts respectively alleged that the Accused - Appellant - Appellant;

I. during the period 2011-12-01 to 2012-02-20, at Tambuththegama, kidnapped the prosecution witness No. 1, a girl less than 16 years of age, from the custody of her lawful guardianship and thereby committed an offence punishable under section 354 of the Penal Code;
II. on the date referred to in count No. 01 above, and in the course of the same transaction, at Galgamuwa, committed rape of the prosecution witness No. 1, a girl less than 16 years of age and thereby committed an offence punishable under section 364 (2) read with section 364 (2) (e) of the Penal Code;
III. during the period referred to in count No. 01 above, at Tambuththegama, on a date other than the date referred to in the count No. 01, kidnapped the prosecution witness No. 1, a girl less than 16 years of age, from the custody of her lawful guardianship and thereby committed an offence punishable under section 354 of the Penal Code;
IV. on the date referred to in count No. 03 above, and in the course of the same transaction, at Galgamuwa, committed rape of the prosecution witness No. 1, a girl less than 16 years of age and thereby committed an offence punishable under section 364 (2) read with section 364 (2) (e) of the Penal Code;
V. on the 21st of February 2012 or on a date closer to the said date, at Tambuththegama, kidnapped the prosecution witness No. 1, a girl less

than 16 years of age, from the custody of her lawful guardianship and thereby committed an offence punishable under section 354 of the Penal Code;

VI. on the date referred to in count No. 05 above, and in the course of the same transaction, at Galgamuwa, committed rape of the prosecution witness No. 1, a girl less than 16 years of age and thereby committed an offence punishable under section 364 (2) read with section 364 (2) (e) of the Penal Code.

On 21-10-2013, the learned High Court Judge had read out the charges to the Accused - Appellant - Appellant and also assigned Priyanthi Hettiarachchi Attorney-at-Law to appear for the Accused - Appellant - Appellant at the cost of the state. As the Accused - Appellant - Appellant had pleaded not guilty to all the charges, the learned High Court Judge had fixed the case for 05-11-2013 to commence the trial.

Accordingly, the trial had begun on the said date i.e. 05-11-2013. The prosecution on that date had concluded the evidence of three witnesses including the prosecution witness No. 1. The learned High Court Judge had then fixed the case for 27-11-2013 to resume the further trial.

On 27-11-2013, the prosecution had concluded the evidence of the Judicial Medical Officer after which the learned High Court Judge had fixed the case for 04-12-2013 to resume the further trial.

It appears from the journal entry dated 04-12-2013 that the further trial could not be resumed on that date hence the further trial was re-fixed for another date i.e. 18-12-2013.

On 18-12-2013, when the case was taken up for further trial, the Accused - Appellant -Appellant had pleaded guilty to all the six counts in the indictment. This was before the prosecution closed its case. Accordingly, the learned High Court Judge had proceeded to convict the Accused - Appellant - Appellant on all counts in the indictment on his own admission of guilt. Thus, from that point onwards, the only

task left for the learned High Court Judge was to decide on an appropriate sentence to be imposed on the Accused - Appellant - Appellant. Having heard the submissions of both parties relating to sentencing, the learned High Court Judge had then proceeded to impose the following sentences on the Accused - Appellant - Appellant.

Count No. 1

Seven (07) years rigorous imprisonment.

Count No. 2

Twenty (20) years rigorous imprisonment and a fine of Rupees Two thousand five hundred (2,500/=). One year simple imprisonment in default of the payment of the said fine was also imposed.

The Accused - Appellant - Appellant was also ordered to pay Rs. 50,000/= as compensation to the victim. One-year simple imprisonment in default of the payment of the said compensation was also imposed.

Count No. 3

Seven (07) years rigorous imprisonment.

Count No. 4

Twenty (20) years rigorous imprisonment and a fine of Rupees Two Thousand Five Hundred (2,500/=). One-year simple imprisonment in default of the payment of the said fine was also imposed.

The Accused - Appellant - Appellant was also ordered to pay Rs. 50,000/= as compensation to the victim. One-year simple imprisonment in default of the payment of the said compensation was also imposed.

Count No. 5

Seven (07) years rigorous imprisonment.

Count No. 6

Twenty (20) years rigorous imprisonment and a fine of Rupees Two Thousand Five Hundred (2,500/=). One year simple imprisonment in default of the payment of the said fine was also imposed.

The Accused - Appellant - Appellant was also ordered to pay Rs. 50,000/= as compensation to the victim. One-year simple imprisonment in default of the payment of the said compensation was also imposed.

The learned High Court Judge has further ordered that none of the above terms of imprisonment shall run concurrently. This means that the Accused - Appellant - Appellant has to undergo a cumulative period of 81 years rigorous imprisonment and a further cumulative period of 06 years simple imprisonment in case he defaults the payment of the fines and the compensation ordered.

Being aggrieved by the order of the learned High Court Judge, the Accused - Appellant - Appellant appealed to the Court of Appeal. The petition of appeal submitted to the Court of Appeal dated 31-12-2013 has also been produced marked **P 3** as part and parcel of the petition.

Having considered the arguments presented before it, the Court of Appeal by its judgment dated 22-05-2017, held that;

i. the Accused - Appellant - Appellant was never misled and he was well aware of the nature of the charges when he decided to plead guilty;
ii. the performance of the counsel at the trial in the original court is not a criteria in deciding the appeal;
iii. and hence, there was no reason to interfere with the order of the learned High Court Judge.

The Court of Appeal on the above basis dismissed the appeal.

Being aggrieved by the judgment of the Court of Appeal, the Accused - Appellant - Appellant filed the instant application for special leave to appeal. He has framed following questions of law in his petition dated 17th October 2017.

a) *"Did the learned High Court Judge and the learned judges of the Court of Appeal err in law and in fact by respectively imposing and affirming a term of rigorous imprisonment for 81 years on the petitioner for two types of offences included in six counts in the indictment which alleged to have been committed by the petitioner on the victim within a period of 3 months, i.e. from December 2010 to 21st February 2011?*
b) *Did the learned High Court Judge and the learned judges of the Court of Appeal err in law and in fact by respectively imposing and affirming a term of rigorous imprisonment for 81 years on the petitioner by failing to consider the fact that the petitioner pleaded guilty without proceeding with the trial?*
c) *Did the learned High Court Judge and the learned judges of the Court of Appeal err in law and in fact by failing to consider the fact that the indictment was erroneous and defective as counts 1, 2, 3, and 4 did not appropriately specify date relating to the alleged offences?*
d) *Did the learned High Court Judge and the learned Judges of the Court of Appeal err in law and in fact by failing to appreciate that the Petitioner was deprived of a fair trial which led him to plead guilty where the counsel assigned by Court failed to discharge his duties to an acceptable standard.*
e) *Did the learned High Court Judge and the judges of the Court of Appeal err in law and in fact by failing to consider the fact that imposing a term of rigorous imprisonment for 81 years for two types of offences included in six counts in the indictment which alleged to have been committed by the Petitioner on the victim within a period of 3 months is excessive and against the well-accepted principles of sentencing and theories of punishment? "* [1]

Perusal of the averments in the petition presented by the Accused - Appellant - Appellant to this Court, shows clearly that he had admitted the fact that he pleaded guilty separately to all the six counts in the indictment on 18-12-2013. He has further stated in his petition[2] that he honestly believed that the learned High Court

[1] Quoted from paragraph 23 of the petition dated 17th October 2017.
[2] Paragraph 8 of the afore-said petition.

judge would take into consideration, the fact that he had pleaded guilty to all the counts in the indictment, when deciding the quantum of the sentence to be imposed on him.

Moreover, paragraphs 14 and 15 of the petition presented to this court by the Accused - Appellant - Appellant shows clearly that his main concern, complaint and focus in his application for special leave, is on the quantum of the sentences imposed on him. The said paragraphs are quoted below for easy reference.

14. Being aggrieved by the above sentence imposed by the learned High Court Judge of Anuradhapura, the Petitioner states that the Petitioner preferred an appeal to the Court of Appeal on 31-12-2013 inter alia on the following grounds;

a) The sentence imposed by the learned High Court Judge on the Petitioner was excessive,

b) The sentence imposed on the Petitioner was erroneous as the learned High Court Judge has not considered the principles in section 303 of the Code of Criminal Procedure Act as amended and the fact that the Petitioner did not have any previous convictions or pending cases against him.

c) The trial held against the Petitioner was illegal as the indictment filed against the Petitioner was erroneous and misconceived.

15. Accordingly, the Petitioner, by his petition of appeal, prayed for inter alia;

a) To declare that the sentence of 81 years of rigorous imprisonment imposed by the learned High Court Judge on the Petitioner on 18-12-2013 was erroneous,

b) To alter the sentence imposed by the learned High Court Judge on the Petitioner on 18-12-2013 and to make a suitable order,

c) *To acquit the Petitioner.* [3]

The afore-said leave to appeal application was supported before this bench firstly on 23-10-2019 and then on 28-01-2020.[4] (This bench commenced hearing submissions of counsel on 23-10-2019 and concluded it on 28-01-2020). Having heard the submissions of the learned Counsel for both parties, this bench by its order dated 28-01-2020, has granted special leave to appeal only in respect of the question of law set out in sub paragraph (e) of paragraph 23 of the Petition dated 17-10-2017. The journal entry dated 28-01-2020 is reproduced below for clarity.

"28-01-2020

Before: *B. P. Aluwihare PC J*

P. Padman Surasena J

E. A. G. R. Amarasekera J

Asthika Devendra with Kaneel Maddumage for the Accused-Appellant-Petitioner.

Ms. Lakmali Karunanayake DSG for A/G.

Court has heard the learned Counsel for the Petitioner as well as learned DSG for the Rspdt.

Both Counsel agree that this is a fit matter to grant spl leave to Appeal on the question of law raised in paragraph 23 (e) of the Petition & affidavit dated 17/10/2017.

This Court heard the submissions of counsel on behalf of the Petitioner-Appellant as well as the Rspdt.

[3] Paragraphs 14 and 15 of the petition dated 17th October 2017.
[4] Vide journal entries dated 23-10-2019 and 28-01-2020.

Judgement reserved by Hon. B. P. Aluwihare PC J."

The said question of law referred to in paragraph 23 (e) of the Petition is reproduced below.

"(e) Did the learned High Court Judge and the judges of the Court of Appeal err in law and in fact by failing to consider the fact that imposing a term of rigorous imprisonment for 81 years for two types of offences included in six counts in the indictment which alleged to have been committed by the Petitioner on the victim within a period of 3 months is excessive and against the well-accepted principles of sentencing and theories of punishment."

Thus, as stated in paragraph 11 of the draft judgment of His Lordship Aluwihare PC J, it was in the above circumstances that this Court immediately after granting special leave to appeal on the question of law set out in paragraph 23 (e) of the Petition, on the same day, proceeded to hear parties on the question of law. It was thereafter that His Lordship Aluwihare PC J reserved the judgment.

The said paragraph 11 is quoted below for easy reference.

"As the question of law is confined only to the issue of the imposition of an excessive sentence, both the learned counsel for the Petitioner as well as the learned Deputy Solicitor General agreed to make submissions on behalf of the respective parties on the afore-stated question of law with a view to an early disposal of this matter. Accordingly, this court, acting under the proviso to Rule 16(1) of the Supreme Court Rules, dispensing with the requirement of complying with the provisions of the Rules regarding the steps preparatory to the hearing of the appeal, heard the learned counsel on the very day that Special Leave to Appeal was granted."

Thus, it is clear that this bench on 28-01-2020 decided that special leave to appeal in respect of the questions of law set out in paragraph 23 (a) to (d) of the above mentioned petition must not be granted. This was after hearing the submissions of counsel for both parties firstly on 23-10-2019 and then on 28-01-2020.

It would be opportune at this stage, to reproduce Rule 16 (1) of the Supreme Court Rules. It is as follows.

".. If special leave to appeal is granted, the Court shall, after consulting the parties, or their attorneys-at-law if any, forthwith fix the date or dates of hearing of the appeal. If the Court for any reason does not fix the date of hearing, the date or dates of hearing shall be fixed by the Registrar on the date fixed in terms of sub-rule (2), after consulting the parties present and obtaining their assessment of the likely duration of the argument;

Provided that the Court may, with the consent of the parties or their attorneys-at-law, proceed to hear and determine the appeal, either forthwith or on another date to be then fixed, dispensing with compliance with the provisions of these rules in regard to the steps preparatory to the hearing of such appeal…."

Therefore, in the instant case it is clear that both parties of this case consented for this Court to proceed to hear this appeal only on the question of law in respect of which this Court granted special leave to appeal.

Thus, it was in the above circumstances, that this Court as per the proviso to the above Rule proceeded to hear the submissions of the parties only in respect of the question of law set out in paragraph 23 (e) of the petition on the same day. This, no doubt, gave both parties the impression that this Court would not consider the correctness of the conviction but would only confine its judgment to the question of the quantum of the sentence imposed on the Accused - Appellant - Appellant.

I would now proceed to consider the question of law in respect of which this Court has granted special leave to appeal.

As has been mentioned above, according to the order of the learned High Court Judge, it is imperative for the Accused - Appellant - Appellant to undergo a cumulative period of 81 years rigorous imprisonment. In case he defaults the payment of the fines and the compensation ordered, he also has to undergo a further cumulative period of 06 years simple imprisonment.

It is clear that the learned High Court Judge has imposed the maximum term of imprisonment provided in the penal sections of the relevant offences with which the Accused - Appellant - Appellant was charged. This is despite the Accused - Appellant - Appellant had pleaded guilty to all the charges.

There is no doubt that the sentences imposed on the Accused - Appellant - Appellant are manifestly excessive. Since it is manifest by itself, I need not further elaborate on its excessive nature.

Further the order made by the learned High Court Judge preventing to run the sentences imposed in respect of each count concurrently has also resulted in a further enhancement of the already excessive sentences imposed on the Accused - Appellant - Appellant.

Thus, I answer the said question of law referred to in paragraph 23 (e) of the Petition in the affirmative.

In these circumstances, I set aside the sentences imposed on the Accused - Appellant - Appellant by the learned High Court Judge. I substitute therefore, the following sentences on the Accused - Appellant - Appellant.

Count No. 1

Four (04) years rigorous imprisonment.

Count No. 2

Ten (10) years rigorous imprisonment and a fine of Rupees Two thousand five hundred (2,500/=). One (01) month simple imprisonment in default of the payment of the said fine is also imposed.

The Accused - Appellant - Appellant is also ordered to pay Rs. 50,000/= as compensation to the victim. Three (03) months simple imprisonment in default of the payment of the said compensation is also imposed.

Count No. 3

Four (04) years rigorous imprisonment.

Count No. 4

Ten (10) years rigorous imprisonment and a fine of Rupees Two Thousand Five Hundred (2,500/=). One (01) month simple imprisonment in default of the payment of the said fine is also imposed.

The Accused - Appellant - Appellant is also ordered to pay Rs. 50,000/= as compensation to the victim. Three (03) months simple imprisonment in default of the payment of the said compensation is also imposed.

Count No. 5

Four (04) years rigorous imprisonment.

Count No. 6

Ten (10) years rigorous imprisonment and a fine of Rupees Two Thousand Five Hundred (2,500/=). One (01) month simple imprisonment in default of the payment of the said fine is also imposed.

The Accused - Appellant - Appellant is also ordered to pay Rs. 50,000/= as compensation to the victim. Three (03) months simple imprisonment in default of the payment of the said compensation is also imposed.

I further order that the main terms of imprisonment imposed on the Accused - Appellant - Appellant i. e. each of the terms of 04 years imposed in respect of counts 01, 03 and 05 and also each of the terms of 10 years imposed in respect of counts 02, 04 and 06 shall run concurrently. Thus, the cumulative period of the said main terms of imprisonment would be 10 years.

The said cumulative period of the said main terms of imprisonment (10 years RI) must be taken as having run from the date of the conviction i.e. 18-12-2013. This is because I observe that the Accused - Appellant - Appellant has been in remand

to date since 18-12-2013 i. e. the date on which the learned High Court Judge sentenced him.

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 Provinves (Special Provisions) Act No. 54 of 2006 read with Article 128 of the constitution.

SC Appeal No. 34/2010
SC Application No:
SC/HCCA/LA 160/2009
SP/HCCA/MA0069/2001(F)
D.C. Matara Case No. L7623

Yogananda Wickramasinghe Mohotti,
No.76/2D, Paramulla Road,
Paramulla,
Matara.

PLAINTIFF

-VS-

Nimal Bambarenda,
No.20, Bandaranyake Pura,
Medahittetiya,
Matara.

DEFENDANT

AND BETWEEN

Nimal Bambarenda,
No.20, Bandaranayake Pura,
Medahittetiya,
Matara.

DEFENDANT-APPELLANT

-VS-

Yogananda Wickramasinghe Mohotti,
No.76/2D, Paramulla Road,
Paramulla,
Matara.

PLANTIFF - RESPONDENT

AND NOW BETWEEN

Nimal Bambarenda,
No.20, Bandaranayake Pura,
Medahittetiya,
Matara.

DEFENDANT-APPELLANT-APPELLANT

-VS-

Yogananda Wickramasinghe Mohotti,
No.76/2D, Paramulla Road,
Paramulla,
Matara.

(Presently of No. 3/7, Samson Dias Mawatha, Polhena, Matara)

PLAINTIFF-RESPONDENT-RESPONDENT

BEFORE : **SISIRA J. DE ABREW, J.**
S. THURAIRAJA, PC, J.
E.A.G.R. AMARASEKARA, J.

COUNSEL : Manohara De Silva, PC with Pubudini Wickramaratne and Imalka Abeysinghe for the Defendant – Appellant – Appellant.

Nagitha Wijesekara for the Plaintiff – Respondent – Respondent.

ARGUED ON : 30th January 2020.

WRITTEN SUBMISSIONS : Plaintiff - Respondent - Respondent on the 30th of July 2010

Defendant – Appellant – Appellant on the 14th of July 2010

DECIDED ON : 02nd June 2020.

S. THURAIRAJA, PC, J.

Yogananda Wickramasinghe Mohotti i.e. Plaintiff – Respondent – Respondent (hereinafter sometimes referred to as Plaintiff – Respondent) instituted action bearing number L7623 in the District Court of Matara against Nimal Bambarenda i.e. Defendant – Appellant – Appellant (hereinafter sometimes referred to as Defendant – Appellant) seeking, a declaration that the Plaintiff – Respondent was the owner of the land referred to in the schedule to the plaint, to eject the Defendant – Appellant from said land and to hand over vacant possession thereof to the Plaintiff – Respondent.

In his plaint, the Plaintiff – Respondent took up the position that the aforementioned land originally belonged to the National Housing Development Authority and that Hewa Lunuwilage Dayananda became owner by conveyance bearing No. 7330 dated 04/01/1991. Dayananda transferred the land to the Plaintiff – Respondent by deed No. 30121 dated 08/03/1991 attested by Jinadasa Pathirana, Notary Public and the Plaintiff – Respondent had been in undisturbed and uninterrupted possession thereof for 10 years and also had prescriptive title. He further stated that the Defendant – Appellant was the tenant of Dayananda and when the Plaintiff – Respondent purchased the land, the Defendant – Appellant contested the Plaintiff's title and was unlawfully occupying the land and claimed title to said land.

The Defendant – Appellant filed answer maintaining, inter alia, that Hewa Lunuwilage Dayananda and the Plaintifff – Appellant had acted in collusion and had fraudulently executed the Deed No. 30121 to defraud the Defendant – Appellant since on the 6th of September 1985, Hewa Lunuwilage Dayananda had entered into an agreement to sell aforesaid land to the Defendant – Appellant for a sum of Rs.

80,000/- and the Defendant – Appellant came into possession of the land upon paying an advance of Rs. 24,000/-.

The case was fixed for Trial in the District Court on 11/06/1996. On this day the Defendant did not appear and the learned District Judge entered ex-parte judgment in favour of the Plaintiff – Respondent. Thereafter the Defendant – Appellant filed papers under Section 86 (2) of the Civil Procedure Code to purge his default. Section **86 (2)** states 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*

The Defendant – Appellant stated in his petition that he worked as a motor mechanic undertaking work in different parts of the Island, he stated that on 02/06/1996 he had undertaken the repair of a bus belonging to one Jagath Wickramasinghe who was a resident of Dela, Maudella, Marapana in Ratnapura. Several days thereafter, there had been heavy rains in Ratnapura and the Marapana area suffered heavy flooding and transportation was completely halted. The Defendant – Appellant states that due to this heavy flooding he was unable to attend court on 11/06/1996. Thereafter the matter was fixed for inquiry and the Defendant – Appellant, Jagath Wickramasinghe and Herbert Clarence Silva who was the Grama Niladhari of Marapana, Maudella gave evidence.

By Order dated 11/12/2001 the learned District Judge after considering all evidence before him refused the Defendant's application. The Defendant appealed against the Order of the District Court to the Provincial High Court holden at Matara. The Appeal was argued on 02/04/2009 and the learned High Court delivered judgment on 15/06/2009 dismissing the Defendant – Appellant's appeal. Being

aggrieved with the Judgment of the High Court the Defendant – Appellant preferred an appeal to this Court.

Leave to appeal was granted on the questions of law set out in paragraph 14 of the Petition dated 27/07/2009.

There are several issues that need to be addressed with regard to this matter. The first being that the Defendant – Appellant had not provided sufficient evidence to prove that there were floods in Ratnapura on the day of the hearing. In his judgment the learned additional District Judge stated as follows;

> **අදාළ දිනයේ ගංවතුරක් තිබූ බව සනාථ කිරීමට විත්තිකරුගේ සාක්ෂිය සහ ජගත් වික්රමසිංහගේ සාක්ෂිය හැරුණු විට වෙනත් කිසිදු සාක්ෂියක් ඉදිරිපත් කර නැත. එසේම කිසිදු ලිඛිත සාක්ෂියක්ද ඉදිරිපත් කර නොමැත.**

Herbert Clarence Silva who was the Grama Niladhari of Marapana, Maudella also gave evidence and in his evidence he stated that there was no flooding;

> **ප්‍ර: තමන්ට පැමිණිල්ලක් කලේ නැත්නම් තමන් කුමක් පිලිබඳව සාක්ෂි දෙන්නද ආවේ අධිකරණයට.**
>
> **උ: අධිකරණ නියෝගය නිසා ආවා. ජගත් වික්රමසිංහ මගේ කොට්ඨාශයේ පදිංචි කෙනෙක්. ඔහු බස් ඩ්‍රයිවර් කෙනෙක්. ඔහු මට මගදි හම්බ වෙනවා. ඔහු මට ගංවතුර තිබුන දවස් මතක් කරලා කිව්වා සාක්ෂියක් දෙන්න වේවි කියලා. නමුත් මගේ කොට්ඨාශය ගංවතුරෙන් යට වුනේ නැහැ.**

When this matter was appealed to the High Court, the learned High Court Judge confirmed the findings of the learned District Judge that the Defendant – Appellant had failed to adduce sufficent evidence on his behalf in regards to the floods in Ratnapura. The learned High Court Judge further observed on perusal of the brief, that it appears that after this matter was fixed for hearing in the District Court the Defendant – Appellant obtained several dates citing various reasons. On the eighth trial date, he had failed to appear in court and had failed to give

instructions to his AAL. Therefore the case was decided ex-parte in favour of the Plaintiff - Respondent. The High Court Judge gave several reasons for dismissing the Defendant – Appellant's appeal. they are as follows;

a) The Defendant had failed to adduce evidence to the satisfaction of the Court that he could not appear on the trial date due to the sudden flooding in the area where he was residing at the time.
b) Upon the perusal of the case record, it appears that after the case was fixed for trial, the Defendant had obtained several dates citing various reasons and on the 8th trial date, the Defendant had failed to appear in court and failed to give instructions to his AAL. Therefore the case was decided ex-parte.
c) At the inquiry to set aside the ex-parte order, the Defendant did not attempt to lead the evidence of the Grama Niladhari of the Division he was resident at the relevant time.
d) In terms of the decision in Paramalingam v Sirisena and Another (2001) Vol. 2 SLR 239, the law assists those who are vigilant and not those asleep on their rights.

In ***Paralingam v Sirisena and Another (2001) Vol. 2 SLR*** Justice Wigneswaran held as follows;

> *Laches means negligence or unreasonable delay in asserting or enforcing a right. There are two equitable principles that come into play when a statute refers to a party being guilty of laches. The first doctrine is delay defeats equities.* ***The second is that equity aids the vigilant and not the indolent***
>
> (Emphasis added)

Furthermore I find that the more appropriate area of law for the Defendant – Appellant would have been Section 114 (f) of the Evidence Ordinance which states as follows;

The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business in their relation to the facts of the particular case;

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;

I find that the Defendant – Appellant did not provide both the District Court and the High Court with sufficient evidence. The Newspaper articles that the Defendant – Appellant produced to this Court as evidence were not produced at the District Court. In addition to this the bus that the Defendant – Appellant repaired was parked at Jagath Wickramasinghe's brother's house which was located in Sudugedara, Marapane in Ratnapura. The Grama Sevaka who gave evidence in the District Court was the Grama Sevaka of the Marapana, Maudella division. The correct Grama Sevaka division in relation to this matter is the Sudugedara Division.

In David Appuhamy v 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."

Moreover this incident occurred in 1996. When the Defendant – Appellant was unable to make his appearance in court, if he was vigilant (*Vigilantibus non dormientibus jura subveniunt*) he could have used a telephone to inform his lawyer. There is no explanation as to why he failed in doing so. Whether the flood prevented the Defendant – Appellant in coming to court is a matter of fact. The learned District Judge who heard and observed the witnesses disbelieved the story of the Defendant – Appellant. Consequently, we are not in a position to hold otherwise.

When taking into consideration the questions of law, I find that the Judgment of the High Court was accurate and was arrived at after taking into consideration all

available evidence. The learned High Court Judge had reached her conclusion after considering all material and submissions available to her and had taken into consideration the position of both parties. Furthermore, I find that the Defendant – Appellant had failed in providing both the District Court and the High Court with the evidence necessary to substantiate his application to purge his default. The Order of the learned District Judge had been made after all the evidence was taken into account. Moreover the Grama Sevaka who gave evidence was not from the right division and there were substantial contradictions in the evidence given by the Defendant – Appellant, Jagath Wickramasinghe and Clarence Silva. For these reasons I answer the questions of law under which leave was granted in the negative.

Taking the aforementioned into consideration I find no reason to interfere with the judgments of the District Court and High Court. The Defendant – Appellant did not provide sufficient evidence to support his application to purge his default under Section 86 (2) of the Civil Procedure Code. I dismiss the appeal with cost and I fix cost at Rs. 150,000/-

Appeal dismissed.

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

SC.Appeal No. 39/2019.

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

In the matter of an application for Special Leave to Appeal in terms of Article 127 read with Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC.Appeal No. 39/2019

CA.Appeal No. 294/2012

HC. Jaffna No. 996/2006

Thiruganapillai Sivakumar,
No.4M, Vaddatam,
Delft West, Delft,
Jaffna.

Presently at

Welikada Prison,
Welikada,
Colombo-10.

Accused-Appellant-Petitioner

-Vs-

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

Complainant-Respondent-Respondent

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

P.Padman Surasena, J &

E.A.G.R.Amarasekera, J

Counsel: Asela B. Rekawa with Ramalingam Ranjan for the Accused-Appellant-Petitioner.

P.Kumararatnam S/DSG for the Hon. A.G.

Argued &
Decided on: 23.01.2020

Sisira J.de Abrew, J

Heard both counsel in support of their respective cases. In this case the Accused-Appellant was charged for the murder of Thilagaraja Jegath Janani which is an offence punishable under section 296 of the Penal Code. The Accused-Appellant was also charged for the robbery of 03 rings, one pendent and one pair of bangles worth Rs. 124,000/- from the possession of said Thilagaraja Jegath Janani which is an offence punishable under section 383 of the Penal Code.

After trial the learned High Court Judge by his judgment dated 01.11.2012, convicted the Accused-Appellant for the offence of culpable homicide not amounting to murder which is an offence punishable under section 297 of the Penal Code and sentenced him to a term of only 10 years Rigorous Imprisonment. The Accused-Appellant was also convicted for the offence of robbery and was sentenced to a term of 10 years R.I.

Being aggrieved by the said Judgment of the learned High Court Judge, the Accused-Appellant appealed to the Court of Appeal. The Court of Appeal by its Judgment dated 19.05.2017 affirmed both convictions of the Accused-Appellant and dismissed the appeal.

Being aggrieved by the said Judgment of the Court of Appeal, the Accused-Appellant has appealed to this Court. This Court by its order dated 11.02.2019 granted leave to appeal on the following question of Law. " Have Their Lordships' of the Court of Appeal erred in law by failure to consider evidence adduced in respect of the identification of the Petitioner."

The facts of this case as alleged by the prosecution may be briefly summarized as follows;

On the day of the incident Yesurasan, on hearing screams of a woman, ran to the place where the screams emanated and saw the Accused-Appellant grappling with a woman. On hearing the shouts of Yesurasan, a toddy tapper named Marrie and his son Tiron Ranjith came to the scene.

When his son came to scene, he saw a person hiding behind a parapet wall. He chased after this person as he ran away from the scene of offence and attacked him with a club. However he says he could not identifying him as there was mud on his face. He says that this person was a dark short person. But according to Identification Parade notes the Accused-Appellant is a 5 and ½ feet tall person. The Accused-Appellant was arrested 11 months after the incident. Then an identification parade was held in order to identify the Accused-Appellant. Yesurasan, at the Identification parade, identified the Accused Appellant. However Yesurasan's son Tiron Ranjith did not identify the Accused-Appellant at the Identification parade. At the trial, Yesurasan identified the Accused-Appellant as the person who was grappling with the woman on the day of the incident. But his son in his evidence said that the Accused-Appellant in Court is not the person who ran away from the scene of offence. Thus in

our view the evidence of the son of Yesurasan creates a reasonable doubt in the evidence of Yesudasan .If the evidence of Tiron Ranjith who is the son of Yesudasan is accepted, the Accused-Appellant will have to be acquitted. As I pointed out earlier, the evidence of Tiron Ranjith has created a reasonable doubt in the evidence of Yesurasan.

The Accused gave evidence under oath. The learned trial Judge after considering the evidence of the Accused-Appellant did not either accept or reject the evidence of the Accused-Appellant. In a criminal trial when the Accused-Appellant gives evidence it is the bounden duty of the trial Judge to consider the Accused's evidence and come to a conclusion whether he accepts or rejects the evidence of the Accused- Appellant or whether the evidence of the Accused-Appellant creates a reasonable doubt in the prosecution case. . If the learned Trial Judge fails to reject or accept the evidence of the Accused-Appellant, the question must be considered whether he is entitled to be acquitted. In this connection I would like to consider a judicial decision of the Court of Criminal Appeal ***Ariyadasa Vs Queen (68 NLR page 66)*** His Lordship Justice T.S.Fernando, held as follows: " The Accused is entitled to be acquitted even if his evidence though not believed , is such that it causes a jury to entertain a reasonable doubt in regard to his guilt ".

In ***Martin Singho Vs Queen (69 CLW page 21 at page 22)*** His Lordship Justice T.S. Fernando made the following observations. "As this Court has pointed out on many occasions in the past where an Accused person is not relying on a general or special exception contained in the Penal Code there is no burden on him to establish any fact. In this case the Appellant was not relying on any such exception. Even if the jury declined to believe the Appellant's version, he was yet entitled to be acquitted on the charge if his version raised in the mind of

the jury a reasonable doubt as to the truth of the prosecution version."

In ***Queen Vs Kularatne (71 NLR page 529)*** considering the question as how to evaluate a dock statement Court of Criminal Appeal held as follows: " The jury must be directed that:-

a) If they believe unsworn statement it must be acted upon
b) If it raises a reasonable doubt in their minds about the case for the prosecution the defence must succeed

For the benefit of the Trial Judges and the legal practitioners of this country we would like to state the following guidelines as to how the evidence given by an Accused person should be evaluated.

1) If the accused's evidence is believed, it must be acted upon.
2) If the evidence of the accused raises a reasonable doubt, in the prosecution case, the defence of the accused must succeed.
3) If the evidence of the accused is neither accepted nor rejected by the trial Court, the defence of the accused must succeed.

In the present case, the learned Trial Judge has failed to follow the above guidelines. Further the learned Trial Judge has failed to decide whether he accepts the evidence of the accused person or rejects it.

The Accused person in his evidence has taken up the position that he did not participate in this crime and he was going to Jaffna from Kaiyts in a bus on that day. Since the learned trial Judge has neither accepted nor rejected the evidence of the Accused-Appellant, we hold that the Accused-Appellant is entitled to be acquitted. We have earlier pointed out that the

evidence of Tiron Ranjith has created a reasonable doubt in the evidence of his father Yesudasan.

Their Lordships' of the Court of Appeal has also failed to consider whether the Accused has been properly identified by the witnesses at the trial. Considering all these matters we answer the above question of law in the affirmative.

Considering all the aforementioned matters, we hold that the prosecution has failed to prove its case beyond reasonable doubt . For the aforementioned reasons, we set aside the Judgment of the Court of Appeal dated 19.05.2017 and the Judgment of the High Court dated 01.11.2012 and acquit the Accused-Appellant from all the charges on which he was convicted.

Accused *acquitted.*

The Registrar of this Court is directed to send a certified copy of this Judgment to the relevant High Court.

JUDGE OF THE SUPREME COURT

P.Padman Surasena, J

I agree.

JUDGE OF THE SUPREME COURT

E.A.G.R.Amarasekera, J

I agree.

JUDGE OF THE SUPREME COURT

kpm/-

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

Sascon Knitting Company (Pvt) Ltd.
No. 752, Baseline Road,
Colombo 09.

Petitioner

Vs

1. Commissioner General of Labour,
   Labour Secretariat,
   Narahenpita, Colombo 05.

2. Free Trade Zones & General
   Services Employees Union,
   141, Ananda Rajakaruna Mawatha,
   Colombo 10.

3. G.M. Shiromala Gajanayake,
   Kapila Sevana, Ihala Dimbulwewa,
   Welimada.

and 49 others

Respondents

SC Appeal 52/2014
SC Spl LA 17/2013
CA 175/2009

AND NOW

Sascon Knitting Company (Pvt) Ltd.
No: 752, Baseline Road,
Colombo 09.

Petitioner-Petitioner/Appellant

Vs.

1. Commissioner General of Labour,
   Labour Secretariat,
   Narahenpita, Colombo 05.

2. Free Trade Zones & General
   Services Employees Union,
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   Colombo 10.

3. G.M. Shiromala Gajanayake,
   Kapila Sevana, Ihala Dimbulwewa,
   Welimada.

and 49 others

Respondents-Respondents

Before: Priyantha Jayawardene, PC, J.
Vijith K. Malalgoda, PC, J. and
Murdu N.B.Fernando, PC, J.

Counsel: T.M.S. Nanayakkara for the Petitioner-Appellant.
Suren Gnanaraj SSC for the 1st Respondent-Respondent.
Srinath Perera for the 2nd Respondent-Respondent.

Argues on: 17/10/2018

Decided on: 07/08/2020

Murdu N.B. Fernando, PC, J.

The Petitioner-Petitioner/Appellant ("the Petitioner/Appellant/Sascon Knitting") came before this Court being aggrieved by the Judgement of the Court of Appeal dated 14-12-2012. By the said judgement, the Court of Appeal dismissed the Writ Application filed by the Petitioner in the Court of Appeal praying for Writs of Certiorari to quash the decisions made by the 1st Respondent-Respondent, the Commissioner General of Labour ("the Commissioner /1st Respondent").

This Court granted the Petitioner, Special Leave to Appeal on 13.03.2014 on the following questions of law, the last question being raised on behalf of the 1st Respondent.

1. Do the letters of Appointment of the employees set out the fact that they are liable to be transferred from one associate company to another, namely from the company styled Sascon to the company styled San Fashion which are claimed to be subsidiary companies of the St. Anthony's Group?

2. Has the Court of Appeal given appropriate consideration to the aforementioned term which is in the letter of appointment when deciding on the question whether there was a lawful re-location of the employees from one facility to another?

3. Has the Court of Appeal considered whether the transfer was a temporary measure and that the petitioner was prepared to pay a transportation allowance if there was an inconvenience to the employees as pleaded in the petition?

4. Was the Court of Appeal in error when it arrived at the determination that the delay has not been explained and in any event that there was an undue delay in the filing of this application for judicial review?

5. Are the Orders made by the 1st Respondent in any event nullities in that the Commissioner of Labour had no power to assume jurisdiction under the Termination of Employment Act when there was in fact no termination?

6. In view of the language of the contract of employment in Clause (ii), is the failure to specify the associate company which the workman maybe bound to serve at the time of contract of employment be interpreted in favour of the workman and is the workman bound to serve an unknown employer?

The Petition of Appeal filed before this Court by the Appellant, stated that Sascon Knitting Company is a member of the St. Anthony's Group of Companies and the Appellant, operate textile factories at Ekala, Ja-Ela and at Baseline Road, Colombo.

The 3rd to 53rd Respondents-Respondents ("the employees") were employed by the Appellant as machine operators at the Ekala factory for a number of years. In 2006, the Appellant informed the said employees that they will be transferred/attached to the Baseline Road premises and to report for work at that premises where San Fashions has its factory and building. The employees refused to accept the transfer/attachment and by individual letters intimated to the Appellant, that to their knowledge the Appellant Sascon Knitting did not have a factory at Baseline Road and were thus not willing to accept employment at another company.

Upon receipt of the said letters, the Appellant informed the employees that according to the terms of contract in the letters of appointment, the employees could be transferred to an associate company and therefore the transfer to San Fashions Limited, an associate company is legal and valid. The employees abstained from reporting for work at Baseline Road and through their Trade Union, the 2nd Respondent-Respondent ("2nd Respondent") made representations to the 1st Respondent that the Appellant had terminated their services and requested that they be re-instated in employment.

Upon receipt of the complaints and by virtue of the provisions of the Termination of Employment of Workmen (Special Provisions) Act No 45 of 1971 as amended by Law No 04 of 1976 ("the Act") the 1st Respondent held two separate inquiries. A site visit was also conducted at which it was revealed that the Appellant did not have a factory or office at Baseline Road but San Fashions had a factory at the said premises. At the two inquiries the Appellant did not lead any evidence and relied only on written submissions whereas the employees represented by the 2nd Respondent led evidence. Subsequent to the inquiry, the 1st Respondent made Order that the Appellant had violated the provisions of the Act and terminated the services of the employees and directed that compensation be paid to the said employees as enumerated in the Orders dated 19-08-2008 and 28-11-2008 respectively.

Being aggrieved by the said two Orders of the 1st Respondent, the Appellant came before the Court of Appeal in a Writ Application. The Court of Appeal upheld the decision of the 1st Respondent and dismissed the application with costs. Now, the Appellant is before this Court having obtained Leave to Appeal on the six questions of law referred to earlier.

Upon the said back ground, I wish to consider the questions of law raised before this Court in two segments, the questions of law bearing no. 1,2,3,5 and 6 which are based on the merits of the application and the question of law bearing no. 4 based upon the preliminary objection raised by the 1st Respondent before the Court of Appeal.

In the first instance let me look at the merits of the application and specifically question five, which in my view encompasses many of the questions in the said segment.

Question 5

> Are the Orders made by the 1st Respondent in any event nullities in that the Commissioner of Labour had no power to assume a jurisdiction under the Termination of Employment Act, when there was in fact no termination?

The main contention of the learned Counsel for the Appellant before this Court was that in the instant application, there was no termination of employment but only a relocation

of employees or a transfer of employees from one point to another and thus the provisions of the Termination of Employment of Workmen Act has no applicability and the 1st Respondent cannot assume jurisdiction under the said Act and thus has no role to play in this matter. Hence the decision made by the 1st Respondent is not legally valid and it's deemed a nullity.

The learned Counsel further submitted that clause (ii) and (vi) of the letter of appointment / contract of employment permitted the Appellant to transfer and/or attach the employees to its associate companies and San Fashions was one of the associate companies in which the Directors and the General Manager were one and the same as in Sascon Knitting, and thus the transfer of the employees to Baseline Road where San Fashions had its factory and building was in order and the said transfer of employees by the Appellant did not merit the intervention of the 1st Respondent.

However, it is observed, that the Appellant approbates and reprobates. From the documents briefed to this Court, it is apparent that the initial intimation to the employees was that they were transferred to a section of the Appellant Company located at Baseline Road, where the building of San Fashions is situated. When the employees resisted the transfer, the Appellant changed its stance and took up the position that it was an attachment to San Fashions an associate company and the terms of appointment permitted such a course of action and to report for work at the new place of employment.

The learned Counsel for the Appellant strenuously argued before this Court, that the two clauses of the letter of appointment permitted the employer to attach the employees to the factory at Ekala and/or to any other associate company and also to transfer employees between sections and departments of the Company. It was further contended, that at the time the employees were initially recruited, San Fashions was in existence and hence the employees of the Appellant Company could be transferred to the said Company, San Fashions.

Thus, the case presented by the Appellant before this Court was that the services of the employees were never terminated, there was no closure of business and only a temporary transfer or relocation of the employees from one facility to another or from Ekala to Colombo.

However, the question that begs an answer is, in which capacity were the employees transferred? Was it a routine transfer to a branch office of the same company as stated in the letter of transfer or an attachment and/or transfer to an associate company and a new place of work as stated in a later communication.

It is observed that the Appellant did not lead any evidence at the inquiry conducted by the 1st Respondent to substantiate the aforesaid position. It failed to establish the nexus between

the two companies or that the said two companies were even members of the St. Anthony's Group of Companies as was pleaded in the Petition of Appeal filed before Court. Hence the 1st Respondent having analyzed the evidence led and the on-site inspection report held that the Appellant did not have a branch office or a factory at Baseline Road, Colombo and therefore the alleged attachment of employees to San Fashions which is a separate and an independent company is not legally valid. Hence such a transfer of employees cannot take place as it will be a transfer of employees between one company to another.

Further, the finding of the 1st Respondent was that the alleged transfer had been done in violation of the law by not obtaining the prior approval of the 1st Respondent and thus the Appellant has terminated the services of the employees, constructively. The 1st Respondents also held that the termination stems from was a closure of business situation and the Appellant had violated the provisions of the Act and directed the Appellant to pay compensation to the respective employees as more fully stated in the two Orders P8 and P9 dated 19-08-2008 and 28-11-2008 respectively.

The said decisions of the 1st Respondent were upheld by the Court of Appeal. The Appellant is now before this Court to set aside the said judgement of the Court of Appeal.

The Court of Appeal in its Judgement relied upon the case **Hassan Vs Fairline Garments International Ltd. and others [1989]2 SLR 137** and observed that an employer has no right to transfer an employee from one company to another, whether it is an associate company or a subsidiary company merely because the directors were the same. The Court went onto observe, if the employer relying upon a term of contract which permit transfer of employees from one section or from one department to another, make use of such a course of action to move employees from one legal entity to another, it would offend the provisions of the Termination of Workmen Act.

Having referred to the factual circumstances of this case let me now examine the provisions of the Act viz-a-viz the questions of law raised before this Court especially in reference to the jurisdiction of the Commissioner General of Labour pertaining to termination of employment of a workman.

Section 2(1) of the Termination of Employment of Workmen (Special Provisions) Act as amended reads as follows: -

> "No employer shall terminate the scheduled employment of any workmen without

(a) the prior consent in writing of the workmen; or
(b) the prior written approval of the Commissioner."

Sections 2(2)(b) and (c) reads as follows: -

> "(b) the Commissioner may, in his absolute discretion, decide to grant or refuse such approval;
> (c) the Commissioner may, in his absolute discretion, decide the terms and conditions subject to which his approval should be granted, including any particular terms and conditions relating to the payment by such employer to the workman of a gratuity or compensation for the termination of such employment…."

Thus, the statute in very clear terms lays down the procedure to be followed. In order to terminate the services of workmen the prior written approval of the Commissioner is mandatory and the Commissioner has an absolute discretion either to grant or refuse such approval to an employer.

Section 2(4) of the Act reads as follows: -

> "For the purposes of this Act, the scheduled employment of any workmen shall be deemed to be terminated by his employer if for any reason whatsoever, otherwise than by reason of a punishment imposed by way of disciplinary action, the services of such workmen in such employment are terminated by his employer and such termination shall be deemed to include.
>
> (a) non-employment of the workmen in such employment by his employer, whether temporarily or permanently, or
> (b) non-employment of the workmen in such employment in consequence of the closure by his employer of any trade, industry or business."

Section 5 of the Act reads as follows: -

> "where an employer terminates the scheduled employment of a workmen in contravention of the provisions of this Act, such termination shall be illegal, null and void, and accordingly shall be of no effect whatsoever."

According to the above provisions of the Act, it is manifestly clear that the non-employment of the workmen whether temporary or permanently or non-employment of the workmen in consequence of the closure of any trade, industry or business is deemed to be termination of his services by the employer and where it is in contravention of the Act. i.e when services had been terminated without obtaining the required authority under section 2(1) of the Act, that such termination shall be illegal, null and void and will have no effect whatsoever.

Section 11 of the Act, states that the general administration of the Act is with the Commissioner and the interpretation section defines Commissioner to be the holder of the Commissioner of Labour (which office has now been re-named Commissioner General of Labour) and Section 20 of the Act safeguards the primacy of this Act over such other written law.

Thus, the provisions of this Act specifically and has categorically given the Commissioner jurisdiction to make necessary orders when he determines that an employer has terminated the services of a workmen in contravention of the law.

This brings us to the pivotal issue in this appeal. Is the determination of the 1st Respondent in this appeal, in accordance with the provisions of the Act or is it a nullity?

It is trite law, that when relief is sought from a Court of Law by way of a writ application, the function of the Court is to consider whether the decision sought to be quashed is lawful or unlawful. The Court ought not to exercise its appellate powers and decide whether the said decision is right or wrong.

I wish to refer to Prof H.W.R. Wade and C.F.Forsyth on Administrative Law (11th edition) at page 26. It states thus :-

> *"The system of judicial review is radically different from the system of appeals. When hearing an appeal Court is concerned with the merits of a decision; is it correct? When subjecting some administrative act or order to judicial review, the Court is concerned with its legality, is it within the limits of the powers granted? On an appeal the question is* ***'right or wrong'.*** *On review the questions is lawful or unlawful."* (emphasis added)

Thus, the scope of a writ application is abuntedly clear. Was the Order made by the 1st Respondent, lawful or unlawful? That was the question that the Court of Appeal had to answer and determine.

The submission of the Appellant before this Court was that the Order made by the 1st Respondent was not a legally valid Order and thus a nullity, as there was no termination of employment and only a transfer of employees between one company to another which is permitted under the terms of employment and hence the judgement of the Court of Appeal, which upheld the said Order of the 1st Respondent was erroneous and a nullity and should be set aside.

Prior to considering the aforesaid proposition of the Appellant, I wish to consider the concept of transfer as the 'transfer' is the material issue in this application. The right of an employer to transfer an employee has undoubtedly been acknowledged and accepted by Courts in many an instance. The 1970 case of the **Ceylon Estate Staffs' Union Vs The Superintendent Meddecombra Estate, Watagoda and another 73 NLR 278** is one such case and a leading authority. In the said case at page 281, Weeramantry, J. states thus: -

> *"The employers right to transfer his staff* ***within his service*** *is too well established to need elaboration here. Both in English Common La [ ]and more specifically in relation to industrial dispute in India[ ]and Ceylon[ ]that right has received firm recognition".* (emphasis added)

As seen from above, the said right to transfer an employee should be within the service. For example, from one branch to another or from one department to another or in an estate or plantation from one division to another.

In the instant appeal, clause (vi) of the letter of appointment, clearly envisages and incorporate the said right of the employer in the following manner-

> "You will be liable to be transferred from one section to another section or from one department to another department."

However, the right of the employer to transfer an employee even within the service is not an absolute right. There are limitations and exceptions.

In the **Meddecombra Estate case** referred to above, Weeramantry, J., considered some of the limitations and exceptions viz-a-viz reported judgements of the Appellate Courts of India and Sri Lanka and at page 287 stated as follows: -

> *"No doubt the employee was entitled to contest the right of the management to make this transfer and the employee was entitled to take the*

necessary steps towards bringing their dispute to adjudication in the manner provided by law."

"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 or the circumstance of the transfer so humiliating that the employee may well refuse to act upon it…"

Thus, the inherent right of an employer to transfer an employee within the service must be made bona fide and for good and valid reasons and in terms of the contract of employment.

In the **Meddecombra Estate case** referred to above, the transfer was within the estate from one division to another and the Court held the refusal of the workman to comply with the transfer, justified the employers right of termination of the services of the workman.

It is observed that the afore mentioned case was an appeal from a Labour Tribunal decision prior to the enactment of the Termination of Employment of Workmen (Special Provisions) Act of 1971 the statute under which the 1st Respondent made Order in the instant appeal.

As discussed earlier, the appellants' initial intimation to the employees was that the impugned transfer was a transfer within the service. Thereafter the Appellant abandoned the said position and took up the stand that it was a transfer to an associate company and clause (ii) of the letter of appointment permitted such a transfer.

Clause (ii) of the letter of appointment reads thus,

"You will be attached to our factory at Ekala/Any other associate company."

Clause (ii) sits between clause (i) which speaks of the date of appointment and clause (iii) which refers to probation. Thus in my view, upon a plain reading of the said clause and the flow of the clauses, clause (ii) refers to the original 'attachment' at the time of commencement of employment and clause (vi) which incorporates the employers' right to transfer as discussed earlier, speaks of a 'transfer' that would take place whilst been in service and attached to a particular place.

In the instant appeal, the employees, at the commencement of employment were attached to the Ekala factory. The transfer/ re-location/change of place of work as intimated in

the initial letter addressed to the employees took place many years after commencement of employment and many years after being originally attached to the Ekala factory. I do not propose to explore or analyse the terms 'attachment', 're-location' and 'transfer' and the effect of such a proposition at this juncture and would confine myself to answer the questions raised before this Court.

The 1st question of law refers to the factual matrix and the question is reproduced for easy reckoning. It reads as follows: -

Question 1

> Do the letters of employment set out the fact that they are liable to be transferred from one associate company to another, namely from the company styled Sascon to the company styled San Fashion which are claimed to be subsidiary companies of the St. Anthony's Group?

In simpler words, in view of the terms of employment does the employer has a right to transfer an employee from one company to another company and is the employee bound to follow such a command.

The fundamental attributes of a company are that it is a legal entity and has a separate existence from its shareholders, director's and staff and the law recognizers it as a body corporate, a juristic person. These principle characteristics are the bedrock of the Company Law and have been established and recognized over a century and needs no elaboration. In the famous English case **Salmon Vs Salmon and Co. Ltd. (1897) AC 22** the law was exhaustively analyzed in respect of same. In **Trade Exchange (Ceylon) Ltd. Vs Asian Hotels Corporation [1981]1 SLR 67** our courts too considered this concept.

Thus, a Company is distinct and separate from its members, board of directors and its chief executive officer. A transfer of employees from one company to another or from one legal entity to another is legally not valid and permissible as the two entities are independent bodies. Hence, even if the directors/ the chief executive officer/ the senior management are one and the same, such a transfer is not possible, legally not permitted and cannot take place.

However, a party who wishes to establish that the contract of employment permitted such a transfer between associate companies or between the principle company and the subsidiary company could establish same at the appropriate forum at the relevant time.

In the instant Appeal, the appellant failed to establish such a fact at the appropriate forum. Consequent to an inquiry the 1st Respondent made Order that the transfer/ re-location was not in accordance with the law and thereby the Appellant had terminated the services of the employees unilaterally.

In **Hassan Vs. Fairline Garment International Ltd.** (referred to earlier) this Court considered a transfer of an employee from the principal company to one of its subsidiary companies, i.e from Fairline Garment International Ltd., to Jetro Ltd., whereas the letter of appointment did not provide for such a transfer. The Court held that Jetro being a limited liability company is a separate legal entity, quite distinct and different from Fairline Garment International, though it was one of its subsidiaries and thus the employer cannot transfer an employee to another company without his consent or against his will, especially when the letter of appointment does not provide for such a transfer. In this case **Meddecombra case** referred to earlier was considered and distinguished.

The duty of a Court to construe a statute, whether it is a new law, special provisions law an amending act or other enactment in order to ascertain and implement the intention of the Legislature as could be understood from its language, have consistently been upheld by our Courts.

The intention of the Legislature in enacting the Termination of Employment of Workmen's Act was to ensure a greater degree of control over retrenchment and lay-off of employees and to impose a mechanism on an employer in the exercise of his right of termination and to make such termination conditional on the written consent of the workman and/or the Commissioner.

Hence, when considering the said Act, the intention of the Legislature should be given utmost regard. Similarly, the basic concepts of labour law, the implied right of an employer to transfer a workman from one establishment to another, and the inalienable right of an employee to choose his employer together with the contractual provisions of employment and the terms of contract cannot be ignored but should be examined, considered, analyzed, properly balanced and weighed, from the perspective of the employer as well as from the employee, in arriving at a correct determination.

In the instant appeal, according to the letter of appointment, the Appellant Sascon Knitting in clear and unambiguous terms and under its seal, employed the workmen. The letter of appointment only makes provision for transfer of employees from one section to another or from one department to another. It does not envisage transfer of employees from one company to another company. It does not refer to a conglomerate or a group of companies. San Fashions

is a limited liability company quite distinct and different from Sascon Knitting and is a legal entity of its own with a separate existence.

Thus, in my view a transfer of an employee from Sascon Knitting Company Pvt Ltd. to San Fashions Ltd. is neither legal nor valid and cannot and should not be permitted nor made. The specific terms of employment agreed to by the employees cannot and should not be varied many years after unilaterally by and employer. Such a course of action in my view would not be in accordance with the letter and spirit of the of law.

Further it is observed that there is no reference whatsoever to St. Anthony's Group as pleaded before Court in the letter of employment. In the communique issued to the employees with regard to transfer, there is no reference to St. Anthony's Group or that the Appellant Sascon Knitting is a member of a group of companies. The initial letter of transfer which refered to San Fashions, did not refer to it as an associate company. Only when the employees intimated that Appellant has no branches at Baseline Road, that the Appellant changed its stance and informed that San Fashions is an associate company.

Hence, as discussed earlier, a transfer of employees from Sascon Knitting to another company cannot take place in terms of the contract. The employees are not liable to be transferred as contemplated by the 1st question of law raised before this Court. Thus, the transfer of employees from Sascon Knitting to San Fashions without the consent of the employees, in my view, amounts to an implied termination of its employment with Sascon Knitting. If such implied termination is permitted, it would amount to termination of employment without any terminal benefits being paid to the employees and would, offend and go against the gravamen of the Act itself.

The 1st Respondent, the relevant authority under the Act and who in my view, can assume and has jurisdiction to look into this matter, came to a correct finding, that the contemplated transfer as evidenced at the inquiry was not a transfer *per se* but would amount to termination of the services of the employees and held it was a violation of the provisions of the Act and granted terminal benefits to the employees in accordance with the Act.

The Court of Appeal upheld the said finding of the 1st Respondent and categorically held that the said transfer of employees from one entity into another or from one company to another cannot be made as the said two companies are different legal entities.

I see no reason to interfere with the said finding. The 1st Respondent acted within jurisdiction and within the purview of the provisions of the Act and the Orders made by the 1st

Respondent cannot be construed as a nullity. Undoubtedly, there was a termination and the 1st Respondent had power and authority to assume jurisdiction.

For the aforesaid reasons, I answer the 1st and 5th questions of law raised before this Court in the negative. Similarly, I have considered the 2nd and 3rd questions of law which refer to the judgement of the Court of Appeal, and answer the said questions too in favour of the Respondents. The 6th question of law, based upon the merits of this application and raised on behalf of the 1st Respondent is also answered in favour of the Respondents.

This leaves me only with the 4th question of law, the preliminary objection raised by the 1st Respondent pertaining to delay to be considered and answered.

The 1st Respondent, upon receipt of the complaints of the employees held two inquiries and made separate decisions, the first order was dated 11-08-2008 in respect of 19 employees and the second order was dated 28-11-2008 in respect of 31 employees.

The Appellant came before the Court of Appeal in March 2009, six months after the initial decision of the 1st Respondent. The preliminary objection raised by the 1st Respondent relating to delay was responded to by the Appellant upon the basis that the Appellant awaited the outcome of the 2nd Order, with a view to consolidate both Orders and come before Court and challenge both Orders in one application. The Court of Appeal considered the reasons given by the Appellant and upheld the preliminary objection on the basis that the Appellant had not properly and convincingly explained the time lapse in coming before Court.

It is observed that the Court of Appeal distinguished the facts of the instant case viz-a-viz the leading case on time lapse and delay, **Biso Manika Vs Cyril de Alwis [1982]1 SLR 368** and held that the facts and circumstances of this case, did not justify giving the Appellant the benefit of the objection raised, as there had been an inordinate delay.

The Court of Appeal also considered the case of **PS Bus Co. Ltd Vs Members and Secretary of the Ceylon Transport Board 61 NLR 491** and observed that prerogative writs are granted not as a matter of course but at the discretion of Court and based upon the facts and circumstances of this case, held that with regard to the case in issue the discretion of Court warrants a refusal of the writ. I am in total agreement with the said findings. Thus, in my view the Court of Appeal was correct and not in error, in not exercising the discretion in favour of the Appellant with regard to the instant writ application for judicial review.

Hence, I see no reason to interfere with the said finding of the Court of Appeal and would answer the 4th question of law raised before this Court also in the negative.

Thus, I answer all six questions of law in favour of the Respondents.

I have already discussed the merits of this application in detail and observed, that the Orders made by the 1st Respondent in respect of the termination of the employees (3rd to 53rd Respondents-Respondents) from the employment of the Appellant Company and the payment of compensation to be paid to the employees are legal and valid. The said decision of the 1st Respondent, Commissioner General of Labour was upheld by the Court of Appeal. Thus, I see no reason to interfere with the said judgement of the Court of Appeal.

Hence, for reasons adumbrated above, I affirm the judgement of the Court of Appeal and answer all six questions of law in favour of the Respondents and dismiss this appeal with costs fixed at Rs. 100,000.00.

The appeal is dismissed.

Judge of the Supreme Court

Priyantha Jayawardene, 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 an application for special leave to appeal under Article 128 of the constitution of the Democratic Socialist Republic of Sri Lanka.

SC/Appeal No. 59A/2006
SC/SLA/115/2006
CALA/71/2004
DC Colombo 29769/MR

Ravindra Sandresh Karunanayake of
No. 1291/6,
Rajamalwatta Road,
Battaramulla.

Plaintiff

Vs.

Wimal Weerawansa of
No. 198/19,
Panchikawatta Road,
Colombo 10.

Defendant

AND BETWEEN

Wimal Weerawansa of
No. 198/19,
Panchikawatta Road,

Colombo 10.

Defendant – Petitioner

Vs.

Ravindra Sandresh Karunanayake of
No. 1291/6,
Rajamalwatta Road,
Battaramulla.

Plaintiff – Respondent

AND BETWEEN

Ravindra Sandresh Karunanayake of
No. 1291/6,
Rajamalwatta Road,
Battaramulla.

Plaintiff – Respondent – Petitioner

Vs.

Wimal Weerawansa of
No. 198/19,
Panchikawatta Road,
Colombo 10.

Defendant – Petitioner – Respondent

AND NOW BETWEEN

Wimal Weerawansa of
No. 198/19,
Panchikawatta Road,
Colombo 10.

Defendant – Petitioner – Respondent – Petitioner

Vs.

Ravindra Sandresh Karunanayake of
No. 1291/6,
Rajamalwatta Road,
Battaramulla.

Plaintiff – Respondent – Petitioner – Respondent

Before : Sisira J. de Abrew J
Murdu N.B. Fernando, PC, J And
E.A.G.R. Amarasekara J

Cousel : Manohara de Silva, PC for the Defendant – Petitioner – Respondent – Petitioner.
Romesh de Silva, PC with Sugath Caldera for the Plaintiff – Respondent – Petitioner – Respondent.

Argued on : 16.05.2019

Decided on : 29.07.2020

E.A.G.R. Amarasekara, J.

The Plaintiff –Respondent – Petitioner- Respondent (hereinafter sometimes referred to as the Plaintiff Respondent) instituted proceedings in the District Court of Colombo against the Defendant- Petitioner- Respondent - Petitioner (hereinafter sometimes referred to as the Defendant Petitioner) claiming a sum of Five Hundred Million (Rs.500, 000,000/-) on an allegation of defamation. The Defendant Petitioner filed his answer and thereafter made an application to amend the said answer. The Plaintiff Respondents filed objections and accordingly, the learned District Judge fixed the matter for inquiry by way of written submissions. The date given was 06.01.2003. Yet the Counsel for the Defendant Petitioner has allegedly heard the date as 06.02.2003 as opposed to 06.01.2003 and it is said that the instructing Attorney-at-Law for the Petitioner had made arrangements to file written submissions on 06.02.2003. Consequently, when the case was called on 06.01.2003 for inquiry as agreed by way of written submissions, the Defendant Petitioner was absent and unrepresented. Thus, no written submissions were tendered in support of the application to amend the answer.

By the order made on the same date, namely 06.01.2003, the learned District Judge rejected the amended answer on the basis of the Defendant-Petitioner's default and fixed the case for trial on the original answer. Being aggrieved by the said order, the Defendant-Petitioner filed a leave to appeal application to the Court of Appeal. The said application to the Court of Appeal was originally dismissed due to the default of the Defendant-Petitioner but when it was re-listed, dismissed again stating that the matter had become academic.

However, the Defendant-Petitioner also preferred an application to the District Court to vacate and set aside the said order dated 06.01.2003 on the ground that the default was due to the mistake of the Counsel in taking down the correct date. This application being objected by the Plaintiff-Respondent, the learned District Judge, with the consent of the parties, fixed the matter for inquiry by way of written submissions. By order dated 09.02.2004 the learned District Judge set aside his own order dated 06.01.2003 and re-fixed the matter for inquiry. (This might be the reason for the Court of Appeal to dismiss the aforesaid leave to

appeal application on the ground of being academic). It appears from the said order of the learned District Judge that he had acted under Section 839 of the Civil Procedure Code in making the impugned order. Being aggrieved by the said order dated 09.02.2004 the Plaintiff-Respondents preferred an application to the Court of Appeal and its judgment dated 17.03.2006 allowed the application of the Plaintiff-Respondent and set aside and vacated the order dated 09.02.2004 made by the learned District Judge.

The Court of Appeal appears to have based its decision on the grounds mentioned below;

- The District Court has jurisdiction to set aside its own order only in specific and limited instances which are countenanced by the law either in terms of specific provisions of the Civil Procedure Code or if the said order is *per incuriam.* There is no provision in the Civil Procedure Code for the learned District judge to vacate the impugned order and the impugned order cannot be considered as an order made per incuriam.
- Even though the learned District Judge had taken the view that he has jurisdiction to vacate the said order in terms of Section 839 of the Civil Procedure Code, in view of the established Judicial authority, Section 839 of the Civil Procedure Code does not contemplate overriding an express provision of the Civil Procedure Code or being used as a source of new jurisdiction to vacate his own orders. Since there are express provisions providing for the vacation of its own orders, expressio unius est exclusio alterius rule applies and Section 839 cannot be used to provide an additional situation of vacating its own orders. Section 839 must be complimentary to the Code and not detract from it.
- However, Section 839 can be invoked in instances where the court is desirous in redressing a wrong done to a party by its own act. But the Petitioner does not come within this ambit for in the instant action the Petitioner failed to appear on the due date due to his own doing. It was the Petitioner and his lawyers who had taken down the wrong date due to negligence or an alleged lapse on his part or his lawyers for which no other could be blamed.
- If the Defendant Petitioner wanted to demonstrate that the default in appearance on the date of inquiry was not due to negligence but was a

bona fide genuine mistake, the burden is on the Defendant Petitioner to satisfy the court either by oral evidence or in the least by evidence in the form of a proper and valid affidavit. However, no oral evidence was led and the three affidavits filed were bad in law as the jurat attested by the Justice of Peace does not state that he either administered an oath or that the affidavit was affirmed to by the affirmant. Thus, no proper evidence to prove their contention.

- The Defendant Petitioner had submitted only the page of the lawyer's diary relevant to 06.02.2003 which, as per his stance, was the date erroneously noted down but the page relevant to 06.01.2003 which was the date the inquiry was actually fixed for was not produced. If that page in the lawyer's diary was produced and if it was blank then it would have established his bona fides. However, that was not the case in this instance.
- The cases referred to by the Defendant Petitioner deal with situations where the District Court has been specifically conferred with the power in terms of the Civil Procedure Code to purge the default and vacate its own order. Thus, the cases cited by the Defendant Petitioner, to indicate that to vacate an ex parte order the better procedure is to apply first to the court of first instances which made the order, were quoted out of context and has no application to the issue at hand.

Being aggrieved by the said judgment, the Defendant Petitioner preferred an application before this court for special leave to appeal and was granted leave on the questions of law arising from the propositions appearing on paragraph 13 of the Petition. The said questions of law are reproduced at the end of this judgment.

There are certain provisions in the Civil Procedure Code that permit the District Court to vacate its own orders or judgments on certain occasions. For example, applications to vacate ex parte judgments and ex parte dismissals of plaintiffs' actions can be entertained in terms of Sections 86(2) and 87(3) of the Civil Procedure Code and similarly an interim injunction or enjoining order made can be set aside on an application made in terms of Section 666 of the Civil Procedure Code. The reasons given by the Court of Appeal indicate that when such

provisions are available expresio unius est exclusio alterius principle applies and thus, on other occasions District Court cannot vacate its orders even in terms of Section 839 of the Civil Procedure Code. It is trite law that when there is an express provision to remedy a situation, one cannot seek relief in terms of Section 839 of the Civil Procedure Code- vide **Leechman & Company Ltd. V Rangalla Consolidated Limited (1981) 2 S L R 373 at 389. Victor de Silva V Jinadasa de Silva (1964) 68 NLR 45,48.** This is understood because when there is a provision, the court need not use its inherent powers in terms of Section 839. If an aggrieved party does not use the provisions available for his redress, it is his own doing and the court need not interfere.

However, the aforesaid position which appears to have been taken by the Court of Appeal, if correct, further diminish the application of Section 839 since, as per the said position, if a provision is made to remedy certain situations (for e.g. vacation of certain ex parte orders for which provisions are made in the Code), other similar situations not provided with a specific remedy (for e.g. vacation of other incidental ex parte orders for which provisions are not made in the Code to vacate it) cannot be remedied through an order made under Section 839 of the Civil Procedure Code due to the application of aforesaid rule expressio unius. At this juncture it is necessary to look at Section 839 which is reproduced below;

"*Nothing in this Ordinance shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of process of the court*."

The plain reading of the words "*Nothing in this ordinance shall be deemed to limit or otherwise affect ....*" clearly indicates that what is expressed through various provisions of the code cannot limit or affect the inherent power of the court to make orders necessary for the ends of justice and to prevent abuse of process of the court. Thus, the terminology used in the section itself questions the position taken by the Court of Appeal with regard to the application of expressio unius rule in relation to the matter at hand, since what is expressed in the ordinance cannot limit the power to make necessary orders for the ends of justice and prevent abuse of process of the court. What is paramount is the need to meet the ends of justice and prevent abuse of process of the court. However, before coming to a conclusion it is worthwhile to see how our courts have applied inherent powers or

Section 839 of the Civil Procedure Code to meet the ends of justice and to prevent abuse of process of the court, with special attention to the decisions made in relation to ex parte orders.

In **Ramasamy Pulle V De Silva 12 NLR 298**, overruling **Mohideen Vs Carder (1893) 3 C.L.R.13** which held that a court has an inherent right to vacate an order or decree into which it has been surprised by fraud, collusion, or mistake of fact, it was held that a court has no jurisdiction to vacate or alter an order after it has been passed, other than the amendments allowed by section 189 of the Civil Procedure Code. Bench of two judges of the Supreme Court including the then Chief Justice came to the conclusion that there is no such inherent power to vacate its own order. However, this decision does not contemplate a situation where the order has been made ex parte. In **Deonis Vs Samarasinghe 15NLR 39** also, where there was an omission to mention costs in relation to the lower court proceedings, a bench of two judges held that even the Supreme Court has no inherent powers to amend its decree to supply an omission after the decree had passed the seal. However, the aforesaid judgments do not refer to or discuss a similar provision to the present Section 839 and it appears Section 839 was brought in through an amendment made later in 1921. This also does not consider a situation where the order was given ex parte.

However, in **Caldera Vs Santiagopillai 22NLR 155**, the service of summons was not in order. After the decree, the Defendant came to know the decree and applied to set aside the decree which was granted by the District Court on the ground that there had been no effective service of summons. In appeal, with regard to the argument that the substituted service must be taken as good unless it is set aside, and the judge who made it and his successors were not competent to set it aside, the then Supreme Court held "*the order was made ex parte behind the back of the defendant. And a person seeking to set aside such an order must first apply to the court which made it, which is always competent to set aside an ex parte order of this description*." Thus, inherent powers to remedy its own mistake by the same court appears to have been admitted though there is no reference to a provision similar to Section 839 in the judgment. This was a partition action and it does not indicate that the original application to vacate the decree and the order for substituted service of summons was in terms of any express provisions in that regard in the Civil Procedure Code or any other Law.

It was held in **Sayadoo Mohamado V Maula Abubakkar 28 NLR 58** that an order made ex parte, granting leave to defend may be vacated by the court making the order. Even as far back as 1895 in **Muttiah V Muttusamy 1 NLR 25,** against an apparent argument that the District Court has no power to vacate its own ex parte sequestration order since there is no provision for dissolution on defendant showing good cause**,** it was decided that the District Judge can, on good cause shown by the party aggrieved, vacate an ex parte order of sequestration. Lawrie A.C.J. has stated "*There is as a rule no appeal against an ex parte order. The proper course is to apply to the court which made the order to vacate it on notice to the party who holds the order, and showing good grounds that the order had been made on insufficient materials, or was otherwise wrong.*". Even in **Gargial Vs Somasundaram Chetty 9 NLR 26** Layard C.J. has expressed that a party aggrieved by an ex parte order should not appeal, but should move the Court which passed the order to vacate it and it is the practice of the Court. **Lokumenika Vs Selenduhamy** reported in **48 NLR 353** is another case that held where an order is made ex parte, the proper procedure to be adopted by the person against whom that order has been made is to move the Court which made the order to set it aside and such an application would not be in terms of the Civil Procedure Code but in accordance with a rule of practice which has become deeply ingrained in the legal system of Ceylon. In **Andradie v Jayasekara Perera (1985) 2 Sri L R 204** Siva Selliah, J. in agreement with G. P. S de Silva, J. (as he then was), refers to this practice and held that this established procedure and practice which had taken deep root, should not be lightly disturbed.

The Court of Appeal in **Galigamuwa V Air Lanka Ltd**. **(1993)1 Sri L R 411**, dismissed the appeal made against an ex parte order where no application was made to vacate it before the Labour Tribunal in the first instance. Senanayake, J. stated "*I am of the view the Appellate Court had the power and right to intervene but not in all ex parte orders. The Applicant-Appellant was aware of the date of inquiry and if he was ill it was his duty to communicate the fact and submit the relevant medical certificate to the tribunal. The tribunal was in a better position to examine the documents and his petition and affidavit and make suitable order. The Tribunal has the inherent right to set aside its own orders if the order was made per incuriam or non-service of notice or summons on the parties or any good cause being shown by the defaulting party for the absence on the date of inquiry. In my view Applicant- Appellant should have made his petition to the original*

Tribunal. This court has expressed this view earlier and I do not see any reason to take different view on this matter with all due respect to the decisions cited by the Learned counsel."

De Fonseka V Dharmawardena (1994) 3 Sri LR 49 was a case where the learned District Judge vacated his own order refusing to give a date to call the Fiscal Officer as a witness and, directed the Fiscal to be called. In appeal to the Court of Appeal, Sarath N Silva J as he then was and Ranaraja J agreeing, held "*since the order relates to a matter of procedure and does not affect the substantive rights of the parties we are of the view that there is no error in the subsequent order of the learned judge which is consistent with the principles of natural justice and the requirement of fairness in the conduct of proceedings at the inquiry. Section 839 of the Civil Procedure Code recognizes the inherent power of the Court to make an order as may be necessary for the ends of justice."* In this occasion the order vacated appears to have been made when the other party was present.

Senaviratne V Francis Fonseka Abeykoon reported in **(1986) 2 Sri LR 1** is a case where the Plaintiff took law into his hands and forcibly evicted the Defendants. It was held by the Supreme Court that the Court could, in the interest of justice resort to its inherent powers saved under Section 839 of the Civil Procedure Code and make order of restoration of possession for the Fiscal to execute even though the Civil Procedure Code Provided for such restoration to possession only on a decree to that end entered under Section 217(C) of the Civil Procedure Code. In this occasion when there were express provisions for the restoration of possession under a decree, restoration of possession without a decree for the interest of justice using inherent powers was approved by the apex court. Thus, in a new situation not contemplated by the provisions of the Civil Procedure Code, restoration of possession was done through the inherent powers of the Court. In this occasion, what was remedied was not a harm or injury caused by the Court but by a party to the action which took the law into its hand. However, harm was caused by the opposite party and not a harm or injury caused by aggrieved party's own doing. Furthermore, when there are express provisions in relation to restoration of possession under different circumstances, inherent powers were used to meet the ends of justice and expressio unius rule appears to have not been considered as having any application to stop the use of the inherent powers. **Sirinivaso Thero Vs Sudassi Thero 63 N L R 31** is a case where it was held that a

Court has inherent powers to repair the injury done to a party by its act. **Ittepana V Hemawathie (1981) 1 Sri L R 476** is a case where decree nisi was made absolute but since it was found that no summons had been served on the Defendant, the original Court set aside its decree nisi and decree absolute. In this case it was held that since the proceedings being void, the person affected by it can apply to have them set aside using inherent powers saved by Section 839.

With regard to the application of Section 839 of the Code, following excerpts from the judgment of Soza, J. in the Court of Appeal case **Leechman & Company Ltd. V Rangalla Consolidated Limited (1981) 2 S L R 373 at 388 and 389** looks very relevant.

" Section 839 as has been pointed out in more than one decided case does not create new powers but merely saves the inherent powers of court to make such orders as may be necessary for the ends of justice or to prevent abuses of the process of the court- see the case of ***Paulusz v Perera (1933) 34 NLR 438****.*

A. Woodroffe, J. laid down in the case of ***Hukum Chand Boid V Kamalanand Singh (1905) 33 Cal.927*** *the Civil Procedure Code binds all Courts so far as it goes but not exhaustive. The legislature cannot anticipate and make provision to cover all possible contingencies. The power and duty of the Court in cases where no specific rule exists to act according to equity, justice and good conscience remain unaffected. In the exercise of its inherent powers the Court must be careful to see that its decision is based on sound general principles and is not in conflict or inconsistent with them or the intention of the legislature. Howard C.J. adopted Woodroffe J.'s enunciation in the case of* ***Karunaratne V Mohideen (1941) 43 NLR 102****. In the case of* ***Victor de Silva V Jinadasa de Silva (1964) 68 NLR 45,48*** *Manickavasagar, J. explained these principles as follows;*

> *'...our Code is not exhaustive on all matters; one cannot expect a Code to provide for every situation and contingency; if there is no provision, it is the duty of the judge, and it lies within its inherent power to make such order as the justice of the case requires.'*

The inherent powers of the court were preserved in section 151 of the Indian Code of Civil Procedure 1908 and our section 839 is a verbatim reproduction of it brought in by an amendment in 1921. The inherent powers are not to be used for the benefit of a litigant who has his remedy under the Code of Civil Procedure. On

any point specially dealt with by the Code the Court cannot disregard the letter of the enactment according to its true construction."

The aforementioned **Leechman & Company** case was a case where the learned District Judge had made orders, contrary to Civil Procedure, to hold an inquiry, which was something similar to trial within a trial with regard to the other debtors revealed by the garnishee's statement, without jurisdiction to hold such an inquiry in the same action. Thus, it was correctly held that Section 839 does not create new powers. However, what is quoted above indicates that the Legislature cannot foresee all the contingencies and make provisions for them and as such the Civil Procedure Code is not exhaustive and cannot be expected as providing for every situation and contingency. Further, it clearly points out that when there are express provisions one cannot resort to inherent powers and when there is no provision it is the duty of the judge, and within the inherent powers to do what is necessary, to meet the ends of justice or to prevent abuse of process of the Court.

The **Paulusz v Perera** referred to above in the case of **Leechman & Company** sturdily express the view that District Court cannot vary its own order. However, the issue involved in that case was the vacation of the previous dismissal of the action. Hence the order relevant to that case was an order that has the effect of a final judgment which makes the judge functus officio after the dismissal. On the other hand, it was a partition action and the vacation of the dismissal might have affected the rights of third parties who gain rights after the dismissal.

In **Kamala V Andris 41 NLR 71** where an application was made to vacate the previous abatement order, the learned Judge ordered the abatement to stand but gave leave to the plaintiff to file a fresh action in contrary to the statutory bar in Section 403 of the Civil Procedure Code. It was held "*Section 839 of the Civil Procedure Code is not intended to authorize a court to override the express provisions of the Civil Procedure Code".*

Even in the case of **Jeyaraj Fernandopulle V Premachandra de Silva (1996) 1 Sri. L R 70**, an application to review or revise an order of the Supreme Court by a fuller bench of the same court was refused. At page 101 of the said reported judgment referring to **Hettiarachchi V Senaviratne and others (1994) 3 Sri L R 293**, **Wijesinghe et al. V Uluwita (1933) 34 N L R 362**, it is stated " *Although as a general rule, no court or judge has power to rehear, review, alter or vary any*

judgment or order after it has been entered, either in an application made in the original action or matter or in a fresh action brought to review the judgment or order, yet the rule is subject to certain exceptions. All courts have inherent jurisdiction to vary their orders in certain circumstances." In the discourse of his judgment Amarasinghe, J. though not an exhaustive list, refers to certain instances where inherent powers could be used to set aside a previous order made by the same Court. Among others a judgment entered in default under certain circumstances or an order made on wrong facts given to the prejudice of a party is recognized as occasions where inherent powers can be used by a Court to vacate its own orders. However, His Lordship has emphasized that two questions must be asked by the Court in invoking inherent jurisdiction, namely;

1. Is it a case which comes within the scope of the inherent powers of the Court?
2. Is it one which those powers should be exercised?

Moreover, it further appears from His Lordship's judgment of the aforesaid case that when there is no express provision to remedy a situation, attainment of justice is what is expected from invoking Section 839.

Even the impugned judgment of the Court of Appeal admits a Court can vary or vacate its own order when it was made per incuriam or where an act of the Court has caused harm to a party. Thus, a Court has inherent powers to vacate an order made per incuriam or to rectify a harm caused by the Court itself. As such, the notion one would get by going through the impugned judgment of the Court of Appeal that a Court cannot vacate its own order under section 839 of the Civil Procedure Code;

- unless the said Code expressly provides for or
- owing to the expressio unius rule when the Code provides for similar situation but not for the same situation,

is qualified as the Court of Appeal itself states that it can do so when it is per incuriam or to rectify a harm caused by the court itself. Furthermore, the cases cited above indicate that there are other exceptions to the general rule that, a Court cannot vary or set aside its own order- vide **Jeyaraj Fernandopulle Vs Premachandra** (supra).

However, in certain cases per incuriam concept has been used in a restricted sense as defined by Lord Chief Justice Goddard in **Huddersfield Police Authority V Watson (1947) 1 All E R 193.** [see **Alasupillai V Yavetpillai (1948) 39 C L W 107, All Ceylon Commercial and Industrial Workers Union (1995) 2 Sri L R 295, Hettiarachchi V Senaviratne (1994) 3 Sri L R 209**]. As per the said restricted view a decision is made per incuriam when it is made in ignorance or forgetfulness of an existing statute or a binding decision. It appears that the dictionary meaning of the latin term 'per incuriam' connotes something similar to 'through lack of care.' {for broader meanings of 'per incuriam' see **Gunasena V Bandarathilake (2000) Sri L R 292 at 301 and 302**}. If one adopts the extreme wider meaning represented by the said dictionary meaning it may be a hindrance to reach a finality in a litigation, since lack of care may even appear in evaluation of evidential material after every party is given a chance to present their evidence and positions. Anyhow, our courts on certain occasions, where mistake was so obvious, have used 'per incuriam' concept in a much wider meaning than that of Lord Goddard's interpretation as demonstrated by following decisions. In **The King v Baron Silva (1926) 4 Times of Ceylon Reports 3**, a conviction given under a section which was not in force at the time of alleged commission was vacated. In **The Police officer of Mawalla V Galapatha (1915) 1 C W R 197**, an order of dismissing an appeal on a misunderstanding that the prosecution was properly sanctioned by placing the signature of the proper authority was vacated. In **V.A. Ranmenika V B. A. S. Tissera 65 N L R 214** the Supreme Court rejected an appeal on the ground that notice of appeal had not been duly served but when the court found notice had been duly served on the guardian -ad-litem, it set aside its own order. **Kariyawasam V Priyadarshani (2004) 1 Sri L R 189** is also an example for the use of wider interpretation of 'Per Incuriam" to vacate a decree of the Court of Appeal by the Court of Appeal itself, since the previous order was made as a result of Court of Appeal's attention not being drawn to the 2nd page of the final decree of the lower court where a certain person was allotted shares. The case of **Gunasena V Bandarathilake (2000) 1 Sri L R 292** is another example for our Courts applying per incuriam concepts in its wider interpretation. In this case the Court of Appeal set aside its own judgment since the Court of Appeal mistakenly thought that the District Judge had entered judgment for the Plaintiff and the appeal was by the Plaintiff. Thereafter, the Court of Appeal re-fixed the matter for argument and delivered a second judgment. This Court held that the Court of

Appeal had the inherent powers to do that and the procedure adopted by the Court of Appeal was what it considered most appropriate in the circumstances and there was nothing objectionable in that procedure.

The law as discussed in the above decisions does not negate the general rule that a Court cannot vacate or re consider its own order but it is clear that with the passage of time, law has recognized several exceptional situations where a Court can reconsider or vacate its own order. Ex parte orders and per incuriam orders are among the exceptions recognized by our courts. Furthermore, it is clear from some of the decisions quoted above, including some of the decisions made in the early part of the previous century, that a practice has been developed over the years, for the aggrieved party to make an application in the first instance to the original Court which made the ex parte order. When there are express provisions one has to make his or her application as per the said provisions and Courts need not have developed a practice in such situations. The aforesaid decisions refer to a practice since that practice covers the situations not provided by any section or provision of law. However, a Court cannot confer jurisdiction on itself as conferring jurisdiction on a Court is a matter for the legislature. As such, it is my view that the practice developed over the years as aforesaid has to be used as an adjunct to the existing jurisdiction and not to create a new jurisdiction, as such it has to be practiced within the limits of inherent powers recognized by Section 839.

No provision in the Civil Procedure Code or any statute has been brought to the notice of this Court that debars the holding of an inquiry where the aggrieved party alleges that the default on his part was due to an excusable reason or that there are good reasons to adduce for his default. This Court cannot find such restriction imposed by a statutory provision. Moreover, there is no express provision providing a remedy from the same Court for a default on an inquiry date as happened in the case at hand. If one argues that every order on such defaults has to be challenged by leave to appeal applications or by revision applications, superior courts will be inundated with such applications contributing to the law's delays. On the other hand, original court is in a better position to evaluate the factual situations related to a default. These may be among the reason for the development of a long-standing practice recognized by the afore quoted judgments. Thus, when a need arise to meet the ends of justice or to prevent the

abuse of process of the Court due to a per incuriam order, ex parte order, or by an order that cause harm or injury to a party which is not at fault etc., the court may use its inherent power.

As discussed above the Legislature cannot foresee all the contingencies and make provisions and the Civil Procedure Code is not exhaustive. The phraseology used in Section 839 itself and the practice of our Courts indicates that expressio unius rule does not apply in the manner submitted by the Plaintiff Respondent. Thus, I do not see that the application made or the inquiry held by the learned District Judge overrides any express provision of law. Furthermore, the learned District Judge when holding the inquiry was not functus officio with regard to the main cause of action and he was only reviewing an incidental order in relation to an application for amended answer since the Defendant Petitioner alleged that his default was excusable as human beings are prone to make mistakes. Thus, I do not see that the learned District Judge was using a new power but was making incidental orders and holding an inquiry to see whether he could act in terms of Section 839 to remedy the alleged injustice. In my view the learned District Judge was acting within the main Jurisdiction in relation to the cause of action placed before it by the Plaint and was not creating a new power which should have been considered in a different forum or a different action. The District Judge had powers to see whether his order was per incuriam in its wider sense as the order was made without the Petitioner having a chance to place factual situation in relation to his default or to see whether the Court had caused harm to the Petitioner by making the order without his presence, which denied his opportunity to place his side of the story.

Thus, the notion one gets from reading the impugned Court of Appeal Judgment that, the District Court can vacate ex parte orders only when there are express provisions in that regard in the Civil Procedure Code or any other law as well as the notion that expressio unius rule applies since there are some provisions that enable the vacation of certain ex parte orders by the same court are flawed. Those notions only express the general situations but there appears to be exceptions other than those referred to in the Court of Appeal Judgment. It is the long-standing practice to invoke Section 839 to vacate other ex parte orders to repair abuse of process of the court and meet the ends of justice when there are reasonable grounds for such invocation and where there is no express provision

to remedy the injustice, the Learned District Judge appears to have had entertained the application in terms of Section 839 and held the inquiry.

On the other hand, default of a party to appear and/or to proceed with the task or inquiry fixed for on the given date may take place, inter alia, on following situations;

- Due to a factor where fault can be attributed to the defaulting party (For e.g.; Negligence or lack of interest of the party)
- Due to a factor where fault cannot be attributed to the defaulting party (For e.g.; A Sickness, an accident, a god's act or natural disaster like landslides or an intervention of a superior force like a regional curfew, that hinders the presence of the party)

In the first category of situations a judge may not intervene as the outcome is a result of the relevant party's own doing but with regard to the 2nd category the original Court is in a better position than an appellate court to inquire into the matter; if necessary to examine the witnesses orally and see whether the applicant is in fact not at fault and, if so, had the Court known the correct factual situation whether it would have made the ex parte order. In other words, original Court is in a better position to decide whether the factual situation warrant the invocation of Section 839 of the Civil Procedure Code. Thus, learned District Judge cannot be found fault with for holding an inquiry to see whether he should use Section 839 to redress the Petitioner when it was alleged that the default was due to a mistake or human error.

For the foregoing reasons I am of the view that the Court of Appeal misstated in expressing a view to indicate that the District Court has no jurisdiction to vacate an ex parte order in terms of Section 839 of the Civil Procedure Code;

- where there is no provision made for such vacation of ex parte orders or
- due to expressio unius rule, when there are express provisions to similar situations but not to the alleged situation.

Further, the Court of Appeal in its judgment itself, as mentioned before, has recognized two exceptions to the general rule which states that a court cannot set aside its own order, and the judgments cited above indicate that there are other exceptions to this general rule. (See **Jeyaraj Fernandopulle case** supra).

As this was an inquiry in terms of Section 839, one cannot say that it must be held in terms of Section 86 or 87 of the Civil Procedure Code as those are for specific situations. However, the District Court has to follow some procedure similar to said provision or that adheres to rules of natural justice. The learned District Judge has given an opportunity to file objections to the Defendant Petitioner's application and parties have agreed to hold the inquiry by way of written submissions. Thus, sufficient compliance of rules of natural justice can be observed. However, the issue is whether the Defendant Petitioner submitted adequate and legally acceptable evidence before the Learned District Judge.

Another ground set out in the impugned judgment of the Court of Appeal for the setting aside of the District Court order is that the three affidavits tendered on behalf of the Defendant Petitioner are invalid, and therefore, there was no evidence at all to prove his stance that the default was due to a mistake. In fact, this was one of the objections taken by the Plaintiff Respondent even in the District Court to the application (Petition) of the Defendant Petitioner that prayed to vacate the order made ex parte on 06.01.2003. The brief does not reveal that the Defendant Petitioner moved Court to tender fresh affidavits. With this objection standing against his application, the Defendant Petitioner and his Lawyers agreed to hold the inquiry by way of written submissions which created a situation if affidavits were flawed his application also should fail. The objections to the affidavits was founded on the fact that jurat of each affidavit does not indicate whether it was affirmed before the Commissioner of Oaths.

In **De Silva V L.B. Finance Ltd. (1993) 1 Sri L R 371**, the affidavit stated that deponents affirmed and in the body of the affidavit the deponents described themselves as affirmants. In the jurat there was a statement that the affidavit was read over and explained to the within named affirmants, it was held by this Court that the affidavit was valid despite the fact that the jurat did not contain the fact of affirmation. However, in my view, when the Commissioner of Oaths describes the declarants as affirmants in the jurat there is an implication that the declarants affirmed before him.

In **Clifford Ratwatte v Thilanga Sumathipala (2001) 2 Sri L R 55** where the deponent stated that he was a Christian and made oath and the jurat clause at the end stated that the deponent had affirmed, the Court of Appeal held the

affidavit was invalid. It appears that due to the said contradictory statements in the body of the affidavit and jurat, the court could not come to the conclusion that it was in fact affirmed or sworn before the Justice of the Peace and the Court was of the view that the Justice of the Peace blindly signed it. Even in **Pan Asia Bank V Kandy Multipurpose Co-operative Society and Others (2005) 2 Sri L R 211**, where the deponent in the affidavit had stated that he being a Roman Catholic made oath but the attestation clause stated otherwise, namely that he affirmed to, the Court of Appeal held that the affidavit was bad in law.

In **Multi-Purpose Co-operative Society, Madawachchiya V Kirimudiyanse and Others (2011) 1 Sri L R 135** where the contention was that the deponent being a Buddhist had not affirmed to either in the head or recital of the affidavit or in the jurat, the Court of Appeal held that the words 'solemnly sincerely and truly' connote that the deponent was publicly admitting the truth of the contents in the most responsible manner. It further held that the absence of a particular word 'affirm' referred to in the statute cannot and should not be allowed to stand in the way of justice and the words must be given a purposive and meaningful construction instead of trying to split hairs on technicalities. It appears that the Court of Appeal did not follow the decisions in **Chandrawathie V Dharmaratne and others 2001 BLR, Cliffered Ratwatte V Thilanga Sumathipala** (supra), **Inaya V Orix Leasing Co. Ltd. (1993) 3 Sri L R 197**. In **Chandrawathie V Dharmaratne** the Supreme Court held that if the affirmation is not in the head of the affidavit or in the jurat clause it is defective and fatal, and, in **Inaya V Orix leasing Co. Ltd**., the deponents being Muslims had failed to solemnly, sincerely, and truly declare and affirm the specific averments set out in the affidavit. The recital merely stated that they make declaration and in the jurat there was no reference as to whether the purported affidavit was sworn or affirmed to. As such the affidavit appears to have been considered not valid as it contained unsworn testimony. Also, in **Facy V Sanoon and Others (2003) 3 Sri L R 8,** the Court of Appeal held a Muslim who elected to make oath and swear at the beginning could not have affirmed before the Justice of Peace and the affidavit was flawed. However, in **Mohomad v Jayaratne and Others (2002) 3 Sri L R 181** the Court of Appeal had held that the words used by the Petitioner in the opening part of his affidavit manifest his intention to make a solemn and formal declaration and the words used show his consciousness of his fundamental obligation to tell the truth. The use of the word

“affirm” in the opening part of the affidavit and the word swear in the jurat cannot militate against the manifested intention of the Petitioner to make a formal declaration in the discharge of his fundamental obligation to tell the truth.

In **Kumarasiri and Others V Rajapaksha (2006) 1Sri L R 359**, the jurat of the affidavit was confusing, incorrectly worded and did not state where the affidavit was affirmed. The Court of Appeal considered the jurat as flesh and blood of the affidavit and held that the affidavit was invalid. The Court of Appeal in **Weeraman V Sadacharan (2002) 3 Sri L R 222,** where in the body of the affidavit and as well as in the jurat, the deponent was not referred to as an affirmant but only as a declarant and no administration of an affirmation as required by law was visible, held that affidavit is fatally flawed. **Mark Rajendran V First Capital Ltd (2010) 1Sri L R 60** was a case where the purported deponent averred in the affidavit that he was a Christian and had made oath but as per the jurat he had affirmed to the averments before the Justice of Peace. The Supreme Court while referring to **Cliffered Ratwatte v Thilanga Sumathipala** (Supra) and **Kumarasiri and Others V Rajapaksha** (Supra) held that the affidavit cannot be accepted as valid.

The above decisions indicate that on some occasions where there was a defect in the jurat, our courts have acted somewhat strictly, and on other occasions more liberally. In some instances, our courts have expressed that even though technicalities should not be allowed to stand in the way of justice, the basic requirements of the law must be fulfilled; and in some cases the rationale behind making an oath or affirmation appears to have been considered and if it is visible from the affidavit as a whole that it is a responsible statement admitting the truth with regard to what is contained in the affidavit, it has been considered as valid. Thus, a mere declaration or statement of facts have been rejected. When there were contradictions between the contents of the affidavit and its jurat, in certain instances affidavit was not given the legal recognition, perhaps due to the doubt that the signing of the affidavit would have taken place blindly and not in a responsible manner. In some cases, even if there were contradictory statements as to whether it was affirmed or sworn, or when the jurat was silent as to whether it was affirmed or sworn or when the contents indicated that either it was affirmed or sworn as required by law or when it was a responsible statement to vouch for the truth, the relevant affidavit was considered as valid.

Section 5 of the Oaths and Affirmation Ordinance states that where the person required by law to make oath is a Buddhist, Hindu, or Muslim or of some other religion according to which oaths are not of binding force; or has a conscientious objection to make an oath, he may, instead of making an oath, make an affirmation. Section 168 of the Civil Procedure Code, which comes under the chapter XIX named 'Of Trials', stipulates that Christian and Jew witnesses, who do not object on religious tenets or on other grounds to the taking of oath, shall be examined under oath and others to be examined on affirmation. This rule in the said Section 168 also applies to affidavits. Section 437 of the Civil Procedure Code enables the preparation of affidavit evidence to be used as evidence in a judicial proceeding. Section 438 of the said Code states that the affidavit shall be signed by the declarant before the Court, Justice of Peace or Commissioner of Oath before whom it is affirmed or sworn. As per Section 439 of the same Code affidavit has to be read over and interpreted to the declarant in declarant's own language if the declarant is subject to any disability such as blindness, illiteracy, inability to understand English language etc. In such occasions, the jurat must express that it was read over, interpreted and the declarant understood it.

It may be helpful if the fact of affirmation or making of the oath is expressly stated in the jurat but as stated in **De Silva V L.B. Finance Ltd** (Supra), Civil Procedure Code does not require that should be expressly stated in the jurat.

After perusing the aforementioned decisions of our superior courts and the relevant provisions it is my view that what is necessary is whether the deponent made an oath or affirmed , as the case may be, as to the truthfulness of the contents of the affidavit, before the Justice of Peace or the Commissioner of oath. This has to be ascertained not only by looking at what is stated in the jurat but taking the affidavit as a whole.

The jurats of the purported affidavits tendered by the Petitioner do not say whether the deponents affirmed before the Commissioner of Oaths. The relevant jurat in each affidavit contains a statement to say that on the date mentioned there in the jurat, it was read over and explained to the declarant mentioned therein. Thus, each of the affidavits in its jurat refers to the deponent as 'declarant' (ඉහත සඳහන් සිද්ධි ප්‍රකාශය ප්‍රකාශකට කියවා තේරුම් කර දීමෙන්). In each affidavit, the first averment states that the deponent is the

declarant named therein (මෙහි සඳහන් සිද්ධි ප්‍රකාශක මම වෙමි).Even though the deponent has been referred as the declarant in those places, in the recital or at the beginning of each affidavit each declarant has stated that he honestly and truly affirms and states the contents therein. (අවන්කවත්, සත්‍යවාදීවත් ,ගාම්භීරතා පූර්වකවත් ප්‍රතිඥා දී ප්‍රකාශ කර සිටින වගනම්). Thus, when the Commissioner of Oath states that it was read over and explained, the deponent signs with the understanding that he affirms to the truth of the contents of the document read over to him. Hence there were sufficient materials before the learned District Judge as well as the Court of Appeal to consider the relevant affidavits as valid affidavits. In my view, the Court of Appeal erred in treating the said affidavits as invalid.

However, what is discussed above is not adequate to declare that the final conclusion of the impugned judgment of the Court of Appeal is invalid and the learned District Judge's decision to act in terms of Section 839 to vacate ex parte order is correct. To overturn the final conclusion of the Court of Appeal it is pertinent to see whether the Court of Appeal's finding that the evaluation of facts by the learned District Judge in relation to the default of the Defendant Petitioner was erroneous and cannot stand. Thus, whether facts revealed in the inquiry before the learned District Judge were sufficient to use the powers in terms of Section 839 to rectify the alleged injustice is still to be considered.

The application to vacate the order made ex parte refusing the amended answer and fixing the trial on the original answer was presented on the basis that the Counsel for the Defendant Petitioner had failed to note down the correct date of inquiry. It appears that the position of the Defendant Petitioner in the original court was that the default was not intentional or due to negligence or lack of care but due to a genuine human error. As per the petition dated 21.01.2003, filed in the District Court, praying to vacate the order dated 06.01.2003, the Defendant Petitioner had averred that on the instructions of his Registered Attorney, one Counsel appeared on 29.10.2002 and he mistakenly noted down the inquiry date, which was to be held by way of written submissions, as 06.02.2003. It is further averred that the said Counsel conveyed the said date to the Defendant Petitioner and the said Registered Attorney who noted down the inquiry date as 06.02.2003 when, as per the journal entries, the date given for the said inquiry was

06.01.2003. In support of this the Defendant Petitioner had tendered three purported affidavits; one under his name and the other two from the said Registered Attorney and the Counsel respectively. He had also tendered to the District Court a photo copy of the entries of the diary of the said Registered Attorney pertaining to the date 06.02.2003. Anyway, he had not submitted any document to prove the date noted down by the Counsel as averred in the petition or the entries relevant to the correct date, namely 06.01.2003 either in the said Counsel's or the Registered Attorney's Diary. The Plaintiff Respondent has objected to this application and among others he had challenged the reliability of the contents of the Petition and the validity of the affidavits tendered by the Defendant Petitioner. It appears parties agreed for the holding of the inquiry by way of written submissions -vide journal entry dated 24.07.2003. As referred to above the learned District Judge by his order dated 04.02.2004, purportedly acting in terms of Section 839 of the Civil Procedure Code accepted the Defendant Petitioner's version submitted through the purported affidavits mentioned above. The said order was set aside by the impugned order of the Court of Appeal.

If the default on the relevant date was a genuine mistake it was within the exclusive knowledge of the Defendant Petitioner and/or his lawyers. Thus, the Court of Appeal correctly held the burden of proving the genuine mistake was on the Defendant Petitioner. The Court of Appeal further observed that the Defendant Petitioner had produced the diary entries of his lawyer only in respect of the purported date erroneously noted down but had failed to produce diary entries in respect of the correct date 06.01.2003. As such, the Court of Appeal, in my view, correctly held that the Petitioner failed to discharge his onus of demonstrating to Court that nonappearance on the due date was a mistake and not negligence. To prove that it was a mistake, the Defendant Petitioner should have submitted the entries noted down by his Lawyers in relation to the correct date, namely 06.01.2003. If the correct case number was not entered in the diary on the correct date, and it is entered only on the date said to be erroneously entered, it becomes substantial evidence to decide that the Lawyer/s made a mistake. By producing the entries relating to the latter date he only proves that there is an entry made in relation to that date. One can make such entry even after the correct date lapsed. Thus, not producing the diary entries relating to the correct date or the note relevant to the date noted down at the first instance by

the Counsel as averred in his Petition has to be weighed against the Defendant Petitioner since these are matters within the exclusive knowledge of the Defendant Petitioner. Hence it is clear that learned District Judge did not consider the relevant facts in coming to his decision but the Court of Appeal considered them and came to a correct finding which stand against in acting in terms of Section 839.

It appears from the impugned judgment of the Court of Appeal that it rejected the contention of the Defendant Petitioner that the default of the Attorney- at-Law can be excused. The decision of **Fernando V Ceylon Breweries Ltd. (1998) 3 Sri L R 61** cited by the Defendant Petitioner in that regard has not been followed as the said decision was set aside by the Supreme Court- vide **The Ceylon Breweries Ltd. V Jax Fernando (2001) 1 Sri L R 270.** However, setting aside of the said Court of Appeal decision by the latter decision of the Supreme Court was done on different grounds. Thus, the two decisions **Punchihamy V Rambukpotha 16 Times Law Reports 119** and **Kathiresu V Sinnaiah 71 NLR 450** can still be cited to say that a mistake of a lawyer with regard to mistakenly taking down a wrong date can be excused. However, the mistake has to be proved and as elaborated elsewhere in this judgment, the defendant Petitioner has failed in proving that it was due to a genuine mistake.

Even if the Court thinks that a genuine mistake can be considered to give relief to meet the ends of justice, what could have been avoided by due diligence cannot be considered as a mistake as it falls within the ambit of one's negligence. A lawyer being a human being, he/she may err in many aspects including what he heard as the next date of inquiry. The Registered Attorney who was in charge of the Defendant Petitioner's brief must foresee such shortcomings that may take place. He is not a mere intermediary between his client and the Court to file documents and appear in court. He is a professional who can gain access to the case record through the registry and who can get the next date verified through the office of the court. The inquiry date given by the learned District Judge on 29.10.2002 was 06.01.2003. There was a time gap of more than two months in between. If the inquiry was fixed for the next day or the following day, one may say that there was no sufficient time to get the date verified. I do not think one can say that the Registered Attorney in the case at hand acted with due diligence, among others, with regard to the date fixed for the inquiry on the amended

answer. In **Pakir Mohideen V Mohammadu Casim 4 N L R 299** it was held that it is the duty of the proctor to inform the client of the proper date of trial and have asked for instructions. Thus, it is not sufficient for a Registered Attorney to state that he noted down the date given by the Counsel he instructed and the Counsel's mistake caused the default on the inquiry date. He must also show that he acted with due diligence and care to get the date verified by other means available.

With regard to the due diligence of the Registered Attorney, following excerpts from the **"Professional Ethics and Responsibilities of Lawyers"** By **A.R.B. Amarasinghe, 5th Print 2018, published by Stamford Lake (Pvt) Ltd**., will be relevant.

"*There is a heavy duty on a registered attorney to ensure that all things that are expected of him by the law and in terms of the standards of the profession are done diligently, promptly, conscientiously, with reasonable competence. The registered attorney performs functions previously performed by proctors in employing and instructing counsel, carrying out his advice and organizing the case behind the lines*" – vide page 303

"*It is no excuse for a registered attorney in a contentious civil matter to say that he failed to appear in any court because he usually acts, as a matter of personal preference, only as an 'instructing attorney' and never did advocacy and did not ordinarily appear in court or that he did not usually appear in that type of court*" – Vide page 304.

However, it further appears at page 306 of the aforesaid book that when the Registered Attorney has made all arrangements for the Counsel, if Counsel agrees to dispense with the appearance of the Registered Attorney, it is not necessary that Registered Attorney should ordinarily be in attendance at the proceedings. However, in the case at hand, it appears that the Registered Attorney was not present in court on 29.10.2002 when the inquiry date was given. There is no clear evidence in the purported affidavits that there was an agreement with the Counsel to dispense with the presence of the Registered Attorney on the said date and other dates to be given by the court. Rule 16 of the Supreme Court (Conduct of Etiquette for Attorney at Law) Rules of 1988 prescribes professional obligation on the lawyer retained in any proceedings to appear at such proceedings unless prevented by any circumstances beyond his control. As such, it is my view that even if there was such an agreement with the Counsel to

dispense with the Registered Attorney's appearance in Court, it is the duty of the Registered Attorney to personally keep a track on the dates of the case since he is obliged to represent the Defendant Petitioner till the proxy is valid, as opposed to the Counsel whose obligation to appear depends on the instructions he gets from the proxy holder . There is no evidence to show that the Registered Attorney acted promptly and diligently to get the next date verified specially when he did not appear in court on 29.10.2002. In **Daniel V Chandradeva (1994) 2 Sri L R 1**, it was held *"If a registered attorney has not appointed another Attorney to act as Counsel, or having appointed Counsel, he has not agreed with Counsel that the attendance in Court of such Registered Attorney may be dispensed with, then such Registered Attorney must personally keep a track of the dates of hearing, having regard to the usual way in which dates of hearing are fixed and notice is given in the Court or Tribunal, and appear when the case comes on for hearing or other purpose decided or ordered by the Court or Tribunal."* As said before, the Registered Attorney was not present on 29.10.2002 when the date of inquiry was given. No evidence was placed to show that there was an agreement with the Counsel to dispense with his appearance on the dates so given by the court and the Registered Attorney took steps to keep a track of the dates of hearing other than relying on what is purportedly conveyed by the Counsel who appeared on 29.10.2002. Thus, the failure to appear on the correct date of hearing is not an unavoidable result of a genuine mistake. The said default is tainted with lack of due diligence and fault of the Registered Attorney.

In **Rankira V Silindu 10 N L R 376** Middleton, J. stated that if a lawyer makes an error, it is to all intents and purposes the error of his client which that client must be responsible for**. Julius V Hodgson 11 N L R 25** was a case where the Appellant's Counsel urged that failure was due to accident but no explanation was given why the proctor, when he left Badulla, did not leave someone in charge of his office who could have attended to kind of a matters that was in issue in that case. Sir. Joseph Hutchinson, C. J. with Middleton, J. agreeing held that in his opinion, the failure in that case to file petition of appeal in time was due to the default of the proctor at Badulla, and the Appellant must suffer for it. Even in **Pakir Mohideen V Mohammadu Casim** (Supra) Boncer, C. J., held that client must suffer for the fault of his proctor. **Sanjeewa and Another V Piyatissa And Another (2006) 1 Sri L R 241** is a case where it was held that a mistake or oversight on the part of the registered Attorney -at- Law is not a cause which is not within the control of his

client to entertain an appeal notwithstanding lapse of time. In the case of **Packiyanathan V Singarajah (1991) 2 Sri L R 205** it was held that relief may not be granted;

- Where the default has resulted from the negligence of the client or both the client and his Attorney-at-Law
- Where the default has resulted from the negligence of the Attorney-at-Law in which event the principle is that the negligence of the Attorney-at-Law is the negligence of the client and the client must suffer for it.

The above cases clearly indicate that when the Attorney at Law was at fault his client has to face the adverse consequences. Thus, it is also clear that the learned District Judge did not properly evaluate the available facts and the stance taken by the Defendant Petitioner which was demonstrative of the lack of due diligence and care by his Registered Attorney.

A.R.B. Amarasinghe in his aforementioned book states;

"*The Court may, upon application set aside an order or judgment given in the absence of the attorney and order a new hearing if there were reasonable grounds for his absence.*

However, if he had no reasonable excuse, the court would not reinstate the matter. The earlier practice it seems was more harsh and did not permit a restoration." (Sic)

I do not consider a statement by the Registered Attorney, who was not present in court when the date was given, to the effect that he noted down the date conveyed by the Counsel, when he had time and access to get the date verified but failed to get it verified, is a reasonable excuse. Furthermore, I do not think when the Registered Attorney does not submit the entries of his diary in relation to the correct date given by the Court or when the Counsel does not submit what is noted down by him when the Court gave the date, one can say that the alleged mistake is proved.

In my view, Section 839 of the Civil Procedure Code is not there to remedy harm caused by one's own action or inaction which could have been averted with due diligence and care. As elaborated above, the Defendant Petitioner failed in proving that the default was a genuine mistake. It could have been avoided if the

Registered Attorney paid due attention to his duty with due care and diligence. Hence, the learned District Judge erred in applying Section 839 and granting relief for the Defendant Petitioner and the final conclusion of the Court of Appeal to set aside the District Court's order was correct.

Thus, with regard to the evaluation of facts in relation to the default, the learned District Judge erred in coming to the conclusion that the default was a result of a bona fide mistake. In my view, in that aspect, the Court of Appeal was correct as the situation does not warrant the invocation of Section 839 of the Civil Procedure Code to grant relief. The Defendant Petitioner failed in proving that the default was a result of a bona fide mistake due to the non production of the relevant entries, and even if it is assumed that the Counsel made a mistake in noting down the correct date, the Registered Attorney's due vigilance could have easily avoided the outcome.

Inquiry in the District Court where the default was made was for the amended answer. Whether the amendment shall be allowed or not is subject to the discretion of Court when Section 93 (1) of the Civil Procedure Code applies and furthermore, subject to the conditions in Section 93(2) when that section applies. Therefore, when an inquiry is fixed, the default of the applicant matters as it is his/her burden to satisfy the Court's discretion or satisfy the District Judge as to the existence of the conditions stipulated in Section 93(2), as the case may be. Thus, the Defendant Petitioner cannot argue that the learned District Judge could have made an order on the acceptance of the amended answer irrespective of his default. If it is his position, he should have asked an order on the application itself without getting it fixed for inquiry by the Court.

For the foregoing reasons I answer the questions of law contemplated in paragraph 13 of the Petition and allowed by this Court as follows;

Question (a).

Whether the said order is contrary to law and against the material placed before Court.

Answer;

No. Even though, there appears to be misstatements in the Court of Appeal Judgment with regard to the invocation and application of District Court's power in terms of Section 839 of the Civil Procedure Code to vacate its own orders made ex parte as well as the Court of Appeal erred in rejecting the affidavits tendered on behalf of the petitioner, the final conclusion of the said judgment is correct.

Question (b).

Whether the Court of appeal erred in making the aforementioned order on the basis that the learned District Judge cannot vacate its own order made upon default of a party if the Civil Procedure Code is silent on the procedure which ought to be adopted in such a matter

Answer;

Yes, there appears to be a such misstatement but the final conclusion is correct and valid in law.

Question (c).

Whether the Court of Appeal erred in holding that the same procedure spelt out in Sections 86 and 87 of the Civil Procedure Code cannot be applied in respect of the other defaults and or default inquiries conducted in the District Court

Answer;

No, those provisions are for the specific occasions referred to in those sections and related sections, but in other occasions of default where there is no specific procedure provided for the vacation of orders, there is no bar to adopt similar procedure in adherence to rules of natural justice. What is necessary is adherence to rules of natural justice.

Question (d).

Whether the Court of Appeal erred in holding that when the Court makes an order on a default of a party in any proceeding before the District Court other than in trial the aggrieved party has no redress whatsoever and has to suffer the consequences of his negligence

Answer;

No, if it is the negligence of the party, it has to suffer the consequences but in other occasions, even if it is not a default with regard to a trial and the party is not at fault or has excusable reasons, a party may have redress under Section 839 if the circumstances demands the ends of justice and prevention of abuse of process of the court.

Question (e).

Whether the Court of Appeal erred in making the said order without appreciating the scope of the power given by the legislature to the District Court under Section 839 of the Civil Procedure Code.

Answer;

Yes, there seems to be a misapprehension of the powers of District Court under Section 839 but, as elaborated above, the final conclusion of the Court of Appeal is correct and valid in law.

Question (f).

Whether the Court of Appeal erred in failing to appreciate that even if the Petitioner defaulted on the day the matter was fixed for written submissions the District Court ought to have considered the amendment suggested by the Petitioner in the light of Section 93 of the Civil Procedure Code and ought not have summarily dismissed the Petitioner's amended answer and as such the said act of Court injured the Petitioner and thus the said injury could have been cured by Court under Section 839 of the Civil Procedure Code.

Answer;

No. The default of the Defendant Petitioner matters and he should have taken part in the inquiry and satisfied the discretion of court to allow the amendments. The default of the Defendant Petitioner is tainted with lack of due diligence of his lawyers and alleged mistake is not proved.

Question (g).

Whether the Court of Appeal erred in holding that the authorities which dealt with a default of a lawyer at a trial has no application to the instant matter as the

proceedings relates to an inquiry in respect of the acceptance of an amended answer.

Answer;

It appears this proposition of law has been raised out of context since the Court of Appeal has not held in that manner. Thus, answering the said question does not arise.

The Court of Appeal has held "*…….an examination of the aforesaid cases one could see most significantly that they deal with situations where District Court has been specifically conferred with the power in terms of the Civil Procedure Code to purge default and vacate its own order. As such aforesaid excerpt has been quoted out of context and has no applications to the issue at hand*." This comment by the Court of Appeal was in respect of the argument of the Plaintiff Respondent, which was based on an excerpt taken from **Loku Menika Vs Selenduhamy 48 NLR 353**, which states that it is the deeply ingrained practice of the court to entertain applications to vacate ex parte orders and therefore the District Court had power to vacate the order made ex parte in this case. Before making the aforementioned comment the Court of Appeal has referred to the aforesaid case and some cases referred in the decision of the said case, which have been cited by the Plaintiff Respondents. Thus, the relevant comment by the Court of Appeal is not directly related to the authorities cited in relation to the defaults of lawyers at trial. However, the Court of Appeal appears to have been misdirected in making the aforesaid comment as some of the cases cited just prior to the said comment do not refer to purging default under any express provision of the Civil Procedure Code but to a practice of Court. Even some of the cases cited before in this judgment confirm the existence of this practice and they need not refer to a practice if it only applies to situation where a specific provision is available for that specific situation. However, in my view, to grant relief under this practice, the situation must fall within the ambit of Section 839, in other words it should come under general inherent powers adjunct to existing jurisdiction but not as a new jurisdiction. Furthermore, the cases cited above in relation to defaults made by lawyers are not limited to defaults made at the trial and they indicate that the client has to suffer when the Attorney-at- Law is at fault. Nevertheless, The Court of Appeal was correct in coming to the conclusion that no mistake was proved and the Defendant Petitioner must face the consequences of his lawyer's fault.

Question (h).

Whether the Court of Appeal erred in holding that the affidavits filed in support of the Defendant Petitioner's petition to purge default are bad in law and cannot be accepted when the said affidavits clearly manifests the intention of the affirmant to affirm to the contents thereof and when a statement in the jurat affirmation to the facts is not a prerequisite under the law.

Answer;

Yes, but the final conclusion of the Court of Appeal is correct and valid in law.

Hence the appeal is dismissed with 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 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 60 / 2017

SC Spl LA No. 246 / 2015

C A (PHC) No. 141 / 2010

H C Colombo No. R A 61 / 2009

M C Colombo No. 9341 / 5

S A Rajalingam,

No. 102 / 2,

Sri Rathanajothi Sarawanamuttu

Mawatha,

Colombo 13.

RESPONDENT - RESPONDENT - RESPONDENT - APPELLANT

-Vs-

Dissanayake Mudiyanselage Udaya Ranjith,

Municipal Engineers Department (planning),

Colombo Municipal Council,

Town Hall,

Colombo 07.

APPLICANT - PETITIONER - APPELLANT - RESPONDENT

Before: **PRIYANTHA JAYAWARDENA PC J**

MURDU N. B. FERNANDO PC J

P. PADMAN SURASENA J

Counsel:

Manohara de Silva PC with Ms Imalka Abeysinghe for the Respondent - Respondent - Respondent - Appellant.

Jacob Joseph for the Applicant - Petitioner - Appellant - Respondent.

Argued on : 04 - 12 - 2019

Decided on : 18 - 06 - 2020

P Padman Surasena J

In this case, the Applicant - Petitioner - Appellant - Respondent (hereinafter sometimes referred to as the Respondent) has made an application to the Magistrate's Court of Colombo seeking a mandatory order from the learned Magistrate under section 28 A (3) of the Urban Development Law (hereinafter sometimes referred to as UDA Law), to demolish an unauthorized construction. This was pursuant to the Respondent - Respondent - Respondent - Appellant (hereinafter sometimes referred to as the Appellant) defaulting the compliance with a notice issued under section 28 A (1) of the UDA Law.

Learned Magistrate having considered the material before him, had pronounced his order dated 20-02-2009, rejecting the application made by the Respondent on the basis that the said application is misconceived in law.

Being aggrieved by this order, the Respondent filed a revision application in the Provincial High Court of Western Province holden in Colombo seeking to revise the said order of the learned Magistrate. The Provincial High Court after hearing parties had pronounced its order dated 19-11-2010 dismissing the said revision application.

Being aggrieved by the said order, the Respondent appealed to the Court of Appeal challenging the said order of the Provincial High Court. The Court of Appeal after the argument of the case, by its judgment dated 16-10-2015 set aside both the judgment of the Provincial High Court and the judgment of the Magistrate's Court. The Court of Appeal by the said judgment has directed the Magistrate to hold a proper inquiry in to the application filed by the Respondent.

It is against the said judgment of the Court of Appeal that the Appellant has filed the instant appeal in this Court.

This Court, when the leave to appeal application pertaining to the instant appeal was supported, having heard the submissions of the learned President's Counsel for the appellant and the learned Counsel for the Respondent, by its order dated 16-03-2017, has granted leave to appeal in respect of the questions of law set out in paragraph 35 (a) - (g) of the petition dated 27-11-2015. The said questions of law could be identified as follows.

1) Is the judgment of the Court of Appeal contrary to law and against the weight of evidence?

2) Is the delegation of authority made in favour of the Respondent to institute the action bearing No. 9341/5 in the Magistrate's Court of Colombo bad in law, illegal and ultra vires the provisions in section 23 (5) of the Urban Development Authority Law No. 41 of 1978 (as amended)?

3) Whether in the said circumstances, the Respondent could have lawfully instituted the case bearing No. 9341/5 in the Magistrate's Court of Colombo?

4) Did the Court of Appeal err in directing the Magistrate to hold a proper inquiry in to the application of the Respondent?

5) Did the Court of Appeal err by holding that the section under which the Appellant was charged by the Respondent is section 28 (1) of the Urban Development Authority Law 04 of 1982?

6) Did the Court of Appeal fail to consider that the application to the Magistrate's Court had been made in terms of section 28 A (3) of the Urban Development Authority Law (as amended) which is specifically to seek an order to demolish an unauthorized construction?

7) Did the Court of Appeal fail to consider that the Appellant would have to be found guilty of an offence in a case instituted in terms of section 136 (1) of the Criminal Procedure Code in order to impose a fine in terms of section 28 (1) or 28 (2) of the Urban Development Authority Law (as amended)?

The learned President's Counsel for the Appellant has advanced three arguments. They are as follows.[1]

1. The delegation of authority to the Respondent in terms of section 23(5) of the UDA Law is bad in law, illegal and ultra vires.

2. The Respondent has intervened unlawfully into a dispute between the Appellant and the landlord and therefore the application filed in the Magistrate's Court by the Respondent cannot be maintained.

3. The application of the Respondent filed in the Magistrate's Court is misconceived because it contained the prayers to convict the Appellant under section 28 (2) of the UDA Law and impose a fine of Rs.1000 per each day the Appellant continues to commit that offence.

[1] Vide written submissions filed by the Appellant.

Considering the first argument set out above, would involve interpreting section 23 (5) of UDA Law as amended. Thus, it would be convenient at the outset to reproduce the said section. It is as follows.

S. 23(5)

The Authority may delegate to any officer of a local authority, in consultation with that local authority, any of its powers, duties and functions relating to planning within any area declared to be a development area under section 3, and such officer shall exercise, perform or discharge any such power, duty or function so delegated, under the direction, supervision and control of the Authority.

It is the contention of the Appellant that the delegation of power by the UDA in terms of the above section can only be done with regard to the activities of planning and not regarding development activities. The Appellant had relied on the judgement of Jayasinghe Vs Seethawakapura Urban Council and others[2], which had been decided by a bench comprising a single Judge of the Court of Appeal. In that case, His Lordship Sripavan J (as he then was) in his judgment dated 09-06-2003, had held inter alia;

i. that it is well settled that statutory powers can only be exercised by Public bodies invested with such powers and not by others;

ii. that the powers which can be delegated are only the powers duties and functions relating to planning;

iii. that the matters relating to development activities are not capable of being delegated under the said section.

Thereafter, by the judgment dated 29-05-2009, a bench of two judges of the Court of Appeal in the case of Muniyandy paneer Selvan Vs Kuragamage Harishchandra Perera of the Municipal Engineers' Department (Drawing) of Colombo Municipal Council and Hon. Attorney General[3] also took the same view as in Jayasinghe's case with regard to the interpretation of section 23(5) of UDA Law. His Lordship W L Ranjith Silva J in that case (Muniyandy paneer Selvan's case) cited Jayasinghe's case with approval and held;

[2] 2003 3 SLR 40.
[3] CA (PHC) APN 170/2007, decided on 29-05-2009.

i. that section 23(5) of UDA Law as amended has only conferred power upon the UDA to delegate to any officer of the local authority, its powers, duties and functions relating to planning and nothing else and nothing more; and

ii. that therefore the UDA had no power or justification to delegate powers to District Inspector of the Colombo Municipal Council to file action against the petitioner in that case under section 28 A (3) of the UDA Law.

The Court of Appeal bench in Muniyandy paneer Selvan's case had disagreed with the judgment of a single judge bench of the Court of Appeal in the case of E R M Piyasena (Chairman Urban Council, Bandarawela) Vs H M Wijesooriya.[4] His Lordship Dr. A De Z Gunawardana J (as he then was) had stated in E R M Piyasena's case (decided on 04-11-1994) that the 'delegation of powers relating to planning' referred to in section 23(5) of the UDA Law would include the taking steps to enforce planning procedures and it was in the exercise of that function that the chairman Urban Council Bandarawela had filed the relevant case in the Magistrate's Court.

It would be pertinent to note that in 2002, a bench of two Judges of Court of Appeal had followed the decision of E R M Piyasena's case in the case of S Sivapragasam and two others Vs Robert Jayaseelan Perimpanayagam of Municipal Council Batticaloa and Saravanamuttu Navaneethan - Special Commissioner, Municipal Council Batticaloa.[5] His Lordship Gamini Amaratunga J in the judgment of that case (Sivapragasam's case) has cited and followed the judgment in E R M Piyasena's case confirming that the functions of planning would include the taking of steps to enforce planning procedures. His Lordship Gamini Amaratunga J in that case affirmed the conclusion of the learned High Court Judge that the Mayor of Batticaloa Municipal Council had the authority to institute proceedings against owner of an unauthorized construction to obtain an order for its demolition. The relevant part of the said judgment (Sivapragasam's case) is as follows.

"The argument adduced on behalf of the present appellants was that delegation of functions relating to planning activities did not extend to the demolition of unauthorized

[4] CA Application No. 119/1990 decided on 04-11-1994.
[5] CA (PHC) Appeal 02/1997, decided on 16-05-2002.

structures and accordingly Mayor did not have the authority to make an application for a mandatory demolition order. The learned High Court Judge held that the delegation of the functions of planning would include the taking of steps to enforce planning procedure and accordingly the Mayor had the authority to institute proceedings against owner of an unauthorized building for an order to demolish such building. The learned High Court Judge's conclusion finds support from the decision of this Court in Piyasena V Wijesooriya CA Application 119/90 - CA Minutes of 4-11-1994 where it was held that functions of planning would include the taking of steps to enforce planning procedure."

It was in the above backdrop that the District Inspector of the Colombo Municipal Council being aggrieved by the judgment of the Court of Appeal pronounced in Muniyandy paneer Selvam[6]'s case had appealed to the Supreme Court. This was because (as has already been mentioned above), the Court of Appeal in that case, had held inter alia, that the UDA had no power or jurisdiction to delegate its powers to the Colombo Municipal Council to file action against the Respondent, as section 23 (5) of the UDA Act (as amended by Act No 04 of 1982) had only permitted delegation of powers duties and functions relating to planning.

The Supreme Court in the said appeal (Palligoda Withanage Keerthi Wimal Withana (District Inspector - Colombo Municipal Council) Vs Muniyandy paneer Selvam)[7] had focused on the following two questions of law.

i. Did the Court of Appeal err in law in interpreting section 23 (5) and 28 A (3) of the Urban Development Authority Law as amended by Act No. 04 of 1982?

ii. Did the Court of Appeal misconstrue the provisions of the Urban Development Authority Act No. 04 of 1982?

In the judgment of the Supreme Court, His Lordship Sripavan J, having analyzed the provisions in section 23 (5) and section 28 A, stated as follows.

[6] Ibid.
[7] SC Appeal No. 123/2009 decided on 18-01-2012.

"…for the reasons set out above, I hold that the provisions contained in section 28 A (3) fall within the scope of the term "planning" and therefore the powers, duties and functions referred to therein could be delegated by the UDA to any officer of a local authority…"

The Supreme Court answered the above two questions of law in the affirmative, set aside the judgment of the Court of Appeal and affirmed and restored the mandatory order of the Magistrate authorizing the Colombo Municipal Council to demolish the relevant unauthorized construction.

Indeed, the Supreme Court in the above judgement has referred to the case of Jayasinghe Vs Seethawakapura Urban Council.[8] The relevant portion in the judgment is reproduced below for convenience.

"… The learned counsel for the First Respondent relied on the judgement in Jayasinghe V Seethawakapura Urban Council (2003) 3 S L R 40. It is observed that Jayasinghe's case dealt with a situation where there was no delegation of power under section 23 (5) of the UDA Act.

Further, in that case the Urban Council purported to act under section 84 (1) of the Urban Councils ordinance within an area declared as a "development area" by the UDA without any delegation of power by the UDA. The dicta in Jayasinghe's case is distinguishable from the present case and cannot apply to the facts and circumstances of this application… "

In the instant case, the argument advanced by the learned President's Counsel for the Appellant is that the Bench hearing this case should not follow the judgment in Muniyandy paneer Selvam's[9] case. It is his submission that the observation by the Supreme Court that Jayasinghe's case dealt with a situation where there was no delegation of power under section 23 (5) of the UDA Act is erroneous and that therefore the Court of Appeal judgment in Jayasinghe's case must continue to be valid. Learned President's Counsel for the Appellant has advanced the above argument based on the sentence " *… Learned Deputy Solicitor General urged that the third respondent has delegated its powers to the*

[8] Supra.
[9] SC Appeal No. 123/2009 decided on 13-06-2011.

Chairman of the second respondent under section 23(5) of the UDA Law … " which is found in the Court of Appeal judgment of Jayasinghe's case.

Perusal of the judgment of the Court of Appeal in Jayasinghe's case reveals the followings.

i. What the petitioner in that case has filed is an application for a writ of certiorari seeking to quash, a notice issued by Seethawakapura Urban Council exercising its powers vested in it by virtue of section 84(1) of the Urban Councils Ordinance,

ii. The basis the Court of Appeal in that case had issued a writ of certiorari was the fact that Seethawakapura Urban Council could not have invoked the powers given to it under section 84(1) of the Urban Councils Ordinance, as the relevant area has admittedly been declared as an "Development area" by the Minister in terms of section 3 of the UDA Law. Therefore the main thrust of the argument by the petitioner in that case was the fact that the relevant authority should have invoked section 28 A of the UDA Law and not section 84(1) of the Urban Councils Ordinance, as UDA Law alone can apply in respect of any development activity carried out in a "development area".

iii. It was in those circumstances that the learned Deputy Solicitor General who had appeared for the respondents in that case had urged that in any case, the UDA has delegated its powers to the Chairman of the Seethawakapura Urban Council under section 23(5) of the UDA Law. It must be observed that interpretation of section 23(5) was not the issue in that case. The argument that the UDA has delegated its powers to the Chairman of the Seethawakapura Urban Council under section 23(5), has been put forward by the learned DSG in that case as a last ditch attempt to save the notice issued by Seethawakapura Urban Council under section 84(1) of the Urban Councils Ordinance.

iv. Therefore, it is clear that the question whether the delegation of powers of UDA with regard to planning referred to in section 23(5) of the UDA Law would include the taking steps to enforce planning procedure in particular authority to file an application in terms of section 28 A (1) of the UDA Law in the relevant Magistrate's Court was not the contested issue in Jayasinghe's case.

v. The statement that the matters relating to development activities are not capable of being delegated under the said section by His Lordship Justice Sripavan in Jayasinghe's case is a mere passing remark in reference to the above submission of the learned DSG. The said statement is therefore not the ratio decidendi of that case.

Be that as it may, it must be noted that the judgment in Jayasinghe's case is by a single Judge of the Court of Appeal and the judgment of Muniyandi paneer Selvam[10]'s case is by three-judge bench of the Supreme Court. Moreover, the ratio decidendi in the judgment of the Supreme Court in Muniyandy paneer Selvam[11]'s case can stand alone independent of its reference to the judgment in Jayasinghe's case. This is because His Lordship Sripavan J has considered the other provisions in UDA Law before arriving at his conclusion.

The said conclusion could be gathered from the ratio decidendi of the Supreme Court judgement, which is in the following paragraph. "*…for the reasons set out above, I hold that the provisions contained in section 28 A (3) fall within the scope of the term "planning" and therefore the powers, duties and functions referred to therein could be delegated by the UDA to any officer of a local authority…"* Thus, it is not necessary for this Court to embark on an examination to ascertain whether the reference to Jayasinghe's case in the judgment of the Supreme Court in Muniyandy paneer Selvam's case is correct.

In any case, it would only require referring to few sections in the UDA Law to show that the interpretation provided by the Supreme Court in Muniyandy paneer Selvam's case is correct.

Section 8 of the UDA Law has set out powers, and functions of the UDA. The primary purpose of this section can be seen as conferring necessary powers on the UDA to carry out, integrated planning and physical development within and among 'development areas'

[10] Ibid.
[11] Ibid.

subject to any directions that may be given to the Authority by the Minister from time to time.

This is consonant with the preamble of the Law which states that it is *"A law to provide for the establishment of an Urban Development Authority to promote integrated planning and implementation of economic, social and physical development of certain areas as may be declared by the minister to be Urban Development Areas and for matters connected therewith or incidental thereto"*.

Moreover, when considering the scheme of section 8 of the U D A Law, one can observe that the powers and functions assigned to the UDA by the Law revolve around carrying out integrated planning of physical development of such areas and then implementing such planned development activities, which by law are required to be consistent with aforesaid integrated planning. Powers to approve, co-ordinate, control, regulate any development project or scheme of any Government agency in such areas are amongst these powers.

According to the interpretation section[12] of UDA Law, "physical planning" includes the physical and economic development of land. This clearly indicates, "Physical planning " includes "physical development". Therefore, 'planning' for the purposes of UDA Law clearly encompasses 'development' and hence one should not seek further reasons to deduce that 'development' in its common course of events encompasses 'development activity'. This is because development can only be done by development activities.

Section 29 of the UDA Law has also interpreted the term "development activity." It is as follows.

" development activity " means the parcelling or sub-division of any land, the erection or re-erection of structures and the construction of works thereon, the carrying out of building, engineering and other operations on, over or under such land and any change in the use for which the land or any structure thereof is used, other than the use of any land for purposes of agriculture, horticulture and the use of any land within the curtilage

[12] Section 29.

of a dwelling house for any purpose incidental to the enjoyment of a dwelling house, not involving any building operation that would require the submission of a new building plan;

It is of some relevance to observe that while powers and functions of the UDA Law has been set out under Part II of the UDA law, a new Part (Part II A) was introduced to the Law by the UDA (Amendment) Act No. 04 of 1982. The said new Part II A has laid down a detailed 'Planning Procedure'.

It is under the said 'Planning Procedure' that section 8 J states that no Government Agency or any other person shall carry out or engage in any development activity in any development area except under the authority, and in accordance with the terms and conditions, of a permit issued in that behalf by the UDA. It was in that backdrop that Act No. 04 of 1982 amended the UDA Law by inserting the definition of a new term 'development activity' to its interpretation section, which is section 29. Thus, the concept of 'development activity' for the purpose of the UDA Law is nothing but part of 'Planning Procedure' described in the Law.

Further, it must be borne in mind that section 28 A (3) is also a new section introduced by UDA (Amendment) Act No. 04 of 1982 to lay down the procedure to be followed in respect of certain development activities commenced and continued without a permit or contrary to any term and condition of a permit. Thus, it could be seen that section 28 A (3) has a direct bearing on sections 8 J and 8 K introduced by Act No. 04 of 1982. Therefore, the procedure set out in section 28 A (3) is also indeed a part and parcel of 'Planning Procedure'. Indeed all the above new sections are found under Part II A - 'Planning Procedure' introduced by Act No. 04 of 1982.

Therefore, I have no hesitation to concur with the ratio decidendi of the judgment of the Supreme Court in Muniyandy paneer Selvam[13]'s case that the provisions contained in section 28 A (3) fall within the scope of the term "planning" and therefore the powers, duties and functions referred to therein could be delegated by the UDA to any officer of a local authority.

[13] Ibid.

For the above reasons, I am in full agreement with the interpretation given to section 23 (5) of the UDA Law by their Lordships in the cases cited above namely E R M Piyasena Vs H M Wijesooriya, [14] S Sivapragasam and two others Vs Robert Jayaseelan Perimpanayagam, Municipal Council Batticaloa and Saravanamuttu Navaneethan, Special Commissioner, Municipal Council Batticaloa[15] and Palligoda Withanage Keerthi Wimal Withana (District Inspector Colombo Municipal Council) Vs Muniyandy paneer Selvam.[16]

Thus, I am of the view that the delegation of authority to the Respondent to institute the case bearing No. 9341/5 in the Magistrate's Court of Colombo has been correctly done in accordance with section 23 (5) of the Urban Development Authority Law No. 41 of 1978 as amended.

The second argument advanced by the appellant is that the Respondent has intervened unlawfully into a dispute between the Appellant and the landlord and therefore the application filed in the Magistrate's Court by the Respondent cannot be maintained. I would now consider the said argument.

The Appellant is admittedly occupying the alleged unlawfully constructed premises as a tenant. It is the position of the Appellant that the said premises is a business premises coming under the purview of the Rent Act No. 07 of 1972 as amended, as the Appellant has been in occupation in that premises as the tenant since 1956. [17]

It is in the above backdrop that the Appellant takes up the position that his landlord has been instrumental in moving the City Planning Division of the Municipal Engineers Department of the Colombo Municipal Council to issue a notice on the Appellant under section 28 A (1) of the UDA Law.

The question of the application of the Rent Act to illegally constructed premises was considered by this Court in the case of Malwattage Vs Dharmawardena.[18] In the said

[14] CA Application No. 119/1990 decided on 04-11-1994.
[15] CA (PHC) Appeal 02/1997, decided on 16-05-2002.
[16] SC Appeal No. 123/2009 decided on 13-06-2011.
[17] Vide paragraph (B)(i) at page 5 of the written submissions filed by the Appellant.
[18] 1991 (2) Sri. L. R. 141.

case, the Plaintiff filed a plaint in the District Court praying inter alia for a declaration of title to the premises in suit and an order to eject the Defendant and to demolish the unauthorized structure standing on the land. The Defendant took up the position that she was in fact the tenant of a house who came into its occupation under Plaintiff's father in 1965. It was therefore the position of the Defendant that the provisions of the Rent Act would apply to prevent her ejection from the premises in suit. In the trial, it was transpired that the father of the Plaintiff had at an earlier occasion (in 1969) had instituted action for ejectment of the Defendant from the premises in suit and for the recovery of arrears of rent and thereafter the mother of the Plaintiff had instituted an action for ejectment of the Defendant from the premises in suit and for the recovery of arrears of rent in 1972. Both those actions were subsequently withdrawn. The main point of contention in that case was whether the alleged contract of tenancy was invalid due to the fact that the premises in suit was constructed in contravention to the provisions of the Housing and town Improvement Ordinance. Having considered the relevant provisions of law, His Lordship Justice Wadugodapitiya in his judgment stated as follows.

"… I am in entire agreement with the submissions of learned counsel for the Respondent. I must state here that in the circumstances, the Appellant's claim to protection under the Rent Act has no merit and must fail. An illegality cannot give rise to any such rights; nor can the Rent Act be used to cover up and rectify an illegality under the Housing and Town Improvement Ordinance.

It is pertinent to observe that in the instant case no one disputed the fact that the structure in question was an unauthorized one and that there was no certificate of conformity in respect of the said structure, which is the subject matter of the alleged tenancy. Thus, in terms of section 15(3) of the Ordinance, both the person who actually occupies such a structure as well as the person who allows another to occupy it, will be guilty of an offence and will be liable to a continuing penalty not exceeding Rs. 25/- for each day during which the contravention continues. There can be no doubt therefore, that there is an express statutory prohibition against occupying such a building, which in turn means that the structure in question is not one which is "capable of being let" under our law. According to Dr. H W Thambiah (Landlord and Tenant in Ceylon," citing

Vanderlinden and Maasdorp), this is one of the essential requisites of a contract of letting and hiring. (Pages 2 and 3). Cooper in "The South African Law of Landlord and Tenant" agrees when he says: "A lease like any other contract must be legal; it must not be prohibited by statute …. " (Page 10). …"

It is relevant to note that in the instant case too, section 8 J (1) of the UDA Law states that "notwithstanding the provisions of any other law, no Government agency or any other person shall carry out or engage in any development activity in any development area or part thereof, except under the authority, and in accordance with the terms and conditions, of a permit issued in that behalf by the Authority".

Further,section 8 K (2) of the UDA Law states that upon the completion of any development activity by any person under the authority of a permit issued in that behalf, it shall be the duty of such person to apply for and obtain a certificate of conformity from the UDA.

According to section 8 K (3) of the Law, upon the receipt of a certificate of conformity no land or building shall be used for any purpose other than for the purpose specified in the permit issued in that behalf.

Moreover, UDA (Special Provisions) Act No. 44 of 1984 has introduced a new section 8 K (4) which is as follows.

"any person who occupies or allows to be occupied any building, in contravention of the provisions of sub section (2), shall be guilty of an offence and shall on conviction after summary trial before a Magistrate be liable to a fine not exceeding one thousand rupees, and where the offence is a continuing offence to an additional fine of one hundred rupees for each day during which such contravention continues"

The above provisions show clearly that the UDA Law has also expressly prohibited the occupation of premises constructed in contravention of its provisions. The provisions of the Rent Act therefore cannot have any application to such premises.

In these circumstances, I reject the argument of the Appellant that the Respondent has intervened unlawfully into a dispute between the Appellant and the landlord and therefore the application filed in the Magistrate's Court by the Respondent cannot be maintained.

Thus, I am of the view that the Respondent could have lawfully instituted the case bearing No. 9341/5 in the Magistrate's Court of Colombo.

The third argument advanced by the Appellant is that the application of the Respondent filed in the Magistrate's Court is misconceived because it contained the prayers to convict the Appellant under section 28 (2) of the UDA Law and impose a fine of Rs. 1000/= per each day the Appellant continues to commit that offence. This relates to the questions of law No's. 5-7. It is convenient to commence the consideration of this argument with the application made by the Respondent to the Magistrate's Court.

The said application states in its caption that it is an application made under section 28 A (3) of the UDA Law. This fact is further confirmed by the several averments set out in the said application as they show that necessary steps including the issuance of a notice under section 28 A (1) of the UDA Law have previously been taken. According to paragraph 5 of the said application the main prayer of the Respondent is for a mandatory order in terms of section 28 A (3) of the UDA Law authorizing the Respondent to demolish the unauthorized construction referred to in the sketch attached to it. Thus, there could not have been a difficulty for the learned Magistrate to identify the said application as an application made under section 28 A (3) of the UDA Law. Indeed the learned Magistrate in his order has done so in no uncertain terms. Therefore, there is no ambiguity that it is an application made under section 28 A (3) of the UDA Law.

However, it is a fact that the prayer 5(d) in the application is a prayer for an order to pay the UDA Rs. 50,000/= under section 28(1) of the UDA Law and the prayer 5(e) in the application is a prayer for imposing a fine of Rs. 1000/= per each day the Appellant continues to commit this offence after conviction under section 28 (2) of the UDA Law.

As has been correctly stated by the learned Magistrate, any conviction under section 28(1) of the UDA Law must be after a summary trial. This is also specifically mentioned in that section.

However, it is not an exaggeration to mention here that one can, more often than not find in any application many relief prayed from Court. This however does not mean that Courts have any obligation to grant every such relief merely because they have been prayed.

Looking at the application and relief prayed in the instant application, I am of the view that prayers 5(d) and 5(e) are relief prayed in excess and are liable to be ignored. This is because the application filed by the Respondent is clearly an application made under section 28 A (3) of the UDA Law.

Therefore, I am of the view that the most appropriate course of action by the learned Magistrate should have been to ignore the prayers 5(d) and 5(e) and proceed with the main application under section 28 A (3) of the UDA Law. The learned Magistrate in the instant case has failed to appreciate this position.

I will now consider the order made by the learned Provincial High Court Judge. It would be of some relevance to note that the case filed before the Provincial High Court is an application for revision. Thus, it is necessary to bear in mind that a Court exercising revisionary powers can examine the record of any case for the purpose of satisfying itself as to the legality or propriety of any order passed therein or as to the regularity of the proceedings of such Court. Thus, three aspects, which a Court could consider in revisionary proceedings, are the legality or propriety of any order and the regularity of the proceedings.

I have already held that the course of action taken by the learned Magistrate is not the most appropriate one. The learned Provincial High Court Judge has failed to appreciate this position in its correct perspective. Further, the above circumstances could not have satisfied the learned Provincial High Court Judge as to the propriety of the order of the leaned Magistrate. Therefore, the learned Provincial High Court Judge should have revised the order of the leaned Magistrate.

The main complaint made by the Respondent to the Court of Appeal is that the learned Magistrate has misdirected himself and thereby erred in law by failing to give due consideration to the main relief sought in the application namely the demolition of the unauthorized structure in terms of section 28 A (3) of the UDA Law.

Although Her Ladyship of the Court of Appeal had not set out this position with clarity in her judgment she had clearly referred to the fact that the learned Magistrate had taken the view that the application of the Respondent was an application made in terms of section 28 (3) of UDA Law. It appears to be the basis on which the Court of Appeal was inclined to set aside both orders of the Magistrate's Court and the Provincial High Court and directed the Magistrate to hold a proper inquiry into the application of the Respondent. Therefore, the Court of Appeal has not erred in directing the Magistrate to hold a proper inquiry in to the application filed by the Respondents. Thus, the direction by the Court of Appeal to the Magistrate to hold a proper inquiry in to the application filed by the Respondents must stand.

For the above reasons, I cannot find any basis to deviate from the course of action adopted by the Court of Appeal to set aside both the judgment of the Provincial High Court and the judgment of the Magistrate's Court.

However, the Court of Appeal appears to have stated in its judgment that the 'charges are framed well within the frame work of section 28(1) of the UDA Law'. It has not stated any legal basis for the above statement. For the reasons I have already stated above, I am of the view that the said statement is neither necessary nor warranted. Further, there is no legal basis, which can substantiate that statement.

However, the said statements should not vitiate the judgment of the Court of Appeal as it has correctly granted the main relief to the Respondent namely the granting of the main relief to hold a proper inquiry into the application. In those circumstances, the judgment of the Court of Appeal must stand altered to the above extent.

In the above circumstances, and for the foregoing reasons, I answer the questions of law as follows.

1) The judgment of the Court of Appeal is not contrary to law and against the weight of evidence subject to the above alteration.

2) The delegation of authority made in favour of the Respondent to institute the action bearing No. 9341/5 in the Magistrate's Court of Colombo is not bad in law or illegal or ultra vires the provisions in section 23 (5) of the Urban Development Authority Law No. 41 of 1978 (as amended).

3) The Respondent could have lawfully instituted the case bearing No. 9341/5 in the Magistrate's Court of Colombo.

4) The Court of Appeal did not err in directing the Magistrate to hold a proper inquiry in to the application of the Respondent.

5) The Court of Appeal erred by holding that the section under which the Appellant was charged by the Respondent is section 28 (1) of the Urban Development Authority Law 04 of 1982.

6) The Court of Appeal has not failed to consider that the application to the Magistrate's Court had been made in terms of section 28 A (3) of the Urban Development Authority Law (as amended) which is specifically to seek an order to demolish an unauthorized construction.

7) The Court of Appeal has failed to consider that the Appellant would have to be found guilty of an offence in a case instituted in terms of section 136 (1) of the Criminal Procedure Code in order to impose a fine in terms of section 28 (1) or 28 (2) of the Urban Development Authority Law (as amended).

In view of the above answers I direct the learned Magistrate to treat the application of the Respondent as an application made in terms of section 28 A (3) of the UDA Law praying for a mandatory order in terms of that section authorizing the Respondent to demolish the unauthorized construction more fully depicted in the sketch attached to it. The prayers mentioned in the said application which are not falling under section 28 A (3) of the UDA Law should be ignored.

Subject to the above variations, the direction given by the Court of Appeal to the Magistrate to hold a proper inquiry into the application of the Respondent is affirmed. Appeal is dismissed without costs.

Appeal is dismissed without costs.

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 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 A of the said Act.

S C Appeal No. 62/2016

SC/HC/CA/LA No. 407/2012

WP/HCCA/COL/31/2009/RA

DC Colombo case No. 36038/MR

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

DEFENDANT - PETITIONER - APPELLANT

-Vs-

M S M Najimudeen and 02 others

All of 93 2/4,

Prince Street,

Colombo 11,

Carrying on a business in partnership under the name and style and firm of Artex Garments of 93 2/4,

Prince Street,

Colombo 11.

PLAINTIFF-RESPONDENT-RESPONDENTS

Before: BUWANEKA ALUVIHARE PC J

VIJITH K. MALALGODA PC J

P PADMAN SURASENA J

Counsel:

Sumathi Dharmawardene PC ASG with Sureka Ahmed SC for the Defendant - Petitioner - Appellant.

Senany Dayaratne for Plaintiff - Respondent - Respondent with Nishadi Wickramasinghe instructed by G S Thavarasa.

Argued on: 16 - 01 - 2020

Decided on: 12 - 03 - 2020

P Padman Surasena J

The Plaintiff - Respondent - Appellant (hereinafter sometimes referred to as the Plaintiff) filed plaint in the District Court of Colombo seeking to recover damages for the wrongful detention by Sri Lanka Customs, 96 bales of fabric, which the Plaintiffs had imported. The Plaintiff in the said plaint had alleged that the Sri Lanka Customs had wrongfully seized the said items on 15-07-1988 and continued to keep them in detention until the Plaintiff filed a writ application in the Court of Appeal seeking a writ of Mandamus to compel the Sri Lanka Customs to act in terms of law. The Plaintiff has further stated in his plaint that in the course of the proceedings of the said case (C A writ application No. 159/2000) in the Court of Appeal, the parties had agreed to settle the matter on the terms and conditions set out in the motion dated 25-09-2000. Accordingly, the Sri Lanka Customs had released the 96 bales of fabric to the Plaintiff on 23-02-2001. It is the complaint of the Plaintiff that the Sri Lanka Customs had breached its legal duty either to hold an inquiry into the matter if it had taken the view that the Plaintiff had violated any law or to release the said consignment upon payment of due customs

levies. The Plaintiff has further stated in the plaint that he was compelled to dispose the said 96 bales of fabric (after their release) at a low price, which had incurred a loss to him.

The Defendant-Petitioner-Appellant (hereinafter sometimes referred to as the Defendant) filed its answer stating that the detention of the relevant goods was an official act by the officers of the Sri Lanka Customs and therefore the Plaintiff is not entitled to claim any damages from the Defendant. The Defendant had further stated that it is not open for the Plaintiff to maintain this action as the matter was settled in the Court of appeal. The Defendant had prayed that the plaint be dismissed.

At the conclusion of the trial, the learned District Judge delivered the judgment dated 22-07-2009 in favour of the Plaintiff holding that the Plaintiff is entitled to recover the damages.

The Defendant being aggrieved by the said judgment of the learned District Judge has filed an application for revision in the Provincial High Court canvassing the said judgment.

At the conclusion of the argument of the said revision application, the Provincial High Court, having considered the material, by its order dated 23-

08-2012 has dismissed the said revision application on the basis that there are no exceptional circumstances to exercise the revisionary jurisdiction of Court as the judgment under challenge was an appealable one.

This Court, when the leave to appeal application pertaining to the instant appeal was supported, having heard the submissions of the learned Deputy Solicitor General for the Defendant and the learned Counsel for the Plaintiff, by its order dated 15-03-2016, has granted leave to appeal in respect of the following questions of law.

1) *Did their Lordships of the Civil Appellate High Court err in law by failing to consider the legal effect and the spirit of the settlement between the parties before a Court of law, especially the settlement before the Court of Appeal?*

2) *Did their Lordships of the Civil Appellate High Court err in law by deciding that the detention of the fabric is a statutory power exercised by the customs officers under the Customs Ordinance and thus the officers are protected against claims for damages?*

3) *Did their Lordships of the Civil Appellate High Court err in law by not considering that the Plaintiff - Respondents had not availed itself of*

the statutory relief available in the Customs Ordinance to obtain damages and the aforesaid District Court action for damages was in contravention of the Customs Ordinance?

4) *Did their Lordships of the Civil Appellate High Court err in law by not considering that the Plaintiff - Respondent's action for damages was prescribed under the Customs Ordinance?*

5) *Did their Lordships of the Civil Appellate High Court err in law by failing to consider that the total disregard of the settlement entered into by the learned District Court judge would in fact amount to exerting supervisory jurisdiction over the Court of Appeal?*

6) *Did their Lordships of the Civil Appellate High Court err in law by failing to appreciate that the Civil Appellate High Court exercises its revisionary jurisdiction in the interests of due administration of justice?*

Perusal of the impugned order of the Provincial High Court clearly shows that the learned Judges of the High Court had not considered merits of the case. The sole question they had considered is the question whether there are any exceptional circumstances which warrant their intevention in the matter to exercise their revisionary powers. Therefore, one does not find

any decision made by the Provincial High Court on the questions of law set out in questions of law No's 1-5. I am therefore of the view that the said questions of law are misconceived. Further, this Court is not in a position to decide whether the Provincial High Court has erred in its decision on the said points as it has in fact not adjudicated on any of them.

As has also been pointed out by the Petitioner in his written submissions[1], the primary question this Court has to resolve at the outset is whether in the given circumstances, there are any exceptional circumstances, which warrant the intervention of the Court at the stage of the said revision application. Although not clear enough, question of law No. 6 appear to be on that line.

The learned Additional Solicitor General in the course of his submissions conceded that it is imperative on the Defendant to show the existence of exceptional circumstances before the Provincial High Court. It was his submission that the exceptional circumstances relied upon by the Defendant were set out in paragraph 4 of the revision application filed before the

[1] Paragraphs 28-35 of the written submissions of the Petitioner.

Provincial High Court. Thus, I would reproduce the said paragraph 4 below. It is as follows.

"… Being aggrieved by the said judgment, the Petitioner seek to invoke the reversionary jurisdiction of Your Lordships Court on the following among other exceptional circumstances that may be urged by the Counsel at the hearing of this revision.

i. *The Learned District Judge erred in determining that the "final and conclusive" settlement entered by the parties in the Court of Appeal cannot be considered as final and conclusive.*

ii. *The learned judge erred in determining that the District Court has jurisdiction to determine the action of the Plaintiff.*

iii. *The learned District Judge erred in determining that the Plaintiff Respondents cannot maintain an action for damages as the Customs officers detained the goods whilst exercising statutory powers under the Customs ordinance.*

iv. *The learned District Judge erred in failing to consider that the Court of Appeal had concluded that the Plaintiff Respondents attempted to remove the 96 bales illegally.*

v. *The learned Judge has erred in determining that there was a delay in releasing the goods.*

vi. *The learned Judge has erred in deciding that there is no evidence to conclude that the settlement entered in to in the Court of Appeal case no. 159/2000 is final and conclusive.*

vii. *The Learned Judge has erred in not considering that the Plaintiff Respondents have not paid for the material to the buyer.*

viii. *The Learned Judge has failed to consider that the Plaintiff Respondents are only entitled to CMT charges for the entire transaction.*

ix. *That the said judgement is contrary to law and against the weight of the evidence presented during the case.*

x. *That the learned District Judge has erred in evaluating the evidence led on behalf of the Defendant - Petitioner.*

xi. *The learned District Judge has erred in relying on the Defendant - Petitioner's evidence to prove the Plaintiff - Respondent's case.*

xii. *The learned District Judge had given undue weight to the evidence of the Plaintiff - Respondents and that of the evidence of the witnesses.*

xiii. *That the learned Judge has erred in evaluating the evidence relating to the documents led at the trial and failed to evaluate the evidence led by Defendant Petitioner in that regard.*

xiv. *The learned Judge has failed to give reasons.*

xv. *The learned Judge has disregarded/ misinterpreted the evidence led on behalf of the Defendant - Petitioner.*

xvi. *The learned District Judge has failed to consider that the Plaintiff - Respondents have not produced evidence on a balance of convenience to prove the wrongful/ illegal acts of the Defendant - Petitioner.*

xvii. *The learned District Judge has failed to consider that the Plaintiff - Respondents have not produced evidence on a balance of convenience to prove damages and/or misdirected herself in calculating damages or has awarded damages in excess than warranted in the case.*

xviii. *The learned District Judge has based the judgment on extraneous and irrelevant facts. ..* "

Learned Additional Solicitor General did not seek to controvert the fact that the Defendant in fact had lodged an appeal against the judgment of the District Court and that the said appeal was filed out of the time stipulated

by law. Further he also did not seek to controvert the finding by the Provincial High Court that the Defendant has filed the revision application after realizing that it cannot maintain the said appeal and that the grounds it has pleaded in the revision application are the same as in the appeal it had filed.

Grounds set out in the revision application by the Defendant are merely grounds of appeal which are centered around the issues framed in the trial.

Our Courts have consistently held that the revisionary power of Courts is an extraordinary power and that the Courts must exercise it only in exceptional circumstances when the law has expressly provided the aggrieved party a right of appeal.

The Defendant has had an alternative remedy available. In the instant case, what the Provincial High Court was called upon to exercise was its revisionary jurisdiction. The Defendant has not been successful in convincing Court that the grounds he had urged have any exceptional character which is sufficient to move Court to exercise its discretionary revisionary power. Thus, this Court has no reason to disagree with the conclusion of the Provincial High Court that there are no exceptional circumstances to invoke the revisionary jurisdiction of the Court. In these

circumstances and for the foregoing reasons, the appeal is dismissed without costs.

JUDGE OF THE SUPREME COURT

BUWANEKA ALUWIHARE PC J

I agree,

JUDGE OF THE SUPREME COURT

VIJITH K. MALALGODA PC J

I agree,

JUDGE OF THE SUPREME COURT

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

In the matter of an Appeal

1. Samsudeen Sithy Fareeda

2. Fathima Jiffriya Shafi
Both of 7A, Tharalanda Road,
Matale.

Plaintiffs

SC Appeal 65/2014
SC/HC(CA)/LA No. 452/2013
CP/HCCA/KAN/120/2009 (FA)
DC Matale Case No. L 5568

Vs

1. The Municipal Council
Matale
2. The Mayor,
The Municipal Council
Matale.
3. The Municipal Commissioner
The Municipal Council
Matale

Defendants

AND BETWEEN

1. Samsudeen Sithy Fareeda

2. Fathima Jiffriya Shafi
Both of 7A, Tharalanda Road,
Matale.

Plaintiff-Appellants

Vs

1. The Municipal Council
Matale.

2. The Mayor,
The Municipal Council
Matale.

3. The Municipal Commissioner,
The Municipal Council
Matale.

Defendant-Respondents

AND NOW BETWEEN

1. The Municipal Council
Matale.

2. The Mayor,
The Municipal Council
Matale.

3. The Municipal Commissioner,
The Municipal Council
Matale.

Defendant-Respondent-Appellants

Vs

1. Samsudeen Sithy Fareeda

2. Fathima Jiffriya Shafi

Both of 7A, Tharalanda Road, Matale

Plaintiff-Appellant-Respondents

Before: Sisira J. de Abrew J
Vijith Malalgoda PC J &
Gamini Amarasekara J

Counsel: Kushan de Alwis President's Counsel with Kanchana Ratwatte and Amali Tennakoon for the Defendant-Respondent-Appellants.
W. Dayaratne President's Counsel with R. Jayawaedene for the Plaintiff-Appellant-Respondents.

Written submission
tendered on : 7.7.2014 by the Defendant-Respondent-Appellants
6.5.2015 by the Plaintiff-Appellant-Respondents

Argued on : 17.1.2020

Decided on: 3.3.2020

Sisira J. de Abrew, J
Plaintiff-Appellant-Respondents (hereinafter referred to as the Plaintiff-Respondents) filed this action against the 1st, 2nd and 3rd Defendant-Respondent-Appellants (hereinafter referred to as the Defendant-Appellants) seeking a permanent injunction preventing the Defendant-Appellants from demolishing the boundary wall constructed on the boundary of the land described in the schedule to the plaint. The learned District Judge, by his judgment dated 24.7.2009, dismissed the action of the Plaintiff-Respondents. Being aggrieved by the said judgment of the learned District Judge, the Plaintiff-Respondents appealed to the Civil Appellate High Court of Kandy in the Central Province (hereinafter referred to as the Civil Appellate High Court). The learned Judges of the Civil Appellate High

Court, by their judgment dated 25.9.2013, set aside the said judgment of the learned District Judge granting permanent injunction against the Defendant-Appellants preventing them from demolishing the said boundary wall. Being aggrieved by the said judgment of the Civil Appellate High Court, the Defendant-Appellants have appealed to this court. This court, by its order dated 12.5.2014, granted leave to appeal on questions of law set out in paragraphs 10(a),(b),(c) and (d) of the petition of Appeal dated 4.11.2013 which are reproduced below.

1. Did the High Court of Civil Appeal err in holding that a cause of action had arisen due to the order of a learned Magistrate for the demolition of an unauthorized structure in a designated Urban Development area?
2. Did the High Court of Civil Appeal fail to take into consideration the effect of Section 42A(2) of the Municipal Council Ordinance which empowers a Municipal Council to demolish all and any unauthorized building situated within the administrative limits of the Municipal Council and erected on any land belonging or vested in the State?
3. Did the High Court of Civil Appeal fail to take into consideration the effect of authority granted by Section 23(5) of the Urban Development Authority Act No.41 of 1978 as amended for the delegation of authority of the Urban Development Authority to the Matale Municipal Council?
4. Did the High Court of Civil Appeal misinterpret and/or misconstrue the provisions of Section 5 of the Civil Procedure Code taking into consideration the facts and circumstances of the above-styled action?

It is undisputed that the land in question has been acquired by the Government by an order dated 6.9.1973 published in the Government Gazette marked V4 for the road widening. The Plaintiff-Respondents have, after the said acquisition order,

constructed a wall on the old boundary line of the land. Therefore, it is clear that the boundary wall had been constructed on a portion of the land acquired by the Government. The said acquisition order (V4) was not set aside by any court of law. Therefore, the said acquisition order stands valid. This wall was, however, constructed on a permit issued by the Defendant-Appellants. Though a permit was issued, on an application filed by the Defendant-Appellants in the Magistrate's Court, the learned Magistrate, Matale by order dated 5.2.1997 issued an order to demolish the said boundary wall as it had been constructed in breach of the conditions of the permit. This order of the learned Magistrate has been produced at the trial as V6. The said order of the learned Magistrate has, so far, not been set aside by any Appellate Court.

The learned Judges of the Civil Appellate High Court decided the case mainly on the basis that the Urban Development Authority (UDA) has not given power of delegation to the Defendant-Appellants to demolish unauthorized constructions. Therefore, the most important question that must be decided in this case is whether the UDA has delegated its power to the Defendant-Appellants to demolish unauthorized constructions. I now advert to this question. In considering this question, I would like to consider whether the UDA has power to delegate its powers and functions to the Defendant-Appellants. Section 23(5) of the UDA Act No.41of 1978 states as follows.

> *The Authority may delegate to any officer of a local authority, in consultation with that local authority, any of its powers, duties and functions relating to planning within any area declared to be a development area under section 3, and such officer shall exercise, perform or discharge any such power, duty or function so delegated, under the direction, supervision and control of the Authority.*

Section 28A (1) of the UDA Act No.41of 1978 reads as follows.

> *Where in a development area, any development activity is commenced continued, resumed or completed without permit or contrary to any term or condition set out in a permit issued in respect of such development activity, the Authority may, in addition to any other remedy available to the Authority under this Law, by written notice require the person who is executing or has executed such development activity, or has caused it to be executed, on or before such day as shall be specified in such notice, not being less than seven days from the date thereof*
>
> *(a) to cease such development activity forthwith; or*
>
> *(b) to restore the land on which such development activity is being executed or has been executed, to its original condition; or*
>
> *(c) to secure compliance with the permit under the authority of which that development activity is carried out or engaged in, or with any term or condition of such permit, and for the purposes of compliance with the requirements aforesaid*
>
> *(i) to discontinue the use of any or building; or*
>
> *(ii) to demolish or alter any building or work.*

Section 28A (3) of the UDA Act No.41of 1978 reads as follows.

> *(a) Where any person has failed to comply with any requirement contained in any written notice issued under subsection (1) within the time specified in the notice or within such extended time as may have been granted by the Authority, the Authority may, by way of petition and affidavit, apply to the Magistrate to make an Order authorizing the Authority to-*
>
> *(a) to discontinue the use of any land or building;*
>
> *(b) to demolish or alter any building or work ;*

> *(c) to do all such other acts as such person was required to do by such notice, as the case may be,*
> *and the Magistrate shall after serving notice on the person who had failed to comply with the requirements of the Authority under subsection (1), if he is satisfied to the same effect, make order accordingly.*
> *(b) If such person undertakes to discontinue the use of the land or building or to demolish or alter the building or work, or to do such other acts as are referred to in paragraph (a) of subsection 3 of section 28A, the Magistrate may, if he thinks fit, postpone the operation of the Order for such time not exceeding two months as he thinks sufficient for the purpose of giving such person an opportunity of complying with such requirement.'";*

In the case of Palligoda Vithanage Keerthi Wimal Withana Vs Muniyandy Paneer Selvam SC Appeal 123/2019 decided on 18.1.2012 this court held as follows (by Sripavan J).

> *"Every subsection under 28A of the Act must be considered as a whole and self-contained. It is not permissible to omit any part of it and must therefore be read as part of an integral whole throwing light on the rest so that harmonious construction be placed on them for the purpose of giving effect to the legislative intent and object. Thus, one could see that Section 28A(1) (a) to (c) provides that the UDA, in order to ensure compliance with the permit could request the person to whom such permit was issued to cease such development activity, to restore the land to its original condition and for the purposes of doing so discontinue the use of any land or building or demolish or alter any*

building or work. None of the subsections of Section 28A imposes a penalty or punishment on the permit holder."

His Lordship Justice Sripavan in the above case further held as follows.

"I hold that the provisions contained in Section 28A(3) fall within the scope of the term "planning" and therefore the powers, duties and functions referred to therein could be delegated by the UDA to any officer of a local authority."

His Lordship Justice Sripavan in the above case considered the judicial decision in the case of Jayasinghe Vs Seethawakapura Urban Council (2003) 3 SLR 40 but did not follow it. After considering the above legal literature, I hold that the UDA, in terms of Section 23(5) of the UDA Act, has the power to delegate its powers to the Defendant-Appellants. Has the UDA delegated its powers to the Defendant-Appellants? In this connection it is relevant to consider documents marked V44 and V44(a) (pages 601 and 602 of the brief). The UDA by the said documents has delegated its powers to the 2nd and 3rd Defendant-Appellants and in terms of the said delegation of powers, the 2nd and the 3rd Defendant-Appellants have the power to issue demolition orders. The 2nd Defendant-Appellant by his letter dated 29.9.1995 marked V10 (page 506 of the brief), has issued a demolition order to the 2nd Plaintiff-Respondent. After considering the above legal literature and the documents, I hold that the said order is a legally valid order. As I pointed out earlier, the boundary wall stands on a portion of the land acquired by the State for the road widening. Even the learned Judges of the Civil Appellate High Court have made this observation. I have earlier held that the 2nd and 3rd Defendant-Appellants have the power to issue demolition orders. If the boundary wall stands on a portion of the land acquired by the State for the road widening and the 2nd and 3rd

Defendant-Appellants have the power to issue demolition orders, how can an injunction be issued preventing the demolition of the said boundary wall? The learned Judges of the Civil Appellate High Court by allowing the appeal of the Plaintiff-Appellant-Respondents have granted an injunction preventing the demolition of the said boundary wall. When I consider all the above matters, the said judgment of the Civil Appellate High Court is clearly wrong. The learned Judges of the Civil Appellate High Court have failed to consider the aforementioned matters in the judgment dated 25.9.2013. In my view, they were wrong when they set aside the judgment of the learned District Judge dated 24.7.2009. Therefore, the above judgment cannot be permitted to stand. For the above reasons, I answer the 3rd question of law stated above in the affirmative. The 1st,2nd and 4th questions of law do not arise for consideration.

For the above reasons, I set aside the judgment of the Civil Appellate High Court dated 25.9.2013 and affirm the judgment of the learned District Judge dated 24.7.2009.

Judge of the Supreme Court.

Vijith. K. Malalgoda PC J

I agree.

Judge of the Supreme Court.

Gamini Amarasekara J

I agree.

Judge of the Supreme Court.

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

Kushan Ediriweera of,

40, Lake Gardens,

Rajagiriya.

Represented by his duly appointed next Friend.

Chandra Ediriweera of,

40, Lake Gardens,

Rajagiriya.

Plaintiff

Case No. SC. Appeal 65/2016

Case No. SC/HC/CA/LA/137/2013 **Vs.**

Case No. WP/HCCA/COL/123/2011

Case No. 58123/MR

1. Sadhasivam Sivagankan,

   442, High Street, Tooting,

   London, United Kingdom and

   439, Galle Road,

   Colombo 06.

2. Tissaweerasingham Sundhararajan of,

   439, Galle Road,

   Colombo 06 and of,

   17, De Mel Road, Mount Lavinia.

Defendants

3. Union Assurance Limited of,
No. 20, St. Michael's Road,
Colombo 03.

Added Defendant

AND BETWEEN

In the matter of an application, inter alia, under Section 757 of the Civil Procedure Code and Sections 5A (1) and 5A (2) of the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006 for leave to appeal from the Order made by the Learned Additional District Judge in DC Case No. 58123/MR and Delivered in open court on 24.10.2011.

Union Assurance Limited of,
No. 20, St. Michael's Road,
Colombo 03.

Added Defendant – Petitioner

Kushan Ediriweera of,
40, Lake Gardens,
Rajagiriya.
Represented by his duly appointed next Friend.

Chandra Ediriweera of,

40, Lake Gardens,

Rajagiriya.

Plaintiff - Respondent

1. Sadhasivam Sivagankan,
   442, High Street, Tooting,
   London, United Kingdom and
   439, Galle Road,
   Colombo 06.
2. Tissaweerasingham Sundhararajan of,
   439, Galle Road,
   Colombo 06 and of,
   17, De Mel Road, Mount Lavinia.

Defendant – Respondents

AND NOW BETWEEN

In the matter of an application for Special Leave to Appeal to the Supreme Court under and in terms of Article 128 of the Constitution.

Kushan Ediriweera of,

40, Lake Gardens,

Rajagiriya.

Represented by his duly appointed next
Friend.

Chandra Ediriweera of,
40, Lake Gardens,
Rajagiriya.

Plaintiff – Respondent - Petitioner

Vs.

1. Sadhasivam Sivagankan,
   442, High Street, Tooting,
   London, United Kingdom and
   439, Galle Road,
   Colombo 06.
2. Tissaweerasingham Sundhararajan of,
   439, Galle Road,
   Colombo 06 and of,
   17, De Mel Road, Mount Lavinia.

Defendants – Respondents –Respondents

3. Fairfirst Insurance Limited (formerly known as Union Assurance General Limited) of,

No. 33, St. Michael's Road,

Colombo 03.

Added Defendant – Petitioner – Respondent

Before: Vijith. K. Malalgoda, PC, J

S. Thurairaja, PC, J and

E. A. G. R. Amarasekara J

Counsel: Chandaka Jayasundara, PC with Shivan Kanagiswaran and Naduni Madara for Plaintiff – Respondent – Petitioner instructed by Kularatne Associates.

S. A. Parathalingam, PC with Kushan D' Alwis, PC and Hiran Jayasuriya for Added Defendant- Petitioner – Respondent.

Argued on: 29th July 2019

Decided on: 11th September 2020.

E.A.G.R. Amarasekara, J.

The Plaintiff – Respondent – Petitioner (hereinafter referred to as the Plaintiff or the Petitioner) instituted action in the District Court of Colombo against the 1st and 2nd Defendant – Respondent – Respondents (hereinafter referred to as the 1st and 2nd Defendants) and sought a judgment in a sum of Rs.700 million. Subsequent thereto, the Union Assurance General Limited was added as the 3rd

Defendant (hereinafter sometimes referred to as the 3rd Defendant or the Added Defendant).

This action was originally instituted owing to an accident in which the Plaintiff was knocked down and seriously injured by a vehicle bearing Registration No. WP HA 7159 driven by the 1st Defendant driver on Galle Road, Colombo 3 on 19th of July 2005.

Thereafter, the trial was fixed ex parte against the 1st and 2nd Defendants and inter parte against the 3rd Defendant. With regard to the inter parte trial at the District Court, 10 admissions were recorded and 16 issues were raised. However, the parties agreed to take issue no. 10 as a preliminary issue of law, which was based on two admissions i.e. admission no 3 and 10. The said issue and admissions are quoted below.

"Issue No. 10;

a. in view of the admissions no. 3 and 10, is the 3rd Defendant entitled to a declaration of non liability under Section 109 of the Motor Traffic Act No.14 of 1951 as amended?
b. If the above is answered in favour of the 3rd Respondent, should the Plaintiff's action against the 3rd Respondent be dismissed *in limine*?"

Admissions Nos 3 and 10;

> "3. It is admitted that the 1st Defendant drove the vehicle after consuming intoxicating liquor at the time of the accident.
> 10. It is admitted that the 3rd defendant has sent a notice to the Plaintiff under Section 109 of the Motor Traffic Act and the Plaintiff has received the same."

Thus, admittedly, at the time of the accident the 1st Defendant driver was driving the vehicle after consuming intoxicating liquor. The 2nd Defendant was the registered owner of the said vehicle and it was further admitted that the 1st Defendant drove the said vehicle under express or implied permission of the 2nd Defendant. It was common ground that the vehicle in question was insured by the added 3rd Defendant in terms of insurance policy No. LMMVDP/00162.

It was not in dispute that the said insurance policy had a term under general exceptions which states "**The *Company is not liable under the policy in respect of: ……..***

5) any accident or loss damage arising directly or indirect *(Sic)* ***whilst the insured driving such motor vehicle having consumed any intoxicating liquor or drugs or any person having consumed any intoxicating liquor or any drugs driving such motor vehicle***" – vide item 5 of the general exceptions of the Insurance Policy.

It appears that the position of the Added Defendant was that, since there was a term in the policy as stated above denuding the liability when the vehicle was driven by the insured or any person having consumed intoxicating liquor or drugs, 1st Defendant driver fell within the category of 'named person' under Section 102(4) (c) (i) of the Motor Traffic Act and as such the added defendant was entitled to a declaration of non- liability in terms of Section 109 of the said Act. Thus, the added defendant moved to dismiss the action against him *in limine*.

By Order dated 24.10.2011, the Learned District Court Judge held in favour of the Plaintiff – Petitioner on the basis that;

- 3rd party insurance being a statutorily introduced compulsory legal requirement aimed at the safety and well-being of the public at large should only be restricted by the statutorily permitted limitations as specified in Section 102 (4) (c) and therefore any exemption clause based on limb (i) should have specified, ascertainably and precisely, the person or persons intended to be named in the policy to be considered as excluded drivers, and the wording of this particular item 5 of the general exceptions does not satisfy this requirement as it lacks in precision.
- Unlike the immediate parties to a contract who can look after themselves in entering into terms, the third parties do not have the same opportunity to decide the terms of the policy. Thus, their rights have to be safeguarded by the courts in the interest of justice.
- Public policy does not encourage the efficacy of such illusory wordings, used by the parties to the policy, to adversely affect the members of the public who are not parties to the policy.

Further the Learned District Judge appears to have expressed the view that exception clauses must be construed strictly and the benefit of any ambiguity has to be given to the person against whom it is set up.

Being dissatisfied with the Order of the Learned District Judge, the Added Defendant filed a leave to appeal application in the High Court of the Western Province (Civil Appellate) Holden in Colombo, against the said order.

The order of the Learned District Judge dated 24.10.2011 was set aside by the Learned Judges of the High Court by the Judgment dated 08.03.2013.

The High Court seems to have misstated when it says in its judgment that it was an admitted fact that the first defendant was intoxicated or under the influence of liquor when he drove the car at the time of accident. Nevertheless, it is an admitted fact that the 1st defendant driver drove the vehicle after consuming intoxicating liquor at the time of the accident and it was common ground that there was a term in the insurance policy as described above as item 5 under general exceptions to disclaim any liability by the insurer. However, terms or conditions in a policy of insurance basically represent the agreement between the parties to the policy but not with the third parties who have no voice in the agreement between the insurer and the insured. Thus, the matter to be resolved is whether the insurer can deny his liability towards third parties due to the said term included as item 5 under general exceptions. In other words, can the insurer name a person as contemplated by Section 102 (4) (c) (i) in the manner described in the aforesaid term, namely item 5 under general exceptions of the policy. It appears from the judgment given by the Learned High Court Judges that they were of the view that the said term found as item 5 under the general exceptions is clear enough for the insurer to deny his liability. Thus, the conclusion of the High Court is that the policy names the 1st defendant adequately as excluded driver under aforesaid Section 102 (4) (C) (i).

Being aggrieved by the said Judgment of the High Court, the Plaintiff- Petitioner preferred an application before the Supreme Court. In the Supreme Court, leave to appeal was granted on the following questions of law as set out in paragraph 36 (a) (i) to (iv)of the petition dated 4th April 2013;

"*Did their Lordships of the High Court err in law and misdirected themselves in law in not considering the question that:*

(i) *The intention of the legislature was to limit the category of "excluded drivers" to those specifically contained in Section 102(4)(c) and*

(ii) *Any exclusion of liability that falls outside the said provisions would be deemed to be of "no effect" as per Section 102(1) of the Act*

(iii) *The exclusion relied upon by the Petitioner clearly does not fall within the limited categories specified in Section 102(4)(c) of the Act and as such cannot be relied upon to escape liability*

(iv) *A condition excluding drivers, as set out in General Condition 5 of the policy, is clearly not permitted by Section 102 of the Act and does not therefore relieve the Petitioner from the obligation imposed by Section 105 of the Act and such the Petitioner is not entitled to a declaration under Section 109 as sought by it."*

It is the contention of the Plaintiff- Petitioner in this court that;

1. The Insurance policy was entered into between the 3rd defendant and the 2nd defendant and as such, the terms and conditions governing the said policy are of no consequence to and have no effect on an innocent third party, such as the plaintiff who was not privy to terms and conditions.
2. The Motor Traffic Act limits the category of 'excluded drivers' to Section 102 (4) (C) and any exclusion of liability outside the said provision is of 'no effect' and that the exclusion relied upon by the Added Defendant insurer, namely to exclude liability on damages when the harm was caused by drivers while having consumed any intoxicating liquor or drugs, is outside the scope of Section 102 (4) (C). Thus, the added Defendant is not entitled to a declaration under Section 109, specifically since a condition excluding drivers as set out in item 5 of the general exceptions of the policy is clearly not permitted by Section 102.
3. The driver of the motor vehicle in question being a person driving with express permission of the policy holder and holding a valid driving license, was an authorized driver in terms of the insurance policy. Thus, the Added Defendant cannot now say that an authorized driver who has breached the general exceptions of the policy is an excluded driver.
4. The law requires every person who uses a motor vehicle on the road to obtain insurance for third party claims. To widen the exceptions set out in Section 102 (4) in such a manner so as to surreptitiously include the

conditions of the policy, which are specifically excluded by Section 102(1) of the Act, would defeat the very purpose of requiring to obtain insurance for third party claims.

It is submitted to this court, on behalf of the Added Defendant that;

1. The legislature has enacted provisions in the Motor Traffic Act to allow the Insurance Company to disclaim liability in limited circumstances. Thus, a declaration of non-liability can shield an Insurance Company from liability towards 3rd parties.
2. The Legislature through Section 102(4) of the Motor Traffic Act has permitted the insurer to name the people who are not authorized to drive. In the present case "a person under the influence of intoxicating liquor" is a person not allowed to drive under the policy which in turn then falls within Section 102(4)(c)(i) and it is an admitted fact that the 1st defendant driver was under the influence of intoxicating liquor. As such the 1st defendant was a named person in the policy who is not allowed to drive or is excluded from driving. (However, this Court observes what was admitted was that the 1st defendant drove the vehicle at the time of the accident after consuming intoxicating liquor but not that he was under the influence of liquor. It is further observed that what appears to have been purportedly excluded from liability by item 5 of the general exceptions of the policy is any accident or damage or loss caused by drivers who drives after consuming intoxicating liquor, including the insured.)
3. At the time of the accident the vehicle was driven by a person having consumed intoxicating liquor, which amounts to a breach of essential condition of the policy.

Thus the 3rd Defendant (Added Defendant) argues that it is entitled to a declaration of non-liability and henceforth action against it should be dismissed *in limine*.

In my view, the fundamental issue is whether the term found in item 5 of the general exceptions of the policy is sufficient to treat the 1st Defendant driver as a named person as contemplated in Section102 (4)(c)(1) of the Motor Traffic Act and if so, whether the 3rd Defendant is entitled to a declaration of non-liability. It is evident from the Judgment of the learned District Judge that he considered the said term as

one lacks precision and definiteness to name the 1st Defendant as an excluded driver. On the other hand, the Learned High Court Judges considered the said term is clear and sufficient to treat 1st Defendant Driver as one named in terms of the Section 102 (4)(c) of the Motor traffic Act.

Analysis

In order to resolve the said issue, this court has to draw its attention to the provisions of the Motor Traffic Act No 14 of 1951 as amended in relation to insurance covering third-party risks, intention of the legislature making the third-party insurance mandatory and how they apply to the admitted facts of this case.

Section 99(1) of the Motor Traffic Act states "…***no person shall use or drive, cause or permit any other person to use or drive, a motor vehicle on a highway unless there is in force in relation to the use of the vehicle by that person or that other person, as the case may be, a policy of insurance, or a security, in respect of third-party risks..***" Thus, having a valid insurance or a security that covers third party risks is made mandatory by the legislature for the use of a vehicle on a highway.

It appears that mandatory third-party insurance which was similar to aforesaid Section 99(1) of the present Act was first introduced by Section 127(1) of the Ordinance No. 45 of 1938. There seems to be a provision for mandatory insurance against third -party risks even in section 61 of the Motor Cars ordinance No.20 of 1927 which was to come into operation only with a declaration by regulation by the Governor. However, following excerpts taken from the Hansard of 1938(Volume 2- July to September) is very much relevant in comprehending the intention of the legislature when the said similar provision was introduced in 1938. (It seems that on this occasion the mandatory insurance for third-party risks was not included in the original bill but due to deliberations made by the honourable members, those were included prior to the passing of the bill)

(quote)

"*Then, Sir, the other point, in broad outline, is third-party insurance, which has been mentioned so often. The Hon. Member for Kandy said that he would not insist now on third-party insurance because there were a great many*

unsatisfactory insurance companies and all the money was drained away into foreign channels.

Sir, the matter is not so simple as all that. I think it is a characteristic of the use of machines that we are able to become a trifle callous. The question is not whether a certain amount of money is to go here or there; the question is whether, having put machines on the road, we are going to run over people, maim them for life; injure children of five and eight and ten years to such an extent as not to give them a chance in life—send them into the world without hands, without arms—send them to their graves by depriving them of the means of existing. That is the question. That is not a question to which we can shirk the answer; it is not a matter in which we can shirk our responsibility for one moment. The problem has to be faced in spite of all the difficulties.

There was a very interesting passage in the debate in connection with the introduction of the Motor Bill in the House of Commons. It was this, -

'As against that, the Government had to face the great difficulties involved in compulsory third-party insurance, but on balance, we decided that we would face the difficulties and deal with an intolerable injustice which ought not to be allowed to exist.'

And that, Sir, is the spirit in which we should approach this question… The public safety and the public interest must come first, and there can be no public interest where we acquiesce in people being maimed and driven out, never heard of, never cared for." (unquote)-- { On July 13th 1938 at 5.19 p.m., at page 1782 – 1783 by the Hon. Mr. ALUWIHARE (Acting Minister for Agriculture and Lands) in 1938 Hansard Vol.2}.

(quote)

"***To my mind the daily holocaust of killed, maimed and injured people must be the first consideration. In the absence of third-party insurance I am not in support of this or any other Motor Bill.***" (unquote) --(On 13th of July, at 5.35 P.M. at page 1785 of the same Hansard by Mr. Freeman)

(quote)

"…I should now, like to deal with the main subject on which I propose to speak and that is the question of third-party insurance. I can assure you that all Members who commented on this particular omission feel that third-party insurance is absolutely imperative in the interest of the public and they are actuated by no other motives whatsoever……..
…all we seek to do by the introduction of compulsory third-party insurance is to provide compensation for the poor that are crushed." (unquote)-- {On 13th July 1938, at 5.53 p.m., at pages 1787 and 1789 of the same Hansard, by Mr. Gaddum (Nominated Member);}

(quote)

"…….This insurance is an insurance that is imposed by the state in the public interest……" (unquote)--{ On September 21st at page 3371 of the same Hansard by Hon. Mr. Bandaranaike,}

The above excerpts from the Hansard indicate that the legislature wanted to introduce compulsory third-party insurance to safeguard public from possible risks and hazards that may be caused by allowing potentially dangerous machines on places where the public have access or right of way (See the interpretation given to the term 'Highway' in the said Ordinance as well in the present Motor Traffic Act prior to the 2009 amendment.). As mentioned before Section 127(1) of Ordinance No.45 0f 1938 is very much similar to the Section 99(1) of the present Motor Traffic Act. Thus, the State Policy throughout in this regard appears to have been focused on the need to safeguard public safety. Thus, third-party insurance was introduced and maintained up to date for the interest of the Public.

The reference to a statement made in the House of Commons during the debate quoted above indicates that, during the colonial era, when the request was made to include third-party insurance, our legislature was influenced by the rationale that caused the introduction of mandatory third-party insurance by the colonial masters in the United Kingdom.

In the English case of ***Gardner V. Moore (1984) 1 All.E.R 1100*** **at 1105** it was stated *"…The policy of insurance which a motorist is required by statute to take out must cover any liability which may be incurred by him arising out of the use of*

the vehicle …The injured third party is not affected by the disability which attach to the motorist himself…" and also in the case of ***White (A.P) v. White and the Motor Insurers Bureau (2001) 2 All E R 43 at 45 & 46*** it was stated; *"compulsory insurance in respect of the driving of motor vehicles was first introduced in 1930. Before then, most motorists chose to insure themselves against third party risks. But there were cases of serious hardship where the person inflicting the injury was devoid of financial means and, being uninsured, was not able to pay the damages for which he was liable. It was primarily to meet these cases of hardship that the Road Traffic Act 1930 was enacted."* Thus, it is clear that the rationale of introducing mandatory third -party insurance was to relieve third parties from hardships caused by motorists irrespective of the financial disabilities of the wrong doing motorists.

Even our courts in **Royal Insurance Co. Ltd. V Ven. J. A. R. Navaratnam 60 NLR 520 at 524** held that "*The Legislature's intention as appearing from Sections 100 and 105 was apparently that ……..if the owner or driver of the vehicle becomes liable under the ordinary law to pay damages in consequence, those damages should, if not paid, be automatically recoverable from another source. The alternative source which the statute provides is one which can reasonably be expected to be in funds for the purpose, namely, an approved insurer. Accordingly the statute compulsorily provided for insurance against third party risks. It is noteworthy that Section 105 does not provide even that the liability of the insurer to pay will arise only if and when the insured person himself fails to pay the amount of the decree. Once the decree is entered, the section casts a direct obligation on the insurer to pay the damages*."

The above quotes from the said decisions also confirm that the mandatory third-party insurance is for the benefit of the public who uses the Highway.

While Section 99 (1) of the present Act makes third party insurance a mandatory requirement, Section 100 (1)(b) of the Motor Traffic Act mandates that a policy of insurance in relation to the use of a motor vehicle must be a policy which insures in accordance with the provisions of paragraph (c), such person, persons or classes of persons as may be specified in the policy in respect of <u>any liability</u> which may be incurred by him or them in respect of the death of or bodily injury to <u>any</u>

person caused by or arising out of the use of motor vehicle on a highway." (Emphasis by underlining done by me)

According to the said Section, the insurer through its policy of insurance has to undertake to insure the person or persons or classes of persons specified in the policy in respect of the death of or bodily injury to a third party caused or arising out of the use of motor vehicle on a highway. Thus, an insurance cover can be issued to cover the liability of a single person or many specified in the policy (However, as per the proviso to the said Section the policy need not cover death or injuries arising out of and in the course of employment as well as any contractual liabilities).

Furthermore, Section 102 (1) of the Motor Traffic Act, restrain the imposition of conditions by the parties to the policy, which restricts the liability set out in Section 100(1)(b) subject to what is set out in Section 102 (4) of the said Act. Section 102(1) states "***Where a certificate of insurance has been issued in connection with a policy of insurance, so much of the policy as purports to restrict, or attach conditions, to the insurance of any person insured thereby shall, save as is otherwise provided in subsection (4), be of no effect as respects any such liability as is required to be covered by Section 100 (1) (b)*****".**

Thus, even though, as per Section 100(1)(b), the use of conditions that affect or restrict liability with regard to third parties are not permitted, the Motor Traffic Act itself, through its Section 102(4) permits certain conditions or restrictions that can be included in a policy of insurance, which may exclude the liability of the insurer to satisfy the decree of court contemplated in Section 105(1), in relation to third-party cover . {Section 102(4) will be discussed later in this judgment as it is the most relevant provision to the matter at hand}

Section 105(1) states, **"*If after a certificate of insurance has been issued under Section 100(4) to the persons by whom a policy has been effected, a decree in respect of any such liability as is required by Section 100(1)(b) to be covered by a policy of insurance (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of Sections 106 to 109, pay to the persons entitled to the benefit of the decree any sum payable thereunder***

in respect of that liability including any amount payable in respect of costs and any sum payable in respect of interest on that sum under such decree."

Therefore, if there is a valid insurance policy covering third-party risks, the Motor Traffic Act imposes a statutory obligation on the insurer to satisfy the decree unless he can disclaim liability under Sections 106 to 109.

Sections 106, 107 and 108 of the present Motor Traffic Act deal with situations where notice of action is not given to the insurer, non-liability due to cancellation of the policy prior to the event and non-liability due to misrepresentation respectively. Those sections have no relevance to the matter at hand since the Learned District Judge's order which was reversed by the impugned Judgment of the Learned High Court Judges was made in relation to the aforementioned issue no.10 raised at the original court. The said issue advances the entitlement of the insurer for a declaration of non-liability only under Section 109 of the Motor Traffic Act.

It was held in **The Ceylon Insurance Co. Ltd V Richard 53 NLR 64** *"As between insurer and insured, their rights and obligations inter se are measured solely by the terms of their contract, so that the contractual duty of the former to indemnify the latter may be avoided on any lawful ground which the parties might mutually agree upon. As far as the injured party is concerned, however, his right against the insurer to claim direct satisfaction of a decree entered in his favour against the insured is unaffected by the terms of the contract itself unless the insurer is protected by a declaration (under Section 137) that there has been a breach of condition in the policy which falls within one or other of the categories of excepted conditions enumerated in section 130(4)".* Sections 137 and 130(4) referred here are the parallel sections in the Act No.45 of 1938 to the sections 109 and 102(4) of the present Motor Traffic Act. Thus, it is clear that the rights of the third parties are statutory protected rights subject to the statutorily, allowed exclusions of liability of the insurer while rights of the parties to the policy are governed by the lawful terms of the contract between the parties. In **Ruby General Insurance Co. Ltd V S. Yasapala De Silva 71 NLR 54,** in appeal, the declaration of non-liability was granted to the Insurance Company on a breach of a condition of the policy, namely the condition that forbade the vehicle being driven by a person not holding a driving licence. It is true that it was a condition agreed by the parties to

the policy but as well as a permitted condition allowed by the statute itself to exclude liability. Anyhow, H.N.G. Fernando C.J at the end of the judgment in agreement with De. Kretser, J has commented on the inappropriateness of having statutorily permitted exceptions to escape from liability against third-parties. As those statutorily permitted exceptions are still in force, it is necessary to see whether the added 3rd Defendant is entitled to a declaration of non-liability based on the term it relies on.

The first part of the said Section 109 read as follows;

"No sum shall be payable by an insurer under Section 105 in respect of any decree if, in proceedings commenced before or within three months after the institution of the action in which the decree was entered, the insurer has obtained from a court of competent jurisdiction a declaration that a breach has been established of a condition specified in the policy, being one of the conditions enumerated in Section 102(4)"

Thus, it is clear that the 3rd Defendant relies on the stipulations in subsection 102(4) which allows certain conditions to be incorporated in the policy which states as follows;

"102(4). Nothing in subsection (1) shall apply in the case of any condition in a policy of insurance, being a condition which-

- ***(a) excludes the use of the motor vehicle to which the policy relates-***
  - ***(i) for business purposes, except by the insured, or by some other named individual, in person;***
  - ***(ii) for business purposes, other than the business purposes of the insured;***
  - ***(iii) for the carriage of goods or samples in connection with any trade or business;***
  - ***(iv) for the carriage of persons or goods for fee or reward;***
  - ***(v) for organized racing or speed testing;***
  - ***(vi) on a contract of letting and hiring;***
- ***(b) provides that the motor vehicle shall not be driven by a person other than-***
  - ***(i) the insured or any person driving with his express or implied permission;***

(ii) the insured or any person employed by him;

(iii) any person or persons named in the policy;

(c) provides that the motor vehicle shall not be driven by-

(i) any person or persons named in the policy;

(ii) any person who is not the holder of a driving licence;

(iii) any person whose driving license has been cancelled or suspended or who is for the time being disqualified for obtaining a driving licence; or

(d) in the case of a motor cycle which has no side car attached thereto, provides that no person other than the driver shall be carried thereon;

(e) excludes liability for injury caused or contributed to by conditions of war, riot or civil commotion."

The 3rd defendant's claim for declaration of non-liability is not based on a condition that relates to the use of the motor vehicle. Neither the said condition relates to a motor cycle which has no side car nor to injuries caused or contributed by conditions of war, riot or civil commotion. Hence, it is not necessary to discuss subsections 102(4)(a)(d) and (e) quoted above. As mentioned above the 3rd Defendant's position is that the 1st Defendant Driver can be considered as a named person in terms of subsection 102 (4) (c) (i), the most relevant provision is subsection 102(4)(c)(i). However, subsections 102(4)(b) and 102(4)(c) relates to permitting of conditions that exclude certain person or persons or category/ genre of persons driving the vehicle which is the subject matter of the policy of insurance. When these two parts of subsection102(4) , namely 102(4) (b) and 102(4)(c), are read with the subsection 102(1), which restrict conditions that deters the liability to pay third parties, it is clear that, as far as the availability of declaration of non-liability for the insurer is concerned, the legislature's intention was to limit such exclusions or restrictions as to who drives the vehicle to the person or persons or category of persons as recognized by these two subsections. Therefore, in deciding the scope of different limbs of those two subsections it is prudent to consider both these subsections together since it may help to avoid conflicting situations.

While aforementioned Section 102(4)(b)(i) allows to exclude drivers other than the insured and the drivers permitted by the insured, Section 102(4)(b)(ii) allows to exclude drivers other than the insured and any person employed by him. When

a condition is permitted as per 102(4)(b)(i), the policy contemplates only covering the liability caused by the insured or the persons permitted to drive by the insured. This is more likely, but may not be limited, to happen when the vehicle is intended for the personal use of the insured; In other words, where the policy covers the personal use of the vehicle by the insured himself or through drivers permitted by him. When a condition is permitted as per 102(4)(b)(ii), the policy contemplates only covering the liability caused by the insured or by a person employed by him. This is more likely, but may not be limited, to happen when the vehicle is intended to be used for the business or trade purposes of the insured and/or is intended to be driven by the insured or a driver employed by the insured; In other words, where the policy covers business or trade use including the personal use by the insured by himself or through an employed driver. In both these occasions the insured, persons who are permitted to drive by the insured and the employee/ employees of the insured as the case may be become authorized drivers as per the policy while all others become excluded drivers. I also observe that these two subsections, namely 102(4)(b)(i) and (ii), have a direct relation to our civil law on delictual liability in relation to accidents which is based on the Roman Dutch Law remedy, Aquilian Action. To successfully claim damages, one has to prove the wrongful act and dolus (willful or intentional act) or culpa (negligence) of the wrong doer. Thus, our system is a fault-based system and where the fault of the wrong doer is proved liability may be direct or vicarious. It is my view that these two sub sections, namely 102(4)(b)(i) and (ii) are drafted in a manner that would safeguard the third party rights when the insured is liable directly or vicariously; in other words when the insured is the wrong doer or where he is liable vicariously for the wrong doing of drivers who drive with his permission or as his employees. Subsection 102(4)(b)(i) contemplates where direct or vicarious liability might arise by the use of vehicle by the insured or close acquaintance, like family members and friends etc., since this limb of the section is, as said before, more likely concerns an insurance policy that covers the personal use of the vehicle, and subsection 102(4)(b)(ii) contemplates where direct or vicarious liability might arise by the use of vehicle by the insured or an employed driver by the insured since this limb of the section, as said before, more likely concerns an insurance policy that covers the use of the vehicle for business and trade purposes as well as certain instances of personal use.

The aforementioned subsection 102(4)(b)(iii) allows the insurer to exclude drivers other than the person or persons named in the policy. This is more likely to happen when the owner of the vehicle or the one who gets the insurance cover does not intend to drive the vehicle or does not want his close acquaintance or employees to drive the vehicle unless any of them is the named person in the policy; Perhaps situations contemplated here may include where the vehicle is given to use by some other person than the insured according to that person's own will or where depending on the circumstances vicarious liability may fall on the insured. Following among others may provide few illustrations where the permitted drivers have to be named in the policy.

a) A father who does not want or capable to drive gives his vehicle for the business purposes of his son to use according to son's own will. He can agree with the insurer to issue a policy including a third-party cover for his vehicle naming the son and his employees as the permitted drivers while excluding all others including himself.
b) A is unable to drive due to some disability and he gives his vehicle on an agreement to B to use by B for a monthly payment. He can agree with the insurer to issue a policy for his vehicle including a third-party cover naming B as the permitted driver excluding all others including himself.
c) A company gives a vehicle to a named executive or a director with a third-party cover excluding all others as permitted drivers.
d) A Company that publish a News Paper or broadcast or telecast news come into agreement with a freelance reporter to use the reporter's family vehicle for the travels relating to news reporting and also agree to provide a third-party insurance cover for incidents that may happen when the reporter drives the said vehicle. The company agree with the insurer to issue a policy covering third-party risks naming the reporter as the permitted driver and excluding all others. In this occasion other members of the reporter's family may need another policy for their use.

When subsection 102(4)(b) allows the parties to the policy to exclude all others other than the permitted drivers as provided by each limb as the case may be, for the purpose of clarity, on certain occasion they may need to name the person or persons who are not permitted to drive the vehicle. For example, in the above

illustrations a) and b), the parties may prefer to name the owner of the vehicle who takes the insurance cover for the vehicle as an excluded driver while in illustration d) they may prefer to name everyone other than the reporter including his family members as excluded drivers. Thus, need for such clarifications may be among other things that there is a provision allowing to name the excluded driver or drivers in subsection 102(4)(c)(i). Subsection 102(4)(c)(i) will be discussed later in this judgment.

In **Royal Insurance Co. Ltd. V Ven. J. A. R. Navaratnam 60 NLR 520** H N G Fernando J (as he then was) seems to have expressed the opinion that separate limbs of Section 102(4)(b) is rather a description of permitted drivers than who may be excluded as drivers. It is true that while referring to exclusion of all others other than the person or persons or category of persons named there, each limb of Section 102(4)(b) indicate who are permitted drivers. He further has expressed that all three limbs in Section 102(4)(b) has to be considered as a composite description of persons who shall not be specified as excluded drivers and those three limbs should not be read disjunctively. However, I do not think that this would compel the parties to a policy to cover all the categories permitted by those three limbs, namely the insured, persons permitted by the insured and the persons employed by the insured, and named person, in each and every policy issued on the ground that they are the possible users of a vehicle. Parties are at liberty to select whom they are going to cover taking each limb separately or in combination. What may be necessary is to include all possible drivers as per the intended use of the vehicle. It is relevant to note that as per Section 100(b) even a single person can be covered by a policy. In terms of Section 99(1) it is upon the person who uses or drives or causes or permits any other to use or drive to see whether there is a third-party cover for the driver or user when the vehicle runs on the high way. If he fails, he may be faced with penal measures. Duty cast on the user or driver or one who causes or permits to use or drive cannot make the parties to the policy, including the insurer, bound to enter into an agreement to cover all the permitted drivers contemplated under all three limbs for third-party risks. If it is the insured who use or drive or causes or permits to use or drive, then it is his duty to see that driver is a permitted driver with a third -party cover. In the illustration (d) given above, the newspaper company need not get any cover for all the possible users of the vehicle. Thus, when one gets a third party cover

for the insured and persons who drives with his consent, I do not think there is any impediment to name his employees and all others as excluded drivers and, in the same manner when one gets a cover for his trade purposes there cannot be any impediment to name all others except the insured and the employees as excluded drivers. Similarly, when a third-party insurance cover is taken for a named person in the policy there is no bar to name all others including the one who enters into the policy as excluded drivers.

As said before our delictual liability to pay damages to or compensate the victim of an accident is still founded on proof of fault, despite the fact that it appears that some countries have done away with the fault-based system to pay damages or compensation. Even though, with the introduction of autonomous vehicles without drivers and computerized automated machines, our system based on fault may fail, still we have to consider and interpret our law in accordance with the principles of law we follow. Thus, the subsection 102(4)(b) is drafted to safeguard third-party rights when damages are caused due to the fault of the insured or fault of other drivers for which the insured become vicariously liable or for the fault of the named person or persons as agreed by the insurer and one who takes the insurance cover. A policy of accident insurance is basically to indemnify the liabilities of the insured, and the parties to the policy also can agree to indemnify the liabilities of the named person in the policy. The insurer is paid a consideration for the cover given by the policy. If the provisions of subsection 102(4)(b) were not there, the insurer may have to pay for the fault of unauthorized drivers not concerned in the policy due to the mandatory provision for an insurance cover for third-party risks, for example, pay to the victim of an accident caused by a driver who robbed the vehicle, for whose actions neither consideration is paid for the insurer nor the insured is liable directly or vicariously.

However, the legislature has decided to allow further exclusions of drivers as contemplated in subsection102(4)(c). This has to be comprehended in the background of exclusions allowed by the subsection 102(4)(b), since the said Section 102(4)(b) has provisions to exclude unauthorized drivers for whose action insurer need not pay, while the insured, drivers permitted by him or his employees or the named person in the insurance cannot be excluded, as the case

may be, to ensure the payment for the loss caused to the third-parties. Hence, the exclusions allowed by Section 102(4)(c) may not be limited merely to further clarify who are excluded by naming them as aforementioned but also to further exclude certain drivers even though they may come within the category of drivers who cannot be excluded or are permitted in terms of the different limbs of the subsection 102(4)(b). Thus, a question arises as to what extent the law allows to exclude persons as drivers under subsection 102(4)(c).

The first limb of subsection 102(4)(c), namely 102(4)(c)(i), allows the parties to the policy, to exclude any person or persons named in the policy as drivers. The other two limbs, namely section 102(4)(c)(ii) and (iii) allow the parties to the insurance policy to exclude;

- Any person who is not the holder of driving licence,
- Any person whose driving licence has been cancelled or suspended or who is for the time being disqualified for obtaining a driving licence.

It is fathomable why the legislature allows to exclude persons who does not have a valid licence. It is said before, that the need for an insurance covering third-party risks was made mandatory for the benefit of the public at large. In the same manner public interest requires to discourage engagement of persons without valid driving licence as drivers. On the other hand, if these provisions to exclude persons who do not have valid driving licence were not there, unskilled drivers or drivers whose competency was not tested by the authorities may be used to drive vehicles by vehicle owners, to the detriment of the public as well as insurance companies even though there may be penalties for driving without licence when they are caught by the law enforcement authorities. As I mentioned before, our system of compensating the loss caused by an accident is based on the proof of fault of the wrong doer and the compulsory insurance to cover third party risks is to guarantee the payment of damages and/or compensation that may be ordered by a decree that follows such proof, as the case may be, against the insured or his employees or drivers permitted by him or by a named person or persons in the policy. As said before the said decree may be based on direct or vicarious liability. However, what I observe is that not having a valid driving licence, though, according to the circumstances, may be supportive of proving fault based on dolus or culpa yet not decisive in proving fault, since there may be drivers who

are skilled but do not have a driving licence; for example a skilled driver who does not hold a driving licence since he has not reached the necessary age limit or a person who holds a driving licence for all category of vehicles from a foreign country and have considerable experience without any bad record but does not have a local or international driving licence. Thus, lack of a valid driving license on certain occasions may only prove a legal requirement to drive on the highway but not ingredients to prove dolus or culpa.

In the backdrop of the aforesaid discussion, now I would like to discuss the most relevant provision of the Motor Traffic Act which is relevant to the matter at hand, namely Section102(4)(c)(i) of the Motor Traffic Act.

As mentioned before, this Section 102(4)(c)(i) permits the parties to exclude drivers named in the policy. The question is whether the parties to the policies has unrestricted permission to name anyone as they wish and agree, so that the insurer would be able to claim a declaration of non-liability. Can they do it according to their own whims and fancies even disregarding the public interest which the legislature tried to serve by bringing in mandatory cover for third-party risks? The answer can be reached if one looks at the following situations:

a) When an insurance company issue a policy excluding drivers other than the insured and the drivers driving with the insured's express or implied permission as per Section 102(4)(b)(i), can it exclude the same person or persons, namely insured, or the person or persons driving with the insured's permission, under Section 102(4)(c)(i) by naming them as persons who shall not drive the vehicle?
b) In the same manner, when an insurance company issue a policy excluding drivers other than the insured or his employees or a named person or persons in the policy, as the case may be, as per Section 102(4)(b)(ii) or (iii), can it exclude same permitted drivers,(namely insured, person or persons employed by him or person or persons named in the policy, as the case may be), under Section 102(4)(c)(i) by naming them as persons who shall not drive the vehicle ?
c) In the same manner, when an insurance company issue a policy taking into consideration more than one situations contemplated in Section 102(4)(b) together, for example taking insured, persons driving with the permission

of the insured, persons employed by the insured and the named persons in the policy as permitted drivers, can it exclude them under Section 102(4)(c)(i) by naming them as persons who shall not drive the vehicle?

My view is that it cannot be done. Only exception I can think of is that when such naming specifically identifies the person or persons to be excluded where there are many authorized drivers , since, if the insurer is allowed to name, in toto, who are considered as authorized drivers under separate limbs in Section 102(b) as persons who are not permitted to drive under Section 102(c)(i), in fact, in such occasions there will not remain any third-party cover in relation to the permitted drivers in terms of Section102(4)(b). On the other hand, if it is allowed to use wider terms without precision, insurer would be able to draft such terms to escape liability in a manner harmful to the public interest. Such nominations definitely defeat the intention of the legislature which is expressed by bringing in mandatory third-party insurance, namely priority to preserve public safety and interest. As such, I cannot think that, by Section 102(4)(c)(i), the legislature intended to allow the parties to the policy to name drivers so that the insurer can claim exclusion from liability against the public interest which the very introduction of the insurance to cover third-party risks intended to safeguard. Thus, what is allowed by the said section is naming of drivers as far as it does not conflict with the public interest which was intended to be protected by bringing in legislation to introduce mandatory insurance to cover third-party risks. Thus, the parties to the policy cannot name any person as an excluded driver without any limitation and as per their wish but they can name any person or persons as excluded drivers as far as such naming will not affect the public interest and public safety which was intended to be protected by bringing in mandatory third-party cover. Hence, as mentioned before parties may use the said section to further clarify the persons who were excluded from driving in terms of Section 102(4)(b) and it may also be used to name precisely identified person or persons, though in general they may be included in permitted drivers in terms of Section 102(4)(b) but when their exclusion is not in conflict with the public safeguard and interest which was intended to be protected by bringing in mandatory insurance cover for third-party risks. For example, if the insured, respecting his obligation to maintain uberima fides in entering in to the insurance contract, reveals that there is a person among his employees or family members whose mental condition on

certain occasion become unstable, though the said person still has a valid driving licence issued by the authorities, I do not think there is any bar to name such person as an excluded driver under Section 102(4)(c)(i). Such nomination will not make, in my view, any conflict with the public safety or interest that was intended to be protected by the introduction of mandatory cover for third-party risks and further the owner of the vehicle or the insured would be able to advice himself that he would not be protected under the cover if he engaged the said identified person as a driver. In my view, giving an insurance cover for a person who may become mentally unsound, might not ensure the public interest where the compensating the loss is based on the proof of fault on the part of the wrong doer. Thus, a validity of naming drivers under Section102(4)(c)(i) as excluded drivers against third-party risks depends on the circumstances of each case. If such naming is against the public interest which the legislature expected to protect through the introduction of mandatory third-party insurance, such naming cannot be considered as a valid one to escape from the liability.

The Learned High Court Judges have quoted the following passage from **Emjay Insurance Co. Ltd V P. S. William 70 NLR 566.**

"***An insurer is entitled to obtain a declaration of non liability under section 109 of the Motor Traffic Act if he establishes that the accident in question was caused by the motor vehicle when it was being driven by the owner (the Insured) in breach of a specific condition in the policy of insurance that it should not be driven by any person who is not the holder of a driving licence. In such a case the inclusion of another condition in the policy that the vehicle should not be driven by any person other than the insured is not material***."

However, this decision could be distinguished from the case at hand for reasons mentioned below;

1. The condition relied on by the insurer in the said case falls within the ambit of section 102(4) (c)(ii) and not of section 102(c)(i) where the parties to the policy name the person who shall not be allowed to drive. In terms of 102(c) (ii), even though the person who does not hold a driving licence cannot be identified as Mr. X, Y or Z at the time of entering into the policy, the legislature itself has identified a category of persons and has decided to allow to include a condition in the policy to the effect that a person who he

is not a holder of a driving licence shall not drive the vehicle, most probably, as described above for the interest of the public.

2. The said case appears to have been between the parties to the policy, namely insured and the insurer, who are bound by the terms of the agreement where the third-party rights emanate from the statutory provisions.

Now I would consider whether the relevant item 5 under the general exceptions of the policy is acceptable for the issuance of declaration of non-liability of the insurer in terms of Section 102(4)(c)(i). As mentioned before the said item reads as follows;

"**The Company shall not be liable under this policy in respect of;**

5) any accident or loss damage arising directly or indirect (Sic) **whilst the insured driving such motor vehicle having consumed any intoxicating liquor or drugs or any person having consumed any intoxicating liquor or any drugs driving such motor vehicle"**

Section 102(4)(c)(i) allows the parties to the policy to name who shall not drive the vehicle. The words 'to name' here, in my view is used to mean something similar 'to specify', 'to indicate', 'to mention', 'to nominate', or 'to identify' etc. When one look at the above term contained in item 5, it does not name the insurer or any other person as a person who shall not drive but it says the company shall not be liable if they drive having consumed intoxicating liquor or drugs. In fact, it does not exclude insurer or any other person from driving but it names a situation they shall not drive. Identification of the person who shall not drive is not definite at the time of entering to the policy and it is contingent on whether the said person would consume intoxicating liquor or drugs or not, prior to a point of time in future when he will drive.

On the other hand, if it is allowed to name using wider terms and or without specificity and in a manner the identification to be dependent on what may or may not happen in the future, the parties to the insurance policies would be able to defeat the intention of the legislature, which was to protect the public, by naming drivers using terms such as used in the above item 5 as well as ' insured or any other persons driving negligently and or recklessly' or 'insured or others driving without taking necessary precautions to avoid an accident' etc.

One may argue terms excluding drunken drivers is for the interest of the public and therefore it is not in conflict with the intention of the legislature shown by bringing in insurance to cover third-party risks. A cursory glance may give such an impression but when one looks deep into the issue it is not so. In this aspect one has to examine what was intended by the legislature to be remedied by introducing third-party insurance. It is clear due to what is mentioned before that the insurer has to satisfy a decree against the persons covered by the policy when it is given in favour of a third party unless the insurer is entitled to get a declaration of non-liability as per the provisions of the Motor Traffic Act. This liability to satisfy the decree is there irrespective of the financial capability or incapability of the people whose liability is insured by the policy. Thus, what was intended was to cover the liability of the persons who are insured or covered by the policy. As indicated above under our law liability arises with the proof of fault of the wrong doer. Hence, what was intended to remedy by the third-party insurance cover is the harm caused by the fault. Proof of Drunkenness or acts of negligence and recklessness are decisive in proof of fault of the wrong doer. If in the guise of naming drivers, it is allowed to claim non-liability on such wrongs, the object of bringing in mandatory insurance to cover third-party risks would fail, since it makes the wrong doers, whose fault was to be remedied by third -party cover, excluded drivers. Thus, such naming is contrary to the public interest, which the legislature intended to safeguard by providing mandatory third-party insurance. Thus, I am not inclined to think that the legislature intended to allow naming of drivers under Section 102(4)(c)(i) in a manner to defeat the public interest as found in the said impugned item 5 of the policy; In other words, such naming allows to remove the fault which was to be remedied, from the remedy provided by introducing mandatory third-party cover making the remedy redundant.

Learned District Judge in his order has commented that public policy does not allow the illusory wordings used by the parties to the policy to adversely affect the members of the public who are not parties to the policy. **Wharton's Concise Law Dictionary, 16th edition reprint 2016, Universal Law Publication (An Imprint of 'LexisNexis') , page 192**, with reference to **Central Inland Water Transport Corporation Ltd. V Borja Nath Ganguly, AIR 1986 SC 1571, Shri Parsar V Municipal Board,(1997) 1WLC 443, Oil and Natural Gas Company Ltd. V Saw**

Pipes Ltd. AIR 2003 SC 2629 and few more Indian Cases, defines 'Public Policy' as a term that connotes some matter which concerns the public good and the public interest. As shown above the impugned naming of the excluded driver is in conflict with the public interest that the legislature intended to protect.

Thus, in my view, the Learned District Judge correctly identified the lack of specificity and precision in naming a person or persons as excluded drivers as well as the conflict with the public policy which do not allow to name excluded drivers in the manner done in the impugned term found in item 5 of the general exceptions of the insurance policy, which the Learned High Court Judges failed to appreciate and came to a wrong finding that item 5 is sufficient to exclude liability of the insurer. Therefore, this appeal should be allowed.

Further I observed that even in the relevant insurance policy excluded driver stipulated in the general exceptions of the policy has been defined only as;

- Any person other than the policy holder or a person driving with the policy holder's express or implied permission.
- Any person who is not the holder of a driving licence valid to drive such class of vehicle unless he has held and is not disqualified from obtaining such licence.

Hence, it is clear even at the time of entering into the policy, parties did not consider what is there in item 5 as an exclusion of drivers. Perhaps, it would have been included there to claim from the insured the amount that might have to be paid to third-parties. Even though the impugned term has no effect against a third-party whose rights emanates from the statutory provisions it is valid between the parties to the policy.

The 3rd Defendant argues that the plaintiff is not without a remedy as he can get a decree against the 1st and the 2nd Defendants. Such remedy on direct liability and vicarious liability is always there but what the introduction of mandatory third-party insurance meant is to protect the public from difficulties that the public faces due to financial situations of the wrongdoer and the person vicariously liable for the acts and deeds of the wrong doer.

For the foregoing reasons, I answer the questions of law Nos (iii) and (iv) affirmatively and therefore, answering (i) and (ii) do not arise. However, with

regard to questions of law No.(i) and (ii), I observe that permission to exclude drivers are not limited to Section 102(4)(c) as mentioned in question of law No.(i) but 102(4)(b) also allows to exclude persons other than persons named in the said section as drivers. Any exclusion of drivers contrary to Section 102(4), inclusive of 102(4)(b) and (c), has no effect with regard to third-party risks.

Hence, the judgment of the High Court dated 08.03.2013 is vacated and the order of the learned District Judge dated 24.10.2011 refusing to dismiss the action against the 3rd Added Defendant is restored with costs.

.....

Judge of the Supreme Court.

Vijith. K. Malalgoda, 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 under Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC Appeal No: 70/2018

SC/SPL/LA No. 276/2017
CA (PHC) APN 133/2016
HC Chilaw 03/09

Democratic Socialist Republic of Sri Lanka.

COMPLAINANT

-VS-

Badde Liyanage Wasantha Kumara Fernando.
No. 9, St Rita Mawatha,
Dummaladeniya South,
Wennappuwa.

Presently at,
Welikada Prison, Borella, Colombo 8.

ACCUSED

AND BETWEEN

Badde Liyanage Wasantha Kumara Fernando.
No. 9, St Rita Mawatha,
Dummaladeniya South,
Wennappuwa.

Presently at,
Welikada Prison, Borella, Colombo 8.

ACCUSED-PETITIONER

-VS-

Hon. Attorney General,
Attorney General's Department,
Colombo 12.
COMPLAINANT -RESPONDENT

AND NOW BETWEEN

Badde Liyanage Wasantha Kumara Fernando.
No. 9, St Rita Mawatha,
Dummaladeniya South,
Wennappuwa.

Presently at,
Welikada Prison, Borella, Colombo 8.
ACCUSED-APPELLANT-APPELLANT

-VS-

Hon. Attorney General,
Attorney General's Department,
Colombo 12.
COMPLAINANT -RESPONDENT RESPONDENT

BEFORE : **B.P. ALUWIHARE, PC, J.**
S. THURAIRAJA, PC, J.
E.A.G.R. AMARASEKARA, J.

COUNSEL : Anil Silva, PC with D. Gunaratne for the Accused- Appellant - Appellant.
Varunika Hettige D.S.G. for the Complainant – Respondent – Respondent.

ARGUED ON: 12th May 2020.

WRITTEN SUBMISSIONS : Accused- Appellant -Appellant on the 12th of July 2019.

Complainant – Respondent – Respondent on the 01st of August 2019.

DECIDED ON : 11th September 2020.

S. THURAIRAJA, PC, J.

The Accused-Appellant-Appellant namely, Badde Liyanage Wasantha Kumara Fernando (hereinafter referred to as the "Accused- Appellant") was originally indicted for murder punishable under section 296 of the Penal Code on 21/11/2004 for causing the death of Anthonilage Pradeep Gamini Fernando (hereinafter referred to as the "Deceased"). After the non-summary inquiry the indictment was forwarded in 2009. The Appellant initially pleaded not guilty and the matter was fixed for trial. According to the journal entries and the proceedings, both parties had moved dates on several grounds including the Accused-Appellant wanting to re-consider his plea. The trial commenced on 8/6/2015 and the prosecution led the evidence of two eye-witnesses and the Consultant Judicial Medical Officer (hereinafter referred to as "JMO"). Thereafter the Appellant, through his Attorney-at-Law, informed the Court that he wishes to withdraw his plea of not guilty and to plead guilty under Section 297 of the Penal Code for culpable homicide not amounting to murder **on the basis of grave and sudden provocation**. Accordingly, the State Counsel considered and amended the indictment and preferred a charge under section 297 of the Penal Code. The Appellant unconditionally pleaded guilty to the amended indictment and made submissions to mitigate his sentence.

After hearing submissions from both Counsel for the Appellant and the State, the learned trial judge imposed 15 years rigorous imprisonment and a fine of Rs. 7500/- in-default six months simple imprisonment.

The Appellant was convicted on 28/06/2016 and the sentence was imposed on 12/07/2016. Thereafter the Appellant submitted a revision application to the Court of Appeal on 19/10/2016. The Complainant- Respondent, the Attorney General, raised two preliminary objections at the Court of Appeal. Firstly, although the petitioner had a right of appeal which is a statutory right, he had without exercising the same sought to invoke revisionary jurisdiction and secondly, that the order of the learned High Court Judge is not irregular, illegal or capricious. The Court of Appeal without considering the preliminary objections considered the revision application, affirmed the conviction and reduced the sentence to 10 years rigorous imprisonment from 15 years rigorous imprisonment.

Being aggrieved with the said order, the Appellant preferred an appeal to the Supreme Court and on the 9/5/2018 this Court granted leave on the question of law stated in paragraph 17(b) of the petition dated 07/12/2017. The said question of law is reproduced here for easy reference.

> 17(b) "*did the Learned Judges of the Court of Appeal misdirect themselves in imposing a sentence of 10 years which is excessive considering the fact that 13 years has elapsed since the commission of the offence, this was not a premeditated incident, there was no animosity between the parties and the petitioner had led substantially blameless life?*"

The Counsel for the Appellant made his submissions primarily about intoxication, imposing a sentence after a long period of time and on the basis of knowledge at the time of the offence.

It will be appropriate to first consider the facts of the case. According to the evidence presented before the High Court, it is apparent that the Appellant had consumed liquor with about 10 of his friends including the eye-witnesses and the deceased. The wife of the Appellant had come there and addressed the Appellant in a degrading manner.

"සක්කිලියා මොකද කරන්නේ?"

[*Sakkiliya* (a word used to degrade or humiliate a person in society) what are you doing?]

Then the deceased had said,

"එහෙම කියන එක හරි නැහැනෙ, මනුස්සයා නේද?"

(It's not correct to say that, isn't he your husband?)

Thereafter, the Appellant had tried to hit the deceased with an empty bottle which did not strike him. Thereafter the Appellant had gone home, brought a knife and stabbed the deceased. According to the eye-witnesses, the deceased had not offered anything to provoke the Appellant. There is no evidence to substantiate that there was animosity or any preparation for this offence. As per the submitted facts the Accused- Appellant, deceased and their friends were consuming liquor when the wife of the Appellant came there and scolded the Appellant, the Appellant got angry with two of his friends including the deceased, went and brought a knife, stabbed the deceased and chased the other person. According to the JMO there were three superficial injuries other than the fatal injury which could have been caused in two blows.

When considering intention and knowledge in the context of culpable homicide, the type of weapon used (if any), the way the injuries were inflicted, the nature, location and number of injuries inflicted on the victim are considerable facts. As per the evidence of the JMO at pages 86 and 87 of the brief, he describes that the injury was so serious that it would definitely result in the death of the deceased, hence the Appellant's intention is proved.

ප්‍ර: මෙවැනි තුවාල හේතුවෙන් පුද්ගලයෙක්ට අනිවාර්යයෙන්ම මරනය ගෙනදෙනවාද ? ස්වභාවික තත්ත්වයක් යටතේ මරනය ගෙන දෙනවාද?

(Q: Are such injuries necessarily fatal or could cause death in the ordinary course of nature?)

උ: මෙවැනි තුවාල සඳහා ඉක්මනින් ශල්‍යකර්මයක් සිදු කිරීමෙන් ජීවිතය බේරා ගැනීමේ හැකියාව තිබෙනවා.

(A: There is potential to save lives by performing prompt surgery for such injuries as this.)

ප්‍ර: ශල්‍යකර්මයක් සිදුකලේ නැත්නම් ස්වභාවික තත්ත්වයක් යටතේ මරනය ගෙන දෙනවාද?

(Q: if no surgery is performed could death have resulted in the ordinary course of nature?)

උ: රුධිරය ගලා යාම හේතුවෙන් ඉතා ඉක්මනින් මරනය ගෙන දෙනවා.

(A: Because of bleeding, death results very quickly.)

As revealed from the evidence placed before the trial Court, the Appellant at the time of the incident was married and had two children. The fingerprint report of the Appellant was produced before the trial judge and according to the said report; the Appellant had a previous conviction in 1998.

The Court of Appeal in the order of the revision application referred **Ananda vs Attorney General (1995 2 SLR 315), Attorney General vs Dewapriya Walgamage and another (1990 2 SLR 212)** and **Liyana Mendis Gunadasa and two others vs Attorney General (CA 141/2006 decided on 20/06/2014).** The Court of Appeal stated in the order as follows; *"it is settled law that even a deserving sentence made after a considerable period of time should not be imposed at a later stage"* (sic). There is no reference made in the judgment that the Court of Appeal had considered the above judgments in making their decision.

Since it is mentioned, I perused the said judgments. In **Ananda vs Attorney General** (supra) the Accused was convicted for causing grievous hurt and a sentence of 10 months imprisonment was imposed. When it was appealed, the Court of Appeal observed that implementing a sentence of 10 months after 18 years was inappropriate. Court of Appeal held that,

"An accused has a right to be tried and punished for an offence committed within a reasonable period of time, depending on the circumstances of each case. A delay of over 18 years to dispose of a Criminal Case is much long period by any standard, delays of this nature are generally regarded as mitigating factors."

In **Attorney General vs Dewapriya Walgamage and another** (supra) there was a criminal breach of trust for which a sentence of 2 years rigorous imprisonment and a fine were imposed. The Court of Appeal was reluctant to imprison him after lapse of 13 years since the commission of the offence. Further it was observed that the Accused in this case lost his employment and related benefits. He was further ordered to pay a substantial fine of Rs. 50,000/-. Therefore, the Court of Appeal suspended the sentence for 5 years.

In **Liyana Mendis Gunadasa and two others vs Attorney General** (supra) three accused persons were initially charged for murder and attempted murder. After the trial they were acquitted for murder and found guilty on attempted murder and a sentence of 7 years rigorous imprisonment was imposed. The Court of Appeal observed that imprisoning the Accused for a sentence of 7 years after the lapse of 30 years was inappropriate. Hence, Appellate Court reduced the sentence to 2 years, suspended the same, imposed a fine and ordered to pay Rs. 30,000/- by each accused as compensation. It was held that,

"In the case in hand the long delay of 30 years from the date of offence is a mitigatory factor and no court would be able to decide otherwise mainly for the reason that the court procedure, itself has taken to finally conclude the matter by at least two decades. Such delays not only need to be avoided but condemned in the interest of justice."

Considering the aforementioned cases I find that the imprisonment imposed in those cases is much less than in the present case. Here the learned trial Judge had

imposed 15 years rigorous imprisonment for an offence of culpable homicide not amounting to murder and there is no award of compensation to the deceased. In the present case, the indictment was served in 2009 and as per the journal entries trial could not be taken up before the High Court as there were partly heard matters, thereafter the Accused- Appellant sought time to re-consider his plea and later withdraw his plea of not guilty and pleaded guilty under Section 297 of the Penal Code for culpable homicide not amounting to murder. Trial was taken up on 8/6/2015 and evidence of 3rd, 1st and 13th witnesses were fully led and concluded on 25/04/2016 and judgment of the 12/07/2016 hence it is evident that all evidence had been led and judgment delivered within a year from the commencement of the trial. It is also observed in the available materials that the deceased had not in any way provoked or was in no way involved in any manner towards the crime. In fact, he was defending the Accused- Appellant from his wife who was insulting him in public.

The Court of Appeal has not indicated whether they are accepting or rejecting the preliminary objections namely, although the petitioner had a right of appeal which is a statutory right he had without exercising the same sought to invoke revisionary jurisdiction and the order of the learned High Court Judge is not irregular, illegal or capricious. When the State raises serious and valued preliminary objections, it is the duty of the Court to accept or reject the same after giving due reasons. Further it is also observed that the judgment of the Court of Appeal had not given any reasonable grounds for reducing the sentence from 15 years to 10 years. This was a revision application; the Appellate Court is reasonably expected to give reasons for making a decision. Further the State has raised a specific objection namely; the order of the learned High Court Judge is not irregular, illegal or capricious. Considering those two objections even at this stage, I find that the order of the learned Judge of the High Court is regular, legal and reasonable.

The right of an accused person to a fair trial is recognized in all the criminal justice systems in the civilized world. Its denial is generally proof enough that justice

is denied. The right to a fair trial was formally recognized in International law in 1948 in the United Nations Declaration of Human Rights. Since 1948 the right to a fair trial has been incorporated into many national, regional and international instruments. The Sri Lankan Constitution by Article 13(3) expressly guarantees the right of a person charged with an offence to be heard by person or by an Attorney-at-law at a fair trial by a competent Court. In **the Attorney-General vs. Segulebbe Latheef and another** (2008 SLR Volume 1, Page 225) Justice J.A.N. de Silva (as he was then), held that, *"the right to a "fair trial" amongst other things includes the following: - ….7. The right of an accused to be tried without much delay…"*

I am mindful that any inordinate delay in the conclusion of a criminal trial undoubtedly has highly deleterious effects on society generally and particularly on the two sides of the case. But it will be a grave mistake to assume that delay in trial does not cause acute suffering and anguish to the victim of the offence. In many cases the victim may suffer even more than accused. Therefore, there is no reason to give all the benefits on account of the delay in trial to the accused and to completely deny all justice to the victim of the offence.

In **Niranjan Hemachandra Sashittal and another v State of Maharashtra** (2013 4 SCC 642) it was held (at Para 18 and 19) that,

> *"Each case of delay in conclusion of a criminal trial has to be seen in the facts and circumstances of such case. Mere lapse of several years since the commencement of prosecution by itself may not justify the discontinuance of prosecution or dismissal of indictment. The factors concerning the accused's right to speedy trial have to be weighed vis-a -vis the impact of the crime on society and the confidence of the people in judicial system. Speedy trial secures right to an accused but it does not preclude the rights of public justice."*

In **Abdul Rehman Antulay v. R.S. Nayak** (AIR 1992 SC 1701) it was held that, several questions may be considered before deciding if the delay may be construed to the advantage of the accused (page 1722). Further (at page 1730) it was held that,

> "*…in short it is not possible in the very nature of things and present day circumstances to draw a time limit beyond which a criminal proceeding will not be allowed to go…*" also at page 1731 it was held that, "*while determining whether undue delay has occurred (resulting in violation of right to speedy trial) one must have regard to all the attendant circumstances, including nature of offence, number of accused and witnesses, the work-load of the court concerned, prevailing local conditions and so on..*" .

In the present case, the indictment was served in 2009 and as per the journal entries trial could not be taken up as there were partly heard matters. Then the Accused- Appellant sought time to re-consider his plea. Trial was taken up on 8/6/2015 less than one-year from the commencement of the trial, evidence of three witnesses (witnesses 3, 1 and 13) were fully led and concluded, then the Accused-Appellant pleaded guilty. Judgment of the High Court was delivered on 12/07/2016 hence it is evident that all evidence had been led and judgment delivered within a year from the commencement of the trial. In this circumstance, I am of the view that, there was no severe prejudice caused specifically to the Appellant as he claims when imposing a sentence after a long period of time which was intractable.

Presently, I will proceed to deal with the sentence. The trial court imposed 15 years rigorous imprisonment and Court of Appeal considered the revision application, and affirmed the conviction and reduced the sentence to 10 years rigorous imprisonment from 15 years rigorous imprisonment. The counsel for the Appellant urged intoxication as a defence (which was not pleaded before the trial court) and the fact that the Appellant is a married person and father of two children for mitigation of the sentence imposed on the Appellant by the High Court. In **Rex. Vs. Bazely** (1969) C.L.R. held, that because of the criminal stupidity, when a person

loses his family life, it is not a ground for not imposing a severe sentence. Section 14(b) of the Judicature Act No. 2 of 1978 (as amended) states that, Right of Appeal in Criminal cases- any person who stands convicted of any offence by the High Court may appeal thereto to the Court of Appeal-

"(b) In a case tried without a jury, as of right, from any conviction or sentence except in the case where-

(i) The accused has pleaded guilty; or

(ii) The sentence is for a period of imprisonment of one month of whatsoever nature or a fine not exceeding one hundred rupees;

Provided that in every such case there shall be an appeal on a question of law or where the accused has pleaded guilty on the question of sentence only."

It is trite law that where an accused has pleaded guilty to the indictment an appeal would not lie against the conviction but against the sentence or it would lie where the appeal bears upon a question of law which in this case the Accused-Appellant failed to do so.

Hence, the issue that has arisen for consideration is whether the learned High Court Judge has disregarded the vital procedure of considering the facts in mitigation, when he was imposing the sentence. Before that, it is relevant to note, Section 13 of the code of Criminal Procedure Act No. 15 of 1979 stipulates that: - "That the High Court may impose any sentence or other penalty prescribed by written law". In the instant case the said sentence or penalty prescribed by written law is found in Section 297 of the Penal Code which deals with culpable homicide not amounting to murder and reads as follows;

"Whoever commits culpable homicide not amounting to murder shall be punished with imprisonment of either description for a term which may extend to twenty years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily

injury as is likely to cause death; or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death."

The penalties for culpable homicide not amounting to murder depend on whether the offence was committed with intention (in which case, the maximum is 20 years' imprisonment) or knowledge (in which case, the maximum is 10 years' imprisonment). Hence, Court may impose a sentence upto 20 years imprisonment for an offence of culpable homicide not amounting to murder committed with intention. In considering intention and knowledge in the context of culpable homicide, the type of weapon used (if any), the way the injuries were inflicted, the nature, location and number of injuries inflicted on the victim are considerable facts. As discussed above, JMO described that the injury was so serious and will definitely result in the death of the deceased, hence the Appellant's intention is proved and the Court may impose a sentence upto 20 years imprisonment and the Learned Judge of the High Court had imposed 15 years rigorous imprisonment.

The Accused-Appellant took up the defense of intoxication before this Court which was not pleaded before the High Court. In this case it is evidenced that the Accused- Appellant consumed liquor with about 10 of his friends and there is no evidence to show that the Accused- Appellant had reached the degree of intoxication as envisaged by section 79 of the Penal Code to claim the defence of intoxication in which he could not have formed a murderous intention. There is also a gap between the time when he was allegedly found drinking and the time of the crime.

I am of the view that the trial court saw and heard the parties and it is not an easy task for an appellate court to replace its eyes and ears for those of trial court. Findings of facts are made by a trial court based on evidence led by the prosecution and State, thereby the learned trial judge weighs the evidence in the context of the

circumstances of the case. A finding of fact involves both perception and evaluation. Since the appellate court does not have that advantage of the trial court, such findings should not be treated lightly.

It is observed in many criminal appeals that the accused takes up a new defence and a new stance which he had not taken at the trial court. When the accused takes up a defence before the trial court, the learned trial judge has a tedious duty to consider the facts of the case, victim, accused, social repercussions and many other matters before he passes a sentence. Virtually, the trial judge has the visual and audio of the place and area of the incident. He considers all those matters with a judicially trained mind and evaluates the entire material before him and makes the decision. When the matter is appealed, the Appellate Court should consider the appeal *in situ*. Submitting a new defence or a material which was not before the trial judge should not be tolerated. It is the duty of the Appellate Court to evaluate the judgment and to see whether it is appropriate or not. If the Appellate Court accepts a new defence and a new material and thereafter concludes that the trial judge is wrong and/or the sentence it is inappropriate is very unfair to the judicially trained minded trial judge who is not represented other than by his judgment. It is my view that unless it is a question of law, a new defence and a new material which was not submitted before the trial court should not be considered before the Appellate Court.

Primarily, it is to be borne in mind that sentencing for any offence has a social goal. A sentence is to be imposed by taking into account the nature of the offence and the manner in which the offence has been committed. One of the fundamental purposes of imposing a sentence is based on the principle that the accused must realize that the crime committed by him has not only created a dent in his life but also a concavity in the social fabric. It serves as a deterrent. It is equally true that the proportionality between the offence committed and the penalty imposed must be reflected in the conviction and the sentence.

In this context, I may refer with profit to the pronouncement in **Dhananjoy Chaterjee vs State of West Bengal** [1994 SCR (1) 37, 1994 SCC (2) 220] at paragraph 14 and 15 as follows.

> *" Some criminals get very harsh sentences while many receive grossly different sentence for an essentially equivalent crime and a shockingly large number even go unpunished thereby encouraging the criminal and, in the ultimate, making justice suffer by weakening the system's credibility. Of course, it is not possible to lay down any cut and dry formula relating to imposition of sentence but the object of sentencing should be to see that the crime does not go unpunished and the victim of crime as also the society has the satisfaction that justice has been done to it....*
>
> *Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. 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 imposition of appropriate punishment."*

As to the matter of assessing sentence in a particular instance, Basnayake A.C. J in the case of ***Attorney-General v H.N. de Silva (*57 NLR 121)** as follows;

> *"... in assessing the punishment that should be passed on an offender, a Judge should consider the matter of sentence both from the point of view of the public and the offender. Judges are too often prone to look at the question only form the angle of the offender. A Judge should, in determining the proper sentence, first consider the gravity of the offence as it appears from the nature of the act itself and should have regard to the punishment provided in the Penal Code or other statute under which the offender is charged. He should also regard the*

effect of the punishment as a deterrent and consider to what extent it will be effective. "

As discussed above, every court has a duty to impose a proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence.

We affirm the conviction and the sentence imposed by the Court of Appeal. There is no appeal from the State. For the purpose of clarity, the Accused- Appellant is convicted under section 297 of the Penal Code and imposed a sentence of 10 years rigorous imprisonment and a fine of Rs. 7500/- in default 6 months simple imprisonment. Further the High Court Judge is directed to implement the sentence from the date the Accused- Appellant surrenders himself of his bail.

Accordingly, I answer the question of law negatively and dismiss the appeal.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

B.P. 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 Appeal

Geekiyanage Viyantha Vijithweera
No.156, Kandy Road,
Nuwaraeliya.

Plaintiff

SC Appeal 74/2008
SC/HCCA/LA 52/2008
CP/HC/CA/Kandy/290/2002
DC Nuwaraeliya Case No. L/717

Vs-

1. Mohamed Thuwan
   No.4, Old Bazar.
   Nuwaraeliya

Defendant

AND

Mohamed Thuwan
No.4, Old Bazar.
Nuwaraeliya

Defendant-Appellant

Vs

Geekiyanage Viyantha Vijithweera
No.156, Kandy Road,
Nuwaraeliya.

Plaintiff-Respondent

AND NOW BETWEEN

Geekiyanage Viyantha Vijithweera
No.156, Kandy Road,
Nuwaraeliya.

Plaintiff-Respondent-Petitioner-Appellant

Vs

Mohamed Thuwan
No.4, Old Bazar.
Nuwaraeliya

Defendant-Appellant-Respondent-Respondent

Before: Sisira J de Abrew J
Priyantha Jayawardena PC J &
Murdu Fernando PC J

Counsel: Rasika Dissanayake for
the Plaintiff-Respondent-Petitioner-Appellant
Saman Galappaththi for
the Defendant-Appellant-Respondent-Respondent

Written submission
tendered on : 9.12.2019 by the Plaintiff-Respondent-Petitioner-Appellant
9.12.2019 by the Defendant-Appellant-Respondent-Respondent
Argued on : 2.12.2019

Decided on: 26.2.2020

Sisira J. de Abrew, J

In this case the Defendant-Appellant-Respondent-Respondent (hereinafter referred to as the Defendant-Respondent) did not respond to the summons issued by the District Court and the learned District Judge by his order dated 22.5.2000 fixed the case for exparte trial. The exparte trial was taken up on 13.7.2000 and the learned District Judge by his judgment dated 13.7.2000 gave judgment in favour of the Plaintiff. According to the Fiscal Report the decree was served on the Defendant-Respondent on 8.8.2000. However, the Defendant-Respondent takes up the position that he received the decree only on 19.8.2000. The learned District Judge disbelieved the Defendant- Respondent and held that the decree was served on the Defendant-Respondent on 8.8.2000. The Defendant-Respondent, on 30.8.2000, filed an application to purge the default. The learned District Judge after inquiry by his order dated 3.4.2002 refused the said application to purge the default. Being aggrieved by the said order of the learned District Judge dated 3.4.2002, the Defendant- Respondent appealed to the Civil Appellate High Court and the learned Judges of the Civil Appellate High Court by their judgment dated 8.5.2008 set aside the order of the learned District Judge dated 3.4.2002 and allowed the Defendant-Respondent to file the answer. The learned Judges of the Civil Appellate High Court in their said judgment further directed the learned District Judge to conduct trial and deliver judgment after taking steps in terms of Civil Procedure Code. In effect the learned Judges of the Civil Appellate High Court in their said judgment have set aside the ex parte judgment of the learned District Judge dated 13.7.2000. Being aggrieved by the said judgment of the Civil Appellate High Court, the Plaintiff-Respondent-Petitioner-Appellant (hereinafter referred to as the Plaintiff-Appellant) has appealed to this court. This court by its

order dated 5.9.2008 granted leave to appeal on questions of law set out in paragraphs 25(g) of the Petition of Appeal dated 11.6.2008. Learned counsel for the Plaintiff-Appellant at the hearing of this appeal confined himself to the question of law set out in paragraph 25(g) of the said Petition of Appeal which reads as follows.

"In all the circumstances of the case whether the judgment of the Central Provincial High Court of Appeal of Kandy dated 8.5.2008 is liable to be set aside by Your Lordships' Court."

At the inquiry before the learned District Judge relating to the application to purge the default, the Defendant-Respondent stated in evidence that the decree was served on him only on 19.8.2000. But Modara Archchige Wilbert who is the Process Server stated in evidence that he served the decree on the Defendant-Respondent on 8.8.2000. When the learned District Judge by his order dated 3.4.2002 refused the application to purge the default, the Defendant-Respondent filed a petition of appeal in the Civil Appellate High Court against the said order dated 3.4.2002 but not against the exparte judgment of the learned District Judge dated 13.7.2000. It has to be noted here that there was no appeal before the Civil Appellate High Court seeking to set aside the ex parte judgment of the learned District Judge dated 13.7.2000. In fact, the notice of appeal filed by the Defendant-Respondent dated 10.4.2002 in the Civil Appellate High Court states that the Defendant-Respondent seeks to set aside the order of the learned District Judge dated 3.4.2002. In the Petition of Appeal filed in the Civil Appellate High Court by the Defendant-Respondent dated 30.5.2002, the Defendant-Respondent seeks to set aside order of the learned District Judge dated 4.4.2002 (this date appears to be a typographical mistake- it should be 3.4.2002). The Defendant-Respondent in the said Petition of Appeal does not seek to set aside the exparte judgment of the

learned District Judge dated 13.7.2000. But the learned Judges of the Civil Appellate High Court have set aside the ex parte judgment of the learned District Judge dated 13.7.2000.

Learned counsel for the Plaintiff-Appellant submitted that learned Judges of the Civil Appellate High Court did not have power to set aside the exparte judgment of the learned District Judge dated 13.7.2000 especially when the Defendant-Respondent had not sought such a relief. He further submitted that under Section 88(1) of the Civil Procedure Code, there could not be an appeal against any judgment entered upon default.

Section 88(1) of the Civil Procedure Code reads as follows.

"No appeal shall lie against any judgment entered upon any default."

Learned counsel for the Defendant-Respondent submitted that the Judges of the Civil Appellate High Court have the power to set aside the judgment of the learned District Judge dated 13.7.2000 in terms of Section 753 and 839 of the Civil Procedure Code even though there is no appeal. The most important question that must be decided in this case is whether the Civil Appellate High Court had the power to set aside the exparte judgment of the learned District Judge dated 13.7.2000 when the Defendant-Respondent filed an appeal against the order of the learned District Judge refusing the application to purge the default and when there was no appeal against the exparte judgment of the learned District Judge. I now advert to this question. In this connection it is relevant to consider the judgment in the case of Sirimavo Bandaranayake Vs Times of Ceylon [1995] 1 SLR 22. In the said case this court observed the following facts.

> *"The Times of Ceylon Limited (defendant-respondent) published several newspapers including the Times of Ceylon. On 2.8.1977 the business*

undertaking of the defendant having its registered office, 3 Bristol Street, Fort, was vested in the Government under and in terms of the Business Undertakings (Acquisition) Act, No. 35 of 1971 and a Competent Authority was appointed under that Act to administer the business undertaking. The Sunday Times of 4.12.77 reported that Mr. E. L. Senanayake then Minister Agriculture and Lands had stated that the plaintiff respondent (the plaintiff) had revalued her lands in order to obtain enhanced compensation from the Land Reform Commission.

On 18.9.1978 the plaintiff filed action in the District Court of Colombo against the defendant alleging that this and a related statement were defamatory of her, The Government takeover was not disclosed. The defendant did not appear on the summons returnable date (17.11.78) and ex parte trial was fixed for 10. 1.79. On 10.1.79 witness Dr. K. L. V. Alagiyawanna gave evidence and produced the Sunday Times of 4.12.77 but neither did he say that the defendant published nor did he mention that the Government had taken over the defendant's undertaking. The name of the printer and publisher was stated in newspaper marked in evidence as "printed and published by the Competent Authority, Republic of Sri Lanka successor to the business undertaking of Times of Ceylon Ltd..." However the trial judge entered judgment against the defendant on 29.1.79. On 17.4.79 the draft decree was tendered to the District Court and signed. There was no journal entry that the copy of the decree was served on the defendant. On 29.12.80 the plaintiff applied for execution. The Court ordered notice on the defendant and the Fiscal reported on 13.2.81 there was no such establishment. Notice was re-issued and a copy was sent to the

Competent Authority. The Fiscal reported on 17.3.81 that notice was pasted on the front door of the building of Times of Ceylon Ltd. and also served on the defendant at No. 9, Castle Street, Borella. The defendant filed objections stating that no summons or decree was served and praying that proceedings be set aside and that permission to file answer and defend the action be allowed. On 12.3.82 the Court upheld the objections and set aside the ex parte judgment and decree and ordered summons to re-issue on the defendant. This order was affirmed by the Court of Appeal on 13.8.82. On appeal to the Supreme Court, the Supreme Court allowed the appeal and set aside the orders of the District Court and Court of Appeal by the judgment reported in (1984) 1 Sri LR 178. Thereupon on 18.4.84 the defendant applied to the Court for revision of the ex parte judgment. The Court of Appeal by its judgment delivered on 11.12.90 held that the defendant had nothing to do with the impugned publication and there had been a failure of justice and set aside the judgment and dismissed plaintiff's action. In the meantime plaintiff had recovered the sum of Rs. 750,000/- from the defendant. The Court of Appeal ordered the plaintiff to repay this sum to the defendant but refused defendant's claim for interest. Leave to appeal to the Supreme Court was granted on the following questions.

1. Whether the remedy of revision is available in law to the (defendant) having regard to all the facts and circumstances of this case?

2. Whether the Court of Appeal had jurisdiction to revise the order of the learned District Judge entering judgment ex parte in favour of the plaintiff, which order (it is claimed) had been restored by the Supreme Court and had become res adjudicata between the parties?"

This court held as follows

1. *Judgment had been entered when there was not a scrap of evidence that defendant was responsible for the defamatory publication and no finding had been made on the question of publication.*
2. *The plaintiff's lawyers, unfortunately, failed to tell the trial judge that the defendant was not responsible for the impugned publication, despite their duty to court (now stated in Rule 51 of the Supreme Court (Conduct of and Etiquette for Attorneys-at-Law) Rules 1988) not to mislead or deceive or permit a client to mislead or deceive in any way the Court before which they appear.*
3. *The decision of the Supreme Court of 1.2.84 had the effect of restoring the ex parte judgment, but the Supreme Court did not expressly affirm or approve the judgment. None of the Courts considered the legality or propriety of the judgment.*
4. *Even in an ex parte trial, the judge must act according to law and ensure that the relief claimed is due in fact and in law, and must dismiss the plaintiff's claim if he is not entitled to it. An ex parte judgment cannot be entered without a hearing and an adjudication.*
5. *The revisionary jurisdiction of the Court of Appeal in Article 138 of the Constitution extends to reversing or varying an ex parte judgment against the defendant upon default of appearance on the ground of manifest error or perversity or the like. A default judgment can be canvassed on the merits, in the Court of Appeal in revision, though not in appeal and not in the District Court itself.*
6. *The judgment of the Supreme Court holding that the defendant had failed to purge its default does not amount to an affirmation of such ex parte*

judgment, so as to preclude the exercise by the Court of Appeal of its revisionary jurisdiction.

7. Section 85(1) requires that the trial judge should be 'satisfied' that the plaintiff is entitled to the relief claimed. He must reach findings on the relevant points after a process of hearing and adjudication. This is necessary where less than the relief claimed can be awarded if the Judge's opinion is that the entirety of the relief claimed cannot be granted. Further, sections 84, 86 and 87 all refer to the judge being 'satisfied' on a variety of matters in every instance; such satisfaction is after adjudication upon evidence.

8. Section 88 must be read with section 753 of the CPC. The fact that. section 88(1) bars an appeal against an ex parte default judgment restricts the right of appeal conferred by section 754 of the CPC but does not affect the revisionary jurisdiction by section 753, if anything it confirms that jurisdiction. From the fact that section 88(2) confers a right of appeal, one cannot, possibly infer am exclusion of revisionary jurisdiction on the same matter.

9. Insofar as a remedy in the District Court is concerned the general rule is that judge is functus officio and cannot review its own judgment However, section 86 makes an exception, by conferring jurisdiction on the District Court to set aside a default judgment if it was flawed in procedural respects - but not on the merits. The necessary implication of the grant of that jurisdiction is that the District Court is not competent to review a default judgment on the merits. There are two distinct issues. The first is whether the ex parte default judgment was procedurally proper and this depends on whether a condition precedent had been satisfied namely whether a proper

order for ex parte trial had been made and whether the defendant had failed to purge his default. The second is whether, apart from that default, the ex parte default judgment was on the merits i.e. in respect of its substance, vitiated by lack of jurisdiction, error and the like."

It is therefore seen that in the above case that the Defendant filed objection stating that no summons was served on him and prayed that the proceedings be set aside; that the District Court upheld the objection which was affirmed by the Court of Appeal; that this court set aside both orders of the District Court and the Court of Appeal; that thereafter the defendant applied to this court for a revision of the ex parte judgment; and that it is in the said revision application that court made the above decision. But in the present case there is no appeal or revision application filed against the ex parte judgment of the learned District Judge. Therefore, it is wrong for the learned Judges of the Civil Appellate High Court to base their judgment on the judgment in the case of Sirimavo Bandaranayake Vs Times of Ceylon (supra) and set aside the ex parte judgment of the learned District Judge dated 13.7.2000. I note that in the present case, there is no appeal or revision application filed in the Civil Appellate High Court challenging the legality of the exparte judgment of the learned District Judge dated 13.7.2000.

In my view, the Defendant-Respondent was not successful in his application to purge the default since the Defendant-Respondent has failed to come to the District Court to purge the default within 14 days of the service of the decree. If the judgment of the Civil Appellate High Court is accepted as correct, it would help the defaulting party (Defendant-Respondent) to set aside the ex parte judgment against which he has not appealed. When I consider the aforementioned matters, I am unable to accept the contention of learned counsel for the Defendant-

Respondent that the court has power to intervene in this case under Section 753 and 839 of the Civil Procedure Code.

A party cannot be permitted to succeed in a matter where there is no appeal or application to revise an ex parte judgment. Considering all the above matters, I hold that the Civil Appellate High Court has no power to set aside an ex parte judgment of the District Court in an appeal filed against an order of District Court refusing the application to purge the default.

I would like to state that in an ex parte trial the plaintiff is not always entitled to the judgment in his favour on the basis that the defendant is absent. In an ex parte trial too, plaintiff must prove his case on a balance of probability. It is the duty of the trial Judge to consider whether the plaintiff has proved his case even in an ex parte trial and if he fails to do so, it is the duty of the trial Judge to dismiss the plaintiff's case. Considering all the aforementioned matters, I answer the above question of law in the affirmative. Accordingly, I set aside the judgment of the Civil Appellate High Court dated 8.5.2008 and affirm the order of the learned District Judge dated 3.4.2002.

Judge of the Supreme Court.

Priyantha Jayawardena PC J

I agree.

Judge of the Supreme Court.

Murdu Fernando PC J

I agree.

Judge of the Supreme Court.

IN THE SUPREME COURT OF THE

DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an appeal in terms of section 31 DD of the Industrial Disputes Act as amended read with section 9 of the High Court of the Provinces (Special Provisions) Act No 19 of 1990.

S C Appeal No. 79/2012

SC HC LA No. 05/2012

HC Badulla Case No. 90/2010 (Appeal)

LT Case No. 36/1982/2002

1. Superintendent,

   Udaweriya Estate,

   Ohiya.

2. Agarapatana Plantations Limited,

   53 1/1,

   Sir Baron Jayatilleke Mawatha,

   Colombo 01.

3. Lankem Tea and Rubber Plantation Limited,

   53 1/1,

Sir Baron Jayatilleke Mawatha,

Colombo 01.

RESPONDENT - RESPONDENT - APPELLANT

-Vs-

Lanka Wathu Seva Sangamaya,

No. 06,

Aloysee Mawatha,

Colombo 03.

(On behalf of K Jayaratne)

APPLICANT - APPELLANT – RESPONDENT

Before: JAYANTHA JAYASURIYA PC CJ

P PADMAN SURASENA J

E A G R AMARASEKARA J

Counsel: Ms. Manoli Jinadasa for the Respondent - Respondent - Appellant.

Mr. D P L A Kasyapa Perera with Aslam M Hanifa and S S Nafnees for the Applicant - Appellant - Respondent

Argued on: 27 - 08 - 2019

Decided on: 18 - 02 - 2020

P Padman Surasena J

The Applicant - Appellant - Respondent (a trade union) filed an application in the Labour Tribunal seeking a re-instatement of service of its member K Jayaratne (hereinafter sometimes referred to as the Workman). It also sought compensation and back wages for him from the Labour Tribunal. The applicant had alleged that the said termination of service of the workman was wrongful and unfair.

The Respondent - Respondent - Appellants - (hereinafter sometimes referred to as the Employer) filed its answer and;

1. admitted that the Workman was employed in the capacity as a Junior Assistant Factory Officer at its Udaweriya Estate,
2. stated that a domestic inquiry was held against the Workman in which he was found guilty of a charge of stealing tea from the said factory on 27-02-2002,
3. stated that it had decided to terminate the service of the Workman as it had lost the confidence in him as a Junior Factory Officer.

The Employer had prayed in its answer that the application of the Workman be dismissed on the basis that the termination of the service of the Workman is justified.

The Workman thereafter filed his replication denying the averments of the answer filed by the Employer.

At the conclusion of the inquiry, the learned President of the Labour Tribunal pronounced her decision dated 05th August 2010. She held that the termination of the service of the Workman by the Employer is justifiable in the face of the evidence adduced in the case. The learned President of the Labour Tribunal had therefore decided that the just and equitable order she should make, is to dismiss the application of the Workman. Accordingly, the said application was dismissed.

Being aggrieved by the said order of the learned President of the Labour Tribunal, the Workman appealed to the High Court of Uva Province holden in Badulla challenging the said order of the Labour Tribunal.

The High Court by its judgment dated 13th December 2011, set aside the decision of the learned President of the Labour Tribunal and directed that a compensation of Rs.247,681.08 (being the salary for 03 years) be paid to the Workman. This was because the learned High Court Judge had taken the view that she should not order reinstatement of the Workman as a period of approximately 10 years had elapsed since the termination of the service of the Workman.

The judgment of the learned High Court Judge shows that she has based her conclusions inter alia, on the followings;

I. that the Employer had failed to conduct a formal domestic inquiry upon a formally prepared charge,

II. that the charges against the Workman had not been read over and explained to him at the commencement of the inquiry,

III. that the said domestic inquiry had not been held following rules of natural justice,

IV. that the fact that the Workman had been acquitted in the trial in the Magistrate's Court on the basis that the charges against him had not been proved beyond reasonable doubt, is an important factor which should have been considered in favour of the Workman,

V. that she cannot accept the evidence of the witnesses called on behalf of the Employer to establish the charge levelled against the Workman,

This Court, when the leave to appeal application pertaining to this appeal was supported on 29-03-2012, having heard the submissions of the learned counsel, had decided to grant leave to appeal on the following questions of law.

1) Whether the Provincial High Court erred in law and acted in excess of jurisdiction, in disturbing the findings of fact by the Labour Tribunal, which findings were consistent with the evidence?

2) Whether the Provincial High Court erred in law in awarding the relief of compensation to the applicant when the facts and circumstances of the case do not warrant awarding of such relief?

3) Whether the Provincial High Court erred in law in awarding the relief of compensation by the failure to identify correctly and/or properly the petitioner against whom the order has been made?

In the course of the submissions, learned counsel for the Employer drew the attention of this Court to several items of evidence, which directly implicate the Workman in the charge framed against him. It was on that basis that she made submissions to convince this Court that the learned High Court Judge had clearly erred in holding that the Employer had failed to prove the charges. Therefore, I would now turn, albeit briefly, to the evidence adduced in this case.

Krishnakumari is one of the workers engaged in the work in the factory during the relevant night shift. She is amongst several witnesses called to give evidence on behalf of the Employer. She had seen the Workman (who was overseeing the production work of the factory in that night as the Junior Factory Officer), dragging a bag of made tea out of the room. The other workers too, upon noticing this incident, started shouting at the Workman. It is relevant to note that the said witness (Krishnakumari) had retired from service by the time she gave evidence before the Labour Tribunal. I do not find any legally valid ground to disregard the evidence of this witness.

Krishnakumari's evidence has been corroborated by witness Thyangamanie who had rushed to that place after hearing the voice of Krishnakumari. All of them thereafter had taken steps to inform the watcher of the factory Weeraiya Sivakumar. The said watcher in his evidence before the Labour Tribunal had confirmed the occurrence of the events narrated by

Krishnakumari and Thyangamanie. Moreover, the watcher had noticed a bag of tea left at the place shown by the above witnesses. As the finding of the bag at that place is something unusual, as that is not the place where made tea bags are stored, the watcher had informed the Factory Officer. The Factory Officer who came there after about half an hour later, having secured the bags found, had alerted his superior officer regarding this incident.

The Workman too has given evidence before the Tribunal. It is relevant to note that the Workman in the course of answering the questions posed to him in cross-examination, had admitted dragging the bags. It is apparent that he had unsuccessfully attempted to give the Tribunal an impression that he had done so to prevent substandard bags of tea getting mixed up with good bags of tea.

It is important to bear in mind that the position taken up by the Workman is not a total denial of the incident. He had admitted moving out the bags of tea in question but attempted to explain the reason for doing so. However, I observe that he has not been able to answer any of the important questions put to him by the learned counsel who appeared on behalf of the Employer. Considering in its totality, the evidence adduced in the case, it is clear that the Tribunal had acted correctly in refusing to accept the explanation the Workman has offered, for moving the bags of tea. The learned counsel appearing on behalf of the Workman had failed to put forward the position taken up by the Workman to the senior officers of the factory when they gave evidence on behalf of the Employer. Therefore, it is clear that the

position taken up by the Workman is something, which he had concocted after the closure of the Employer's case.

Considering the totality of the evidence led before the tribunal, I am of the view that the evidence against the Workman is cogent and hence must be accepted and acted upon. Therefore, I am of the view that the Employer has successfully discharged his burden by presenting cogent evidence against the Workman.

In view of the said cogent evidence adduced against the Workman before the Tribunal, I see no justification for the conclusion of the learned High Court Judge that the evidence of the witnesses called on behalf of the Employer cannot be acted upon to prove the charges against the Workman. Thus, I am of the view that the conclusions arrived at, by the learned High Court Judge, are based on the misconceived facts. The said conclusions cannot be supported by evidence adduced in the case and hence are perverse.

As has been mentioned above, the learned High Court Judge in her judgment had also held;

I. that the Employer had failed to conduct a formal domestic inquiry upon a formally prepared charge,

II. that the charges against the Workman had not been read over and explained to him at the commencement of the inquiry.

However, it must be borne in mind that there is no mandatory requirement in our law either to produce the charge sheet before the Labour Tribunal or

to necessarily hold a domestic inquiry before termination of service of a workman. Therefore, the above view taken by the learned High Court Judge is erroneous.

Moreover, although the learned High Court Judge has held that the said domestic inquiry had not been held following rules of natural justice, she has failed to point out any circumstance or instance at which the Employer has breached the said rules. Therefore, the said assertion by the learned High Court Judge is also without any merit.

Learned High Court Judge has also held that the Labour Tribunal should have attached more weight to the fact that the Workman had been acquitted in the trial in the Magistrate's Court. However, the learned High Court Judge has failed to distinguish the standard of proof applicable to criminal cases from that applicable to inquiries before Labour Tribunals. The above-mentioned Magistrate's Court case is a criminal case against the Workman. Therefore, the charges should have been proved beyond reasonable doubt. However, it is not the standard of proof applicable when the Employer is called upon to prove the charge against the Workman before the Labour Tribunal. The learned High Court Judge would not have come to the conclusion she arrived at, had she appreciated and applied the said difference in two standards of proof.

This Court in K B D Somawathie v. Baksons Textile Industries Ltd.[1] had an occasion to describe the task of the Labour Tribunal in the following way.

[1] 79 (1) NLR Part 1 - 2014 at page 206.

".... The mere inquiry into an allegation of misconduct and inefficiency and the finding whether this allegation is true or not is not a complete finding as required by the Industrial Disputes Act. It is my considered view that Labour Tribunals were never intended to perform the functions of Courts of law, and make an order whether the applicant is guilty or not of the allegations made against him by the employer. It is not a verdict that the Law requires from the President but a just and equitable order - an order that is just and equitable in relation to the employer and employee and the employer-employee relationship, due consideration being given to discipline and the resources of the employer and even the interests of the public may have to be given thought to. It is for this reason that the Labour Tribunals are not confined by rules of evidence. They can adopt their own procedure, they can act on confessions and the testimony of accomplices so that they can have a free hand to make a fair order..."

Section 31 D (3) of the Industrial Disputes Act states that a party dissatisfied with an order of Labour Tribunal may appeal from that order to the High Court only on a question of law. While this is mentioned in section 31 D (3) of the Act, section 31 D (2) states that subject to sub section 3 (above), an order of the Labour Tribunal shall be final and shall not be called in question in any Court.

In the Caledonian (Ceylon) Tea & Rubber Estates, Ltd. Vs. J S Hillman[2] the Supreme Court stated as follows: *"…. Under section 31 D (2) of the Industrial Disputes Act, an appeal to the Supreme Court lies from an order of a Labour*

[2] 79 (1) NLR Part 1, 421 at 425

Tribunal only on a question of law. Parties are bound by the Tribunal's finding of facts, unless it could be said that the said findings are perverse and not supported by any evidence. With regard to cases where an appeal is provided on questions of law only, Lord Normand, in Inland Revenue v Fraser, (1942) 24 Tax Cases P 498 spelt the powers of courts as follows:

> *"In cases where it is competent for a tribunal to make findings of fact which are excluded from review, the Appeal Court has always jurisdiction to intervene if it appears…. that the tribunal has made a finding for which there is no evidence, or which is inconsistent with the evidence and contradictory of it."*

In this framework, the question of assessment of evidence is within the province of the Tribunal, and, if there is evidence on record to support its findings, this court cannot review those findings even though on its own perception of the evidence this court may be inclined to come to a different conclusion. "if the case contains anything ex facie which is bad in law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances too, the court must intervene." – per Lord Radcliff in Edwards v. Baristow (1956) 3 AER at 57. Thus, in order to set aside a determination of facts by the Tribunal, limited as this court is only to setting aside a determination which is erroneous in law, 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. Hence, a heavy burden rested on the Appellant when he invited this court to reverse the conclusion of facts arrived at by the Tribunal…."

Thus, it is settled law that a party invoking the appellate jurisdiction of High Court under section 31 D (3) of the Industrial Disputes Act is necessarily required to satisfy the High Court that a question of law indeed exists for its determination. It is on that basis that the High Court could assume jurisdiction to consider an appeal under that section.

The argument of the Workman in the High Court was based on the evidence presented before the Labour Tribunal and hence is purely a question of fact. This is so in view of the fact that the conclusion reached by the learned President of the Labour Tribunal cannot be categorized (by any yardstick) as perverse. Thus, I am of the view that the learned High Court Judge has clearly failed to appreciate the legal framework within which she could have considered the evidence presented in the Labour Tribunal when she is exercising jurisdiction of an appellate Court as per the provision of law in section 31 D (3) of the Industrial Disputes Act.

As I have already mentioned above, the evidence adduced on behalf of the Employer in this case, has positively established that the Workman had been clearly involved in stealing made tea stored in the storeroom of the factory in the night of 27-02-2002. As the Employer has proved before the Labour Tribunal that the termination of the service of the Workman is a just and

equitable step taken towards maintaining discipline in its workforce, the judgment of the High Court cannot be permitted to stand.

For the foregoing reasons, I set aside the judgment of the High Court dated 13th December 2011 and proceed to allow the appeal. I further direct that the decision of the learned President of the Labour Tribunal dated 05th August 2010 be restored. Appeal is allowed with costs.

JUDGE OF THE SUPREME COURT

JAYANTHA JAYASURIYA PC CJ

I agree,

CHIEF JUSTICE

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.

SC Appeal 88/2012

SC SPL LA 180/2008

CA 189/1996

HC Colombo 6025/1993

The State

Complainant

Vs

Udugamaralalage Walter Mendis

Accused

And

Udugamaralalage Walter Mendis

Accused-Appellant

Vs

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

Complainant-Respondent

And Now between

Udugamaralalage Walter Mendis
No. 34C/45,
Rukmalgama Housing Scheme,
Pannipitiya.

Accused-Appellant-Petitioner-Appellant

Vs

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

Complainant-Respondent-Respondent

Before: Buwaneka Aluwihare PC, J.
Preethi Padman Surasena J. &
E. A. G. R. Amarasekara J.

Counsel: Faisz Musthapha PC with Kamran Aziz and Ershan Ariyaratnam for the Accused-Appellant-Appellant.

Madhawa Tennakoon SSC for the Attorney-General.

Argued on: 28.01.2020

Decided on: 11.09.2020

JUDGEMENT

Aluwihare PC. J.,

The only question of law that this court is called upon to consider in this matter is, as to whether the sentence imposed on the accused-appellant-appellant (hereinafter the 'accused') is excessive. [The question of law raised in subparagraph 'L' of paragraph 8 of the Petition of the Petitioner].

The accused had been convicted for the offence of Criminal Breach of Trust in a sum of Rs. 527,496.00, punishable under Section 391 of the Penal Code. Upon conviction the accused has been imposed with a sentence of a term of 5 years rigorous imprisonment and in addition a fine of Rs. 700,000.00 was also imposed, which carried a default sentence of 21 months rigorous imprisonment.

Aggrieved by the conviction and sentence, the accused appealed to the Court of Appeal. After the hearing of the appeal, their Lordships of the Court of Appeal by their judgment of 9th July 2008 dismissed the appeal.

The appeal before us arises from the said judgment of the Court of Appeal. At the outset the Learned President's counsel for the accused contended that he is only seeking the relief prayed in paragraph 'c' of the petition, namely, to vary the custodial sentence imposed on the accused to a non-custodial sentence.

The allegation against the accused was that he committed Criminal Breach of Trust in a sum of money, while being employed as an Accounts Executive at the Freudenberg Air Service Ltd. It transpires from the record that the prosecution had led 5 witnesses to prove the charge and after the conclusion of the prosecution case, the accused had testified under oath on his own behalf and has refuted the charge. In view of the fact that the court is only called upon to consider as to

whether the sentence is excessive or not, I see no purpose in considering the merits of the prosecution case.

The main contention of the Learned President's Counsel on behalf of the accused was that 30 years has elapsed since the date of the offence, and it is highly inappropriate to incarcerate a person who has had a clean life since then after the lapse of such a long period. It was also submitted that the accused was incarcerated for a period of 8 months consequent to the conviction and sentence by the High Court before he was released on bail, pending the appeal by the Court of Appeal. The attention of the court was also drawn to the deteriorating medical condition of the accused. Medical records of the accused filed in this case ('P1' to 'P10') is indicative of that, the accused had suffered a myocardial infarction in 2006 and had obtained treatment since then from the Cardiology Unit of the Sri Jayawardenapura General Hospital and the Durdans Hospital.

The Learned President's Counsel relied on the decisions of **Karunanayake v. The State** 1978 NLR 413, **Ananda v. The Attorney General** 1995 2 SLR 315, **Wimalaratne v. The State** (CA Application 46/58-CA minutes dated 24.11.2000 and **Ranawaka Arachchige Priyanka Ruwanari Perera** (Sc Appeal 99/2006-SC minutes of 21.07.2007).

In all these decisions the court broadly takes into account the time elapsed since the date of the offence and the date the sentence was to be imposed as a factor in deciding whether imposing a custodial sentence could be justified. Although the period of time between those two events is a factor to be considered, taking into consideration that law's delays are prevalent in the system of administration of justice, the delay alone cannot be a factor to refrain from imposing a custodial sentence. The delay, however, may be taken into account in conjunction with other mitigatory factors in deciding the quantum of sentence that should be imposed to commensurate with the gravity of the offence and any other aggravating factors. Thus, in exercising judicial discretion, it is imperative for a judge to consider both

the mitigating factors as well as the aggravating factors before deciding on an appropriate sentence.

The Learned Senior State Counsel submitted that he has no objection to waiving off the custodial sentence imposed on the accused. However, the Learned Senior State Counsel invited the court to consider enhancing the fine imposed by the High Court in the event the court is of the view that the custodial sentence should be replaced with a suspended term of imprisonment. This court considered the factors peculiar to the case before us and is of the view that this is a fit instance to set aside the custodial sentence and to impose a suspended term of imprisonment in lieu of the same.

The court observes that this is a financial fraud committed by the accused when he was placed in a position of trust in the capacity of the Accounts Executive by his employer. As such this court is mindful of the fact that the sentence to be imposed should act as a deterrent, from the perspective of the society.

Taking all facts and the attendant circumstances into consideration, the sentence imposed by the Learned High Court Judge is hereby set aside and is substituted with the following sentence;

The accused is imposed a sentence of two years (2 years) rigorous imprisonment and, acting under Section 303 of the Code of Criminal Procedure Act, the said term of imprisonment is suspended for a period of ten years (10 years). In addition, a fine of Rupees Two Million Five Hundred Thousand (Rs. 2.5 million) and a default sentence of one year and nine months (1 year and 9 months) rigorous imprisonment are also imposed on the accused.

The Learned High Court Judge is directed to pronounce and enforce the sentence imposed by this court on or before 30th October 2020 and report back of its implementation, to this court.

The accused is directed to appear before the High Court upon receipt of notice from the High Court to that effect.

Appeal partially allowed.

Judge of the Supreme Court

Preethi Padman Surasena 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

1. Leif Heling
2. Kristine Heling
   Both of No. 3070, Sanday, Norway

Appearing through their power of Attorney holder Pothupitiya Kankanamge Udaya Gunabandu.

"If"
Thalpe, Galle.

Plaintiffs

SC Appeal 91/2013
SC (SPL) LA No.260/2012
CA No.1303/98(F)
DC Galle No.12813/L

Vs-

1. Yasawathi Abeywickrama Weerasinghe.
2. Kumarapperuma Arachchige Carolis Gunapala
   Both of Liyanagewatta, Thalpe, Galle.

Defendants

AND BETWEEN

1. Yasawathi Abeywickrama Weerasinghe.

Liyanagewatta, Thalpe, Galle.

2. Kumarapperuma Arachchige Carolis Gunapala
(Deceased)

2A. Kumarapperuma Arachchige Kumara.
Liyanagewatta, Thalpe, Galle.

Defendant-Appellants

Vs

1. Leif Heling
No. 3070, Sanday, Norway
2. Kristine Heling
No. 3070, Sanday, Norway

Appearing through their power of Attorney holder Pothupitiya Kankanamge
Udaya Gunabandu.

"If"
Thalpe, Galle.

Plaintiff-Respondents

AND BETWEEN

Yasawathi Abeywickrama Weerasinghe.
Liyanagewatta, Thalpe, Galle.

1st Defendant-Appellant-Petitioner

Vs

1. Leif Heling
No. 3070, Sanday, Norway
2. Kristine Heling

No. 3070, Sanday, Norway

Appearing through their power of Attorney
holder Pothupitiya Kankanamge
Udaya Gunabandu.

"If"
Thalpe, Galle.

Plaintiff-Respondent-Respondents

Kumarapperuma Arachchige Carolis Gunapala
(Deceased)

Kumarapperuma Arachchige Kumara.
Liyanagewatta, Thalpe, Galle.

2A Defendant-Appellant-Respondent

AND NOW BETWEEN

Yasawathi Abeywickrama Weerasinghe.
Liyanagewatta, Thalpe, Galle.

1st Defendant-Appellant-Petitioner-Appellant

Vs

1. Leif Heling
   No. 3070, Sanday, Norway
2. Kristine Heling
   No. 3070, Sanday, Norway

Appearing through their power of Attorney
holder Pothupitiya Kankanamge

Udaya Gunabandu.

"If"
Thalpe, Galle.

Plaintiff-Respondent-Respondent-Respondents

Kumarapperuma Arachchige Carolis Gunapala (Deceased)

Kumarapperuma Arachchige Kumara.
Liyanagewatta, Thalpe, Galle.

2A Defendant-Appellant-Respondent-Respondent

Before: Sisira J. de Abrew, J
S. Thurairaja PC, J
Gamini Amarasekara J

Counsel: Anuruddha Dharmaratne with Indika Jayaweera
for the 1st Defendant-Appellant-Petitioner-Appellant
Faisz Musthapha PC with Athula Perera and M.S.E. Nadhiya for the Plaintiff-Respondent-Respondent-Respondents

Argued on : 18.12.2019

Written submission
tendered on : 15.8.2013 by the 1st Defendant-Appellant-Petitioner-Appellant
3.10.2013 by the Plaintiff-Respondent-Respondent-Respondents

Decided on: 26.2.2020

Sisira. J. de Abrew, J

Plaintiff-Respondent-Respondent-Respondents (hereinafter referred to as the Plaintiff-Respondents) filed an action against the 1st Defendant-Appellant-Petitioner-Appellant and the 2nd Defendant-Appellant-Respondent-Respondent (hereinafter referred to as the 1st and 2nd Defendants) seeking a declaration to eject the 1st and 2nd Defendants from the property in dispute; for peaceful possession of the property in dispute and for damages as prayed for in the plaint. The Plaintiff-Respondents filed this action on the basis that they are the owners of the property in dispute. The 1st and 2nd Defendants moved for a dismissal of the action. After trial, the learned District Judge by his judgment dated 8.5.1998, held the case in favour of the Plaintiff-Respondents. Being aggrieved by the judgment of the learned District Judge, the 1st and 2nd Defendants appealed to the Court of Appeal and the Court of Appeal by its judgment dated 22.10.2012 dismissed the appeal. Being aggrieved by the said judgment of the Court of Appeal, the 1st Defendant has appealed to this court. This court by its order dated 14.6.2013 granted leave to appeal on questions of law set out in paragraphs 16 (b), (c), (d), (e) and (f) of the Petition of Appeal dated 21.12.2012 which are set out below in verbatim.

1. Did His Lordship of the Court of Appeal fail to consider that the issue No.6 was raised by the Defendants as a preliminary issue of law on the ground of prescription was answered in the negative on the ground that Plaintiff/Respondents were not in possession of the property and not on the ground that it was a declaratory action?

2. Did His Lordship of the Court of Appeal err in law when he came to an erroneous conclusion that the consideration of the Deed produced marked as P1 is only Rs.75,000/- when the learned District Judge has clearly stated that

the actual consideration is Rs.785,000/- and said finding was never challenged by the Plaintiff/Respondents?

3. Did His Lordship of the Court of Appeal err in law when His Lordship stated in his judgment that the only remedy available to the 1st Defendant/Petitioner and 2A Defendant/Respondent was to initiate a separate action to recover the balance consideration against the Plaintiff/Respondents which is legally impossible when he has held the consideration is only Rs.75,000/-?

4. Did His Lordship of the Court of Appeal also fail to consider that the Plaintiff/Respondents' action was prescribed in law in terms of Section 6 of the Prescription Ordinance as the said action has been filed 7 years and two months after the cause of action arose on the ground that it was not raised as a preliminary issue at the commencement of trial?

5. Did His Lordship of the Court of Appeal also fail to consider that the 1st Plaintiff/Respondent waved his right which he had under the document produced marked P3 by which the Defendants have agreed to vacate the premises whereas by document produced marked P6 which was dated 13.6.1987 the 1st Plaintiff/Respondent has agreed that the Defendants could possess the property until the balance consideration is paid by their Attorney Mrs.Charlotte Seneviratne and therefore the Plaintiff/Respondents did not have a cause of action to institute this action?

The Plaintiff-Respondents filed this action on the basis that they are the owners of the property in dispute. According to the evidence led by the Plaintiff-Respondents, they purchased the property in dispute from the 1st Defendant by

Deed No.3128 attested by C.Seneviratne Notary Public marked P1. The consideration stated in the said deed was Rs.75,000/-. The 1st and 2nd Defendants, by way of an admission, admitted that they signed the deed marked P1. The position taken up by the 2nd Defendant in his evidence was that although his wife signed the deed marked P1, the agreed amount for the sale of the property in dispute was Rs.1,500,000/- but they (1st and the 2nd Defendants) got only Rs.550,000/-. However, the position taken up by the 1st and the 2nd Defendants in their answer was that Plaintiff-Respondents had agreed to buy the property in dispute for a sum of Rs.850,000/- and that the Plaintiff-Respondents paid Rs.550,000/-. The 2nd Defendant has stated, in his evidence, that he and his wife (the 2nd Defendant and 1st Defendant are husband and wife) would leave the property in dispute if the entire amount is paid. However, the 2nd Defendant has stated in his evidence that he had received Rs.550,000/- from the Plaintiff-Respondents when the property in dispute was sold to the Plaintiff-Respondents. The 1st and 2nd Defendants have admitted that they signed the Deed No.3128 attested by C. Seneviratne Notary Public. The main point urged by learned counsel for the 1st and 2nd Defendants was that the Deed No.3128 attested by C. Seneviratne Notary Public marked P1 is invalid since the consideration stated in the said deed is fraudulent. However, learned counsel for the Plaintiff-Respondents contended that the consideration stated in the said deed marked P1 was only Rs.75,000/- and the said deed is a valid deed since the consideration mentioned in the said deed has been paid and that if the agreed amount has not been paid there should be a separate action for recovery of the said amount. I now advert to these contentions.

There is no evidence to suggest that the consideration stated in the Deed No.3128 attested by C. Seneviratne Notary Public marked P1 was fraudulent. Document marked P2 which is a valuation report signed by F. Guruge Licensed Surveyor and Valuer states that the value of the property in dispute is Rs.65,000/-. Considering above matters, I reject the above contention of learned counsel for the Defendant-Appellants that the consideration in the said deed is fraudulent.

Assuming without conceding that the consideration stated in the Deed marked P1 was Rs.850,000/- and not paid to the 1st Defendant by the Plaintiff-Respondents, does it mean that the said Deed marked P1 would become invalid. I may in another way present this question in the following manner.

Even if the consideration mentioned in a deed of transfer is not paid to the seller, does the deed of transfer become invalid?

In order to answer the above question, I would like to consider certain judicial decisions.

In Jayawardena Vs Amarasekara 15 NLR 280 Lascalles CJ held as follows.

> *"On the execution of a notarial conveyance the sale is complete, and the mere fact that the whole of the consideration has not been paid cannot, in the absence of fraud or misrepresentation, afford ground for the rescission of the sale and the cancellation of the conveyance."*

In Mohamadu Vs Hussim 16 NLR 368 Pereira J held as follows.

> *"Where a person obtains a conveyance of property without fraud, but afterwards fraudulently refuses to pay the consideration stipulated for, the*

grantor is not entitled to claim a cancellation of the conveyance, but his remedy is an action for the recovery of the consideration."

Applying the principles laid down in the above judicial decisions, I hold that a deed of transfer executed without fraud by a Notary Public in accordance with the provisions of the Notaries Ordinance does not become invalid if the consideration stated in the deed of transfer is not paid to the seller. I further hold that in such a 0situation, remedy of the seller of the property is to file a separate action for the recovery of the consideration. Considering all the above matters, I hold that the Plaintiff-Respondents are the owners of the property in dispute and that they became the owners upon the execution of the Deed No.3128 attested by C. Seneviratne Notary Public marked P1.

The next question that must be considered is whether the Plaintiff-Respondents in this case could seek ejectment of the 1st and the 2nd Defendants from the property in question without a specific prayer for declaration of title. I now advert to this question. The answer to this question is found in the judicial decisions in the case of Jayasinghe Vs Tikiri Banda [1988] 2 CALR 24 wherein Viknaraja J held as follows:

"Where title to the property has been proved, as in this case the fact that one had failed to ask for a declaration of title to the property will not prevent one from claiming the relief of ejectment."

In Dharmasiri Vs Wickramatunga [2002] 2 SLR 218 Weerasuriya J held as follows.

"Even though the plaintiff has not asked for a declaration of title it does not prevent him from seeking the relief for ejectment."

In the case of Pathirana Vs Jayasundara 58 NLR169 at page 172 Gratiaen J held as follows.

"In a rei vindicatio action proper the owner of immovable property is entitled, on proof of his title, to a decree in his favour for the recovery of the property and for the ejectment of the person in wrongful occupation."

Applying the principles laid down in the above judicial decisions, I hold that in an action for ejectment of the defendant from the property in dispute, once the plaintiff's title to the property is proved, he (the plaintiff) is entitled to ask for ejectment of the defendant from the property even though there is no prayer in the plaint for a declaration of title.

In the present case the Plaintiff-Respondents, in the body of the plaint, have pleaded their title to the property in question and issue No.1 which was accepted by trial court was whether 1st Defendant by Deed No.3128 transferred the property in dispute to the Plaintiff-Respondents. The learned trial Judge answered this issue in the affirmative. When I consider the evidence led at the trial, I hold that the decision of the learned trial Judge in answering the above issue in the affirmative is correct and that the Plaintiff-Respondents are the owners of the property in dispute. When I consider all the aforementioned matters, I hold that the Plaintiff-Respondents are entitled to seek ejectment of the Defendant-Appellants even though there is no separate prayer in the plaint for a declaration of title.

Learned counsel for the Defendant-Appellants next contended that the action of the Plaintiff-Respondents should fail on the basis of Section 6 of the Prescription Ordinance which reads as follows.

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

I now advert to this contention. The Plaintiff-Respondents have filed this action on the basis that they are the owners of the property in dispute on the strength of the Deed No.3128 attested by C Seneviratne Notary Public marked P1. The action has not been filed on the basis of a document mentioned in Section 6 of the Prescription Ordinance. Further I note that there was no specific issue at the trial whether the action should fail on the basis of Section 6 of the Prescription Ordinance. The 1st and the 2nd Defendants have raised an issue at the trial to the effect that whether the action of the Plaintiff-Respondents has been prescribed. This issue was tried as a preliminary issue. The learned trial Judge, by his order dated 31.5.1996, answered the above issue in the negative and decided that this action was not a possessory action. The 1st and the 2nd Defendants have not filed an appeal against the said judgment in the Court of Appeal.

In a possessory action person who claims the possession of the property must prove that he was dispossessed from the property. The action should be filed within one year from the alleged dispossession. In the present case, according to the Plaintiff-Respondents, after the execution of Deed No.3128 attested by C.Seneviratne Notary Public marked P1, they never got possession of the property in dispute. The Plaintiff-Respondents in their plaint have sought an order for ejectment of the 1st and 2nd Defendants and their agents from the property in dispute. The Plaintiff-Respondents filed this case on the basis that they are the owners of the property in dispute. When I consider all the above matters, I hold that this is not a possessory action. The learned District Judge has considered the above matters in his order dated 31.5.1996 and decided that this action was not a possessory action. Considering all the aforementioned matters, I hold that the learned District Judge has come to the correct conclusion in his order dated 31.5.1996.

Considering all the above matters, I reject the above contention of learned counsel for the 1st and the 2nd Defendants.

His Lordship of the Court of Appeal while dismissing the appeal of the 1st and 2nd Defendants has made an order to the effect that the Plaintiff-Respondents should pay Rs.300,000/- to the 1st and the 2nd Defendants when the property in dispute is handed over to the Plaintiff-Respondents. I would reproduce below the order of the Court of Appeal. It is as follows.

> *However, I hold with the trial Judge's ruling that the Plaintiff need to pay a sum of rupees three hundred thousand which is the balance sum due on* ***the***

transaction, and Defendants would be entitled to the said sum on handing over the vacant possession.

I would like to note that the 1st and the 2nd Defendants have, in their answer, not sought such a relief. The 2nd Defendant in his evidence has admitted that he received Rs.550,000/- from the Plaintiff-Respondents when the property in dispute was sold to the Plaintiff-Respondents and that they (1st and 2nd Defendants) would leave the property in dispute once they receive the entire amount. Thus, the amount of Rs.300,000/- appears to be the balance amount that they expected. I have earlier held that the Plaintiff-Respondents have, upon the execution of the Deed of Transfer No.3128 attested by C. Seneviratne Notary Public marked P1, become the owners of the property in dispute. If the Plaintiff-Respondents are the owners of the property in dispute, the 1st and the 2nd Defendants cannot, in this action, be permitted and are not entitled to succeed in a condition that they would leave the property in dispute once Rs.300,000/- is paid OR that the Plaintiff-Respondents should pay Rs.300,000/- to the 1st and the 2nd Defendants when they hand over vacant possession of the property in dispute to the Plaintiff-Respondents. However, the1st and the 2nd Defendants may have a separate cause of action to recover the said amount in a separate case. It will have to be decided according to the law of the land. Upon the execution of the Deed of Transfer No.3128 attested by C. Seneviratne Notary Public marked P1, the sale is complete. I therefore hold that the above order of the Court of Appeal, that is to say that the Plaintiff-Respondents should pay Rs.300,000/- to the 1st and the 2nd Defendants when they hand over vacant possession of the property in dispute to the Plaintiff-Respondents cannot be permitted to stand. I therefore set aside the aforementioned order of the Court of Appeal relating to payment of Rs.300,000/- by the Plaintiff-Respondents to the 1st

and the 2nd Defendants. Subject to the above variation, I affirm the judgment of the Court of Appeal and dismiss this appeal. The Plaintiff-Respondents who are the owners of the property in dispute are entitled to eject the 1st and the 2nd Defendants from the property in dispute and for peaceful possession of the property in dispute. The learned District Judge is directed to enter decree in accordance with this judgment.

For all the aforementioned reasons, I answer the 1st, 2nd 3rd and 4th questions of law above in the negative. The 5th question of law does not arise for consideration.

Appeal dismissed.

Judge of the Supreme Court.

S. Thurairaja PC J

I agree.

Judge of the Supreme Court.

Gamini 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 from the Judgment of the Court of Appeal of the Democratic Socialist Republic of Sri Lanka in terms of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

High Court of Colombo;
Case No: HC 61/2003
Court of Appeal Case No:
CA 40/13
SC/ SPL /LA/58/15
SC. Appeal 110/15

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

Complainant

Vs.

Mohamed Iqbal Mohamed Sadath

Accused

And Then

Mohamed Iqbal Mohamed Sadath

Accused-Appellant

Vs.

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

Complainant-Respondent

And Now

Mohamed Iqbal Mohamed Sadath

Presently at,

Remand Prison,

Welikada

Accused-Appellant-Petitioner

Vs.

Hon. Attorney General

Attorney General's Department,

Colombo 12.

Complainant-Respondent-Respondent

Before: Buwaneka Aluwihare PC, J.
Vijith K. Malalgoda PC, J.
Murdu N.B.Fernando PC, J.

Counsel: Palitha Fernando, PC with R. Y. D. Jayasekera and Eranga Gunawardene for the Accused-Appellant-Appellant.

Yasantha Kodagoda, PC ASG for the Attorney General

Argued on: 12. 11. 2018 & 11. 03. 2019

Decided on: 14. 12.2020

Judgement

Aluwihare PC J.

1. The Accused-Appellant-Petitioner-Appellant (hereinafter sometimes referred to as the Accused) along with another, were indicted in the High Court for importation, trafficking and possession of 1384 grams of Heroin, in terms of Section 54A of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No 13 of 1984 (hereinafter referred to as the Ordinance).

2. At the conclusion of the trial, the Learned Judge of the High Court convicted the Accused-Appellant and acquitted the other who was indicted along with him.

3. Aggrieved by the aforesaid judgment the Accused appealed to the Court of Appeal and by its judgment dated 13th March 2015, the Court of Appeal having affirmed the conviction and the sentence imposed on the Accused, dismissed the Appeal.

4. When this matter was supported before this court, the court granted Special Leave to Appeal on the following questions of law.

   Did their Lordships of the Court of Appeal;

   i. *Misdirect themselves on the law pertaining to the burden of proof by holding that the Prosecution need not establish the mental element of conscious possession in a charge of possession, trafficking or importation of Heroin in terms of Section 54 of the Poisons, Opium and Dangerous Drugs Ordinance as amended by the Poisons, Opium and Dangerous Drugs (Amendment) Act No. 13 of 1984.*

   ii. *Err in law, in considering the provisions of Section 69 and 70 of the Penal Code and thereby casting a burden on the defense, without*

considering the case for the Prosecution for the purpose of concluding that the Prosecution had discharged its burden of establishing the ingredients of the offence beyond reasonable doubt.

iii. *Whether mere possession was sufficient to convict the Accused-Appellant on charges of trafficking in terms of the Poisons, Opium and Dangerous Drugs Ordinance.*

iv. *A person who brings narcotic substance into the country through the Airport- does it fall under trafficking.*

5. It is to be noted that the first two questions referred to above are questions raised in subparagraph (i) and (iv) of paragraph 8 of the petition of the Accused whilst the 3rd question was permitted to be raised by this Court when the application for Special Leave to Appeal was supported on 25th June 2015.

6. The 4th question of law referred to above, was raised on behalf of the State which was permitted by the Court.

7. Of the four questions referred to above, as far as the 4th question is concerned, I do not see a question of law embodied therein for the reason that, whether a person carrying drugs on his body passing through the Airport amounts to trafficking or not depends on the facts and circumstances of each case. A person who is addicted to drugs may carry any prohibited substance on his person for his own consumption. In the circumstances I will not embark on an exercise to answer the 4th question as there is no 'question of law' embodied therein. Furthermore, Section 54A of the Act defines the meaning of the word "traffic" and as such whether a person has 'trafficked' any of the drugs referred to in the said provision has to be decided by considering whether the act contemplated, falls

within the said definition and **not** on 'whether a man carrying drugs has passed through the airport'.

The Facts

8. The Accused boarded the Sri Lankan Airlines flight UL124 from Madras, which was bound for Sri Lanka and arrived at the Katunayake International Airport late in the evening, on 01st September 2001. Witness Upul Gonawela, Assistant Superintendent of Customs, had been on duty at the 'Green Channel' of the Customs exit point. He had randomly checked several passengers who were heading towards the exit through the 'Green Channel' and one of the passengers happened to be the Accused. According to witness Gonawela, the Accused had had four bags as his baggage; two large bags, a blue travelling bag and a briefcase. Witness had inspected those bags and had found two cello- taped parcels wrapped in brown paper in the travelling bag that the Accused carried. Upon inspection, witness had noticed that the parcels contained a brown coloured powder which was later established to be Heroin. The Government Analyst had identified 1.384 kilograms of pure Heroin in the two parcels, which had had a gross weight of 2.384 kilograms.

9. These facts and the detection were not disputed by the Accused at the trial or before the Court of Appeal.

Matters That are Not in Dispute

10. The Accused admitted that he went to India on 30th August 2001, met a doctor in relation to his father's illness on 31st August and enplaned on that same day, departing from Chennai on the flight UL124.

11. He has also admitted that baggage was checked by the Customs officers and two brown coloured parcels were removed from the side pockets of the travelling bag. Thereafter his statement had been recorded and on the following day he

had been handed over to the officials of the Prevention of Narcotics Bureau of the Police.

12. Thus, the Accused had not disputed the detection of drugs and as far as the detection is concerned, the evidence placed by the Prosecution, to a large extent, is consistent with the version of the Accused.

The Defense Version

13. The Accused elected to testify under oath before the High Court. His version, albeit briefly, is as follows; The Accused had said that he went to India to consult a medical doctor to obtain an opinion on behalf of his father. He had departed on 30th August and on the following day, that is, the 31st of August, he had left India bound for Sri Lanka in the flight referred to. At the Chennai Air Port he had met a couple, whom he had later come to know as Mohammed Faumi and Chandrani, near the check-in counter of the airline. The couple had approached him and had offered to pay 2000 Indian Rupees if he agreed to carry part of their baggage, to which the Accused had consented. He said, in his evidence, that he was carrying only a briefcase in which he had packed his clothes for the short trip. Accordingly, two strapped bundles, wrapped in material that is used to pack fertilizer and another travelling bag that was given by the couple, had been checked-in as unaccompanied luggage under the Accused's ticket. The Accused says he agreed to do so as Faumi claimed that they had exceeded the weight permitted by the airline. As to the colour of the travelling bag, there appears to be a discrepancy; the Accused in his evidence at page 639 of the brief had said that the bag was black in colour, but at page 649 he had referred to it as a 'blue bag'. This discrepancy, however, is not material to decide the issues in this case.

14. Upon arrival at Katunayake, he had collected the two bundles referred to and placed them on a baggage trolley. When he was about to retrieve the travelling bag from the baggage carousel, a gentleman sporting a tie had approached him

and had directed him to have his baggage checked before leaving. The Accused identified this Officer as Sivakumar, who testified on behalf of the Prosecution. It was thereafter that his baggage was checked by witness Gonawela and the detection was made. The Accused had taken up the position that he had had no knowledge that the travelling bag he brought to Sri Lanka on behalf of Faumi, contained narcotics.

15. If I may reiterate, the position taken up by the Accused is that he had no knowledge that he was taking a bag containing Heroin. Simply his position was that he is entitled to an acquittal, as the 'knowledge' of possessing heroin, which he claimed he lacked, is an element of the offence for which he was indicted.

The Questions of Law

16. In relation to the first question of law on which Special Leave to appeal was granted, it was the contention of the learned President's Counsel that the Court of Appeal misdirected itself on the law pertaining to the burden of proof, by holding that the Prosecution need not establish the mental element of 'conscious possession' in a charge of possession, trafficking or importation of Heroin in terms of Section 54A of the Ordinance. It was further argued on behalf of the Accused-Appellant that the Court of Appeal erred in law and proceeded on the misconception that the offence referred to is a 'strict liability offence'.

17. The thrust of the argument on behalf of the Accused-Appellant was that the Court of Appeal, having accepted the version of the Accused-Appellant that the bag containing the parcels of Heroin was given to him by another person, proceeded to impose liability on the basis that the Accused-Appellant had not acted with due care in accepting the bag given the attendant circumstances and thereby their Lordships of the Court of Appeal failed to appreciate that the burden of proof is on the Prosecution to establish beyond reasonable doubt that the Accused-Appellant had the requisite knowledge as far the offence is

concerned. The Learned Additional Solicitor General drew the attention of court to section 394 of the Penal Code, the offence of retention of stolen property. The learned ASG argued that the said provision criminalises retention [possession] of stolen property. However, the provision has explicitly laid down the requisite *mens rea* [knowledge] but not so under Section 54A of the Ordinance. Based on this distinction, it was argued on behalf of the State that the onus is on the Accused to seek refuge under Section 72 of the Penal code once the possession is established by the Prosecution.

Requirement of 'Conscious Possession' in a Charge under Section 54A of the Poisons, Opium and Dangerous Drugs Ordinance

18. At the outset, it must be said that the relevant provision of the Ordinance that establishes the offences referred to, is silent as to the requisite '*mens rea*'. In the case of **Van der Hultes v. Attorney General** 1989 1 SLR 204 [*supra*] where Van der Hultes was indicted on identical counts as in this case, the Court of Appeal observed; *"We are of the view that mens rea is an essential ingredient of the offences with which the appellant was charged. The ordinance nowhere rules out the necessity, recognized in the general law, that the prosecution must prove this element beyond a reasonable doubt."* [page 215]. Our courts have continuously held that the mental element is an essential ingredient of the offence under Section 54A of the Ordinance.

19. I wish to refer to the observation made by Lord Reid in the case of **Warner v. Metropolitan Police Commissioner** 1968 52 Crim. Appl. R 373. His Lordship stated that *"It is of utmost importance for the protection of the liberty of the subject that a court should always bear in mind that, unless a statute either clearly or by necessary implication rules out mens rea as a constituent part of a crime, the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind".* [page 383]

20. The vexed issue that needs consideration is, what is the *mens rea* contemplated in Section 54A of the Ordinance. In the case of **Warner v. Metropolitan Police Commissioner** [*supra*] where the Accused was charged for possessing amphetamine sulfate tablets, a prohibited substance under the Drugs (Prevention of Misuse) Act of 1964, the House of Lords considered the requisite mental element of the offence. The question that was certified as fit for the decision of the House of Lords was, '*whether a defendant is deemed to be in possession of a prohibited substance when, to his knowledge, he is physically in possession of the substance, but is unaware of the true nature'.* As it appears the question referred to is slightly different to the issue in the present case, where the Accused had taken up the position that he was unaware not only of the *true nature* but he was also unaware of the contents he had [physically] in possession as far as the baggage given to him by Faumi was concerned.

21. In relation to the mental element of 'knowledge', however, the pronouncement of **Warner** [*supra*], in my view, has a significant bearing on the case before us for the reason that Lord Wilberforce has considered the mental element from the context of the requisite *mens rea* that requires to be established in a case of this nature. His Lordship, in reference to the issue of mental element stated; ***"I take this as raising the general question as to the nature and extent of knowledge or awareness, which must be shown against an accused person found in actual control of a prohibited substance, in order that the section may apply",*** [page 452] the very question that this court is called upon to answer.

22. Lord Wilberforce, stating that what must be answered is whether in the circumstances the Accused should be held to have possession of the substance rather than mere control, referred to R.S. Wright [Pollock and Wright] "An Essay on Possession in Common Law" [1888 Part III Chapter 1 page 119] where the writer had said *"The 'modes or events' by which the custody commences and the legal incident in which it is held. By these I mean, relating them to typical situations, that they* [the jury] *must consider the manner and circumstances in*

which the substance or something which contains it, has been received, what knowledge or means of knowledge or guilty knowledge as to the presence of the substance, or as to the nature of what has been received, the accused had at the time of receipt or thereafter up to the moment when he is found with it; his legal relation to the substance or package (including his right of access to it) On such matters as these (not exhaustively stated) they [the jury] *must make the decision whether, in addition to physical control, he has, or ought to have imputed to him the intention to possess or knowledge that he does possess what is in fact a prohibited substance. If he has this intention or knowledge, it is not additionally necessary that he should know the nature of the substance."*

23. Lord Wilberforce went on to state that, on such matters as above, though not exhaustively stated, it must be decided whether in addition to physical control, he has or ought to have imputed to him, the intention to possess or knowledge that he does possess, what is in fact a prohibited substance.

24. The above reasoning in my view is a rational guideline that should be adopted in deciding as to whether the Accused had the knowledge (the requisite *mens rea*) that what he possessed is a prohibited substance, even though he may not have known the precise nature of the substance.

25. I shall now consider the argument placed before this court by the learned President's Counsel in relation to the 1st question of law, in the backdrop of the legal position postulated above.

26. The Court of Appeal had relied on the decision of **Jayaseelan Sathyanathan v. Attorney General** CA 188/96 [CA minutes 20- 08-1998]. Even in the said case, Justice Jayasuriya acknowledged the fact that "*knowledge and mens rea is relevant to liability*" and therefore the Accused person is entitled to be acquitted if he brings his case within the ambit of Sections 69 and 72 of the Penal Code. Justice Jayasuriya in a subsequent case, **Sarala Natarajan Setti v. Attorney**

General CA 209/96 [CA minutes 29-06-1999] succinctly dealt with the requisite mental element in a case under Section 54A of the Ordinance. [Both cases, **Jayaseelan** and **Natarajan Setti** relate to charges under Section 54A of the Ordinance.]

27. In reference to the mental element, Justice Jayasuriya states *"…..the prosecution could discharge the burden in regard to mens rea by relying on a presumption arising under special circumstances of the case established by it in which case there is no burden to establish knowledge, affirmatively, but by relying on a presumption, prosecution shifts the evidential burden of proof and the accused required to rely on the provisions of sections 69 and 72 of the Penal Code to negate the knowledge".* [page 3 of the judgement]

28. This observation, in my view is consonant with the view expressed by Lord Wilberforce in the case of **Warner** [*supra*] when his Lordship [Wilberforce] stated; *"By there, I mean, relating these to the circumstances in which the substance or something which contained it, had been received"* **[by the Accused]** (the emphasis is mine). As such, consideration must be given as to whether the Prosecution has discharged its burden in regard to establishing *mens rea* presumptively, arising under the circumstances peculiar to the instant case, and if that was so, whether the Accused had discharged the evidentiary burden to negate the same. It must be stated that the evidentiary burden on the Accused is to create a reasonable doubt as to the requisite knowledge. See **Sumanawathie Perera v. Attorney General** 1998 2 SLR 20.

29. The learned ASG also drew the attention of the court to the decision in the case of **Shanmugarajah v. The Republic** 1990 2 SLR 57 where the court held, *"..in a clear case it would be open to the prosecution to make out a prima facie case as to the mental element required by invoking the tentative presumption that a person is deemed to intend the natural consequences of his act".* The learned ASG argued that, in the present case the prosecution did establish a strong prima

facie case and if an accused in such situation did nothing, the prosecution may be held to have discharged its burden in regard to proof of the mental element necessary to establish liability. The learned ASG pointed out, that the learned trial judge having carefully evaluated the evidence given by the accused had rejected the accused's version giving reasons for doing so. Thus, the learned ASG argued that the only acceptable evidence that was available to the court was the version of the Prosecution.

30. In the instant case, the Accused had elected to give evidence under oath and stated that he carried his father's medical records, even on his return trip, but none of them were produced to substantiate his assertion which he could have done. His explanation was that his briefcase was taken into custody and when it was returned, the documents were not there. However, he had failed to confront any of the witnesses who testified on behalf of the Prosecution in this regard. Further, his assertion that he volunteered to check in luggage belonging to total strangers who turned up at the airport, under his ticket for a meagre payment is also highly improbable for several reasons. He did not know how genuine the strangers were and more importantly, he did not have any idea as to the contents that were to be checked in as luggage, under his ticket. It would not be unreasonable to presume that it was well within his knowledge that people do smuggle contraband into the country under various guises, given the social standing of the Accused. In the case of **Warner** [*supra*] Lord Reid observed; *" Further, it would be pedantic to hold that it must be shown that the accused knew precisely which drug he had in possession…..and in fact virtually everyone knows that there are prohibited drugs. So it would be quite sufficient to prove facts from which it could properly be inferred that the accused knew that he had a prohibited drug in his possession."*

31. Even if the Accused is given the full benefit of playing the role of a good Samaritan, in assisting the passengers who claimed they were overweight, there was no reason for the Accused to have the luggage collected upon arrival at

Katunayake airport for the simple reason that the 'weight issue' is of no relevance once the baggage arrives. The Accused had not given any explanation for his conduct in this regard. The Learned ASG drew the attention of this court to the testimony of the Accused where he had said that he helped Chandrani [who was with Faumi and came in the same flight] to place the bag she brought on the trolley. The learned ASG argued that this is not a probable conduct of a normal person. In the circumstances I hold that both the learned High Court Judge as well as the Court of Appeal was correct in holding that, inferentially the Prosecution had established that the Accused had the requisite knowledge, thus, I answer the 1st question of law on which Special Leave was granted in the negative.

32. The second question of law on which Special Leave was granted was, as to whether the Court of Appeal, in considering Sections 69 and 72 of the Penal Code, erred in casting a burden on the defence, without first considering as to whether the Prosecution had discharged its burden of establishing the ingredients of the offence beyond reasonable doubt.

33. As stated earlier, as the law stands now, the Prosecution can discharge its burden of establishing the requisite mental element presumptively, by adducing circumstances in which the [prohibited] substance or something which contained it had been recovered [from the Accused]. The learned trial judge having analysed the position taken up by the Accused at the trial (pages 15 to 24 of the judgement) had arrived at a clear finding of fact that the position taken up by the Accused cannot be accepted and has proceeded to reject the same. The learned trial judge had also come to a finding of fact that the Accused had brought into this country from Chennai the bag containing Heroin, which was in the control and possession of the Accused, knowing very well that the bag contained the substance;

"ඉහත සියළු විශ්ලේෂිත සාක්ෂි අනුව 1වන චූදිත සන්තකයේ සහ පාලනයේ තිබී අත් අඩංගුවට ගන්නා ලද බෑගයේ හෙරොයින් අඩංගු බවට චූදිත හට මනා දැනුමක් සහිතව තම ස්වාමීත්වයේ එකී ද්‍රව්‍ය තබා ගැනීමේ චේතනාවෙන් එකී ගමන් බෑගය චෙන්නායි ගුවන් තොටුපලේ සිට මෙරටට ගෙන විත් ඇති බවට ඉදිරිපත් වී ඇති සාක්ෂි මත තහවුරු වේ. තවද, 1වන චූදිත සන්තකයේ තිබූ හෙරොයින් ප්‍රමාණය පුද්ගලික පාවිච්චියට ගනු ලබන ප්‍රමාණයට අධික ප්‍රමාණයක් බවට ඉදරිපත් වන කරුණද මා සැළකිල්ලට ගනිමි. ඒ අනුව පැමිණිල්ලේ සාක්ෂි සමස්ථයක් වශයෙන් සැළකිල්ලට ගැනීමේදී අදාල ගමන් බෑගයේ තිබූ අන්තර්ගතය සම්බන්ධව 1වන චූදිත නොදැන සිටි බවට ඉදිරිපත් කර ඇති විත්ති වාචකය මා ප්‍රතික්ෂේප කරමි." (at page 24-25).

34. Thus, it appears that the trial judge had not cast any burden on the Accused to prove anything but had arrived at his findings purely on an analysis of the evidence led before the court. At the arguments before this court, the learned President's Counsel did not advert to any misdirection on the part of the trial judge as far as application of Sections 69 and 72 of the Penal Code are concerned. It is noteworthy to mention that even in the written submissions filed on behalf of the Accused before the High Court, it had not been urged that the Accused was entitled to the benefit of the said provisions of the Penal Code.

35. The principle contention on behalf of the Accused before the Court of Appeal had been, as to whether the Prosecution had established the requisite knowledge on the part of the Accused in order to convict him for the offences with which he was indicted. The Court of Appeal, in reference to the case of **Jayaseelan v. Attorney General** [*supra*] had made a passing reference to Sections 69 and 72 of the Penal Code presumably because those sections were considered in **Jayaseelan's** case [*supra*]. The court proceeded to hold that both, Sections 69 and 72 postulate that the Accused should have acted in good faith and had given consideration to the manner in which the Accused had conducted himself under the circumstances and had held that the Accused *"cannot be heard to say that he acted with due care and attention in the attendant circumstances."*

36. I am of the view that Section 69 of the Penal Code has no application to the instant case as the section is applicable to an **'act'** done in the belief that he is ***'bound by law'*** to do it.

37. Section 72 of the Penal Code is found in verbatim in the Indian Penal Code and the corresponding provision is Section 79. The enactment of the Indian Penal Code is anterior to ours and as such it could be said that section 72 of our Penal Code is a reproduction of section 79 of the Indian Penal Code, given the fact that both Codes were drafted by the one individual. And as such its scope and application necessarily has to be the same, both here and in India.

38. Gour [Penal Law of India, 11th Edition page 571] states that the section embodies one of the general exceptions in the Code and the onus of showing that the section applies in his case is on the person who seeks to take advantage of it. [Also see **Nirmakumar Bhowmik v. Emperor** AIR 1938 Cal. page 553]. Gour goes on to say that Section 79 requires that the party pleading this exception should have acted in good faith and the definition of good faith involves **due care** and **attention**, both of which were lacking, on the part of the Accused in this case.

39. In fairness to their Lordships of the Court of Appeal, as referred to earlier, no burden has been placed on the Accused by the Court, but the Lordships have stated the legal position relating to the application of Section 72. The Court of Appeal has not erred in that regard. As such I answer the 2nd question on which Special Leave was granted also in the negative.

40. The final question of law that this court is called upon to answer is, as to whether 'possession' was sufficient to convict the Accused-appellant on charges of trafficking in terms of the Poisons, Opium and Dangerous Drugs Ordinance.

41. As far as the mental element is concerned, I am of the view that the offence of [drug] trafficking is similar to possession, since it requires to be established that

the perpetrator **knowingly** possessed or had control over a dangerous drug. Thus, one cannot engage in drug trafficking while being unaware that he or she is in possession of a drug, or if he or she reasonably but mistakenly believes that the substance is legal. The offence of drug trafficking, however, also requires that the Prosecution establish that the perpetrator was involved in the selling, procuring, storing, administering, transporting, delivering or distributing of such drugs, or had offered to do anything referred to above [Definition of the term "traffic" in section 54 A of the Ordinance]. It is this additional requirement [of an act] that transforms the status of the offence [of possession] to trafficking.

42. Since possession and trafficking can look the same at first glance, Prosecution for drug trafficking typically requires producing additional circumstantial evidence to indicate that the Accused was in possession of drugs not for personal use but for commercial purposes. The quantity of the drug detected would be a good indicator to decide whether the perpetrator is a user [an addict] or is trading in drugs. This would be a question of fact. It is in this context, it was stated at the commencement of this judgement, that the 4th question of law raised by the State, on which special leave was granted does not contain a question of law, thus this court will not endeavour to answer that question.

43. For the reasons set out above, I answer the 3rd question of law affirmatively. Even though I have answered the 3rd question of law referred to above in the affirmative, I am of the view that the Accused, cannot stand to benefit from it as for the reasons referred to above inferentially the Prosecution had established that he had the knowledge, that what he carried from Chennai to Sri Lanka was a prohibited substance.

44. For the reasons set out above the 1st and 2nd questions of law on which special leave was granted are answered in the negative while the 3rd question is answered in the affirmative.

Accordingly, the conviction and the sentence imposed on the Accused-Appellant is affirmed, and the appeal is dismissed.

Appeal Dismissed

Judge of the Supreme Court

Vijith K. Malalgoda 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 from the judgement of the Court of Appeal, dated 08 June 2018, in CA (Tax) Appeal No 10/2013, under and in terms of Article 128 (2) of the Constitution read with section 11A (9) of the Tax Appeals Commission Act, No. 23 of 2011 (as amended)

Commissioner General of Inland Revenue,
Department of Inland Revenue,
Sir Chittampalam A. Gardiner Mawatha,
Colombo 02.

Appellant

SC. Appeal No. 114/2019

SC (SPL) LA 217/2018

C.A (Tax) Appeal No. 10/2013

Tax Appeals Commission

Appeal No. TAC/OLD/VAT/017

vs,

Janashakthi Insurance Company Limited,
No. 47, Muttiah Road,
Colombo 02.

Respondent

And between

Janashakthi Insurance PLC
(Previously Known as
Janashakthi Insurance Company Limited
and thereafter as
Janashakthi Insurance Company PLC),
No. 675, Dr. Danister de. Silva Mawatha, Colombo 09.
(Previously of No. 47, Muttiah Road, Colombo 02)
And also of,
No. 55/72, Vauxhall Lane, Colombo 02.

Respondent -Appellant

Vs.

Commissioner General of Inland Revenue,
Department of Inland Revenue,
Sir Chittampalam A. Gardiner Mawatha,
Colombo 02.

Appellant-Respondent

Before: **Justice Vijith K. Malalgoda, PC**
Justice Murdu N. B. Fernando, PC
Justice E. A. G. R. Amarasekara

Counsel: **Dr. Shivaji Felix for the Respondent-Appellant instructed by Heshan Mamuhewa**
Ms. Chaya Sri Nammuni, SSC for the Appellant-Respondent

Argued on 31.10.2019

Decided on 26.06.2020

Vijith K. Malalgoda PC J

The Court of Appeal by its Judgement dated 08.06.2018 had allowed a case stated filed before the Court of Appeal by the Commissioner General of Inland Revenue and the Respondent before the Court of Appeal being dissatisfied by the said Judgment had preferred a Special Leave to Appeal application

before the Supreme Court. This Court by its order dated 15.05.2019 had granted Special Lave on the following questions of law,

a) Did the Court of Appeal err in law by failing to answer the case stated?

b) Did the Court of Appeal err in law by applying the provisions of the Electronic Transactions Act No. 19 of 2006?

c) Did the Court of Appeal err in law by not deciding the case and sending it to the Tax Appeals Commission with its opinion?

d) If one or more questions of law are answered in affirmative, should this appeal be sent back to the Court of Appeal to answer the questions referred to in the said case stated?

As revealed before this court, the determination of the Tax Appeals Commission (hereinafter referred to as TAC) dated 26. 02.2013 which was challenged before the Court of Appeal by way of a case stated, arose from an appeal against two assessments for Value Added Tax (hereinafter referred to as VAT) for the period ended on 31.03.2004 and 28.02.2005 which was confirmed by the Commissioner General of Inland Revenue by determination dated 16.06.2008 under and in terms Section 34 (12) of the Value Added Tax Act No. 14 of 2002 (as amended) (hereinafter referred to as VAT Act).

In the said appeal before the TAC, the Respondent (the Appellant before this Court) had raised two preliminary objections, namely;

a) that the relevant assessment is not valid as it has not been signed and/or do not bear the name and the designation of the person making the assessment.

b) that the said appeal to the TAC is time barred

The TAC by its determination dated 26.02.2013 upheld the first of the above two preliminary objections and overruled the second.

Being dissatisfied with the said determination of the TAC dated 26.02.2013, the Commissioner General of Inland Revenue (the Respondent before this court) had taken steps to initiate the appeal proceedings before the Court of Appeal.

Accordingly, the TAC has forwarded a case stated before the Court of Appeal and the said case stated contained the following questions of law, for the consideration of the Court of Appeal.

1. Whether Tax Appeals Commission has the jurisdiction to annual an Assessment due to service of unsigned notice of the assessment, even all other mandatory requirements have been fulfilled in order to make the assessment.
2. Whether duly served notice of Assessment with omission of signature affect the validity of assessment.
3. Whether duly served notice of Assessments, which was printed and issued by the computer, without signature of issuing officer, is an error covered by the section 61 of the VAT Act.

4. Whether Assessee can challenge the validity of assessment at the hearing of Appeals Commission
5. Whether Assessee can raise an issue as a preliminary objection at the hearing of Appeal at the Appeals Commission, which has not been raised at the time of appeal.
6. Whether issuing a notice of assessment by an Assessor, which is generated through computer under the provision of section 28 of the VAT Act, is exercising of discretionary power of ministerial act.
7. Whether the name of the Commissioner General, Deputy Commissioner or Assessor duly printed or signed on the assessment notice under section 60 of the VAT Act is a mandatory requirement.

As observed by this court, the procedure in forwarding a case stated before the Court of Appeal by the TAC and the subsequent steps that is being taken by the Court of Appeal is identified under the provisions of the Tax Appeals Commission Act No 23 of 2011 (hereinafter referred to as TAC Act) and the decisions of the Appellate Courts too had interpreted some of these provisions.

Section 11A (1) and (2) of the TAC Act provides the acceptance of the case stated by the TAC and transmitting to the Court of Appeal as follows;

11A (1) Either the person who preferred an appeal to the commission under paragraph (a) of the subsection (1) of section 7 of this Act or the Commissioner General may make an

application requiring the Commission to state a case on a question of law for the opinion of the Court of Appeal. Such application shall not be entertained unless it is made in writing and delivered to the secretary to the Commission, together with a fee of one thousand and five hundred rupees, within one month from the date on which the decision of the commission was notified in writing to the Commissioner General or the Appellant, as the case may be.

(2) The case stated by the commission shall set out the facts, the decision of the commission, and the amount of the tax in dispute where such amount exceeds five thousand rupees, and the party requiring the commission to state such case shall transmit such case, when stated and signed to the Court of Appeal, within fourteen days after receiving the same."

When the case stated is transmitted to the Court of Appeal, it contains the questions of law that is to be considered by the Court of Appeal. As decided in a series of Appellate decisions, it is the duty of the TAC in terms of section 11 A (2) of the TAC Act, to state a case on a question of law for the opinion of the Court of Appeal. It is the TAC that must state a case on a question of law for the opinion of the Court of Appeal. This is clear upon a consideration of section 11 A (2) of the TAC Act which states that, "the case stated by the Commission."

Even though it is not directly connected to the questions of law that are to be answered by this court, when considering whether the Court of Appeal has correctly acted within its powers, vested by the statute, it is necessary for me to consider, both the TAC and the Court of Appeal had correctly used its powers vested on them by the TAC Act.

The party preferring an appeal may in the application propose certain questions of law for consideration by the TAC to be referred to Court of Appeal as part of the case stated, but the TAC cannot blindly adopt the proposed questions of law without giving its mind to them.

This was considered by *Basnayake C.J. in* ***R.M. Fernando Vs. Commissioner of Income Tax (Reports of Ceylon Tax Case's Vol l page 571*** as follows;

> "The responsibility for stating a case is vested by the statute in the Board of Review and although the statue provides for the appointment of a clerk and legal adviser to the Board it cannot delegate its function to either of them. Though in the performance of its statutory duty it may make use of its ministerial officers, the ultimate responsibility of the due and proper performance of its duty rests with the Board and the Board alone. If it is the practice to leave the preparation of the case entirely to one of his ministerial officers and for the Board merely sign the case as stated by such officer that practice is not warranted by law and must cease forthwith."

However as observed by me, the TAC had failed to give their mind to the questions of law submitted by the Appellant in the instant case, and merely submitted them for the consideration of the Court of Appeal. In this regard I would like to refer to the paragraph 10 of the case stated, signed by the chairman and two other members of the TAC, which reads as follows;

> "**10.** The questions of law raised by the Commissioner General of Inland Revenue (Appellant) for the opinion of the Court of Appeal are as follows……"

When a case stated is received by the Court of Appeal for its opinion, the Court of Appeal had been vested the following powers by the TAC Act when submitting its opinion,

> **11 A (5)** Any two or more Judges of the Court of Appeal may cause a stated case to be sent back to the commission for amendment, and the Commission shall amend the case accordingly.
>
> **(6)** Any two or more Judges of the Court of Appeal may hear and determine any question of law arising on the stated case and may in accordance with the decision of court upon such question, confirm, reduce, increase or annul the assessment determined by the commission, or may remit the case to the commission with the opinion of the Court, thereon. Where a case is so remitted by the Court, the Commission shall revise the assessment in accordance with the opinion of the court.

When considering the above positions of the TAC Act it is clear that the legislature had expected the Court of Appeal to consider the case stated once it is remitted to the Court of Appeal, and prior to it being determined by the Court. Opportunity had been given for two or more Judges to consider the case stated and sent it back to the TAC for amendments of the case stated and the TAC is bound to effect the amendments that are recommended by the Court of Appeal.

The next stage of a case stated before the Court of Appeal is the determination of the questions of law that are being identified in the case stated. In this regard my attention has already being drawn to two important aspects, namely;

the requirement of the TAC to give its mind for the questions of law that are being submitted by the Appellant, without repeating the same in the case stated and opportunity granted by section 11 A (5) of the TAC Act for the Court of Appeal to consider the questions of law that are being raised in the case stated and if necessary to refer them back to TAC for necessary amendments.

As observed by me both the above steps introduced to the TAC Act gives the opportunity to the TAC and the Court of Appeal to carefully consider the questions of law that are to be contained in the case stated before it being taken up for hearing before the Court of Appeal.

In addition to the statutory provisions found in the TAC Act, our Appellate Courts too have considered the process before the Court of Appeal in a case stated and opined that the Court of Appeal's power in considering the questions of law is not restricted to the questions identified in the case stated, but

the Court is permitted to consider new questions of law agreed upon by the court, if the answers to new questions of law may result in the confirmation, reduction, increasing or annulling the assessment determined by the Commission.

In this regard I am mindful of the dicta of *Abrahams C.J.,* in ***Commissioner of Income Tax Vs. Sarverimuttu Ratty (Report of Ceylon Tax Case, Vol 1 page 103 at 109*** to the effect,

> "Incidentally there was no reference to us on this point by the Board of Review, since that point was not put to the Board when they were called upon to adjudicate in appeal, but we are not, of cause precluded from considering any point upon which the actual decision of the Board might be upheld, no matter what might have been their reasons for arriving at that decision"

As observed by me one of the main grievances of the Appellant before this court is the non-consideration of the majority of the questions of law raised in the case stated by the Court of Appeal. The first question of law, that is to be answered by us is based on this.

The Court of Appeal when finding answers to the questions before them, had considered the provisions in sections 60 and 61 of the TAC Act which is relevant in finding answers before them. Since the questions of law that was before the Court of Appeal were mainly on the validity of the assessment notices served on the Respondent before the Court of Appeal, (Appellant before us) the Court of

Appeal had considered the legality of section 60 of the VAT Act and also considered whether the provisions in section 60 are covered by the provisions of section 61 of the VAT Act.

The validity of the arguments that was considered in the said Judgement was not a matter to be considered by us in appeal but what is to be considered by us is, whether the Court of Appeal had answered the questions before them adequately when considering the case stated before them.

As already observed by me, there are specific provisions in the TAC Act which governs the process before the TAC as well as a case stated before the Court of Appeal. In the said process, much importance has been given for identification of the questions of law that is to be considered in the case stated by making provisions for the TAC to reconsider the question that are submitted by the Appellant and two Judges to consider them once again and referred it back to TAC to reconsider them.

In these circumstances, it is clear that once a case stated is fixed for hearing it only contain the questions that are to be considered by court and/or nothing else.

However, this does not restrict the Court of Appeal considering an additional question of law if the court is of the view that the said question or questions may result in the confirmation, reduction, increasing or annulling the assessment determined by the Commission. Similarly the Court of Appeal is free to decline to answer any of the question or questions, that is included in the case stated, if the court is of the view that it may not result in the confirmation, reduction, increasing or annulling the

assessment determined by the commission, but in any other instance, the Court of Appeal is required to answer all the questions before them.

As observed by this court, the Court of Appeal in its opinion had only answered 3 questions out of the 7 questions before them. Questions 1, 2, 4 and 5 had only answered as “it depends on the facts of each case” but the court had failed to consider those questions in the circumstances of the instant case, and answer them accordingly.

The Court of Appeal in its order had also considered the provisions of the Electronic Transactions Act No 19 of 2006, without any question of law being framed by the TAC or by the Court of Appeal itself, with regard to the relevancy of the said Act when answering the case stated. As already observed by me, there is no restriction on the Court of Appeal in considering an additional question of law outside the case stated, if it is observed by Court, that answering such question may result in confirmation, reduction, increasing or annulling the assessment detrained by the commission.

However as observed by me, there is no such question that has been framed by court, but the Court had proceeded to discuss the relevancy of the provisions of the Electronic Transactions Act No 19 of 2006, since the said Act had facilitated and promoted the use of more electronic records and documents. (page 23 of the C.A. Judgment)

However, when answering question 6 which refers to the assessment which is generated through computer, no reference had been made to the provisions of the Electronic Transactions Act No 19 of

2006 by the Court of Appeal, even though several provisions of the said Act had been discussed at length in the said Judgement.

In these circumstances, consideration of the said material by this court will not serve any purpose for the reason that the said discussion is outside the case stated.

When considering the matters that had already being discussed in this Judgment, I answer the 1st, 2nd and the 4th questions of law before this court in affirmative. In the said circumstances answering the 3rd question will not arise. The Judgement of the Court of Appeal dated 08.06.2018 is set aside. The Court of Appeal is hereby directed to answer all the questions that has been raised in the case stated, if answering the said questions may result in conformation reduction increasing or annulling the assessment determined by the Commission

Appeal allowed.

Judge of the Supreme Court

Justice Murdu 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 in terms of Article 127 read with Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Democratic Socialist Republic of Sri Lanka

Complainant

Vs.

SC Appeal No.115/2014

SC (SPL) LA Application No. 36/2014

CA Appeal No. CA 02/2008

High Court Embilipitiya Case No.199/2006

1. Hiniduma Dahanayakage Siripala *alias* Kiri Mahaththaya.
2. Henapita Gamage Shantha.
3. Kandabige Priyantha *alias* Appuhami.
4. Karivila Kandhage Upul Priyashantha.

Accused

And Now

1. Hiniduma Dahanayakage Siripala *alias* Kiri Mahaththaya.
2. Henapita Gamage Shantha.

Accused-Appellants

Vs.

The Hon. Attorney General

Attorney General's Department,

Colombo12.

Respondent

And Now Between

1. Hiniduma Dahanayakage Siripala *alias* Kiri Mahaththaya.

2. Henapita Gamage Shantha.

Both presently at

Welikada Prison,
Baseline Road,
Borella.

Accused- Appellants-
Petitioners- Appellants

Vs.

The Hon. Attorney General,

Attorney General's Department,

Colombo 12.

Complainant-Respondent-
Respondent

Before: Buwaneka Aluwihare, PC. J.

Priyantha Jayawardena, PC. J.

Murdu N. B. Fernando, PC. J.

Counsel: Indica Mallawarachchi with K. Kugaraja for the 1st and 2nd Accused-Appellants-Appellants.

Priyantha Nawana, PC, ASG with Nayomi Wickremasekara, SSC for the Complainant-Respondent-Respondent.

Argued on: 14.01.2019

Decided on: 22.01.2020

JUDGEMENT

Aluwihare PC. J.,

Introduction

1. This case concerns a challenge to the sustenance of the conviction of the Accused-Appellants due to non-compliance with Section 196 *(Arraignment of Accused)* of the Code of Criminal Procedure Act No. 15 of 1979 as amended (hereinafter referred to as "CCPA"), on the basis that the procedure stipulated under the said provision of the CCPA is a fundamental requirement.

Factual Background

2. The 1st and 2nd Accused-Appellants-Appellants, (hereinafter referred to as the "Appellants") in these proceedings impugned the judgment of the Court of Appeal dated 19.02.2014 and were granted Special Leave to Appeal by this court.

3. The Appellants (along with two others) had been indicted in the High Court of Embilipitiya on three counts, namely; murder, causing grievous hurt and theft. At the conclusion of the trial, the learned trial Judge had convicted the Appellants on the counts of murder and grievous hurt, and had sentenced them accordingly. Being aggrieved by the said judgment, the Appellants preferred an appeal to the Court of Appeal. A divisional bench of three Judges by majority decision dismissed the appeal.

The Issue

4. It is the contention of the Appellants, that the divisional bench of the Court of Appeal, by its majority judgement dated 19.02.2014 had failed to consider and/or appreciate the preliminary objection raised on behalf of the Appellants that, "*the Learned trial Judge had not complied with section 196 of the Criminal Procedure Code (hereinafter also referred to as the CCPA) and as such the conviction could not be sustained"* (Paragraph 4 of the Petition).

5. The Appellants contend that when an Accused appears/is brought before the High Court on an indictment, it is imperative that the learned High Court Judge, before commencing the trial, read and explain the indictment to the Accused and also ask whether he or she is guilty or not guilty of the offence that he or she is indicted for. It was further contended that, since adherence to the procedure laid down in Section 196 of the CCPA is a fundamental and a mandatory requirement, the failure to comply with that requirement vitiates the conviction.

6. Thus, the Appellants state that the Learned trial Judge had misdirected himself in law, causing a grave miscarriage of justice. They state that their Lordships who delivered the majority judgment of the divisional bench of the Court of Appeal erred in law in dismissing the above preliminary objection. Hence, the Appellants contend that the judgment of the learned High Court Judge and the majority judgment of the Court of Appeal should be set aside, and the dissenting judgment- setting aside the convictions of the Appellants and ordering a retrial- should be upheld.

7. Special Leave to Appeal was granted by this Court on the questions of law set out in paragraph 12 (i) and (ii) of the Petition of the Appellants, as well as question number (iii) as suggested by the learned Additional Solicitor General, which was permitted by this Court. The questions are reproduced verbatim;

(I) Is it imperative for the learned High Court Judge, before the commencement of the trial, to read and explain the indictment to the petitioners and also ask whether they are guilty or not of the charge?

(II) Is that a fundamental requirement in terms of Section 196 of the CCPA and does the non-compliance of the said provision vitiate the conviction?

(III) (a) In the circumstances of this case does the non appearance of the words "indictment read and explained" in the record and the non recording of the plea of guilty or not guilty amount to non-compliance of section 196 of the Criminal Procedure Code.

(b) Would any such omission amount to an illegality or is it a mere irregularity?

8. For the reasons set out in this judgement, the above questions of law are answered as follows in the same numerical order;

(I) It is imperative under Section 196 of the CCPA to have the indictment read and explained to the Accused and to ask the Accused whether he or she is guilty or not guilty of the offence charged.

(II) The non-compliance with Section 196 of the CCPA alone *by itself* will not vitiate the conviction. If the conviction is to be vitiated, the Appellant is required to satisfy the court that such non-compliance has "*caused prejudice to the substantial rights of the Accused*" or has "*occasioned a failure of justice*" as stipulated in the proviso to Article 138(1) of the Constitution.

(III) (a) Non-appearance of the words "*indictment read and explained*" in the record and the non-recording of the plea of guilty or not guilty may amount to a non-compliance of section 196 of the Code of Criminal Procedure Act.

(b) In the context of this case, the omission referred to, is an irregularity.

9. For ease of reference, the **Section 196** of the Code Criminal Procedure Act and the **proviso to Article 138(1)** of the Constitution respectively, are reproduced below;

Section 196:-

"When the court is ready to commence the trial, the Accused shall appear or be brought before it and the indictment shall be read and explained to him, and he shall be asked whether he is guilty or not guilty of the offence charged."

Proviso to Article 138(1):-

"Provided that no judgement, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice." (Emphasis added)

The dissenting Judgement

10. In view of the contention on behalf of the Appellants that the minority judgement of the Court of Appeal should be upheld, I shall consider the conclusions reached in the dissenting judgment, in the Court of Appeal.

11. His Lordship, in the said dissenting judgment, has made a pertinent observation that the wording of Section 182 of the CCPA is almost identical to that of Section 196 of the Code. Section 182 reads as follows;

Section 182(1): -*"Where the Accused is brought or appears before the court the Magistrate shall, if there is sufficient ground for proceeding against the Accused, frame a charge against the Accused."*

Section 182(2): -*"The Magistrate shall read such charge to the Accused and ask him if he has any cause to show why he should not be convicted."*

In the dissenting opinion, three decisions of this court have been considered in holding that compliance with Section 182 of the Code is mandatory and failure to do so vitiates the conviction. In doing so, his Lordship has disagreed with the State's position that no prejudice had been caused to the Accused as a result of the indictment not being read to him. The minority opinion, however, does not *elaborate* the prejudice, if any, suffered by the Appellants.

12. The judgements referred to in the minority opinion are, **David Perera v. The Attorney General** (1997) 1 SLR 390, where his Lordship the Chief Justice, G.P.S. De Silva held: *"Compliance with Section 182 (1) and (2) of the Code of Criminal Procedure Act is imperative. When an amended plaint is filed, a fresh charge sheet should be framed and read out to the Accused. Failure to do so vitiates the conviction."*

The second judgement referred to by his Lordship is **Withanage Gunawardena v. The Attorney General** CA 22/2002 (CA Minutes of 12.11.2003) where her Ladyship Justice Tilakawardane referred the case back to the original court for retrial on the ground that the *"charge had not been read to the Accused."*

In the third case cited, **Abdul Sameem v. The Bribery Commissioner** (1991) 1 SLR 76 his Lordship Justice A. De Z. Gunawardena had held: *"that the failure to frame a charge as required under Section 182 (1) is a violation of a fundamental principle of criminal procedure and is not a defect curable under Section 436 of the Code of Criminal Procedure Act No.15 of 1979."*

13. I am not in any way, at variance with those conclusions reached in the three cases referred to above. However, with all due respect, I take the view that, although **Section 182** ('Particulars of the case to be stated to Accused') under Chapter XVII- 'the Trial of Cases Where a Magistrate's Court has the Power to Try Summarily', and **Section 196** ('Arraignment of an Accused') under Chapter XVIII- 'Trials by High Court' of the CCPA are almost identical, **they differ substantially in relation to their application. The resulting position is that the two provisions resonate**

equally contrasting impacts, and a common approach cannot be taken in evaluating the prejudice that may result due to non-adherence to those statutory provisions.

14. In terms of Section 182 read with Section 139(1) of the CCPA, the Magistrate, upon forming the opinion that there is sufficient ground for proceeding against the Accused, is required to frame a charge (Section 182(1)) and the same is also required to be read to the Accused (Section 182(2)). Reading out the charge to the Accused under Section 182(2) is of essence primarily because it is at that stage that the Magistrate informs the Accused of the allegation against him; it is **the solitary opportunity** which an Accused is afforded to have notice of the offence he is charged with. There is no other procedural provision in the CCPA through which the Accused gets to be informed of the nature of the offence with which he is charged, nor is there a statutory requirement to notify the Accused of the charge in writing. Hence, if the provisions in Sections 182(1) and (2) are not adhered to, then the Accused would be completely deprived of knowing the accusation against him. He would be in no better position than a man blindfolded.

15. At the same time, one also needs to be mindful of the fact that legal representation of an Accused in the Magistrate's Court is not mandatory. The compound effect of all these factors would be that, if there is no record of compliance with Section 182 of the CCPA, it is entirely reasonable to conclude that such failure/non-compliance would prejudice the ***substantial rights*** of the Accused and even cause a failure of justice. The simplest reason being that, it is fundamental for one to know the allegation against him or her beforehand, in order to defend oneself at the trial.

16. In contrast, it is Section 195 of the CCPA that triggers the procedure in the High Court, upon the court receiving an indictment. A duty is cast on the High Court judge to cause the Accused to appear before him, cause a copy of the indictment with its annexes to be served on the Accused, and inform the Accused of the trial

date. In addition, the Accused must be asked by the court and upon asking, if the Accused so requests, an Attorney-at-Law must be assigned to the Accused.

17. Thus, it is clear from the above provision that, in the High Court, the Accused is put on notice of the offence or the offences as the case may be, by the service of the indictment and the other relevant documents relating to the case. More importantly, he or she would not be required to answer any of the charges at the point of service of the indictment and the annexes. Furthermore, the Accused is also afforded adequate time to obtain legal advice if he or she so desires, between the service of the indictment and the date on which he or she is called upon to plead to the indictment.

18. [1]Apart from Section 195, consideration of the proviso to **Section 197 (of the CCPA)** also would be relevant, for the reason that the Accused in this matter were indicted on a count of murder as well. The proviso to the said section reads as follows;

> "*Provided that when the offence so pleaded to is one of murder, the Judge may refuse to receive the plea and cause the trial to proceed in like manner as if the accused had pleaded not guilty."* (Emphasis added)

19. With the amendment to the Code of Criminal Procedure Act in 1988 [Code of Criminal Procedure (Amendment) Act No. 11 of 1988] the *mandatory requirement* to have the offences referred to in the Second Schedule to the Judicature Act No. 2 of 1978 to be tried by a Jury before a judge was removed. Thereafter, it became the rule that all prosecutions on indictment instituted in the High Court should be tried by a judge of that court. **Trial by a jury,** before a judge in relation to an offence set out in the Second Schedule to the Judicature Act was made *optional*. Thus, even a charge of murder (a Second Schedule offence), which hitherto could only be tried before a jury, became triable before a judge sitting without a jury. The drafters of the CCPA had placed Section 205 under the heading

[1] Minor changes were made to paragraphs no. 18 and 19 of this judgement by order of Court dated 14.02.2020 to rectify a few errors both typographical and inadvertent.

"TRIAL BY JURY" for the reason that a charge of murder (before the amendment) was exclusively to be tried by a jury. But, with the changes that were brought about to the procedure of the original enactment, in 1988 and 2005, the proviso to section 197 of the CCPA, which was originally under Section 205 and hitherto applicable only to jury trials, now applies *both* to jury and non-jury trials.

20. The point I wish to make here is that, irrespective of how the Accused had pleaded in the case before us, the court would not have any other option, but to proceed to try the Accused *as if he had not pleaded guilty* for the count of murder, as mandated by the proviso referred to above.

The threshold to be satisfied to obtain relief from the Court of Appeal in Appeals;

21. With the promulgation of the 1978 Constitution, if relief is to be obtained in an appeal, a party must satisfy the threshold requirement laid down in the **proviso to Article 138(1)**, which is placed under the heading "The Court of Appeal". The proviso to the said Article of the Constitution lays down that;

> "*Provided that no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice*". (Emphasis is mine.)

22. The proviso aforesaid is couched in mandatory terms and the burden is on the party seeking relief to satisfy the court that the impugned ***error, defect or irregularity*** has either **prejudiced the substantial rights of the parties or has occasioned a failure of justice.** It must be observed that no such Constitutional provision is to be found either in the '1948 Soulbury Constitution' or the 'First Republican Constitution of 1972'.

23. The Constitutional provision embodied in Article 138(1) cannot be overlooked and must be given effect to. None of the decisions (made after 1978) relied upon

by the Appellants with regard to the issue that this court is now called upon to decide, appear to have considered the constitutional provision in the proviso to Article 138(1). It is a well-established canon of interpretation, that the Constitution overrides a statute as the grundnorm. All statutes must be construed in line with the highest law. Judges from time immemorial have in their limited capacity, essayed to fill the gaps whenever it occurred to them, in keeping with the contemporary times, in statutes which do not align with the Constitution. However, such interpretations are not words etched in stone.

24. As the respected American jurist, Justice Benjamin N. Cardozo said, *"The rules and principles of case law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice. Every new case is an experiment; and if the accepted rule which seems applicable yields a result which is felt to be unjust, the rule is reconsidered"* (**'The Nature of the Judicial Process', 1921**).

25. The learned counsel on behalf of the Accused-Appellants had heavily relied on a number of decisions handed down by this court as well as by the Court of Appeal, in support of the proposition that the trial should be declared a nullity in view of the non-compliance with Section 196 of the CCPA. However, I am of the view that these decisions need to be *revisited* in light of the Constitutional provision referred to above. As such I wish to deal with the decisions relied upon by the learned counsel for the Appellants.

26. The Court of Appeal, in the case of **Withanage Gunawardena v. The Attorney General** (*supra*) neither made reference to the proviso to the Article 138(1) of the Constitution, nor considered as to whether the non-compliance has occasioned a failure of justice.

27. In the case of **B.S.H Kodithuwakku v. The Republic** 2010 BLR 167(CA 144/2005), relief was granted to the Accused-Appellant due to lack of credible evidence against the Accused-Appellant, and not as a result of non-compliance with section

196 of the CCPA. The decision, therefore is not of direct relevance here. Their Lordships having commented that compliance with Section 196 of the CCPA is imperative, had gone on to hold that "*the error made by the trial Judge on 14.02.2005 had been rectified on 22.02.2005 and that there is sufficient compliance under Section 196 of the CPC*". In view of the said finding, the Court of Appeal had not proceeded to consider the impact the non-compliance would have had on the Accused, nor had the court made reference to Article 138 of the Constitution.

28. The learned counsel for the Accused-Appellants also cited the case decided by the Court of Appeal, **Rajakaruna and another v. The Attorney General** CA 206-207/ 2010. It must be said at the outset, that their Lordships did not consider the effect of the proviso to Article 138(1) of the Constitution while deciding this matter, and furthermore relied on the decision of **David Perera v. The Attorney General** (*supra*) which dealt with the non-compliance with Section 182 of the CCPA. As I have referred to earlier, the effect of non-compliance with Section 182 is not the same as the effect of non-compliance with Section 196 and therefore they have to be treated separately.

29. **Amaratunga Arachchige Nimal Sarathchandra v. The Attorney General** (2008) 2 SLR 35 (CA 169/2003) is of interest to the present discussion. In this case, their Lordships held that the non-compliance with Section 196 has occasioned a failure of justice. Initially, the Accused-Appellant was indicted along with another for having committed the murder of one Nimal. After the trial, the learned High Court Judge convicted the Accused-Appellant but acquitted the other Accused who was indicted along with him. In appeal, the Court of Appeal referred the case against the Accused-Appellant for retrial. When the second trial commenced, he was neither furnished with an amended indictment nor was the charge read over to him. It is to be observed that when the Accused-Appellant faced the second trial, due to the acquittal of the other Accused who was originally indicted along with him, the complexion of the case had changed. Therefore, he ought to have been informed of that fact, either by furnishing an amended indictment, or by reading

over the fresh charge. None of these steps had been taken in the said case. Accordingly, making reference to the proviso to Article 138(1) of the Constitution, the Court of Appeal had evaluated the chronology of that case and satisfied itself that the non-compliance with section 196 of the CCPA has occasioned a failure of justice. The non-compliance with section 196 of the CCPA in that case transcended a mere irregularity and struck at the very root of the Accused's ability to defend himself. In the case before us, however, the Accused-Appellants were tried on the very indictment that was served on them. As such, the case cited can be distinguished from the instant case.

30. It is observed that, although there is a string of authorities on the subject, as referred earlier, most of those judgements have not considered the threshold requirement to succeed in an appeal laid down in Article 138(1) of the Constitution. This requirement was considered by this Court in **Sunil Jayarathna v. The Attorney General**, SC 97/09 (SC Minutes of 29.07.2011) where it was observed that, "*when considering the Proviso to Article 138(1) of the Constitution, it is evident that the judgment of the Learned High Court Judge need not be reversed or interfered on the account of any defect, error or irregularity which has not prejudiced the substantial rights of the parties or occasioned a failure of justice".* An Accused would therefore only be entitled to relief if it is shown that the irregularity complained of, had *in fact* prejudiced the substantial rights of the parties or has occasioned a failure of justice. A *mere statement* to that effect would certainly not be sufficient, but it must be shown as to how the failure of justice resulted, as in the case of **Amaratunga** (*supra*).

31. Now I wish to consider the steps taken by the Court in the present case, at the point where the indictments were served on the Appellants, and steps taken thereafter in order to ascertain as to whether any failure of justice was caused to the Appellants due to non-compliance with Section 196 of the CCPA;

a) The journal entry dated 18.10.2002 reflects the receipt of the indictment in the High Court of Rathnapura and that the court ordered that summons be issued on the four Accused with a direction to appear before the court on 13.12.2002.

b) According to the proceedings of 13.12.2002, all four Accused had been present and were represented by their counsel Mr. Justin, Attorney-at-Law. It is also recorded that the indictment and the annexes were handed over to them and the trial was fixed for 05.03.2003-providing them with a gap of almost three months.

c) On 05.03.2003, the trial was postponed to 19.05.2003 and after two other postponements the trial was fixed on 29.09.2003. On the said date, an application was made on behalf of the Accused to have them tried without a jury.

d) On the 20.08.2003 and 03.05.2004, two motions were filed along with the list of defence witnesses on behalf of the Accused and upon entertaining both, the court had directed to have summons issued on the defence witnesses.

e) Consequent to the opening of the High Court of Embilipitiya, the journal entry of 26.06.2006 reflects that the Accused had been directed to appear before the High Court of Embilipitiya on 14.09.2004.

f) On 19.06.2007 the trial had commenced before the High Court of Embilipitiya, with the recording of the evidence of witness no. 2, which was almost five years after the indictment was served on the Accused, and right throughout the Accused had had legal representation. The record, however, does not bear the plea of the Accused.

32. Apparently, there is no record of the indictment being read to the Accused as required in terms of Section 196 of the CCPA. As referred to above, a period of almost five years had elapsed since the indictment was served, before the trial finally commenced and throughout the trial, the Accused had been represented by an Attorney-at-Law.

33. At this point I wish to consider the decision in the case of **R v. Williams (Roy)** (1977), 1 All ER 874, as the issue that came up for adjudication in the said case appears to be almost identical to the case before us, namely ***the omission of formal arraignment.*** The matters that were dealt in the said case were, *the intention of the accused to plead not guilty - no plea taken from Accused - trial proceeding on the basis of a plea of not guilty - omission of arraignment not vitiating trial if a plea of not guilty vicariously offered or tacitly conveyed or if arraignment impliedly waived.*

34. As what transpired in the case of **Williams** (*supra*) bears a resemblance to the case before us, for ease of understanding the rationale in the said case, it would be pertinent to outline briefly its facts to the extent required.

35. The Appellant (Roy Brian Williams) appeared before the Crown Court to stand trial on an indictment. He entered the dock and acknowledged his identity, but before the indictment was put to him and he was called upon to plead to it, counsel for the prosecution intervened to request for an adjournment as one of the key prosecution witnesses was too ill to attend court. As the counsel for the Appellant had no objection to the application made on behalf of the Crown, the trial was postponed. On the next date of trial, not only had the case come up before a different judge, there had been a different clerk, and to make matters worse, different counsel appeared representing both the Crown and the Appellant. The clerk did not ask the Appellant to plead, presumably under the impression that the plea had been taken on the previous trial date, but proceeded to read the indictment to the jury and informed them that Williams had pleaded not guilty to

the indictment. The Appellant had not demurred and the trial proceeded in the normal way as if Williams had pleaded not guilty. The outcome of the trial was that the jury returned a verdict of guilty and Williams was sentenced to a term of imprisonment.

36. The question of law that came up for consideration in **Williams** (*supra*) was, "…*whether the proceedings which resulted in the Appellant's conviction were not a mistrial and a nullity, in that he had never been called on to plead"* (at page 876).

37. The court considered the conduct of the Accused in the course of the trial, in order to ascertain as to whether a plea of not guilty was *"vicariously offered or tacitly conveyed"* by the Accused.

38. Lord Justice Shaw at page 877 in **Williams** (*supra*) made the following observation, which I am of the view is very valid in the context of the case before us, "*It does not seem to this court, at any rate, at the present day, that the same fundamental objection* (that the trial is a nullity) *exists where a plea of not guilty is vicariously offered or tacitly conveyed. It is difficult to conceive what possible prejudice to an Accused person could derive from such procedure.*"

39. Lord Justice Shaw went on to state that, "*Insistence on an express plea of not guilty by the defendant himself is no longer a necessary safeguard of justice where that is the intended plea and where the ensuing proceedings are precisely what they would have been if the Accused had himself made the plea in plain terms.*" While holding that there was an irregularity in the proceedings, Lord Justice Shaw went on to hold that, "*it was not a material irregularity and would afford no ground for setting aside the verdict of the jury*".

40. As I have referred to earlier, the Accused-Appellants were served with the indictment and annexes almost five years prior to the commencement of the trial

proper. In the course of the proceedings on two distinct occasions, lists of defence witnesses were filed and at one point the court was informed that the Accused wished to change their earlier election and now wish to be tried by the judge without a jury. Throughout the proceedings, they had the services of counsel of their choice and when the prosecution commenced leading evidence, neither the Accused-Appellants nor the counsel raised any issue. All these factors are a clear indication that the Accused-Appellants had acted as if they had tendered a plea of not guilty or that they were desirous of tendering such a plea. Furthermore, as referred to earlier, the statutory provision (Section 205 of the CCPA) would have required the court to proceed with the trial, even if the Accused-Appellants had pleaded guilty, in view of the charge of murder. The irregularity relating to the arraignment apart, the proceedings which began, on 19.06.2007 had all the elements of a duly-constituted trial.

41. The learned counsel for the 1st and 2nd Accused-Appellants strenuously argued the importance of trial Judges adhering to the procedure laid down under the law. I fully agree with this view. But as Alexander Pope once said, *"to err is human*". Judges erring in their human capacities is but an inevitable fact of the justice system. What we must be conscious of, is the need to rectify such mistakes and lapses in every such instance where they have caused prejudice to the rights of the parties or have subverted the course of justice. At the same time, we must caution against attaching too great a meaning to a mistake, lest we provide a person with a free ticket out of a conviction which the evidence fully warrant. In this present appeal, no justification was made in regard to any prejudice to the substantial rights of the Accused-Appellants or that the irregularity has occasioned a failure of justice, which are constitutional requirements if the Accused-Appellants are to be granted relief in this case.

42. While the omission of a formal arraignment was unfortunate and regrettable, having taken into account the facts and circumstances peculiar to the case before us, it cannot be said, in my view, that it had prejudiced the substantial rights of

the Accused-Appellants, nor can it be said that it had occasioned a failure of justice. In the circumstances, I have answered the questions of law in the manner detailed in paragraph 8 of this judgement and hold that the procedural irregularity referred to, does not have the effect of vitiating the trial.

43. Considering the above, I see no reason to set aside the majority judgement of the Court of Appeal.

44. For the foregoing reasons the Appeal is dismissed.

Appeal dismissed

JUDGE OF THE SUPREME COURT

JUSTICE PRIYANTHA JAYAWARDENA PC

I agree.

JUDGE OF THE SUPREME COURT

JUSTICE MURDU FERNANDO PC

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an application for Special Leave to Appeal in terms of Article 154(P) of the Constitution read with Section 9 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990.

K.H. Dayananda,
Revenue Inspector,
Dehiwala – Mt. Lavania Municipal Council,
Dehiwala

- **Complainant**

Vs.

Ceylon Electricity Board,
No. 75/1,
Aththidiya Road,
Ratmalana

- **Defaulter**

SC Appeal 118/2013

SC/(Spl)LA 64/2013

HCMCA 106/2010

MC (Mt. Lav.) 4190/S/09

AND

Ceylon Electricity Board,
No. 75/1,
Aththidiya Road,
Ratmalana

- **Defaulter/Appellant**

Vs.

K.H. Dayananda,
Revenue Inspector,
Dehiwala – Mt. Lavania Municipal Council,
Dehiwala

- **Complainant/Respondent**

AND NOW BETWEEN

Ceylon Electricity Board,
No. 75/1,
Aththidiya Road,
Ratmalana

- **Defaulter/Appellant/Appellant**

Vs.

K.H. Dayananda,
Revenue Inspector,
Dehiwala – Mt. Lavania Municipal Council,
Dehiwala

- **Complainant/Respondent/Respondent**

Before: Priyantha Jayawardena, PC, J
Murdu N.B. Fernando, PC, J
S Thurairaja, PC, J

Counsel: Uditha Egalahewa, PC with Ranga Dayananda for the Defaulter-Appellant-Appellant.
W. Dayaratne, PC with R. Jayawardena for the Complainant-Respondent-Respondent.

Argued on: 07th June, 2019

Decided on: 17th September, 2020

Priyantha Jayawardena, PC, J

Facts of the case

This is an appeal to have the judgment of the High Court of Western Province holden in Colombo [hereinafter referred to as the "High Court"] affirming the judgment of the Magistrate's Court ordering to pay the Trade Tax and Service Charge imposed on the appellant set aside.

The complainant-respondent-respondent [hereinafter referred to as the "complainant"] is the Revenue Inspector of the Dehiwala-Mt. Lavinia Municipal Council. The defaulter-appellant-appellant [hereinafter referred to as the "appellant"] is the Ceylon Electricity Board.

The complainant had instituted proceedings against the appellant in the Magistrate's Court of Mt. Lavinia in terms of section 136(1)(b) of the Code of Criminal Procedure, No.15 of 1979 (as amended), by filing a written report.

In the said report, the complainant had stated that the appellant had failed to pay Rupees Five Thousand Seven Hundred and Fifty (Rs. 5,750/-) as the annual Trade Tax and Rupees Two Thousand and Five Hundred (Rs. 2,500/-) as Service Charge for the year 2008 for using the premises for commercial purposes situated within the administrative limits of the Municipal Council in terms of section 247B of the Municipal Councils Ordinance No. 29 of 1947 as amended by the Municipal Councils (Amendment) Act No. 42 of 1979 [hereinafter referred to as "Municipal Councils Ordinance"].

Upon the receipt of summons, the appellant had appeared in the Magistrate's Court and raised the objection that section 247B of the Municipal Councils Ordinance was applicable only for premises carrying on a trade and that the appellant was only using the premises under reference as a Regional Engineer's Office. The appellant had stated that in the circumstances, it is not liable to pay a Trade Tax and prayed to be discharged from the aforesaid proceedings.

Responding to the said objections, the complainant had stated that the appellant was using the premises under reference to conduct "trading activities". The complainant had also stated that the appellant had paid the Trade Tax and Service Charge for the said premises until the year 2007 without any objection.

Having heard the parties, the learned Magistrate had overruled the said objections raised by the appellant and had delivered a judgment directing the appellant to pay a sum of Rupees Five Thousand Seven Hundred and Fifty (Rs. 5,750/-) as Trade Tax and Rupees Two Thousand Five Hundred (Rs. 2,500/-) as Service Charge and ordered the same to be recovered as a fine in terms of section 247B (4) of the Municipal Councils Ordinance.

The appellant had deposited the aforesaid total sum of Rupees Eight Thousand Two Hundred and Fifty (Rs.8,250/-) at the Magistrate's Court of Mt. Lavinia but had filed an appeal in the High Court to have the said judgment set aside, *inter alia,* on the following grounds:

a) the [judgment] of the learned Magistrate was contrary to law,
b) the learned Magistrate failed to analyse and interpret section 247B of the said Ordinance according to law,
c) the learned Magistrate failed to take cognizance of the fact that the Regional Engineer's Office is merely an office and not a place where any business activity or industry or any activity which yields any profit is carried out, and
d) the learned Magistrate erred in law by determining that the decision in *Ceylon Electricity Board v. A.D.A. Wijesuriya* SC minutes 5th November, 2011 was not binding on him.

Having heard the parties, the High Court had affirmed the aforesaid judgment of the learned Magistrate and dismissed the appeal. The said judgment of the High Court held *inter alia* that;

a. the said premises were liable to pay a Trade Tax and Service Charge as it came under Item No. 02, i.e. storing office equipment in the premises, of the Regulations issued by Gazette No. 1542 dated 19th March, 2008
b. the judgment in *Ceylon Electricity Board v A.D.A. Wijesuriya* SC Minutes 5th November, 2011 has no application to the instant appeal as it was a settlement entered according to the facts and circumstances of the said case, and
c. the appellant failed to establish that it was not liable to pay the Trade Tax and Service Charge on the premises in question.

Being aggrieved by the aforesaid judgment of the High Court, the appellants sought special leave to appeal from this court to have the said judgment set aside.

Having heard the submissions of the parties, this court granted special leave to appeal on the following questions of law:

(a) Did the Hon. Provincial High Court judge misdirect herself in interpreting the section 247B of the said Ordinance as applicable to the petitioner?

(b) Did the Hon. Provincial High Court judge err in law when she came to the finding that the petitioner was carrying on a trading activity at the Regional Engineer's Office, Ratmalana which was liable to pay Trade Tax in terms of section 247B of the said Ordinance read with the Government Gazette Notification bearing No. 1542?

On 20th September, 2013 this court, with the consent of the appellant, had directed the complainant to produce material to show that the premises under reference are being used for a commercial

purpose. Consequently, the complainant had filed receipts issued to consumers by the appellant for the payment of electricity bills and obtaining of electricity connections at the premises under reference.

The applicability of the judgment delivered in ***Ceylon Electricity Board v A.D.A. Wijesuriya*** **SC Minutes dated 5th November, 2011** in respect of a previous settlement entered by the parties in the Supreme Court relating to another matter will not be considered in this judgment as leave was not granted in respect of the applicability of the said judgment in the instant appeal.

Submissions of the appellant

The learned President's Counsel for the appellant submitted that in terms of section 247B of the English language text [hereinafter referred to as the "English text"] of the Municipal Councils Ordinance, a Municipal Council is conferred with the power to impose and levy a tax on "any trade" carried on within its administrative limits.

However, section 247B of the Sinhala language text [hereinafter referred to as the "Sinhala text"] of the Municipal Councils Ordinance states that the Municipal Council has the power to impose a tax on any *"කර්මාන්තය"* carried on within its administrative limits.

The learned President's Counsel submitted that the word *"කර්මාන්තය"* means an "industry" in the English language and not a "trade". Thus, it was submitted that there is an inconsistency between the Sinhala and English texts of the said section.

It was further submitted that in terms of Article 23(1) of the Constitution, the text in the Official language shall prevail over the text in the English language when there is an inconsistency. Thus, Sinhala being the official language in terms of Article 18 of the Constitution, at the time of enactment of section 247B of the said Ordinance, the Sinhala text of the Municipal Councils Ordinance should prevail.

It was further submitted that section 247B of the said Ordinance only confers power on a Municipal Council to impose and levy a tax on any *"කර්මාන්තය"*, meaning an industry in the English language, carried on within its local limits of administration and not on a trade.

In the circumstances, the learned President's Counsel submitted that a *"කර්මාන්තය"* (meaning an industry) was not carried on at the premises under reference as it was not used to manufacture

goods. Thus, it was submitted that the appellant is not liable to pay a Trade Tax under section 247B of the said Ordinance.

In support of the said submission, learned President's Counsel for the appellant cited the case of *Crest Gems Ltd v The Colombo Municipal Council* [2003] 1 SLR 370 which held:

> *"The activity of the petitioner is a trade or a "Veladama" in Sinhala and does not fall within the meaning of the word "Karmanthaya"; since the petitioner does not manufacture in the said place, no tax under section 247B could be levied."*

Moreover, the learned President's Counsel for the appellant submitted that certain items including Item No. 2 of the said Gazette are not industries (*"කර්මාන්තය"*) as stated in section 247B of the said Ordinance. Thus, it was contended that the Regulations published in the said Gazette is *ultra vires* the said section of the said Ordinance and must be struck down.

It was submitted that the High Court has erred in law in holding that the appellant was liable to pay Trade Tax in terms of section 247B of the said Ordinance and the Regulations published in the said Gazette in respect of Regional Engineer's Office on the basis that a trading activity is being conducted in the said premises.

Further, it was submitted that the notice issued by the complainant to the appellant to recover Trade Tax should be declared null and void as an "industry" in terms of the Sinhala text of section 247B of the Municipal Councils Ordinance is not being conducted at the Regional Engineer's office.

Submissions of the complainant

The learned President's Counsel appearing for the complainant submitted that even though the appellant claimed that the said premises are being used as an administrative office, it had in fact been used to generate income for the appellant. It was submitted that the said premises have been used as an office where consumers of electricity can pay their bills and obtain new electricity connections.

It was further submitted that, the Regulations published in the Gazette No. 1542 dated 19th March, 2008 had been published in terms section 247B of the Municipal Councils Ordinance. Hence, the said Gazette is not *ultra vires* section 247B of the Municipal Councils Ordinance as amended.

Furthermore, it was submitted that, in terms of the Regulations published under section 247B of the said Ordinance, the appellant's premises under reference are subject to tax under Item No.2 which refers to an office storing and/or selling office equipment, Item No.68 which refers to offices used for commercial purposes, and/or Item No.205 which refers to commercial entities which do not pay licensed taxes or taxes for maintaining a commercial business.

In the circumstances, it was submitted that the said premises of the appellant fall within the Sinhala text of section 247B of the Municipal Councils Ordinance and the Regulations published in the Gazette No. 1542 dated 19th March, 2008.

The learned President's Counsel for the complainant further submitted that there is no inconsistency between the word *"කර්මාන්තය"* in the Sinhala text and the word "trade" in the English text of section 247B of the said Ordinance. Thus, the premises of the appellant can be taxed under section 247B of the said Ordinance under the Regulations published in the Gazette No. 1542 dated 19th March, 2008.

Main issues to be considered in the instant appeal

The issues that need to be considered in this appeal are:

(a) whether the Sinhala text of 247B of the Municipal Councils Ordinance prevails over the English text,
(b) whether the Sinhala text is applicable to the appellant if the appellant is not using the premises under reference for a purpose within the meaning of the said section,
(c) whether there is an inconsistency between the Sinhala and English texts of section 247B of the Municipal Councils Ordinance,
(d) whether the Regulations published under section 247B of the said Ordinance are *ultra vires,* and;
(e) whether the appellant is liable to pay Trade Tax and Service Charges for the premises under reference under section 247B of the Municipal Councils Ordinance.

Is there an inconsistency between the Sinhala and English texts of section 247B of the Municipal Councils Ordinance?

In the Magistrate's Court, the appellant had taken up the position that it was not liable to pay taxes under section 247B of the Municipal Councils Ordinance as the premises under reference have only been used as an administrative office and not as a place of business.

Further, the appellant submitted that section 247B of the Sinhala text of the Municipal Councils Ordinance refers to a "කර්මාන්තය" which means an "industry" in the English language. Hence, it was contended that the appellant is not engaged in an "industry" in the premises under reference.

Moreover, section 247B (1) in the Sinhala text of the Municipal Councils Ordinance confers power on the Municipal Council to impose and levy a tax on a "කර්මාන්තය" while the English text stipulates to levy a tax on any "trade". Thus, it was contended by the appellant that there is an inconsistency between the Sinhala and English texts of section 247B of the said Ordinance.

In the circumstances, it is necessary to consider which text shall prevail over the other.

The Municipal Councils Ordinance No. 29 of 1947 was enacted in the English Language. Section 247 of the said Ordinance was amended on 25th June, 1979 by introducing sections 247A, 247B, 247C, 247D and 247E by the Municipal Councils Ordinance (Amendment) Act No. 42 of 1979. Thus, the provisions of the 1978 Constitution prior to being amended by the 13th Amendment apply to the section 247 as amended.

The Amendment to section 247 of the said Ordinance does not stipulate which text shall prevail over the other. However, at the time of the enactment of the aforementioned Amendment, the Official Language of Sri Lanka was Sinhala in terms of Article 18 of the Constitution. Further, Article 23(1) of the Constitution stated that the text in the Official Language should prevail in the event of any inconsistency between any two texts. In light of the above, I am of the view that the Sinhala text of the Municipal Councils Ordinance shall prevail over the English text.

Hence, the Sinhala text of the Municipal Councils Ordinance will be considered first in this judgment.

What does "කර්මාන්තය" in section 247B mean?

The Sinhala text of the said section 247B (1) of the said Ordinance states:

> "යම් මහ නගර සභාවක පාලන සීමා තුළ කර ගෙන යම් <u>කර්මාන්තයක්</u> වෙනුවෙන් බද්දක් නියම කොට අය කිරීම් ඒ මහ නගර සභාව විසින් කල හැකිය." [Emphasis added]

It was submitted by the appellant that the premises under reference were not used for the purposes of a "කර්මාන්තය" which means for the purposes of an "industry". Hence, the appellant is not liable to pay the taxes imposed by the complainant as the Sinhala text prevails over the English text of the section 247B of the said Act.

Thus, it is necessary to interpret the word "කර්මාන්තය" in section 247B of the said Ordinance.

Application of the principles of Literal Interpretation to interpret the word "කර්මාන්තය"

According to the principles of literal interpretation, if a word or phrase has not acquired a technical meaning, it needs to be used in its literal meaning. This rule is generally applied when a word or phrase has not been defined in the Statute itself.

Maxwell on The Interpretation of Statutes, 12th Edition, at page 81 states:

> *"The first and most elementary rule of construction is that it is to be assumed that the words and phrases of technical legislation are used in their technical meaning if they have acquired one, <u>and otherwise in their ordinary meaning</u>".*
>
> [Emphasis Added]

The word "කර්මාන්තය" is not defined in the Municipal Councils Ordinance. Thus, it is necessary to consider the ordinary meaning of the word "කර්මාන්තය" by applying the principles of literal interpretation.

The *"Buddhadasa Hewage Sinhala-English Dictionary",* at page 234, states that the word "කර්මාන්තය" means "business", "industry" and "trade" in the English language.

Further, in "*සිංහල විශ්වකෝෂය*", *6th Edition, compiled by the Department of Cultural Affairs and published by the Department of Government Printing*, at page 396, the word "කර්මාන්තය" is defined as follows:

"*කර්මාන්තය යන පදයට විවිධ නිර්වචන ඉදිරිපත් කොට ඇත. ඇතැම් විට එය නිෂ්පාදන කිරීම යන අර්ථයෙන් යෙදේ. තවත් විටෙක* ***<u>මිනිසාගේ සියලුම ආර්ථික කටයුතු කර්මාන්ත වශයෙන් හැඳින්වීමට උත්සාහගෙන ඇත</u>***.

.....

මිනිසාගේ ආර්ථික කටයුතු ඒවායේ ස්වභාවය අනුව වර්ග කළ හැකිය: ප්‍රාථමික කර්මාන්ත (primary industries), ද්විතීය කර්මාන්ත (Secondary industries) හා තෘතීයික කර්මාන්ත (tertiary industries) වශයෙනි.

.....

ප්‍රාථමික අංශයෙන් නිෂ්පාදනය කෙරෙන ද්‍රව්‍ය උපයෝගී කොටගෙන මිනිසාට අවශ්‍ය භාණ්ඩ සකස් කරන්නේ ද්විතීය අංශයයි. ..... ප්‍රාථමික කටයුතුවලටත් ද්විතීය කටයුතුවලටත් අවශ්‍ය පරිවාර සේවා සපයනු ලබන්නේ තෘතීයික අංශය මගිනි. ***<u>විදුලිය,</u>*** *<u>ගෑස්, ජලය හා සනීපාරක්ෂක සේවාවන්</u> ද ප්‍රවාහන, ගබඩා කිරීම හා පණිවිඩ හුවමාරුව ද තොග හා සිල්ලර වෙළඳාම ද බැංකු හා රක්ෂණ කටයුතු ද රාජ්‍ය පරිපාලන හා ආරක්ෂක කටයුතුද වෛද්‍ය, ඉංජිනේරු, නීතිඥ, සංගීත, නැටුම්, හෝටල්, සංචාරක යනාදී වෙනත් පෞද්ගලික සේවාවන්ට අදාළ කටයුතු ද <u>තෘතීයික අංශයෙහි ලා ගැනේ</u>. මෙම අංශයෙන් ඉටුවන අවශ්‍යතා ඉටුවන ආකාරය දැකිය නොහැකි බැවින් මේවා අදෘශ්‍ය හා අස්පෘශ්‍ය කටයුතු වශයෙන් සැලකේ.*" [Emphasis Added]

In terms of the aforesaid definition, all economic activities are included in the word "කර්මාන්තය". Further, it lists three types of "කර්මාන්ත": primary, secondary and tertiary. Accordingly, primary industries collect raw materials, secondary industries use the said raw materials to manufacture goods and tertiary industries provide services to assist and enable the primary and secondary industries to conduct their activities. In the instant appeal, the appellant provides 'Electricity' which is a service listed as one of the several examples of tertiary industries in the aforesaid definition.

When an Act or a Statute is interpreted by court, an interpretation shall not facilitate the flouting of the intention of the legislation. On the contrary, an Act or a Statute should be interpreted to give effect to the legislation. Further, an interpretation shall not be contrary to common sense and justice.

Maxwell *(supra)* at page 28 states:

> *"In dealing with matters relating to the general public, statutes are presumed to use words in their popular, rather than their narrowly legal or technical sense: "loquitur ut vulgus, that is, according to the common understanding and acceptation of the terms."*

Hence, the meaning of the Sinhala word "කර්මාන්තය" according to the common understanding of the word "කර්මාන්තය" is wide and inclusive of distribution services such as electricity.

Application of the principles of Purposive Interpretation to interpret the word "කර්මාන්තය"

When a word has several meanings, the most appropriate meaning should be used to interpret a word in a Statute by applying purposive interpretation in order to achieve the intention of the legislator. Thus, it is necessary to consider how the word "කර්මාන්තය" has been used in the Municipal Councils Ordinance to determine the intention of the legislator in using the said word.

According to the principles of purposive interpretation, the intention of the legislator in using a particular word can be determined by examining the same or similar words used in an Ordinance or Act as it would have the same or a similar meaning throughout the Ordinance or Act.

A similar view was expressed in Maxwell (*supra)* at page 282, where he states: "*From the general presumption that the same expression is presumed to be used in the same sense throughout an Act or a series of cognate Acts, there follows the further presumption that a change of wording denotes a change in meaning"* [Emphasis Added].

Further, it states at page 286:

> *"In a leading modern case on the subject, Lord Reid said: "There is undoubtedly a presumption that Parliament (or the draftsman) will use the same or similar language throughout an Act when meaning the same thing .... [But] this presumption is only a presumption and one must always remember that the object in construing any statutory provision is to discover the intention of Parliament and that there is an even stronger presumption that Parliament does not intend an unreasonable or irrational result."* [Emphasis Added]

As stated earlier, the Municipal Councils Ordinance has not defined the word "කර්මාන්තය" in the said Ordinance. However, the Sinhala text of section 247C of the said Ordinance states:

"මේ වගන්තියෙහි කාර්ය සඳහා,

"වෙළඳ ව්‍යාපාරය" යන්නට, යම් කර්මාන්තයක් හෝ යම් නිෂ්පාදකයකුගේ හෝ තමා කරන යම් ගනුදෙනුවක්වක් නැතහොත් සේවා සම්බන්ධයෙන් කොමිස් මුදලක් නැතහොත් ගාස්තුවක් අයකරන යම් තැනැත්තකුගේ හෝ යම් වෙළඳ ව්‍යාපාරයක් ද ස්වාධීන කොන්ත්‍රාත්කරුවකුගේ ව්‍යාපාරයක්ද ඇතුළත් වන නමුත්, පෞද්ගලික පොළකදී භාණ්ඩ, බඩු ද්‍රව්‍ය විකිණීමේ රක්ෂාව හෝ රජයෙන් ආධාර දීමනා ගෙවනු ලබන්නා වූ නැතහොත් කලින් එවැනි ආධාර දීමනා ගෙවනු ලැබුවා වූ ද දැනට එවැනි ආධාර දීමනා ගෙවනු නොලබන්නා වූ ද යම් අධ්‍යාපන ආයතනයක් හෝ පාඨශාලාවක් හෝ පවත්වාගෙන යෑමේ රක්ෂාවක් ඊට ඇතුළත් නොවේ" [Emphasis Added]

In view of the above, even though the interpretation given to *"වෙළඳ ව්‍යාපාරය"* is only applicable to the said section, the word "*යම් කර්මාන්තයක්*" used in the aforesaid interpretation can be used to interpret the word "*යම් කර්මාන්තයක්*" in section 247B(1) of the said Ordinance as having the same meaning since the word "*යම් කර්මාන්තයක්*" used in the Act should be given the same meaning.

Further, in view of the aforesaid definition in section 247C, it is apparent that the legislator has also made a distinction between the words "*යම් කර්මාන්තයක්*" and "*යම් නිෂ්පාදකයකු*". It is pertinent to note that the Municipal Councils Ordinance uses the word "*නිෂ්පාදනය*" and its variants like "*නිෂ්පාදකයකු*" and "*නිෂ්පාදිත*" to refer to businesses, organizations and/or individuals engaged in the manufacturing of products.

Thus, within the Sinhala text, the legislator in its wisdom has used different Sinhala words, i.e. *"කර්මාන්තය"* and "*නිෂ්පාදනය*", to change the meaning by using different words when and where it is necessary. In view of the above, the meaning of the word *"කර්මාන්තය"* cannot be restricted only to mean the manufacturing of goods when interpreting the provisions of the Municipal Councils Ordinance.

Is there an inconsistency in the Sinhala and English texts of section 247B?

The English text of section 247B (1) of the Municipal Councils Ordinance reads as follows:

> "A Municipal Council may impose and levy a tax on any trade carried on within the administrative limits of that Council." [Emphasis added]

Accordingly, the English text of the said section 247B (1) states that a Municipal Council has the power to impose a tax on any "trade".

As stated earlier, the *"Buddhadasa Hewage Sinhala-English Dictionary",* at page 234, states that the word "කර්මාන්තය" means, *inter alia,* "trade" in the English language. Further, the *'Malalasekera English-Sinhala Dictionary'*, at page 1065, states that the word "trade" means "වෙළඳාම" and "කර්මාන්තය" in the Sinhala language.

Accordingly, when a literal interpretation is applied, the word "trade" means "කර්මාන්තය" in ordinary usage. Thus, I am of the view that the word "trade" is a translation of the word "කර්මාන්තය".

Moreover, the English text of section 247C of the Municipal Councils Ordinance states:

> *"For the purposes of this section,*
> "*business" includes <u>any trade</u> or profession <u>or</u> calling or <u>the business of a manufacturer</u>, or of any person taking commission or fees in respect of any transaction or <u>services rendered</u> or the business of an independent contractor, but does not include the occupation of selling articles, goods or materials at a private fair or the occupation of maintain any educational establishment or school to which grants from State funds are paid or to which such grants were earlier paid but at present are not paid*". [Emphasis Added]

For the reasons stated above, the word "any trade" in the aforesaid definition in section 247C can be applied to have the same meaning as the word "any trade" in section 247B(1) of the said Ordinance. Thus, it is apparent from the above definition in section 247C that the legislator has consistently used the word "trade" to mean "කර්මාන්තය" throughout the said Ordinance.

Moreover, the aforesaid section 247C of the Municipal Councils Ordinance defines a "business" to include, *inter alia,* "any trade" or "the business of a manufacturer". However, the appellant submitted that the word "කර්මාන්තය" in the Municipal Councils Ordinance means "industry" and not "trade". In support of his submission, the Counsel for the appellant cited the Court of Appeal case of *Crest Gems Ltd v The Colombo Municipal Council (supra)* at page 372 which held:

> *It has been submitted that the notices of the respondent seeking to recover from the petitioner the tax under section 247B of the Municipal Councils Ordinance for*

> *carrying on activities of maintaining an office for trading is ultra vires for the reasons that the petitioner maintains an office only for buying and selling of gems and jewellery. <u>This activity is a trade or "velandama" in Sinhala and does not fall within the meaning of the word "karmanthaya" since the petitioner does not manufacture in the said place</u>.* [Emphasis Added]

In view of the above, the appellant contended that the word "කර්මාන්තය" in the Municipal Councils Ordinance means an "industry" where goods are manufactured. If the said contention is accepted, then the aforesaid word "business" as defined in section 247C would mean to include "industry" <u>or</u> "business of a manufacturer". Thus, I am of the view that the disjunction 'or' that has been intentionally used by the legislator in between "any trade" or "the business of a manufacturer" in the aforesaid section 247C would be rendered redundant.

In the circumstances, adopting the interpretation suggested by the appellant, that "කර්මාන්තය" means 'industry' and not 'trade', would render the intention of legislator nugatory and thus, the applicability of section 247B of the said Ordinance would be made redundant.

Due to the foregoing reasons, I am of the view that there is no inconsistency between the words "කර්මාන්තය" and "trade" in Sinhala and English texts of section 247B of the Municipal Councils Ordinance.

Thus, I am unable to agree with the judgment in *Crest Gems Ltd v The Colombo Municipal Council (supra)* cited by the appellant.

Therefore, the appellant's submission that the Municipal Council does not have an authority to impose and levy a tax on the premises under reference as it is not used as a "කර්මාන්තය" within the meaning of Section 247B of the Municipal Councils Ordinance is untenable in law.

Are the Regulations published under section 247B *ultra vires*?

The High Court has held that in terms of the Regulations issued under section 247B of the Municipal Councils Ordinance published in the Gazette No. 1542 dated 19th March, 2008 the premises under reference have been used for the collection of money for the services provided by the appellant.

It was contended by the appellant that certain items specified in the said Gazette, including Item No. 2 that was considered by the learned High Court judge, are *ultra vires* section 247B of the Municipal Councils Ordinance as certain services referred to in the said items are not in respect of industries but purely trading activities.

Section 289 (1) of the Municipal Councils Ordinance states:

> (1) The Minister may make generally for the purpose of regulations giving effect to the principles and provisions of this Ordinance and in respect of any matter for which regulations are authorized or required by this Ordinance to be made or required by this Ordinance to be prescribed. [Emphasis Added]

Thus, the Minister is vested with the power to promulgate regulations to give effect to the principles and provisions of the said Ordinance.

The said Gazette No. 1542 dated 19th March, 2008 states that the premises referred to in the said Gazette are subject to Trade Tax in terms of and under section 247B of the Municipal Councils Ordinance.

The abovementioned Regulations are published by the Minister exercising his power vested in terms of the aforementioned section 289 of the Municipal Councils Ordinance and the 'Items' specified in the said gazette are required to give effect to section 247B of the said Ordinance.

Therefore, the said Gazette comes within the scope and ambit of section 247B of the Municipal Councils Ordinance and thus, is *intra vires* and valid in law. Hence, the items referred to in the said Gazette are not *ultra vires* the said section.

Is the appellant liable to pay Trade Tax and Service Charges for the premises under reference?

The material before court shows that the appellant is using the premises under reference not only as the Regional Engineer's Office but also as an office, which generates income to the appellant, where consumers could pay their electricity bills and obtain electricity connections.

The High Court has held that the appellant's premises were liable to be imposed and levied a Trade Tax as it falls under 'Item No. 2', i.e. 'an office used to store office equipment', of the Regulations

issued in respect of section 247B of the Municipal Councils Ordinance by the Gazette No. 1542 dated 19th March, 2008.

The said Regulations published in the said Gazette also specify an office used for commercial purposes under 'Item No. 68' as liable to pay taxes under section 247B of the Municipal Councils Ordinance.

In the circumstances, I am of the view that the appellant's premises are used for a commercial purpose.

Thus, the appellant is liable to pay Trade Tax and Service Charges for the premises under reference under Section 247B of the Municipal Councils Ordinance read with the Regulations published in the Gazette No. 1542 dated 19th March, 2008.

Conclusion

In the foregoing circumstances, I am of the view that the two questions of law on which the court granted leave to appeal should be answered as follows:

(a) Did the Hon. High Court judge misdirect herself in interpreting section 247B of the Municipal Councils Ordinance as applicable to the appellant?

No.

(b) Did the Hon. Provincial High Court judge err in law when she came to the finding that the appellant was carrying on a trading activity at the Regional Engineer's Office, Ratmalana which was liable to pay trade tax in terms of section 247B of the Municipal Councils Ordinance read with the Regulations published in the Government Gazette bearing No. 1542?

No.

The appeal is dismissed for the aforementioned reasons stated above.

I order no costs.

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**

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

In the matter of an Appeal

Bank of Ceylon
No.1, Bank of Ceylon Mawatha
Colombo 1
Plaintiff

SC Appeal 120/2012
SC/HC(CA)/LA No. 165/2012
WP/HCCA/MT/58/2008 (F)
DC Mt. Lavinia Case No. 4329/03/M

Vs

Flex Port (Pvt) Limited.
No.127, Jambugasmulla Mawatha,
Nugegoda.
Defendant

AND BETWEEN

Bank of Ceylon
No.1, Bank of Ceylon Mawatha
Colombo 1
Plaintiff-Appellant

Vs

Flex Port (Pvt) Limited.
No.127, Jambugasmulla Mawatha,

Nugegoda.

Defendant-Respondent

AND NOW BETWEEN

Bank of Ceylon
No.1, Bank of Ceylon Mawatha
Colombo 1

Plaintiff-Appellant-
Petitioner- Appellant

Vs

Flex Port (Pvt) Limited.
No.127, Jambugasmulla Mawatha,
Nugegoda.

Defendant-Respondent-

Respondent- Respondent

Before: Sisira J. de Abrew J
Vijith. K. Malalgoda PC J &
P.Padman. Suresena J

Counsel: Rajeev Goonathilake SSC with HAC Caldera
for the Plaintiff-Appellant-Petitioner-Appellant
S.N.Vijithsingh with Iranga Perera, Anuradha Weerakkody and
Laknath Seneviratne for the
Defendant-Respondent-Respondent-Respondent

Written submission
tendered on : 8.1.2013 by the Plaintiff-Appellant-Petitioner-Appellant
18.3.2014 by the Defendant-Respondent-Respondent-Respondent

Argued on : 3.3.2020

Decided on: 3.7.2020

Sisira J. de Abrew, J

The Plaintiff-Appellant-Petitioner-Appellant (hereinafter referred to as the Plaintiff-Appellant Bank) granted overdraft facilities (hereinafter referred to as O/D facilities) to the Defendant-Respondent-Respondent-Respondent (hereinafter referred to as the Defendant-Respondent). The said O/D facilities were granted by the Nugegoda Branch of the Plaintiff-Appellant Bank to the Defendant-Respondent who maintained a current account in the Nugegoda Branch of the Plaintiff-Appellant Bank. The Plaintiff-Appellant Bank instituted action No.4329/03/M in the District Court of Mount Lavinia against the Defendant-Respondent to recover a sum of Rs.1,232,642.57 and 24% interest per annum with effect from 1.8.1999 on the basis of the said O/D facilities granted to the Defendant-Respondent. The learned District Judge by his judgment dated 30.7.2008 dismissed the action of the Plaintiff-Appellant Bank on the basis that the action was prescribed. Being aggrieved by the said judgment of the learned District Judge, the Plaintiff-Appellant Bank appealed to the Civil Appellate High Court. The Civil Appellate High Court by its judgment dated 19.3.2012 dismissed the appeal of the Plaintiff-Appellant Bank and affirmed the judgment of the learned District Judge. Being aggrieved by the said judgment of the Civil Appellate High Court, the Plaintiff-Appellant Bank has appealed to this court. This court by its order dated 6.7.2012, granted leave to appeal on questions of law set out in paragraphs 11(a),(b),(c),(d) and (e) of the Petition of Appeal dated 26.6.2012 which are reproduced below.

1. When money is lent by way of an overdraft, when does prescription begin to run if there is a stipulation that overdraft is repayable on demand?

2. When there is an overdraft facility which does not stipulate repayment on demand and the customer makes a deposit (repayment) in reduction of the overdraft, when does prescription begin to run for the purpose of the Prescription Ordinance No.22 of 1871 as amended?

3. Where there is an overdraft facility which does not stipulate repayment on demand and the bank makes a last advance to the customer by way of an overdraft and the outstanding balance after the said last advance remains unpaid, when does prescription begin to run?

4. Where there is an overdraft facility which does not stipulate repayment on demand and there is a written acknowledgement and/or promise of liability incurred under the overdraft facility, when does prescription begin to run for the purpose of the Prescription Ordinance?

5. Where there is an overdraft facility which does not stipulate repayment on demand and there is a written acknowledgement and/or promise of liability in relation to the overdraft, what would be the period of prescription?

The learned Judges of the Civil Appellate High Court too decided that the action of the Plaintiff-Appellant Bank had been prescribed on the basis of Section 7 of the Prescription Ordinance which 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.

One of the factors that the learned Judges of the Civil Appellate High Court considered to arrive at the said conclusion was the date of default of payment by the Defendant-Respondent which was on 1.8.1999. The action was filed on 19.12.2003. They came to the above conclusion on the basis of letter marked P7 sent by the Plaintiff-Appellant Bank to the Defendant-Respondent. Although the learned Judges of the Civil Appellate High Court came to the above conclusion, the statement of account regarding the current account of the Defendant-Respondent marked P6 indicates that the Defendant-Respondent has made payments in the months of May to December 2000, May, July to November 2001, August and September 2002. P6 further indicates that as a result of these payments over draft balance has been reduced. Thus, the above conclusion reached by the learned Judges of the Civil Appellate High Court regarding the date of default of payment by the Defendant-Respondent (1.8.1999) is wrong.

Learned counsel for the Defendant-Respondent tried to contend that the account of the Defendant-Respondent had lain dormant from year 1999 to 2003 and that therefore the action of the Plaintiff-Appellant Bank has been prescribed. He cited a passage from the book titled 'Law of Contract by Prof. Weeramanthry' 1st Edition Vol. II page 874 which reads as follows.

> *"Overdrafts are loan by the banker to the customer, and in general no demand is necessary, so that the 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."

I now advert to this contention. Has the account of the Defendant-Respondent lain dormant? As I pointed out earlier, the Defendant-Respondent has made payments to his account in the years 2000,2001 and 2002. Therefore, it is clear that the account of the Defendant-Respondent has not lain dormant. For the above reasons, I reject the above contention of learned counsel for the Defendant-Respondent.

The learned Judges of the Civil Appellate High Court have, in order to arrive at the conclusion that the action of the Plaintiff-Appellant Bank was prescribed, considered the judgment in the case of Seylan Bank Limited Vs Intertrade Garments (Private) Limited 2004 BLR Vol. II page 41 wherein Justice Dr. Shirani Bandaranayake held as follows.

"In an action concerning a loan repayable on demand, the cause of action will arise only at the time when demand is made. An action for the recovery of money lent without written security, must be commenced within three years from the time after the cause of action had arisen."

At this stage it is necessary to consider whether the money obtained by the Defendant-Respondent on an O/D facilities is a loan or not.

The amount of money given by a bank to its customer on O/D facilities is money belongs to the bank and the customer is duty bound to repay the said amount. Therefore, the money given by a bank to its customer is a loan. This view is supported by the following legal literature.

Prof. Weeramanthry in his book titled 'Law of Contract' 1st Edition Vol. II page 874 which states as follows.

> *"Overdrafts are loan by the banker to the customer. ."*

In the case of Hatton National Bank Vs Helenluc Garments Ltd [1999] 2 SLR 365 Justice Wijetunga held 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."*

In 'Elinger's Modern Banking in Law' 5th Edition page 756 states as follows.

> *"From a legal point of view, an overdraft is a loan granted by the bank to the customer so that the bank is the creditor and the customer is the debtor"*

Considering all the above matters, I hold that an overdraft granted by a bank to a customer is a loan.

Justice Dr. Shirani Bandaranayake in the case of Seylan Bank Limited Vs Intertrade Garments (Private) Limited (supra) observed that 'in an action concerning a loan repayable on demand, the cause of action will arise only at the time when demand is made. An action for the recovery of money lent without written security, must be commenced within three years from the time after the cause of action had arisen.' I have earlier held that an overdraft granted by a bank to a customer is a loan. Thus, acting on the principles laid down in the above judicial decision, I hold that in an action to recover an overdraft granted by a bank to a customer, cause of action would arise at the time the demand was

made. In the present case the demand to repay the overdraft was made to the Defendant-Respondent on 26.9.2003 by letter marked P7. Thus, the cause of action in the present case has arisen only on 26.9.2003. The action in the present case was filed on 19.12.2003. Thus, the action has been filed within three years from the date of the cause of action arose. For the above reasons, I hold that the action of the Plaintiff-Appellant Bank has not been prescribed. Therefore, I hold that the learned District Judge and the learned Judges of the Civil Appellate High Court were wrong when they came to the conclusion that the action of the Plaintiff-Appellant Bank had been prescribed. Further I would like to point out that when the letter of demand marked P7 dated 26.9.2013 was sent to the Defendant-Respondent, the Chairman of Defendant-Respondent by letter dated 5.12.2003 marked P8, has stated that the overdraft granted to the Defendant-Respondent could be settled. Thus, even on the basis of letter marked P8 it can be said that the action of the Plaintiff-Appellant Bank had not been prescribed when the action was filed.

For the above reasons, I answer the 1st question of law as follows.

In the present case, prescription begins to run from the date of the demand.

In view of the answer given to the1st question of law it is not necessary to answer the 2nd and the 4th questions of law.

The 3rd and 5th questions of law do not arise for consideration.

For the aforementioned reasons, I set aside both judgments of the District Court and the Civil Appellate High Court. The Plaintiff-Appellant Bank has, by way of evidence, proved its case and is entitled to the relief claimed in the plaint. I therefore grant relief claimed in the plaint. The learned District Judge is directed

to enter decree in accordance with this judgment. The Plaintiff-Appellant Bank is entitled to costs in all three courts.

Appeal allowed.

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

In the matter of an appeal in terms of section 9 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990.

SC Appeal No. 123 / 2012

SC / Spl / LA Appln No. 115/2008

Provincial High Court of Panadura

Case No. HCMCA 22 /2002

Magistrate's Court Kesbewa

Case No. 65435

Dehigaspe Patabandige Nishantha Nanayakkara,

No 34/3,

1st Lane,

Egodawatte Road,

Boralesgamuwa.

ACCUSED - RESPONDENT - APPELLANT

-Vs-

1. Kyoko Kyuma,

   No 92/2A,

   Lauries Road,

   Colombo 04.

   AGGRIEVED PARTY APPELLANT - RESPONDENT

2. Officer-In-Charge,

   Police Station,

   Piliyandala.

   COMPLAINANT - RESPONDENT - RESPONDENT

3. Hon. Attorney General,

   Attorney General's Department,

   Colombo 12.

   RESPONDENT - RESPONDENT

Before: **BUWANEKA ALUWIHARE PC J**

L T B DEHIDENIYA J

P PADMAN SURASENA J

Counsel: Asthika Devendra with Kanchana De Silva instructed by G S Thavarasha for the Accused - Appellant - Appellant.

Shanaka Wijesinghe DSG for the Attorney General.

Argued on : 13-05-2020

Decided on : 07-08-2020

P Padman Surasena J

The Accused - Appellant - Appellant (hereinafter sometimes referred to as the Appellant) stood charged in the Magistrate's Court of Kesbewa on seven counts. The said seven counts respectively alleged that the appellant on or about 08-12-1999, had;

I. assaulted Yukinori Kyuma with hand and thereby committed an offence punishable under Section 314 of the Penal Code;

II. abetted Chinthaka alias D. C. R. Wanigasekara to assault Kyoko Kyuma and thereby committed an offence punishable under Section 314 read with 102 of the Penal Code;

III. wrongfully confined Yukinori Kyuma and thereby committed an offence punishable under Section 333 of the Penal Code;

IV. used criminal force to Yukinori Kyuma and thereby committed an offence punishable under Section 343 of the Penal Code;

V. abetted Chinthaka alias D. C. R. Wanigasekara to commit the offence of robbery of a camera from the possession of Kyoko Kyuma and thereby committed an offence punishable under section 380 read with section 102 of the Penal Code;

VI. used criminal force to Kyoko Kyuma and thereby committed an offence punishable under section 343 of the Penal Code;

VII. abetted Chinthaka alias D. C. R. Wanigasekara to commit the offence of mischief by breaking the door of the Directors' room of Ceylon M. K. N. Ecopower (pvt) Ltd. and thereby committed an offence punishable under section 409 read with section 102 of the Penal Code.

The Appellant had pleaded not guilty to all the above charges and hence the learned Magistrate had taken steps to conduct and conclude the trial against him.

In the trial, the prosecution led evidence of four witnesses namely;

i. Kyoko Kyuma, (daughter)

ii. Yukinara Kyuma, (father)

iii. Police Sergeant (PS 4481) Abdul Aziz Mohomed Mihilar,

iv. Woman Police Constable (RWPC 651) Iluksuriya Arachchige Dayawathie.

After the prosecution closed its case, the Appellant had given evidence under oath. The defence also led evidence of two other witnesses namely;

i. Udawattage Don Kamal Chandrasiri,

ii. Anoma Upendranath Walpola.

Learned Magistrate at the conclusion of the trial, pronounced the judgment dated 28-06-2002, acquitting the Appellant from all of the above charges.

Being aggrieved, by the said judgment of the learned Magistrate, the Aggrieved Party - Appellant - Respondent (hereinafter sometimes referred to as the Aggrieved Party) had appealed to the Provincial High Court. The Provincial High Court of Western Province holden at Panadura, by its judgment dated 04-04-2008 had set aside the judgment of the learned Magistrate and ordered a re-trial to be conducted against the Appellant. The Appellant, in this appeal, seeks to canvass before this Court the said judgment of the Provincial High Court.

Upon the Appellant supporting the application for special leave to appeal relevant to this appeal, this Court by its order dated 12-07-2012, had granted special leave to appeal on the following question of law.[1]

> "Having regard to the evidence of this case, including the medical evidence and the history given by the parties to the Medical Officer, is the judgment of the learned High Court Judge setting aside the order of acquittal manifestly erroneous in law?"

In order to answer the above question of law, it would be necessary to turn, albeit briefly, to the evidence adduced before Court in this case.

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[1] Question of law set out in paragraph 13(a) of the petition dated 15-05-2008.

The following facts have been revealed from the evidence of the prosecution witness No. 02, Yukinara Kyuma (father).

I. He came to reside in Sri Lanka in 1997.

II. He, along with the Appellant and one Noriko functioned as Directors of the company named 'Ceylon MKN Eco Power (Pvt) Ltd.'

III. The Appellant functioned as the Chief Officer in the office of the said company situated in Piliyandala.

IV. On 07-12-1999, at about 8 PM he along with his wife, Kyoko, Noriko, Sumuko and driver Jagath went to the said office.

V. As there is a case filed by the Appellant regarding a dispute in the company, which was pending in the Supreme Court, he collected the important documents, kept it in the Director's room of the office, and locked it.

VI. Around 8.30 AM on the following day, he along with his daughter Kyoko went to the said office in Piliyandala.

VII. When they entered, the watcher and driver Jagath were there.

VIII. Around 9 AM, another girl came to the office. Thereafter the Appellant along with several other people also came to the office. At that time, he and his daughter were in the main office.

IX. The Appellant can speak Japanese language well but he can speak Sinhala language only a very little.

X. The Appellant had told that his belongings are also in the locked up room and wanted him to open the locked up room.

XI. When the Appellant assisted by the others with him, attempted to break open the door of the locked up room, he went in front of the said door and stood right in front of it with a view to prevent the said attempt. At that time, the Appellant assaulted him and that resulted in his pair of spectacles getting thrown away. He

then picked up his pair of spectacles and continued to stay in front of the door of the locked up room. At that time, the Appellant assisted by the others (who came with the Appellant), dragged him away and forcibly made him sit on a chair. He then saw his daughter trying to video record the act of breaking open the door. Then Chinthaka, upon being instructed by the Appellant, grabbed the video camera from his daughter. They then sent his daughter and driver Jagath out of the door and locked the main door. After about twenty minutes, officers from the Piliyandala Police Station came to the scene. Yukinara states that he does not know English language. He had observed that there were bleeding injuries on his face and on the small finger of his right hand. The Medico Legal Report was produced marked **P 4**.

He had identified the Appellant as the person who assaulted him. During the cross-examination also, this witness has re-iterated the sequence of events in the same way he had testified in his evidence in chief.

The prosecution witness No. 01, Kyoko Kyuma (daughter) in her evidence has stated that she knows the Appellant as one of the partners in business with his father. The said business was with regard to generation of hydropower electricity and the name of the company engaged in the said business is 'Ceylon MKN Eco Power (Pvt) Ltd.' She states that her father (Yukinara) functioned as the chairman and the Appellant and her sister Noriko Kyuma functioned as the other directors of the said company.

She states that acting on the advice given by their Attorney-at-Law, she along with her father, mother, sister, and the driver went to the office of the said company in Piliyandala on 07-12-1999. They thereafter collected all the important documents, kept them in the Director's room in the said office, locked the said room, and left the office.

At about 9 AM on the following day morning, she along with her father came back to the said office. She had seen an engineer by the name of Walpola also present near the gate. Although said Walpola wanted to come along with them into the office, they had not permitted him to come in. When she and her father were waiting in the office, the Appellant along with Walpola, Chinthaka, driver Kamal and the driver working for the Appellant had come to the office.

Thereafter, as the Appellant had wanted them to open the door of the locked up room an argument between her father and the Appellant had ensued. However, she and her father had refused to open the locked up room. At that time the Appellant with the help of the others who came with him, had made preparations to break open the door. When her father attempted to stop it, the Appellant had assaulted him with his hand. Her father had gone near the door and stood in front of it, to prevent the break opening. It was at that time that the Appellant assaulted her father on his face. She had then telephoned the Police. As she tried to defend her father, somebody in the crowd had assaulted her also. However, she has not identified the person who had assaulted her. On the instructions of the Appellant, the persons in the group of the Appellant had forcibly held her father seated on a chair rendering him immobilized.

As she tried to video record the incident that was taking place, Chinthaka on being instructed by the Appellant, had assaulted her, dragged her out of the main door, pushed her out of the door, and then locked the said main door. Her driver Jagath was also pushed out of the same door in the same way. After some time, Police came to the scene and took all of them to the Police Station. The Medico Legal Report in respect of the examination of this witness was produced marked **P 2**.

Answering the questions posed to her in cross-examination, this witness also has reaffirmed her evidence on the main points in the same way. She has reiterated in cross examination that she saw her father being assaulted by the Appellant and was held immobilized forcibly.

PS 4481 Abdul Aziz Mohammed Mihilar is the police officer who had gone to the place of the incident around 10 AM on 08-12-1999 as he was instructed to do so on a Walkie-talkie, by Piliyandala Police Station. He along with RPC 18608 Navaratne and the driver of the vehicle had gone to the address No. 202, Suwarapola, Moratuwa Road, Piliyandala.

He then had observed the scene of the incident. He had observed that the lock of the room had been broken. He also had observed injuries on Yukinara (father). He also had observed that Yukinara's shirt had been torn and his tie had been pulled out. He had observed the presence of the Appellant, Shammi Ramani Cooray, Chinthaka Wanigasekera, A U Walpola, Indika Atapattu, drivers Kamal Chandrasiri and Jagath at

that place at that time. According to his observations, Yukinara Kyuma did not appear to be normal.

RWPC 651 Iluksuriyaarachchige Dayawathie has entered the complaint produced by Kyoko Kyuma (daughter) written in English on 08-12-1999. She had issued medico-legal examination forms to both Kyuko Kyuma and Yukinara Kyuma and recorded the statements of the others present. She also arrested the Appellant on the instructions of the officer in charge of the crimes branch of the Police Station. She had also recorded the statements of Shammi Cooray who worked as the Accountant, Anoma Upendranath Walpola who functioned as the Electrical Engineer, Chinthaka Wanigasekera who functioned as the Mechanical Engineer, Indika Sanjeewani Atapattu who functioned as a clerk of the relevant organization.

After the prosecution closed its case, the Appellant Dehigaspe Patabendige Nishantha Nanayakkara also has given evidence. The next paragraph would consist of the summary of his evidence before Court.

The Appellant had admitted establishing 'Ceylon Eco Power (Pvt) Ltd' company along with Yukinara and establishing the office in Piliyandala. On 08-12-1999 at about 8.30 AM Engineer Walpola had informed him that Yukinara along with another person had come to the office in Piliyandala. Walpola also had alerted him about the existence of somewhat dangerous situation at the said office. Upon the receipt of the above information, the Appellant had proceeded to the office with his driver. Thereafter, the Appellant along with Walpola, driver Kamal and another employee Chinthaka had opened the gate and entered the office. He had found his room sealed and locked by placing a new lock on the door. He has also found that documents had been removed from the office. He had observed the word 'Kyuma' written in Japanese language on the seal. The Appellant had tried to enter the locked room but Yukinara stood guard in front of the door blocking and preventing access of the room to the Appellant. The Appellant then instructed the others to open the door of the room. Then Chinthaka and Nimal came and attempted to open the door. As Yukinara intervened against opening the door, they had forcibly dragged him and forced him to sit on a chair. Thereafter, Chinthaka and Nimal had forced open the door. According to the Appellant, it was in the course of the said melee that Yukinara

had sustained injuries. The Appellant also has stated that he had instructed Chinthaka to take the video camera from Koyoko (daughter) and he saw her going out of the office though the door. He also had seen her calling the Police. Police had arrived after about 12 minutes. The Appellant states that thereafter all of them went to the police station and Police subsequently arrested him and recorded a statement.

The Appellant denies having assaulted Yukinara, he also denies that Yukinara was assaulted by anybody else in his group. It is the Appellant's position that he used force on Yukinara when he attempted to block the break opening of the door.

Udawattage Don Kamal Chandrasiri who worked as a driver of the relevant company also had given evidence on behalf of the Appellant. This witness having narrated the incident had stated that the locked up room had got broken open when Nimal and Chinthaka pushed its door. According to this witness, Yukinara at that time had jumped towards the door. It was at that time Yukinara's finger had got entangled in the lock, which caused the injury on his finger. Chandrasiri had also stated that Jagath pulled from Yukinara's tie and pulled him away. He had seen Koyoko (daughter) raising the video camera which was in her hand. On being instructed by the Appellant, Chandrasiri had grabbed the video camera from Koyoko's hand and kept it elsewhere. Police had arrived after some time. Chandrasiri had observed injuries on Yukinara's finger and face.

Anoma Upendranath Walpola, who works as the Electrical Engineer of this company, also had given evidence on behalf of the Appellant. Having narrated the incident, he has stated that they had opened the locked door on the instructions of the Appellant. According to Walpola, Yukinara had attempted to block the opening of the door and it was in that process that Yukinara's finger had got injured as the finger had got entangled in the lock.

Walpola also has stated that Chinthaka grabbed the video camera from the hand of Koyoko (daughter) on the instructions of the Appellant as she had attempted to video record the incident at that time.

The question in respect of which this Court has granted special leave to appeal to wit, "*Having regard to the evidence of this case, including the medical evidence and the history given by the parties to the Medical Officer, is the judgment of the learned High*

Court Judge setting aside the order of acquittal manifestly erroneous in law?" would ex-facie be a question of fact as it revolves solely around facts of the case namely the evidence adduced by parties in the case. However, the said question would become a question of law only if the conclusion of the learned High Court Judge is found to be perverse. Therefore, I would endeavor to answer the said question within the above parameters.

Since the question in respect of which this Court has granted special leave to appeal has a reference to the consideration of medical evidence and the short history given by the victim, I would at this juncture briefly set out the medical evidence adduced in this case. The Medico Legal Report (MLR) of Yukinara Kiyuma has been produced marked **P 4** in the course of the trial. The short history given by the patient in the said MLR is recorded as *"assaulted by 7 people with hands & feet on 8/12/99 around 9.10 AM at Piliyandala."* The said MLR has confirmed that Yukinara had sustained following two injuries.

1) *½ cm abrasion about 1 ½ cm lateral to the left eye*

2) *1 cm abrasion in the dorsal aspect of the distal phalanx of second (2nd) finger of right hand.*

Thus, the aforesaid oral evidence adduced in this case, taken in to consideration together with the above medical evidence and the short history to the Medical Officer, shows clearly that this is not a case where the assertion of the witnesses cannot be supported by the medical evidence. This is because the injuries observed by the Medical Officer on Yukinara's body match with the oral account of the incident narrated by the witnesses in the trial.

Further, the consideration of evidence summarized above (including the medical evidence) in the backdrop of the charges set out in the charge sheet clearly shows that there is evidence against the Appellant. It can also be seen that the evidence adduced by the defence is not at substantial variance with that adduced by the prosecution. The main position taken up by the defence in this case is that this incident had sparked off as a result of actions of Yukinara in locking up the office room. It can be seen that the most

of the facts have been admitted by the defence in the course of the evidence they had adduced.

In spite of the presence of aforementioned evidence, the learned Magistrate had concluded that he was not prepared to accept that there has been an assault in view of the fact that the prosecution has not explained as to how these injuries were caused. In contradistinction to the above conclusion, it can be seen towards the end of the judgment that the learned Magistrate from the same breath has also concluded that there has been an incident between the Appellant and the prosecution witnesses and that Yukinara could have been injured in the course of that incident.

The learned Magistrate has also concluded that the prosecution has not proved the fact that Yukinara was unlawfully restrained. In coming to this conclusion, the learned Magistrate has taken the view that both Yukinara and Koyoko should have jointly seen what each of them had separately narrated in Court. This in my view is against the principle enunciated in the case of Bandaranaike V Jagathsena and others [2] where this Court has taken the view that when version of two witnesses do not agree the trial judge has to consider whether the discrepancy is due to dishonesty or to defective memory or whether in the witness' powers of observation were limited.[3] Moreover, it appears that the learned Magistrate has lost sight of the fact that the Appellant also in his evidence has stated that they had forcibly dragged Yukinara and forced him to sit on a chair to prevent his intervention against opening the locked up room.

It appears to me from the judgment of the learned Magistrate that he has not taken into consideration the evidence adduced by the defence before he came to the conclusion that the prosecution has not proved its case. Moreover, it also appears that the Magistrate had failed to assess, evaluate and appreciate the evidence adduced in the trial as a whole. In spite of the presence of an abrasion on Yukinara's face, the move by the learned Magistrate to look for injuries that are more specific to hold that an assault had taken place would in my view be unrealistic in the light of the facts of this case.

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[2] 1984 (2) SLR 397.

[3] Ibid. at page 415.

In these circumstances, I am unable to find any acceptable basis, which could have enabled the learned Magistrate to acquit the Appellant from all the charges. Therefore, I am unable to hold that the conclusion by the learned High Court Judge that she cannot agree with the judgment of the learned Magistrate in acquitting the Appellant from all the charges is a perverse conclusion. Although there are other grounds to support my conclusion I would desist from referring to any more of them in this judgment as I am mindful that the Magistrate after this judgment will be called upon to consider and evaluate the available evidence afresh and pronounce a fresh judgment. Therefore, I would not proceed any further to deal with or pronounce any view on the evaluation of evidence adduced by both parties at the trial.

Further, presumably for the same reason, the learned High Court Judge too had not pronounced any opinion on the evaluation of evidence adduced at the trial by both parties. It is therefore unnecessary for me to embark on the step of evaluation of evidence adduced at the trial by both parties, as my task would be limited to the ascertainment whether the judgment of the learned High Court Judge setting aside the order of acquittal by the learned Magistrate is manifestly erroneous in law.

As has already been indicated, in view of the fact that I am inclined to affirm the judgment of the learned High Court Judge setting aside the learned Magistrate's judgment, I would conclude this judgment with the following quotation from the Indian case of State of Uttar Pradesh V M K Anthony.[4] The Supreme Court of India in that case held as follows.

" … while appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinize the evidence more particularly keeping in view of the deficiencies, draw-backs and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies of trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some

[4] A I R (1985) SC 48 (paragraph 10).

technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. … "

It was further observed by Hon. Justice Desai in the above case that even honest and truthful witnesses may defer in some details unrelated to the main incident because power of observation, retention and reproduction defer with individuals.

As has already been mentioned above, in order to prevent jeopardizing further proceedings in the Magistrate's Court, I am compelled to stop here with the process of reasoning.

I proceed to answer the aforementioned question of law in the negative.

For the above reasons, the Appellant is not entitled to succeed in this appeal. Therefore, I affirm the judgment of the High Court dated 04-04-2008 and dismiss this appeal.

Appeal is 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 for Leave to Appeal to the Honourable Supreme Court of the Republic of Sri Lanka made under and in terms of Section 5C(1) of the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006.

SC Appeal No. 125/2018
SC HCCA LA 518/17
WP/HCCA/LA No. 13/2014F
DC Colombo Case No. DLM 68/08

Ramakrishnan Dharmalingam,
No. 23, Sedawatta, Wellanpitiya.
Plaintiff

Vs

Ramakrishnan Sivalingam,
No. 23, Sedawatta, Wellanpitiya.
Defendant

AND

Ramakrishnan Dharmalingam,
No. 23, Sedawatta, Wellanpitiya.
Plaintiff-Appellant

Vs

Ramakrishnan Sivalingam,
No. 23, Sedawatta, Wellanpitiya.
Defendant-Respondent

AND NOW

Ramakrishnan Sivalingam,

No. 23, Sedawatta, Wellanpitiya.
Defendant-Respondent-Petitioner

Vs

Ramakrishnan Dharmalingam,
No. 23, Sedawatta, Wellanpitiya.
Plaintiff-Appellant-Respondent

BEFORE: Buwaneka Aluwihare PC, J.
V. K. Malalgoda PC, J. &
Preethi Padman Surasena J.

COUNSEL: P. P. Gunasena for Defendant-Respondent-Appellant.
Shrihan Samaranayake for Plaintiff-Appellant-Respondent.

ARGUED ON: 01.04.2019

DECIDED ON: 16. 10. 2020

JUDGEMENT

Aluwihare PC. J.,

The Plaintiff-Appellant-Respondent (hereinafter sometimes referred to as the 'Plaintiff') filed action before the District Court against the Defendant-Respondent-Petitioner-Appellant (hereinafter sometimes referred to as the 'Defendant') and sought a declaration that the Plaintiff has prescribed to a half share of the land and the building bearing No. 23, Sedawatte, Wellanpitiya.

Consequent to a trial, by judgement dated 10th March 2014, the Learned District Judge dismissed the action of the Plaintiff for the reasons set out therein.

Aggrieved, the Plaintiff moved the High Court of Civil Appeal (Colombo) by way of an appeal and the High Court of Civil Appeal by its judgment dated 24th October 2014, set aside the judgement of the Learned District Judge aforesaid and entered judgment in favour of the Plaintiff.

The Defendant moved this court by way of Leave to Appeal and Leave was granted by the Court on 27th August 2018 on the questions of law referred to in sub-paragraphs (c) and (h) of paragraph 11 of the Petition of the Defendant dated 4th December 2017. The said questions in verbatim, are as follows;

11. (c) Whether the High Court of Civil Appeal holden in Colombo has failed to consider that the Learned Trial Judge has properly identified the cause of action?

(h) Whether the High Court of Civil Appeal holden in Colombo has erred by coming to the conclusion that the Respondent ***[Plaintiff]*** *has a prescriptive right to the said property?* (emphasis added)

Facts

The Plaintiff and the Defendant are brothers. According to the Plaintiff, at the time he testified before the District Court he was living at the premises No. 23, Sedawatte, Wellanpitiya, the subject matter of this case. The Defendant along with his family (wife and child) also were living in the same house.

Somewhere in 1960, the Plaintiff's parents had come to reside in these premises along with the Plaintiff and his siblings. They had paid rent to the landlord one Madanayake.

Sometime after 1973, the impugned premises had been vested with the Commissioner of National Housing in terms of the provisions of the Ceiling on Housing Property Law, No. 1 of 1973 and in 1975, they had received a letter in the name of their father, requesting him to take over the property. According to the Plaintiff, by that time his father had passed away.

The Plaintiff had said in his evidence that after the demise of the father, he took the responsibility of managing affairs of the household including meeting the expenses. His mother and the siblings (including the Defendant) had given their consent in

writing, to have the impugned property transferred in the name of the Plaintiff ('P3'). However, the Commissioner of National Housing had transferred the same in favour of their mother ('V1').

According to the Plaintiff their mother had surreptitiously transferred the property in favour of the Defendant and the Plaintiff says that the Defendant showed him the Deed of Gift ('V2') sometime in the year 1990, and that however, he continued to occupy the premises even after he got to know that the property had been transferred in favour of the Defendant.

The Plaintiff also has stated that his family and the family of the Defendant occupied two distinct portions of the disputed premises and that the Defendant never occupied or used the area of the premises occupied by the Plaintiff. He has added that until his children got married, they were also living with him at this premises. According to the Plaintiff, after the demise of his father it was he who had paid all dues relating to the premises up to 1988.

It is conceded by both parties that, over numerous frictions between the families, there had been several police complaints made at various points of time (Such complaints made on 28th June1990 ('P4') and 24th June 2007 ('P5') were produced but not others, due to them allegedly being in a state of decay, at the Police station). At least five police complaints are alleged to have been made by the Plaintiff and the parties have gone to the Mediation Board as well on several occasions due to disputes between the Plaintiff and the Defendant. Nevertheless, the Plaintiff had continued to remain in residence of the premises. The Defendant has dismissed the complaints stating that his brother has a habit of running to the Police station even for trivial misunderstandings.

The Issues

The Defendant's argument before this Court was simply that he became entitled to the corpus by virtue of the Deed of Gift 'V2' and was continuously in possession of the disputed premises. He asserts that under those circumstances, the Plaintiff is not entitled to claim prescription and, furthermore, that the Plaintiff has failed to adequately identify the half portion that he claims from and out of the premises in suit

and therefore has failed to establish the identity of the portion of the corpus in relation to which the Plaintiff sought a declaration from the District Court.

I shall refer to the latter two arguments later in the judgment.

The Plaintiff's action had been dismissed by the District Court on the basis that the portion of the corpus to which the Plaintiff claimed prescriptive title had not been established by way of a plan and that consequently an executable decree cannot be entered in favour of the Plaintiff.

The learned District Judge had concluded that although the Plaintiff had placed evidence (as to the possession) in relation to the portion of the impugned property that he was in possession, however, he had not taken steps to establish by way of a plan the dimensions of the portion that the Plaintiff is so enjoying (pages 10 and 11 of the judgement). The learned District Judge had reiterated this aspect again on page 17 of the judgement and had held that, it would pose a practical difficulty to the court if it were to give possession to the Plaintiff on prescriptive rights due to the reason that the portion the Plaintiff is claiming, has not been identified by way of a plan prepared sequel to a Court Commission. From what the learned District Judge had deduced, if nothing else, one thing is certain, that is, the learned District Judge had not rejected the evidence of the Plaintiff and more specifically that he was in possession of the impugned property continuously since the 1960s.

On the other hand, the Defendant had not challenged this position either. The learned Judges of the High Court of Civil Appeal have made specific reference to the evidence of the Defendant where he had said in the examination in chief that; the wife of the Plaintiff left him in 1985 and even before that, the Plaintiff and his wife were residing at the impugned premises. He had gone on to say that even after the wife left him, the Plaintiff continued to occupy the house (page 163 of the brief). The Defendant had added that after the wife left, the Plaintiff's two children were taken away by their grandmother for upbringing. Thus, from the Defendant's own evidence, it is established that the Plaintiff's whole family were residing there, even prior to 1985.

The High Court of the Civil Appeal on the other hand, held that the Plaintiff had sufficiently described the portion of the premises that he enjoyed possession to enable the court to identify the portion of the house occupied by him.

The Questions of Law

The first question on which Leave to Appeal was granted, as to whether the High Court of Civil Appeal ***"failed to consider that the Learned District Court judge has properly identified the cause of action".***

As far as the cause of action is concerned, I do not see any misdirection on the part of the learned judges of the High Court of Civil Appeal. The Defendant's own written submissions filed before the Civil Appellate High Court refers to the cause of action as: "*Originally this action was instituted by the Plaintiff seeking a declaration that half share of the land and the building (assessment no. 23)* ***belongs to the Plaintiff by way of prescriptive title",*** which was not granted by the District Court. The learned High Court Judges have commenced their judgement having identified the Plaintiff's case in the following terms: *"The appeal of the Plaintiff is that* ***his action based on prescription*** *was not allowed."* (emphasis added).

The High Court having identified the cause of action as referred to above, had proceeded to consider the evidence placed before the District Court by the parties as to the nature of possession the plaintiff alleged to have enjoyed in relation to the premises in issue (pages 2-6 of the judgement). The High Court had made specific reference to parts of the evidence led at the trial and had come to a clear finding that the Plaintiff has established prescriptive title to (part of) the premises in issue, which was the subject matter of the action, before the District Court.

As referred to earlier in the judgement, it is evident from the evidence that the Plaintiff has clearly occupied a portion of the impugned premises with a manifest intention to hold and continue the possession against the claim of the Defendant, a possession that could be termed as hostile or adverse to the rights of the Defendant who had paper title to the property. Going by the Defendant's own admission, the occupation of the premises by the Plaintiff clearly exceeds the prescriptive period.

In the circumstances, I do not see a misdirection on the part of the Judges of the High Court of Civil Appeals *in failing to consider that the District Judge has correctly identified the cause of action* as contended on behalf the Defendant.

In the circumstances aforesaid, I answer the question of law referred to in sub paragraph (c) of Paragraph 11 of the Petition of the Defendant in the negative.

Prescriptive Right of the Plaintiff

At the hearing of the appeal, the Defendant premised his argument mainly on two (legal) issues, in order to substantiate the second question of law on which leave was granted, namely; that only a '***defendant'*** can rely on a plea of prescription and that the Plaintiff had failed to identify the corpus in the manner prescribed in Section 41 of the Civil Procedure Code.

Section 3 of the Prescription Ordinance states that "*proof of undisturbed and uninterrupted possession by* ***a defendant*** *in any action, or by those under whom he claims, of lands or immovable property, by a title adverse to or independent of that of the claimant or plaintiff in such action…for ten years previous to the bringing of such action shall entitle the defendant to a decree in his favour with costs.*"

A plaintiff, however, is not barred from claiming title by prescription, for Section 3 goes onto say that *"…And in like manner,* ***when any plaintiff shall bring his action,*** *or any third party shall intervene in any action for the purpose of being quieted in his possession of lands or other immovable property, or to prevent encroachment or usurpation thereof, or to establish his claim in any other manner to such land or other property,* ***proof of such undisturbed and uninterrupted possession as hereinbefore explained, by such plaintiff*** *or intervenient, or by those under whom he claims,* ***shall entitle such plaintiff or intervenient to a decree in his favour with costs:…***" (emphasis added).

The Defendant, relied on the decision in **Terunnanse v. Menike** (1895) 1 NLR 200 to substantiate the point raised that, prescription can only be used as a defence, and not as a weapon of offence, to the effect that the Plaintiff as the party bringing the action, cannot rely on prescription to claim the title.

Although Chief Justice Bonser in **Terunnanse v. Menike** (*supra*) has indeed stated that; "*the Ordinance…as I venture to think… was intended to be used as a shield only, and not as a weapon of offence*" it was immediately followed with the opinion that "*If* ***the person in possession*** *were sued by the true owner,* ***he could plead the Ordinance*** *or he* ***might take the initiative if his possession was disturbed or threatened, and apply for a decree establishing his title and quieting him in possession.***"(emphasis added). Thus, the court has considered pleading relief under the Prescription Ordinance as well as seeking a declaration of title, as acceptable courses of action available to a

person in possession whose possession has been disturbed or threatened. It must be noted, however, that Withers J. who participated in that decision **(Terunnanse v. Menike)** preferred a different view. Withers, J opined;

"the only law relating to the acquisition of private immovable property by prescription is to be found in the third section of the Ordinance No. 22 of 1871. That section determines the mode of acquisition of a prescriptive title. It has been held over and over again by this court that a decree of title to such immovable property can be granted under the circumstances set forth in that section"

There can be instances where a person who had acquired prescriptive title is forcibly ejected and, in such situations, the ejected party should be able to go before the law and vindicate its rights. In the case of **Naker v. Sinatti** 1860 Ramanathan Reports 75, Creasy C.J commented, "*The result would be that men* ***who were turned out of lands and houses*** *would lose all the benefit of prescriptive title, unless they ran off to the courthouse and instituted a suit on the very day on which wrongful act was committed".* (emphasis added). Although these observations were made by his Lordship in giving expression to the phrase *'possession for ten years previous to'* that occurs in Section 3 of the Prescription Ordinance, it recognised the right of a party, seeking title based on prescription, to invoke the jurisdiction of the court in order to vindicate its rights.

In **Banda v. Banda** 44 NLR 302 Moncreiff J. observed that Section 3 of the Prescription Ordinance deals with three classes of **plaintiffs**. His Lordship observed (at page 303); *"When* ***any plaintiff shall bring his action*** *for the purpose of being quieted in his possession of lands or other immovable property or to prevent encroachment or usurpation thereof or to establish his claim in any other manner to such land or other immovable property, proof of undisturbed and uninterrupted possession by him or by those under whom he claims, by a title adverse to or independent of that of the defendant for ten years previous to the bringing of such action shall entitle the plaintiff to a decree in his favour with costs.*" (emphasis added).

Thus, it appears that there is ample jurisprudence developed by our courts over the years, for the proposition that prescription is not only to be used as a shield but also can be used to vindicate one's title to land or other immovable property.

As referred to earlier, it was also argued on behalf of the Defendant that the Plaintiff has not complied with Section 41 of the Civil Procedure Code.

Section 41 of the Civil Procedure Code stipulates that- "*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 Defendant relied on the decision of the Court of Appeal, in the case of **David v. Gnanawathie** 2000 (2) SLR 352. This was a case where the plaintiff claimed that he has exercised by prescriptive user a right of way over a defined route. In delivering the judgement, his Lordship Justice Jayasuriya observed that "*Strict compliance with the provisions of Section 41 of the Civil Procedure Code is necessary for the judge to enter a clear and such definite judgement declaring the servitude of a right of way and such definiteness is crucially important when the question of execution of the judgement and decree entered arises for consideration.*"

It must be noted that the above case related to a prescriptive praedial servitude of a right of (defined) way over a servient tenement and no court would be in a position to determine the issue without a sketch or plan depicting the road way the party claims that was used over a period of time and in those circumstances, the requirement of strict compliance with Section 41 of the CPC is understandable.

In an earlier case, however, the Supreme Court took a different view as to satisfying the requirements of Section 41 of the Civil procedure Code. In the case of **Abdulla v. Junaid** 44 CLW 84 Chief Justice Basnayake observed; *"That section (Section 41)* ***does not require*** (emphasis is mine) *that when a right of way of necessity is claimed over a servient tenement the path or way claimed should be described by physical metes and bounds or by reference to a sufficient sketch, map or plan. It provides that:-*

(a) Where a specific portion of land is claimed that portion of land must be described in the prescribed manner,

(b) Where some share or interest in a specific portion of land is claimed, then the portion of land *in which the share or interest is claimed must be described in the prescribed manner."*

Also *"… They (the plaintiffs) claim a right of necessity to proceed along a defined path which has been indicated in the sketch annexed to the plaint and the plan subsequently prepared on a commission issued by the Court. Although a person claiming a way of necessity has no right to a specific way of necessity until it is constituted by a grant or a decree of Court, it is open to the claimant to indicate the path along which he wishes to proceed so that the Court may decide whether the claim is reasonable or not and grant the right either along the path claimed or prescribe another which causes the least amount of detriment to the servient tenement. The onus of proving the necessity is on the claimant."*

Thus, if a party to a case of this nature describes the property in the plaint to a degree or to an extent, that enables the court to enter a clear and a definite judgement and if the description of the property would not impede the execution of the decree, that would be sufficient compliance with Section 41 of the Civil Procedure Code. In each case the court has to consider this issue based on the facts and circumstances of that particular case. The contrasting decisions in the cases cited above (case of **David** and the case of **Abdulla**) amply demonstrate this factor.

In the case before us, the schedule to the plaint describes the tenement by reference to; its assessment number, the extent, the plan that identifies the lot number in which the 1.92 perch tenement is constructed as well as the northern, eastern, southern and western boundaries of that lot. This description tallies with the schedule of the deed of conveyance issued in favour of the mother of the Plaintiff and the Defendant in this case, by the Commissioner of National Housing ('V1'). In his testimony the Plaintiff has clearly stated that of these premises, he has separated a portion in extent of 13 ½ feet x 13 ½ feet and possessing it as his own (page 125 of the brief). The evidence referred to above, cumulatively, has crystallized the identity of the premises and the portion claimed by the Plaintiff. Under these circumstances, I do not envisage any difficulty on the court to make a declaration for that portion of the impugned premises, based on the description given in the schedule to the plaint.

The learned Judges of the High Court of Civil Appeals had given their mind to the evidence led and the decisions in the cases of **Leslin Jayasinghe v. Illangaratne** 2006 2 SLR 39 and **Muttu Caruppen v. Rankira** 13 NLR 326 and had come to a finding that the Plaintiff had established prescriptive title to the portion of the impugned premises described by him in his evidence.

Considering the above, I cannot fault the learned Judges of the High Court for reaching the said conclusion and as such, I answer the second question of law on which leave to appeal was granted also in the negative.

Accordingly, I affirm the judgement of the High Court of Civil Appeal dated 24th October 2017 and direct the learned District judge to give effect to the said judgement.

Plaintiff would be entitled to the cost of this appeal.

Appeal dismissed

Judge of the Supreme Court

V. K. Malalgoda PC, J.

I agree.

Judge of the Supreme Court

Preethi 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 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. 129/14.

SC/HC/(CA) LA/25/2014

WP/HCCA/GAM/143/2008(F)

D.C. Negombo No. 4807/L

1. Matara Kiri Liyanage Mary Agnes Fernando
2. Weliwita Wedage Anita Mary Vivian Fernando
3. Weliwita Wedage Anthony Leo Fernando
4. Weliwita Wedage Tekla Mary Jacinta Fernando
5. Weliwita Wedage Emmanual Rekshi Fernando
6. Weliwita Wedage Neville Ananda Sirimal Fernando
7. Weliwita Wedage Hyacinth Mary Chamali Fernando
8. Weliwita Wedage Anslem Ajith Kumar Fernando

All of 189, Fathima Lane (Behind Playground), Kochchikade.

Plaintiffs.

Vs.

1. Galabodage Thiboshius Silva.
2. Madithapola Lekamge Patricial Fonseka
3. Galabodage Samantha Silva.

   All of 185, Fathima Lane, Kochchikade.

Defendants.

NOW

1. Matara Kiri Liyanage Mary Agnes Fernando
   1.(a)Weliwita Wedage Anthony Leo Maximus Fernando
2. Weliwita Wedage Anita Mary Vivian Fernando
3. Weliwita Wedage Anthony Leo Fernando
4. Weliwita Wedage Tekla Mary Jacinta Fernando
5. Weliwita Wedage Emmanual Rekshi Fernando
6. Weliwita Wedage Neville Ananda Sirimal Fernando
7. Weliwita Wedage Hyacinth Mary Chamali Fernando

8. Weliwita Wedage Anslem Ajith Kumar Fernando

All of 189, Fathima Lane (Behind Playground), Kochchikade.

Plaintiff- Appellants.

Vs.

1. Galabodage Thiboshius Silva.
2. Madithapola Lekamge Patricia Fonseka
3. Galabodage Samantha Silva.

All of 185, Fathima Lane, Kochchikade.

Defendant-Respondents.

And Now

1. Matara Kiri Liyanage Mary Agnes Fernando
   1.(a). Weliwita Wedage Anthony Leo Maximus Fernando
2. Weliwita Wedage Anita Mary Vivian Fernando
3. Weliwita Wedage Anthony Leo Fernando
4. Weliwita Wedage Tekla Mary Jacinta Fernando
5. Weliwita Wedage Emmanual Rekshi Fernando
6. Weliwita Wedage Neville Ananda Sirimal Fernando

7. Weliwita Wedage Hyacinth Mary Chamali Fernando
8. Weliwita Wedage Anslem Ajith Kumar Fernando

All of 189, Fathima Lane (Behind Playground), Kochchikade.

Plaintiff- Appellant-Petitioners

Vs.

1. Galabodage Thiboshius Silva (deceased)
   1(a). Madithapola Lekamge Patricia Fonseka
   1(b). Galbodage Samantha Silva
2. Madithapola Lekamge Patricia Fonseka.
3. Galaboage Samanth Silva.

All of 185, Fathima Lane, Kochchikade.

Defendant-Respondent-Respondents

Before: Vijith K. Malalgoda PC J
Murdu N. B. Fernando PC J
E.A.G.R. Amarasekara J.

Counsel: S.N. Vijithsingh for the Plaintiff – Appellant – Petitioners
Gamini Hettiarachchi for the 1st and 2nd Defendant – Respondent – Respondents.

Argued On: 27th June 2019

Decided On: 18th December 2020

E. A. G. R. Amarasekara J.

The Plaintiff – Appellant – Petitioners (hereinafter referred to as the plaintiffs or Appellants) instituted this action in the District Court of Negombo inter alia seeking for a declaration of a right of way with regard to an alleged 10 feet wide roadway based on prescriptive user and/or as a way of necessity, and the removal of the obstruction caused to it, and to have free and complete possession to use and enjoy the said 10 feet wide strip of roadway marked as P.Q in a sketch adduced along with the plaint, with a permanent injunction to stop further obstructions. Allegedly, this roadway was situated on the western boundary of the land of the Defendant – Respondent – Respondents (hereinafter referred to as Defendants or Respondents). The said land of the Defendants is described in the second schedule to the plaint which is lot B of plan no.5196 dated 11.09.1936 made by J. C. Fernando, Licensed Surveyor. In terms of the first schedule of the same, the Plaintiffs' land is Lot A of the same Plan. Their stance in the plaint is that this 10 feet wide road they claim leads to the 15 feet wide public road, from their land described in the first schedule to the plaint. According to paragraph 8 of the plaint, the Defendants had obstructed the roadway on 01.03.1993 by fixing fences across the purported roadway on two points marked as P and Q in the aforesaid sketch.

The Defendants had filed their answer dated 26.05.1995 and later, after the returns of commissions taken by both the parties, filed the amended answer dated 11.12.1998. After the filing of the original answer, the Plaintiffs had filed their replication dated 08.12.1995.

The plan No. 5196 made on 11.09.1936 that depicts the lands of the Plaintiffs and the Defendants in the schedules to the plaint as lot A and lot B respectively, had been marked during the trial as P3 (Hereinafter sometimes referred to as P3). It is explicit from the plan marked P3 as well as the descriptions contained in the

schedules, that both the lands are bounded on the west by a path. However, the said path is not situated within the boundaries of the Defendants' land or Plaintiffs' land but outside them and is positioned as the boundary to the Defendants' land as well as to the Plaintiffs' land- vide pages 77 and 92 of the brief.

The plaintiffs' first commission to depict the roadway they claimed was issued and W.S.S. Perera, Licensed Surveyor executed the same and prepared the plan No. 2618 dated 09.09.1994. The said plan and the report had been marked at the trial as "p1" and "p1(a)" respectively (They are also marked as P4 and P4a with the petition and hereinafter may be referred to as P1 and P1a) - vide pages 88 and 86 of the brief. Thereafter, the aforesaid commissioner has prepared the plan no. 3465 and its report by superimposing the plan No. 5196 (P3) dated 11.09.1936 mentioned above. The said plan no. 3465 and report had been marked at the trial as P2 and P2 a (They are also marked as P5 and P5a with the petition and hereinafter may be referred to as P2 and P2a)- vide pages 89 and 90 of the brief. Defendants also, on a commission, had surveyed and prepared the plan no. 3187 dated 17.07.1997 through Prasad Wimalasena, Licensed Surveyor to depict an alternative roadway to the Plaintiffs' land. The said plan and report had been marked as V1 and V1a at the trial (They are also marked as P6 and P6a with the petition and hereinafter may be referred to as V1 and V1a) - vide pages 96 and 97 of the brief.

In the amended answer dated 11.12.1998 filed subsequent to the execution of aforesaid commissions, the Defendants stated *inter alia* that;

a) Since the Defendants are not the sole owners of the land described in the second schedule to the plaint, the Plaintiffs' action cannot be maintained.
b) The Plaintiffs do not have any right to claim a roadway from any part of the divided portion of the land which belongs to the Defendants either by prescriptive user or on necessity.
c) The Plaintiffs have an alternative road access to their land and the Plaintiffs have deliberately suppressed the said fact.
d) As supported by the aforesaid plan no. 2618 and its report marked P1 and P1a, on the purported land strip claimed as a roadway, there are Croton

trees and Pomegranate trees, Coconut and King coconut trees and Bougainvillea bushes etc. of or about 10 - 15 years old.

e) The 2nd Defendant is in possession of the purported Defendants' land for a period of more than 55 years and the road depicted in the plan No. 3465 (P3) was never used by the Plaintiffs or Defendants or any other person.
f) There is a road constructed by the Municipal council, named Fathima Lane which provides access to the house of the Defendants and prior to that, they entered the main road through the land allocated for the playground which had been now acquired by the Municipal Council.
g) They are unaware of the said road depicted in the plan No. 3465(P3) and the Plaintiffs did not claim any right to such a road till the institution of this action.
h) The land described in the plaint does not correspond to the roads surveyed by the Plaintiff for the purposes of this case.
i) A cause of action arose for the Defendants to claim damages since the Plaintiffs unlawfully destroyed the fence of the Defendants' land.

Without prejudice to the above the Defendants in their answer further stated that;

- Although there is a road depicted in plan No. 3465(P3), it is not within the Defendants' land and, even if there was such a road, it had been abandoned by the non-user for a period of more than 55 years.
- If the court allows to use such a road the Defendants' land will be unusable causing an irreparable damage to the Defendants.
- The Plaintiffs after they bought their land and, prior to that, their predecessors too used the road depicted in the plan No. 3187 (V1) mentioned above.

In the District Court as well as in appeal in the Civil Appellate High Court, the Plaintiffs failed in establishing their case and, when leave to appeal application was considered, leave was granted by this Court on the questions of Law stated in paragraph 16(C) and 16(D) of the petition dated 17.01.2014 which are reproduced in verbatim below – vide Journal entry dated 22.05.2014.

"(c) whether the Honorable judges of the Civil Appellate High Court of Gampaha erred in law by failing to consider whether the petitioner is entitled to a servitude right, by way of necessity to use the right of way, when there is no alternative road available?

(d) whether the Honorable judges of the Civil Appellate High Court of Gampaha erred in law by failing to consider whether the petitioner could restrict his right of way for an extent of 8.8 feet, which is less than 10 feet in the circumstances of the case?"

It appears from certain averments in the plaint, and certain parts of evidence led at the trial as well as due to the plan made and tendered in evidence as a superimposition of the path shown in P3 which is situated outside the Defendants' land, and the written submissions filed before this court, that the Plaintiffs on certain occasions attempt to imply that their claim relates to the path shown in P3 which is outside the land that belongs to the Defendants, namely the land in the second schedule to the plaint. In fact, that path in P3 is the western boundary to the Plaintiffs' as well as Defendants' lands which would have existed at the time of the making of that plan in 1936.

Thus, it is necessary to recognize the nature of the action filed before the District Court; especially whether its cause of action was based on a violation of a servitude, namely right of way belonging to the Plaintiffs or some other cause of action.

A servitude can be defined as '*a real right constituted for the exclusive advantage of a definite person or definite piece of land, by means of which single discretionary rights of user in the property of another belongs to the person entitled*' - **Vide Von Vangerow, Pandekten, Volume III, page 338**[1]. *'In other words, it is a right constituted over the property of another, by which the owner is bound to suffer something to be done with respect to his property, or himself to abstain from doing something on or with respect to his property, so that another person may derive some advantage from it.*'[2] Thus, a servitude is a right one has over another's property.

The Plaint does not directly say that the roadway claimed by the Plaintiffs exists over the land that belongs to the Defendants which is in the 2nd schedule to the plaint. The Plaint also does not expressly describe the Plaintiffs' land and defendants' land as the dominant tenement and the servient tenement

[1] The Law of Property Volume Three- 2nd edition by G L Peris at pages 1 and 2
[2] Maasdorp's Institutes of South African Law, Vol. 11, The Law of Things, eighth edition by C. G. Hall at page 125

respectively. As per the body of the plaint, they claim a roadway that is there on the western boundary (බස්නාහිර මායිමේ තිබෙන) of the Defendants' land. Even the issue no.3 raised before the trial uses the term 'along the western boundary' (බස්නාහිර මායිම ඔස්සේ). Thus, the said words used do not definitely state whether the right claimed is over the land of the Defendants or whether it is situated outside the Defendants' land. However, paragraphs 5 and 7 of the plaint use the word "adjoining" (යාබදව) which indicate that the roadway is not within the Plaintiffs' land. Contrarily, on certain occasions, the 3rd and the 2nd Plaintiffs had stated in evidence of using a roadway over the Defendants' land.

However, it is clear from the issues raised by the Plaintiffs that the cause of action relied upon by the Plaintiffs, had nothing to do with any encroachment caused by the Defendants of a roadway adjoining the land of the Defendants. Neither any averment in the Plaint nor any issue raised by the Plaintiffs indicate that the Defendants became entitled to such encroached portion as part of their land by prescription or otherwise, and thereafter, the Plaintiffs acquired a right of way over the Plaintiffs' land that includes the encroached portion. It must be noted that there is neither an averment in the plaint nor an issue raised in relation to the soil rights of the said path shown on the western boundary of P3 or of the purported roadway they claimed and, also no proof was adduced in establishing such soil rights. It should be also noted that no stance was taken by the Plaintiffs to indicate that the path shown in P3 on the western boundary or the purported roadway they claim was a public road that all members of the society including the Plaintiffs had access. Thus, it is clear that the action filed by the Plaintiffs is not based on soil rights or on an alleged right of the Plaintiffs to use a public roadway or on an alleged encroachment caused by the Defendants. As mentioned above, their cause of action was based on obstructions caused to a right of way and they prayed for a declaration of right of way by prescription and on necessity indicating that their claim was based on a servitutal right of way. Further, the plaint was filed against the purported owners of the land described in the 2nd schedule to the Plaint, namely the Defendants, and no one else while describing only the Plaintiffs' land and Defendants' land in its schedule.

Hall and Kellaway on Servitudes 2nd edition at pages 135 and 136 states that;

"the actions recognized by Roman Dutch Law were the actio confessoria and the actio negatoria or contraria, the former being an action to enforce servitude, and the latter to

declare a property free from a servitude. The actio confessoria embraced (a) the removal of all obstructions or replacement of anything destroyed, through which the servitude is rendered useless (b)…(c)…. (Voet, 8.5.3). the actio negatoria could be brought by an owner against anyone claiming the right to exercise servitude over his property for the purpose of ascertaining whether the servitude existed."[3]

Accordingly, this action filed by the Plaintiffs can be identified as an *actio confessoria* since they assert a right of way by prescription as well as of necessity.

Maasdorp observes: "The *action will in any case lie against the owner of the servient tenement and, if there are several joint owners, all will have to be joined……..".* – vide **Institutes of Cape Law (2nd Edition), volume II, page 229.**[4]

Nathan states: "Generally*, this action (the actio confessoria) lies against the owner of the servient tenement; and, if there are two or more owners, against each of them for the whole servitude (in solidum*)". – vide **Common Law of South Africa (2nd edition), Volume I, page 543.**[5]

Chief Justice Basnayake in **Velupillai Vs Subasinghe 58 NLR 385 at 386** delivering the judgment succinctly remarked as follows;

"*The kind of servitude claimed in the instant case is a real or praedial servitude. Such a servitude cannot exist without a dominant tenement to which rights are owed and a servient tenement which owes them. A servitude cannot be granted by any other than the owner of the servient tenement, nor acquired by any other than by him who owns the adjacent tenement*."

As was correctly observed by the Chief Justice Basnayake, the existence of a dominant and a servient tenement is crucial in establishing a servitutal right.

Yet, the mere existence of a dominant and a servient tenement is not good enough, they must also be defined.

"*Strict compliance with the provisions of Section 41 of the Civil Procedure Code is necessary for the judge to enter a clear and definite judgment declaring the servitude of a right of way and such definiteness is crucially important when the question of execution of the judgment and decree entered arises for consideration. The fiscal would be impeded in the execution of the decree and the judgment if the servient tenement is*

[3] Also quoted in Karunadasa V Subasinghe – Hultsdorp Law Journal 2018 at page 285
[4] The Law of Property Volume Three- 2nd edition by G L Peris at page 156
[5] Ibid at page 156

not described with precision and definiteness as spelt out in section 41 of the Civil Procedure Code." - Vide **David Vs Gunawathie 2000 (2) Sri LR page 352 at page 366**

Hence, to bring a successful *actio confessoria*, the Plaintiff must correctly define the servient tenement and he must file the action against the owner/s of the servient tenement. If it is the position of the Plaintiffs that the right of way they claim is what is shown as a path in P3 which is not within the purported Defendants' land, namely lot B of the same plan, they have failed in naming the owner of the correct servient tenement as a Defendant and/or defining the correct servient tenement since the second schedule to the plaint consists of only lot B of P3 and nothing else, which does not include area belonging to the path shown in P3. Hence, if the Plaintiffs' claim is for a servitude of a right of way that exist outside the land described in the second schedule to the plaint, the plaint has to be considered misconceived.

It is clear from the body of the Plaint and from its prayer as well as from the relevant issue no.3 raised at the trial, that the Plaintiffs claim a right of way by prescriptive user and/or on necessity. Only the purported owners of the land in the second schedule, namely the Defendants, are made the Defendants to the action filed by them and no one else. No other land is described in the plaint other than lot B of P3 which can be considered as servient tenement. Hence, it is filed as an action to get a right of way asserted through courts as a servitude against the Defendants and apparently over their land described in the second schedule to the plaint even if some averments in the plaint had described the road way as one adjoining to it. It can be presumed that the words used in the said issue no. 3 to connote that the roadway exists along the western boundary of the defendants' land was used to indicate a roadway running over the Defendants land by the western boundary. Otherwise the plaint has to be construed as misconceived as explained above. Once issues are raised pleadings recede to the background- vide **Hanaffi V Nallamma (1998) 1Sri L R 73**.

The land in the second schedule to the plaint, namely Lot B of P3, which can be considered as the servient tenement does not include the path on the western boundary in P3. Further, the 3rd and 2nd Plaintiffs while giving evidence had described the roadway they claim as one running over the land of the Defendants- vide pages 120,124 and 176.Thus, this court cannot come to the

conclusion that the learned High Court Judges or the Learned District Judge erred in coming to the conclusion that the Plaintiffs' action was against the Defendants to declare and enforce a servitutal right of way, apparently over the land in the second schedule to the plaint .

The first two issues raised at the trial by the Plaintiffs focused on the ownership of the lands in the first and second schedules of the Plaint, namely whether they belong to the Plaintiffs and the Defendants Respectively. It appears that the ownerships of dominant and servient tenements were put in issue by those issues as it is necessary to prove those facts to claim servitutal right of way. Findings over those two issues are not challenged in this appeal. The 3rd and 4th issues raised by the Plaintiffs put in issue whether the Defendants disturbed the use of 10 feet wide right of way running along the western boundary which is claimed by the Plaintiffs on prescription as well as a way of necessity, on 01.03.1993.

In order for the Plaintiffs to be successful there must be sufficient material before the trial court to establish that plaintiffs have acquired the said right of way by prescription, or it is needed as a way of necessity.

As indicated by the decisions mentioned below in this judgment, to claim a right of way as a servitude by prescription, one has to establish that the adverse user of the right has been used in relation to a particular defined area over the servient tenement.

In **Karunaratne V Gabriel Appuhamy 15 NLR 257 at 259**, Lascelles CJ held that '*In the system of law which prevails in Ceylon rights of way are acquired by user under the Prescription Ordinance, and the course or track over which the right is acquired is necessarily strictly defined'.*

The action of the Plaintiff was dismissed in **Kandaiah V Seenitamby 17 N L R 29** where the Plaintiff could not prove the user of a definite path but only proved that he had generally walked across the land of the defendant for more than 10 years. De Sampayo A. J. quoted Wendt J in **C.R. Mallakkam 16,800 S.C. Minutes 26.01.1909** to say that '*The evidence to establish a prescriptive servitude of way must be precise and definite. It must relate to a defined track, and must not consist of proof of mere straying across an open land at any point which is at the moment most convenient*.' This principle was restated in **Fernando V Fernando 31 N L R 126 at 127** where Fisher C J held that "*user of a definite track is the only way in which a right*

of way over the land of another can be acquired by prescription." Our courts articulated a similar view in **Morgappa V Casie Chetty 17 N L R 31, Hendrick V Saranelis (1940) 17 C L W 87, Marasinghe V Samarasinghe 73 N L R 433**. However, in **Thambapillai V Nagamanipillai 52 N L R 225** Gratiaen J followed the same principle and expressed in obiter that a slight deviation of the route that may take place for the convenience and with the concurrence of all the parties may be permissible.

Thus, as per our law, to claim a right of way by prescription it is necessary to prove that a defined area over the servient tenement was used through the prescriptive period.

The learned District Judge among other things rejected the claim of the Plaintiffs for a servitutal right of way based on prescription on the grounds that the Plaintiffs failed in proving the user of 10 feet wide road and the user of a definite strip/ track of land. It is apparent from the judgment given by the learned High Court Judges that they too conceded the above reasons.

As per the sketch tendered with the plaint, the 10 feet wide roadway claimed by the Plaintiffs was shown along the western boundary of the Defendants' land as a straight strip of land. Even the plan no.2618 marked as P1 depicts the purported 10 feet wide roadway shown by the Plaintiffs as a straight strip of land along the western boundary of the Defendants' land placed in between the Defendants' land and the Municipal Playground. Neither P1 nor its report P1a clearly indicate whether this strip of land is within or belongs to the Defendants' land described in the second schedule to the plaint which is also the lot B in plan marked as P3. As elaborated above, if this strip of land is situated outside the Defendants' land, the Plaint has to be considered as misconceived in law. Even if it is presumed that this strip of land was shown within the purported servient tenement described in the second schedule to the plaint, it is depicted as a straight strip of land which can be identified with definite boundaries as per plan P1. However, the report marked P1a made by the witness for the Plaintiffs, W. S. S. Perera, Licensed Surveyor, clearly states that there is no sign to indicate that this strip had been used as a road. Further, the said report reveals that there are five Coconut and King Coconut trees of around 10 to 15 years old within this strip of land. The aforesaid witness in his evidence had stated that these trees are situated in an irregular

manner within the said strip but not in a line. This evidence shows that the purported roadway claimed by the Plaintiffs was at least not in use during the last 10 to 15 years prior to the making of the said plan marked P1 in the manner shown by the Plaintiffs. Further, it indicates that the obstructions caused on 01.03.1993 by the Defendants as alleged in the plaint may not be the correct representation of facts since those trees would have been planted or allowed to be grown many years prior to that. The aforesaid surveyor in his evidence had stated, due to the trees mentioned above, it cannot be used as a road and a cart cannot be taken using that. However, the 3rd Plaintiff and the 2nd Plaintiff in their evidence had attempted to indicate that a cart road was used over the Defendants' land to bring cadjan leaves to thatch a house in their land evading the trees. This may be an afterthought due to the irreconcilability caused by the existing trees on the strip of land shown by them with their stance of user of 10 feet wide roadway till the alleged obstruction. On the other hand, these two plaintiffs were not consistent in this regard since as per the 3rd Plaintiff, last occasion a cart was so taken with Cadjan leaves was in 1979 or 1980 and thereafter they were taken through the playground while according to the 2nd plaintiff last occasion was in 1992. Other than the issue of reliability, this clearly indicates that even if it is true that they have not shown the definite track or the path they purportedly used as a cart road through plan marked P1 since it cannot be a straight strip of land as per the evidence given by the aforesaid Plaintiffs. Nevertheless, taking a cart with Cadjan leaves to thatch a house that may happen once within 12 to 18 months over the neighbour's land as per the evidence given cannot be considered as using permanent cart road adverse to the interests of the owner of the land. However, contrary to the position of using a cart road over the Defendants' land which is, as per the plaint, described in the second schedule to the plaint as well as lot B of plan marked as P3, to show the roadway, the Plaintiffs have taken another commission to superimpose plan marked P3 which indicates a path outside the aforesaid Defendants' land. It appears, as per the evidence led before the District Court, that the intention of producing this superimposed plan no 3465, marked as P2 at the trial, was to indicate how the path shown in P3 would position on the ground. The tendering of this superimposed plan does not reconcile with claiming a servitude over the Defendants' land because the roadway or path depicted in P3 is situated outside the Defendants' land. Further, it is contrary to the claim that a roadway was used

evading trees of the Defendants' land since what is shown in P3 is a straight path which lies outside the Defendants' land.

Even though the surveyor W.S.S. Perera, almost at the tail end of his evidence-in-chief, had stated that even at present there is a permanent boundary between the roadway shown in P3 and the land-(vide page 109 of the brief) indicating that the roadway in P3 even now is situated outside the defendants' land, under cross examination he had stated that as per the superimposition, now the roadway shown in lot B of P3 is within the Defendants' land- vide page 112 of the brief. As observed above, it must be said that, as per P3, there is no roadway within lot B but only as the boundary of lot B. Even the second schedule to the plaint indicates that roadway is the boundary and not a part of lot B. The aforesaid surveyor in his evidence has stated that he received a commission to superimpose P3 with P1 and his superimposition is satisfactory- vide pages 111 and 108 of the brief. However, in his evidence he did not give reasons to say as to why he found it satisfactory. He had not explained how many identified points in P3 plan tallied with the other plan. As per the evidence given by the 3rd Plaintiff, aforesaid surveyor only surveyed the road on the first occasion and after the second commission, surveyed plaintiffs' land but not the defendants' land – vide pages 142,143 and 144of the brief. Now it is important to observe what the surveyor has stated in his superimposition plan no. 3465 and its report marked as P2 and P2a respectively. Neither the notes on plan marked P2 nor the report marked P2a states that the surveyor superimposed P3 with the Plan no.2618 (P1) as per the commission issued. The notes on the P2 plan which describe the plan P2 states that he surveyed the Siyabalagahawatte claimed by the Defendants and superimposed it with lot A of Plan no. 5196 (P3). Ironically, the said note speaks of a superimposition of the Defendants' land with the Plaintiffs' land since lot A in P3 is the Plaintiffs' land. However, the report marked P2a states that he surveyed the plaintiffs' land and superimposed it with the corresponding lot A in P3. Nonetheless, the facts mentioned above establish that the notes on the superimposition plan marked P2 is contradictory to the contents of its report and, the superimposition plan and report does not show that it was prepared in compliance with the commission issued. As such, it is not proper to rely on the mere statement of the surveyor who made it, saying that it was a satisfactory superimposition. In the said report marked P2a the surveyor had stated the

roadway (Path) shown in P3 was 6 feet wide and in his evidence, he had stated that now it is within the Defendants' land and it is 6 feet 3 inches wide implying that the defendants have encroached it.

As explained above, what the plaintiffs claimed against the defendants was a right of way on prescription as well as on necessity. As said before, there is no cause of action relied on an encroachment of a soil right. As observed above, if the Plaintiffs' implied position is that the Defendants encroached the path existed outside lot B of P3 and/or the Defendants acquired title to it by way of prescription or otherwise and the servient tenement is the land that consists of Lot B of P3 as well as the portion of the path so encroached, then those facts should have been so pleaded and the servient tenement should have been described in the plaint accordingly not limiting it to Lot B of P3. On the other hand, such a position may be inimical to their claim on right of way since it also implies that the Defendants have prescribed against their rights.

The 3rd and the 2nd Plaintiffs while giving evidence had stated that the roadway they claimed had been referred to in their deed and plan -vide pages 132 and 198 of the brief. The deed no.21172 executed in 1957 marked as P4 is a transfer deed which convey only lot A of P3 to the Plaintiffs' predecessor in title. It has not given any right of way over the Defendants land or any other land. It neither state that the Plaintiffs or their predecessors in title have soil rights or any other right to the path mentioned therein as the western boundary to lot A and B of P3 nor that it is the road access reserved for the said lot A. The path shown in P3 is shown outside the Defendants' land and not within it. The said plan made in 1936 only indicates that there was a path along the boundary of their land and the plaintiffs' land when it was made. It may even be a path used by someone else to some other land since, as per P3, it does not seem to end at the Plaintiffs' land. However, the Plan marked V 2 and V2a indicates that there was no such path along the western boundary of the Plaintiffs' land when it was made in 1987. As per the said Plan, the western boundary is the Municipal Play Ground which belongs to the State. Even W J M G Dias, Licensed Surveyor had stated in evidence that he did not observe any sign indicating a roadway on the western boundary when he made that plan. Thus, it appears that the roadway claimed by the Plaintiffs were not in existence by 1987. The Grama Niladari summoned as a witness by the Defendants had revealed that people went across the Municipal Ground prior to 1977 and the

officer of the municipal council sub office who was summoned to give evidence for the Defendants had further revealed that due to the problems faced by people who used a road access over the playground, an alternative roadway, namely Fathima Cross Road was made during the decade that started from 1970. Perhaps, this may be the reason for disappearance of the path shown in P3 in the plan made in 1987. The Defendants had marked plan No.3187 made by Prasad Wimalasena, Licensed Surveyor to show that there is an alternative access from Fathima Cross Road to the Plaintiffs land.

To claim a 10 feet wide right of way by prescriptive user, the Plaintiffs should have proved the adverse user for 10 years of a roadway over a definite track or strip of land which is within the servient tenement belonging to the Defendants but the contents of the plaint as well as the evidence led by the Plaintiffs demonstrate the indecisiveness of the Plaintiffs with regard to;

- whether the claim made by them relates to a straight track of 10 feet wide roadway over the servient tenement (lot B in P3) which is described in the 2nd schedule to the plaint.
- whether the claim made by them relates to 10 feet wide roadway that runs through the servient tenement (lot B in P3) described in the 2nd schedule to the plaint evading trees, which cannot be a straight track or strip of land and is also not shown in any of the plans submitted.
- Whether the claim by them relates to the path shown in P3 which is not within the servient tenement (lot B in P3) described in the second schedule to the Plaint.

The confusion with regard to their own cause of action arisen due to the aforesaid indecisiveness is further visible by citing **Saparamadu V Melder (2004) 3 Sri L R 148** and stating in their written submissions, that to stop a person travelling through a path or a road, the person who blocks the road must have soil rights. **Saparamadu V Melder** was an action filed to declare a property free from servitude, in other words, it was an *actio negatoria*. When the Plaintiffs filed this action against the Defendants for a declaration of a right of way by prescription and on necessity describing the Plaintiffs' and Defendants' lands in the schedules to the Plaint, the action as explained above is *actio confessoria*, and if their cause of action was with regard to the encroachment of the path shown in P3 or

obstructing of the said path, the disputed land or the path has to be described in the schedule to the plaint as per the Section 41 of the plaint and described the cause of action accordingly. Further, as elaborated above, they should have named the necessary parties and/or correct servient tenement as the case may be.

In the above circumstances this court cannot find fault with learned District Judge or the High Court Judges for their conclusions that the plaintiff failed in proving a right of way gained by prescription since the plaintiffs failed in proving a prescriptive user of a definite track or strip of land.

Nevertheless, the Plaintiffs now in this court by way of an issue of law attempt to raise whether the Learned High court Judges could have considered the Plaintiffs' entitlement to an 8.8-feet wide right of way which is lesser than the width of 10 feet. This would have been raised owing to the fact that the learned High Court Judges have observed that there is a gap of 8.8 feet from the eaves of the building in V2 plan to the boundary of the roadway.

Firstly, this observation made by the Learned High Court judges is not correct since there is no roadway on the western boundary as per the said plan made in 1987. As per the evidence given by the surveyor who made that plan, the said gap is the width up to the wire fence from the eaves of the house.

Secondly, the surveyor who prepared P1 plan for the Plaintiffs had testified stating that some of the trees that he found within the 10 feet wide strip shown as the roadway by the Plaintiffs were in the middle of the said strip and some were situated only 4 feet away from the western boundary. Thus, there cannot be an 8.8 strip of land used as a road way along the western boundary and within the lot B of P3 which is the land in the second schedule to the plaint.

Thirdly, the Plaintiffs themselves superimposed P3 and attempted to show through the evidence of the surveyor who did the superimposition, that, on the western boundary, there was a 6 feet or 6.3 feet wide strip which is the roadway found in P3. As said before, this superimposition cannot be considered as reliable but it was what the Plaintiffs tried to convince the original court through marking the said superimposition plan. If there is a 6.3 feet strip of land that originally was the path shown in P3, the issues raised at the trial by the Plaintiffs do not focus on a cause of action based on encroachment to meet such a stance. On the other

hand, this purported encroached portion does not form part of the second schedule to the plaint (Lot B of P3) which has to be considered as the servient tenement for the purposes of this case. Furthermore, a superimposition can only prove comparative state of the boundaries of the present survey with the old one. The prescriptive user has to be proved by other evidence. The indecisiveness of the plaintiffs' position with regard to the track or strip of land they used over the Defendants' land which is described as Lot B of P3 in the plaint shall make the plaintiffs fail in their claim on prescription. There was no reliable evidence before the original court in relation to a definite track or strip of land of either 10 feet wide or 8.8 feet wide or 6.3 feet wide or 6 feet wide over lot B of P3 which is the land described in the second schedule to the Plaint.

The other question of law is based on the claim of the Plaintiffs to use a right of way as a way of necessity. The Plaintiffs appears to argue that the learned High Court Judges erred in not considering their entitlement to such servitutal right. What the learned High Court Judges have stated in their judgment was that, as per plan marked V1, the Plaintiffs had prayed for a right of way to take vehicles instead of the foot path and the learned District Judge had lawfully rejected their claim since the Plaintiffs had not proved their necessity of a roadway that can take vehicles to their land - vide the last paragraph of the judgment of the High Court dated 12.12.2013. It must be observed that V1 was not a plan submitted by the Plaintiffs. It was the plan tendered by the Defendants to show the existence of an alternative roadway. Whether there is an alternative road is a matter of fact and the Learned District Judge who heard the evidence of the surveyor who made that plan had come to the conclusion that the Plaintiffs could use the said alternative roadway- vide answer to issue no 10 of the District Court Judgment. Neither the High Court nor this Court sitting in appeal is better equipped to decide on facts and nothing is there to decide that it was a perverse finding. However, towards the Plaintiffs' land the width of the said access is only 4 feet. The Plaintiffs claim is not related to the widening of the said access shown in V1 but a 10-feet right of way over the Defendants' land. The learned District Judge had observed in his Judgment that the Plaintiffs were not using any private vehicles and even as per the nature of their livelihood it is not apparent that they have any need to use a private vehicle. No evidence seems to have led to show that a fair need to take a vehicle regularly to the Plaintiffs' land had arisen. The Plaintiffs had

only testified of a cart bringing Cadjan leaves to thatch a hut that may happen once in 12 months or 18 months. As mentioned above, one Plaintiff had testified that this was done lastly in 1979/1980 over the roadway they claim while the other had contradictorily stated it was in 1992 posing a question of reliability on this story. Burden is on the Plaintiffs to prove the necessity of a permanent cart road through evidence placed before Court. I cannot see such reliable evidence had been led. In **Fernando V de Silva 30 N L R 56**, it was held that the owner of a land which had access to the High Road by a path, could not claim a cartway unless the actual necessity of the case demanded it. In **Amarasuriya V Perera 45 N L R 348** at **350** Wijewardene J held as follows;

"*I think that a judge would be taking an unreal view of the conditions obtaining in this country if he held that owner of a compound of half an acre requires a cartway for transporting his coconuts. The granting of the cartway claimed will impose a very heavy burden on the defendant whose land appears to be not even an acre in extent*."

Thus, it appears that when a foot path is available the Plaintiffs can claim a cart way on necessity only when there are special circumstances which calls for the exercise of the court's discretion in Plaintiffs' favour. No such special circumstances seem to have been adduced in evidence before the Learned District Judge. As stated in **Chandrasiri V Wickramasinghe 70 N L R 15**, the onus lies on the person/s who claims the right of way of necessity to show that it is necessary. In the present action, the Plaintiffs failed in proving the need of a cart road and the Defendants have proved to the satisfaction of the Court the existence of an alternative foot path.

In the aforementioned circumstances this court cannot state that the learned District Judge or the Learned High Court Judges were in error when they came to the conclusion that the Plaintiffs had not proved the necessity of a road that can take vehicles to the Plaintiffs' land.

Further, the learned District Judge had observed that even if there was a cart road over the Defendants' land, the Plaintiffs had abandoned it since the Plaintiffs had not taken any step to stop the building made by the Defendants on the purported roadway claimed by the Plaintiffs. As per the evidence of the 3rd Plaintiff, this building was completed in 1970s. The plaint in this case was filed only in 1993 December. In this regard learned District Judge had cited **Paramount Investment**

Limited V Cader (1986) 2 S L R 309 to indicate that tacit abandonment takes place where the servient owner is permitted to do something that necessarily obstructs or make inoperative the exercise of servitutal right. However, in the case at hand, purported servitude claimed by the plaintiffs is not one created by a deed, as such the proposition of law stated in the said case that, under our law, a servitude of right of way created by a notarial grant cannot be lost by non-user has no relevance. Furthermore, the Plaintiffs marked P1 plan to show the purported roadway they claim but the trees grown on the said roadway which are 10 to 15 years old as per the Plaintiffs' own witness itself is indicative of an abandonment that had taken place much before the purported obstruction alleged in the plaint. Anyhow, according to Roman Dutch Law, in order for the right to be abandoned, non-user or the abandonment of the right should be for a third of hundred years, i.e. 33 and 1/3 years- vide **Dayawathie V Dias and others, The Bar Association Law Journal 2013 Vol. XX page 20**. As per P3, lot A and lot B appears to be portions of one land named Siyambalagahawatte. There is no evidence to indicate that the path on the western boundary was part of the main land reserved as a road access to these two lots. No roadway is shown over the Lot B as an access road to Lot A. The Plaintiffs deed, as said before, does not indicate any right of way was reserved for Lot A, neither over Lot B nor over the said path on the west to the land. No evidence had been led to show when the original owner transferred Lot B to the predecessors of the Defendants, he reserved a right of way over Lot B for Lot A. Thus, if there was any right of way over Lot B, the abandonment would have taken place when those Lots were given to the predecessors of the parties. If one abandons his right of way, he cannot be allowed to claim it as a way of necessity again. However, even to consider abandonment, first there must be proof for that, at a given time in the past, there was a servitude of right of way over the Defendants' land which is lot B of P3. As said before, the path shown in P3 was not over the said lot B as such there was no proof to indicate that there was servitude of right of way over aforesaid lot B which has to be considered as the servient tenement.

Due to the aforementioned circumstances, this court cannot find fault with the Learned High Court judges' decision that affirmed the judgment of the Learned District Judge which dismissed the Plaintiffs' action.

Hence, this court answers the issues of laws mentioned above in the negative.

Accordingly, the appeal is dismissed with costs.

…….

Judge of the Supreme Court.

Vijith K Malalgoda P C, J.

I agree.

…….

Judge of the Supreme Court.

Murdu N. B. Fernando P C, J.

I agree.

……

Judge of the Supreme Court.

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

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

SC Appeal No.134/14.
Supreme Court Application
No. SC (SPL)LA 253/12
CA. APPN/MISC/01/11
D.C.B.40236

1. Handuwala Devage Simon Fernando
Alias Handuwala Devage Simon Munasinghe,
No. 144, Kelanitissa Mawatha,
Wanawasala,
Kelaniya.

Original Debtor - Applicant.

1A. Handuwala Devage Sisira Munasinghe,
No. 144, Kelanitissa Mawatha,
Wanawsala,
Kelaniya.

Substituted Debtor - Applicant.

-Vs-

Ranepura Devage Hector Jayasiri,
No. 542, Sudharmarama Road,
Kelaniya.

Respondent.

And

In the matter of Chairman and Members of the Debt Conciliation Board had requested

the Court of Appeal under section 53 of the Debt Conciliation Ordinance in to seek the opinion of the Court of Appeal on section 19A (1A) of the Debt Conciliation (amendment) Act No. 29 of 1999.

1. Chairman and Members of
Debt Conciliations Board,
No. 80, Adhikarana Mawatha,
Colombo 12.

Requestor – Applicant seeking opinion from Appeal Court under Section 53 of the Debt Conciliation Ordinance.

Requestor – Applicant.

2. Ranepura Devage Hector Jayasiri,
No. 542, Sudharmarama Road,
Kelaniya.

Original Respondent - Respondent.

-vs-

1A. Handuwala Devage Sirira Munasinghe,
No. 144, Kelanitissa Mawatha,
Wanawasala,
Kelaniya.

Substituted Debtor -Respondent.

And Now Between

Handuwala Devage Sisira Munashinghe,
Of No.144, Kelanitissa Mawatha,
Wanawasala, Kelaniya.

Substituted Debtor–Applicant – Respondent – Petitioner

-Vs-

1. Chairman and Members of
   Debt Conciliation Board,
   No. 80, Adhikarana Mawatha,
   Colombo 12.

Requestor – Applicant – Respondent

2. Ranepura Devage Hector Jayasiri
   No. 542, Sudharmarama Road,
   Kelaniya.

Original Respondent - Respondent - Respondent.

Before : Jayantha Jayasuriya PC, CJ
Sisira J de Abrew, J &
E.A.G.R. Amarasekara, J.

Counsel : P. K. Prince Perera for substituted Debtor – Applicant – Respondent – Appellant.
Sunil Jayakody for Original Creditor – Respondent – Respondent – Respondent.

Argued On : 22.05.2019.

Decided on : 14.07.2020.

E. A. G. R. Amarasekara J,

As per the Petition dated 20.01.2014 submitted by the Substituted Debtor Applicant Respondent Petitioner (hereinafter sometimes referred to as the Substituted Debtor Applicant or the Petitioner), the Original Debtor- Applicant (hereinafter sometimes referred to as the Original Debtor), had preferred an application (No. 40236) to the Debt Conciliation Board (hereinafter sometimes referred to as the Board) on 17th December 2005, praying relief under Debt Conciliation (Amendment) Act No 29 of 1999 (hereinafter sometimes referred to as the Amendment or the Amending Act)

The position of the Substituted Debtor Applicant appears to be that the Original Debtor had obtained a loan of Rs.75, 000/- transferring his land in extent of 36.5 perches to the Original Creditor Respondent Respondent Respondent (Hereinafter sometimes referred to as Original Creditor) on transfer deed No.1539 dated 01-02-1993 attested by a notary public. The averments of the said Petition further state that, the then Chairman and Members of the Board had entertained the said application since 2005. However, before the Board, the question as to the maintainability of the application arose since the application was made relying on a transfer deed executed prior to 17th September 1999 (the date on which the afore-mentioned Amendment to the Debt Conciliation Ordinance was certified). Thereafter, a succeeding Chairman and the Members of the Debt Conciliation Board preferred a case stated to the Court of Appeal in May 2011 for its opinion on the question of law;

"**Whether Section 19A (1A) of Debt Conciliation (Amendment) Act No. 29 of 1999 is applicable to debts secured by transfers made prior to 17th September, 1999". (17th of September 1999 was the date on which the said Act was certified).**

The application to the Debt Conciliation Board, though dated 17.12.2005, was presented to the said board on 02.02.2006. However, the brief indicates that it was once dismissed on 04.07.2006, while the original debtor was not present, on an application made on the ground that the Board had no jurisdiction. Later on,

case was re-opened and, it appears certain evidence was led. Nevertheless, as per the record, it is clear that objection to the adjudication by the Board was there from the beginning on the basis that the relevant transfer deed was executed 13 years prior to the application and also prior to the said amending Act. Anyhow, the Board on 29.11.2010 had taken a decision to state the case to the Court of Appeal as aforesaid.

His Lordship and Her Ladyship of the Court of Appeal who, though wrote separate judgments, for the reasons elaborated in their respective judgments, came to the same conclusion that the aforesaid amendments are applicable to the deeds of transfers executed on or after 17th of September 1996 which being the date fell exactly three years prior to the certification of the said Amendment, Act No.29 of 1999 and the Board cannot entertain applications based on transfer deeds executed prior to 17th September 1996.

Being aggrieved by the said judgment of the Court of Appeal, the Substituted Debtor – Applicant preferred an application before this court. And after supporting the said application, special leave was granted by this court on the question of Law;

"**Has the Court of Appeal misconstrued the proviso to Section 19(A) (1A) of the Debt Conciliation Amendment Act No 29 of 1999 in providing the opinion sought by the Debt Conciliation Board**?"

This appeal has been filed challenging the propriety of the said Court of Appeal judgment. On behalf of the Substituted Debtor Applicant the counsel argued that:

- Even though the relevant Deed of Transfer was executed on 01.02.1993 and the application was submitted on 17th December 2005, the Board has authority to entertain and hear the application.
- Since the Section 2(1) of the Amending Act which became the proviso to Section 19A(1A) reads as '*provided that nothing in this subsection shall be read or construed as preventing the board from entertaining, after the period referred to in that subsection, an application by a debtor who is in possession of the property transferred*', what the Board should take into consideration is whether the applicant or the debtor was in possession of the property transferred as security to the Respondent who is the creditor or lender. This is because the Statute has to be expounded according to the

will of the legislature giving the plain meaning to the language used and when there is one meaning the task of interpretation hardly arises.

- The time bar has been removed with regard to a “Debtor” who had transferred his movable property as security for a Debt obtained but continued to be in possession of such immovable property.
- The three-year period referred to in the main section does not operate as a bar for the Debtors who were continuing in possession of the property already transferred by the deeds when the said amending Act came into operation.
- As per the provisions in Section 19 A(1A), the Debtors who are not in possession and Creditors in respect of debts purporting to be secured by a deed of transfer have to make their respective applications within three years from the date of execution of the relevant deed. Thus, as far as these two categories of applicants are concerned, the Board cannot entertain applications based on deeds of transfer executed three years prior to the amending Act, namely 17th September 1996. However, the debtors who are in possession have no such time bar to make their application and the time period can go backwards as long as the relationship of the Debtor and Creditor exists. With regard to this category one should not substitute a time period which is not there in the section.
- In constructing statutes Judges should;
    - Suppress the mischief and advance the remedy.
    - Must consider the unambiguous language used by the parliament and when the words are not capable of limited construction, apply the words as they stand.
- The rule against retrospective operation is a presumption only. It may be overcome, not only by express words in the Act but also by circumstances sufficiently strong to displace it.
- The main purpose of the amending Act is to strengthen the weak borrower against the hitherto corrupt lender and to counter his subterfuges, and that is why it empowers the Board to receive evidence of the debtor notwithstanding the provisions in the Evidence Ordinance and the Prevention of Frauds Ordinance.
- Since the legislature knew that there are debtors at the time of formulation of the amending Act who are in danger of losing their valuable properties

under the guise of transfers of their properties, it has not included a clause to state the effective date of the aforesaid proviso brought forward by the amending Act.

- As per Section 2 (e) of the Interpretation Ordinance 'Commencement' in reference to an enactment shall mean the day on which such enactment comes into force and 'Operation' used with reference to an enactment which is not to take effect immediately upon coming into force, shall mean the day on which such enactment takes effect. Since the amending Act does not spell a specific date of 'commencement' or 'operation' or a situation prior to the enactment of the Act, the amending Act is retrospective and goes to the beginning of the Principal Act and the amendment is operative from that date.

While the Substituted Applicant Debtor challenged the conclusions of the Court of Appeal as elaborated above, the Original Creditor as well as the Attorney General as Amicus Curiae have deliberated much in favour of the conclusions of the Court of Appeal.

The position of the Original Creditor before this court is that, the Debtor has preferred the application in question to the Board on 2nd February 2006 (13 years after the signing of the deed) and by that time, the said amending Act had already come into operation. Since the Debtor could not make his application to the Board to redeem his property before the said amendment came into effect, the proper remedy for such a debtor would lie in the District Court where the Debtor may plead a cause of action based on a Constructive Trust if there was a loan covered by an absolute transfer.

It is also submitted on behalf of the Original Creditor that the issue that has arisen before this court requires to determine as to whether the said proviso would stand on its own or link with the main subsection 19A(1A). It is the position of the Original Creditor that the Proviso must of necessity be limited to the scope of the main section which it qualifies and a proviso receives only a construction so far as the main section itself is concerned.

With regard to whether the date of operation of the amending Act No. 29 of 1999 would be the date of certification or the date principal enactment became effective, it is submitted, on behalf of the Original Creditor, that if the amending

Act is silent as to the date of operation it comes into operation at the date of its certification.

In relation to whether the said subsection 19A(1A) could be construed retrospectively to the applications made by the Debtors based on deeds of transfer executed on a date beyond a period of three years from the date of certification, provided they are in possession of the properties subject to the said transfers, the Counsel for the Original Creditor argues that the Board cannot entertain an application relying upon deeds of transfer that was executed 3 years prior to the date of certification of the amending Act even if the Debtor remains in the possession.

As per the written submissions on behalf of the Attorney General as Amicus Curiae, it was submitted with regard to the amendments brought forward by the aforesaid amending Act that;

- The debtor could not make an application to the Board to redeem his property given on a transfer, even when it was executed as a security to a loan before the amending Act No. 29 of 1999. But the situation has changed with the amendment.
- With the amendments, the Board is vested with jurisdiction to entertain applications in respect of deeds of transfer from 17.09.1999 onwards.
- However, the Amending Act also fixes a terminal date backwards. The application has to be made within three years of the notarially executed instrument effecting the transfer, but proviso to section 19A(1A) provides a getaway from this time bar when the debtor is in possession of the property despite the absolute transfer shown on the document.
- The proviso is linked to the 3-year time period between the date of execution of the transfer deed and the date of application mentioned in the main section 19A. The date of application has to be a date after 17.09.1999.
- The legislative intent should be gathered by reading the section in its entirety. Thus, proviso does not stand alone and it has to be read with the sub section 19A(1A).
- The terminal date for a notarially executed deed of transfer prior to 17th September 1999 that can be challenged before the board as is a mortgage is 17th September 1996, because a debtor who executed a deed of transfer

on that date can submit his application on 17th September 1999 with the passage of the amendment.

- Thus, an application to be filed before the Board, based on a deed of transfer, the transfer deed has to be executed either on 17.09.1996 or thereafter, and proviso will not apply to a deed of transfer executed prior to 17.09.1996 even if the debtor is in possession.

Before proceeding to analyze the aforementioned stances taken by the parties to this appeal, it is pertinent to place on record following facts which are not in dispute:

- The deed of transfer No. 1539, based on which the application was made to the Board, was executed on 01.02.1993.
- The amending Act, namely the Debt Conciliation (Amendment) Act No. 29 of 1999 was certified on 12.09.1999.
- No date of operation or commencement of the amending Act is expressly provided in the amending Act
- There is no provision in the said amending Act which clearly states that the Act has retrospective effect or that its provisions are effective from a date prior to the date of certification.

Analysis of the Law involved

Sections 19 and 19 A of the Act as amended prior to the amendments brought by the 1999 amending Act were as follows;

"19. ***The Board shall not entertain any application by any debtor or creditor in respect of a debt which is the matter directly and substantially in issue in a previously instituted action which is pending in any court between the same parties or between parties under whom they or any of them claim litigating under the same title :***

Provided that nothing herein contained shall be held to affect the right of the Board to deal with any application referred to it under section 45.

19.A.(1). The Board shall not entertain any application by a debtor or creditor in respect of a debt purporting to be secured by any such conditional transfer of immovable property as is a mortgage within the meaning of this Ordinance unless that application is made before the expiry of the period within which

that property may be redeemed by the debtor by virtue of any legally enforceable agreement between him and the creditor.

(2) ***Where the Board entertains an application of a debtor in respect of such a debt as is referred to in subsection (1), the Board shall cause notice of that fact signed by the secretary to be sent together with a copy of the application by registered post to the creditor to whom the application relates."***

The amending Act has inserted the following subsection with a proviso after the aforementioned section 19.A.(1) as (1A).

"(1A) The Board shall not entertain any application by a debtor or creditor in respect of a debt purporting to be secured by any such transfer of immovable property as is a mortgage within the meaning of this Ordinance, unless that application is made within three years of the date of the notarially executed instrument, effecting such transfer :

Provided that nothing in this subsection shall be read or construed as preventing the Board from entertaining, after the period referred to in that subsection, an application by a debtor who is in possession of the property transferred."

It should be also noted aforementioned subsection 2 of Section 19 A was also amended to include applications made under aforesaid new section introduced by the amending Act, namely section 19A(1A).

Further the amending Act by its section 8 has amended the section 64 of the principal enactment by the substitution in the definition of "***creditor***", for the words "***a conditional transfer of immovable property***" of the words "***a transfer or conditional transfer of immovable property***"; and by the substitution, in the definition of "***mortgage***", for the words "***any conditional transfer of such property***" , of the words "***any transfer or conditional transfer of such property***".

A careful reading of the aforesaid amending Act of 1999 in the light of afore quoted amendments discloses that the said amending Act has brought notarially executed deeds effecting transfers, which alleged to have secured debts, under the purview of the Board. Such deeds of transfers were not within the jurisdiction of the Board prior to the amending Act.

In considering whether the Court of Appeal misconstrued the proviso to Section 19(A) (1A) of the Debt Conciliation Amendment Act No 29 of 1999 and also in forming an opinion by this court with regard to the case stated, namely whether Section 19A (1A) of Debt Conciliation (Amendment) Act No. 29 of 1999 is applicable to debts secured by transfers made prior to 17th September 1999, this court has to resolve the matters mentioned below. That is;

- On what date the amending act came into force or became effective;
- Whether the proviso to Section 19A(1A) is a standalone provision or is linked to the main part of subsection 19A(1A) and, or else whether the scope of the proviso is limited since it links with the main part of the sub section;
- Whether the amending Act has any retrospective effect; if so to what extent; or else whether its effect is only prospective;

As far as the date the Amending Act came into force or became effective is concerned, it is relevant to examine section 2 of the Interpretation Ordinance. As per the interpretations given in that section, the word "commencement" when used with reference to an enactment shall mean the day on which such enactment comes into force and the word "operation" when used with reference to an enactment which is not to take effect immediately upon coming into force shall mean the day on which such enactment takes effect. As mentioned before, since there is no express provision in the amending act with regard to the commencement or operation of the enactment, the Substituted Debtor Applicant argues that the amending Act is retrospective and goes to the beginning of the Principal Act and the amendment is operative from that date.

However, it was so stated in the **R Vs Smith (1910) 1 KB 17** and **R Vs Weston (1910) 1 KB 17** cited on behalf of the Original Creditor that "*at the present time there are two well-known dates in many Acts of Parliament, the date of the Act passing and the date of its coming into operation. If, therefore an Act is silent as to the date of its coming into operation, it comes into operation at the date of its passing*." **Bindra's The Interpretation of Statutes** also cites the aforementioned cases at Ch. XXXIII page 1048.

It is my considered view that unless there is an express provision as to the date of commencement or operation of the enactment, the view expressed in the aforesaid cases is the correct one to follow. If one adopts the view expressed on behalf of the Substituted Debtor Applicant it may cause grave difficulties and hardships to the subjects. An amendment that does not spell a date of commencement, when one adopts the stance of the Substituted Debtor Applicant, may revive already prescribed causes of actions; may create new obligations to past transactions; may convert what was not unlawful prior to the passing of the amendment unlawful.

Therefore, the correct view should be that the date of certification of the amending Act in the case at hand is the date it came into operation. Thus, the amending Act enabled a debtor to file an application before the Board in relation to a deed of transfer which was purportedly executed as a security to a loan given to the Debtor from the date of its certification, namely from 17.09.1999.

Anyhow, it is pertinent to note that the amendment is silent as to whether one can file an application before the Board based on a deed of transfer executed prior to the date of certification of the amending Act. The Court of Appeal has taken the view that applications can be filed based on deeds of transfer executed after 17.09.1996 since there is a limitation to file an action after 3 years of the execution of the deed and the proviso has to be interpreted considering its link with the subsection it belongs to. However, as stated before, the stance of the Substituted Debtor Applicant appears to be that the proviso has a standalone effect and, as such if the debtor is in possession, there is no terminal date backwards and applications can be filed on deeds of transfer even though they were executed at the date of commencement of the original Ordinance. Hence, it is necessary to see whether the relevant proviso has a standalone effect or whether it has to be considered as limited by its link with the Sub section 19A(1A).

Since the proviso to Section 19A(1A) reads as '*provided that nothing in this subsection shall be read or construed as preventing the board from entertaining, after the period referred to in that subsection, an application by a debtor who is in possession of the property transferred*', the contention on behalf of the Substituted Debtor Applicant is that what should be considered by the board in

entertaining the application is whether the applicant or the debtor was in possession of the property transferred as security to the Respondent who is the creditor or lender. In other words, his position is that the proviso has a standalone effect and it is not necessary to examine when the deed of transfer was executed if the debtor is in possession. In other words his argument seems to be that, since the time bar is removed with regard to a debtor who is in possession of the property, even if the deed of transfer was executed as far back as at the time of the enactment of the original Ordinance, what matters is whether the applicant is still in the possession of the property and nothing else.

It is true that court in interpreting statutes must give life to the intention of the legislature. In doing so, if the language is plain, the court must give effect to them. If the words are not capable of limited construction, apply the words as they stand. It is also correct to say that this amendment was brought to strengthen the weak borrower against the hitherto corrupt lender and to counter his subterfuges. Thus, there is no doubt that in constructing the provisions of the amending Act Judges should suppress the mischief and advance the remedy. However, a court should not construe a statute giving retrospective effect in a manner that will affect the substantial rights of the subjects unless it is clear that the intention of the legislature was to give retrospective effect.

On the other hand, as stated by His Lordship Justice in his impugned judgment in the Court of Appeal and, as argued on behalf of the Original Creditor and the Honourable Attorney General, the relevant proviso does not have a separate identity without its link to the main part of the relevant subsection, namely subsection 19A(A1).

The proviso is part and parcel of the said subsection. At this juncture it is pertinent to refer to the following decisions in this regard.

"*Legislative intent should be gathered by reading the section in its entirety in the context of the object and purpose the legislature had in mind in enacting the provisions. An intention to produce an unreasonable result is not to be imputed to a statute if some other construction is available*." See **Ismalebbe Vs Assistant Commissioner of Agrarian Services** (1991) 2 SLR 332.

"*It is a salutary rule, well established, that the intention of the legislature must be found by reading the statute as a whole*." – Vide **Organo Chemical Industries Vs Union of India** AIR 1979 SC 1803 at 1817.

"*The proviso must of necessity be limited in its operation to the ambit of the section which it qualifies*."- Vide **Lloyds and Scottish Finance, Ltd. V. Modern Cars and Caravans (Kingston), Ltd** [(1966) 1QB.779 at 780].

"It is common learning that the object of a proviso is to cut down or qualify something which has gone before. The thing which has gone before is the general power to give a discharge, absolute or suspended, and to impose conditions of the widest possible kind. It would be contrary to the ordinary operation of a proviso to give it an effect which would cut down those powers beyond what compliance with the proviso renders necessary.

What the proviso does is this. It does not give powers; it qualifies powers already given, and provides that in the exercise of those powers the court shall be subject to certain limitations in the sense that one or more of the stated alternatives is made obligatory." - **in re. Tabrisky, Ex. parte The Board of Trade [1947 Chancery Division 565 at pg. 568].** Further, **Maxwell on Interpretation of statutes 12th Edition 189 and 190** also confirms the above position.

The aforementioned case laws and texts indicate clearly that the effect of a proviso is linked with the section or subsection it belongs to and its scope is limited and qualified by the main section.

Thus, in the light of above decisions, this court cannot find fault with the Court of Appeal for taking the view that the proviso to Section 19A(1A) is not a standalone provision but is linked to the main subsection 19A(1A) and the scope of the said proviso is limited since it links with the main sub section 19A(1A). Therefore, there is no error found in the judgment of the Court of Appeal in rejecting the stance taken on behalf of the Original Debtor in the Court of Appeal, namely the restriction referred to in section 19A(1A) does not operate as a bar to entertain applications if the debtor is in possession of the land alleged to have been transferred irrespective of the date of execution of the deed, even if such deed was executed as far back as at the time of the enactment of the principal ordinance.

Even though the Court of Appeal has expressed that under normal circumstances laws do not have retrospective effect, the effect of the decision of the Court of Appeal would be that the deeds of transfers executed on or after 17. 09. 1996 could become the subject of an application to the Board. The reasoning behind the Court of Appeal decision seems to be that;

- The amending act enables filing of applications based on Deeds of Transfers from 17.09.1999.
- The limitation in Section 19A (1) is that such an application cannot be filed after 3 years from the date of execution of the Transfer Deed. Thus, Deeds of Transfer executed on 17.09.1996 can be a subject of an application from 17.09.1999.
- Since the proviso is linked to the main section and limits or qualify the provisions in the main section including the time limit, transfer deeds executed prior to 17.09.1996 cannot be a subject of an application to the Board even when the Debtor is still in possession.

However, the result of the Court of Appeal decision creates a retrospective effect on certain deeds of transfer executed between 17.09.1996 and 17. 09. 1999 where the latter is the date of commencement of the amending Act. Therefore, it is necessary to examine whether the amending Act has any retrospective effect and, if so to what extent.

In **Colombo Apothecaries Limited Vs E.A. Wijesooriya** 73 NLR 05 it was stated that "*A statute may be brought into operation after the date of its enactment and it can also, provided the language is clear and unambiguous, be made to operate before enactment*."

It was held in **Grocock Vs Grocock** (1920) 1 KB 1 DC at page 9 that " In the absence of an expressed intention that a statute shall have a retrospective operation, the rule is nova constutio futuris formam imponere debet non praeteritis."(Every new rule ought to prescribe a form for future, not for past acts; a new law ought to impose form on what is to follow, not on the past.)

Even on behalf of the Original Creditor, while referring to **Grocock Vs Grocock** (1920) 1 KB 1 DC, **R Vs Chandra Dharma** (1905) 2 KB 335 and **Director Public Prosecution Vs Lamb** (1941) 2 All ER 499 , it was submitted that "*a statute ought*

not be held retrospective in its operation, unless the words are clear, precise and quite free from ambiguity". It was further submitted that statutes have retrospective effect when the declared intention of the legislature is clearly and unequivocally manifest from the language employed in the particular law or in the context of connected provisions.

In this regard following decisions and texts have also been brought to the attention of this court.

"The rule against retrospective operation is a presumption only. It may be overcome, not only by express words in the Act but also by circumstances sufficiently strong to displace it." -- Vide page 225 of the 12th Edition of **Maxwell on Interpretation of Statutes by P. St. J. Langan** referring to **Sunshine Porcelain Potteries Pty. Ltd. V Nash** [1961] A C 927.

Maxwell on the Interpretation of Statutes (12th Edition) at pages 215 and 216 –
'*Upon the presumption that the legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation. They are construed as operating only in cases or on facts which come into existence after the statutes were passed unless a retrospective effect is clearly intended. It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication.*

The statement of the law contained in the preceding paragraph has been "so frequently quoted with approval that it now itself enjoys almost judicial authority."

One of the most well-known statements of the rule regarding retrospectivity is contained in this passage from the judgment of R.S. Wright J. ***in Re Athlumney****; "Perhaps no rule of construction is more firmly established than this – that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only." The rule has, in fact, two aspects, for it "involves another and subordinate rule, to the effect*

that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary."

If however, the language or the dominant intention of the enactment so demands, the Act must be construed so as to have retrospective operation, for "the rule against the retrospective effect of statutes is not a rigid or inflexible rule but is one to be applied always in the light of the language of the statute and the subject-matter with which the statute is dealing." '

Bindra's Interpretation of Statutes, 7th Edition page 862*, -- "Operation of rule by express words or by necessary implication – It is fundamental rule that no statute shall be construed to have retrospective operation unless such a construction appears very clearly in the terms of the statute or arises by necessary and distinct implication. It has been held that a statute should not be given retrospective operation unless its words are so clear, strong and imperative that no other meaning can be annexed to them or unless the intention of the Legislature could not be otherwise satisfied particularly where retrospective operation would alter the pre-existing situation of parties or affect or interfere with their antecedent rights. The rule that laws are not to be construed as applying to cases which arose before their passage is applicable when to disregard it would impose an unexpected liability that if known might have caused those concerned to avoid it. When a statute deprives a person of his right to sue or affects the power or jurisdiction of a Court in enforcing the law as it stands, its retrospective character must be clearly expressed.*

The intention to take away a vested right without compensation or any saving is not to be imputed to the Legislature unless it be expressed in unequivocal terms. Statutes have retrospective effect when the declared intention is clearly and unequivocally manifest from the language employed in the particular law or in the context of connected provisions. It is always a question whether the Legislature has sufficiently expressed itself. One must look at the general scope and purview of the Act and the remedy the Legislature intends to apply in the former state of the law and then determine what the Legislature intended to do. More retrospectivity is not to be given than what can be gathered from expressed or clearly implied intention of the Legislature.

Acts which have the effect of impairing contracts and affect vesting rights must be strictly construed and in interpreting such laws the Courts must lean against giving retrospective effect to their provision. Unless there is something in the language of an Act showing a contrary intention, the duty and the practice of the Court of Justice is to presume that the Act is prospective and not retrospective."

The aforementioned decisions and authorities indicate that there is no strict prohibition for retrospective legislation but there is a general presumption in favour of the rule against retrospective legislation. Generally, Statutes are construed as operating only in cases or on facts which come into existence after the statutes were passed unless a retrospective effect is clearly intended. However, a statute can be construed to give retrospective effect when the intention of the legislature to give retrospective effect is conspicuous by the clear, precise and unambiguous language used or by the strong attending circumstances. Thus, as law stands today it is correct to state that no statute shall be construed to have a retrospective operation to affect substantive rights of a subject unless such a construction appears very clearly in the terms of the statute, or arises by necessary and distinct implication.

At this juncture it is worthwhile to see the changes brought forward to the debt conciliation law by the amending Act. As said before the amending Act came into force on its date of certification, namely on 17.09.1999. As per words used in the relevant provisions of the amending Act, the plain and simple meaning would be;

- That from the date of commencement of the Act, it enables the debtors to file applications before the Board in respect of loans taken by executing deeds of transfers. (However, it is pertinent to note that no application could have been made in respect of loans taken by executing deeds of transfer prior to that date.)
- That such an application has to be filed within 3 years from the date of execution of the deed of transfer but this 3-year limit was not applicable if the land is in the possession of the debtor.

In simple words, the amendment enabled debtors to file applications in relation to loans supposedly taken by executing transfer deeds within 3 years of the

execution of the deed but making that limitation of 3-year period not applicable when the debtor is in possession of the land.

However, the amendment is silent whether it applies to the Deeds of Transfers executed prior to the date of certification of the amending Act or its application is limited to the deeds of transfer executed after the date of certification. No express provision is found therein about how it affects the rights, privileges, obligations, liabilities or immunities of vendees of such deeds executed prior to the date of certification of the enactment. In that regard there is an ambiguity or uncertainty warranting an interpretation.

What is stated in **Craies on Statute Law 7th Edition** page 387 sheds light on in recognizing a retrospective legislation. It reads as follows;

'"*A statute is to be deemed to be retrospective, which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past. But a statue "is not properly called a retrospective statute because a part of the requisites for its action is drawn from a time antecedent to its passing*."'

The interpretation given by the Court of Appeal to the amending Act and its provisions may not adversely affect the debtors, but as far as the Vendees of deeds of transfer executed after 17.09.1996 till the date of commencement of the amending act are concerned, the interpretation given by the Court of Appeal may cause a substantial impact on their rights and obligations. Namely; they or their deeds of transfer were not subject to the authority of the Board till the 17.09.1999 but with interpretation given by the court of Appeal, they have been made subject to the authority of the Board. (On similar circumstances there was a possibility for them being sued in the District Court for a declaration of constructive trust but with the Interpretation given by the Court of Appeal their insusceptibility from the powers of the Board is removed.) A new duty and or obligation is created to present their case before the Board if an application is made by the purported debtor stating that the transfer deed is only security as is of a mortgage in respect of a loan, and failure or avoidance of which, or an adverse decision of the Board, possibly may cause severe consequences limiting or disabling their ability to deal with the relevant property involved as their own.

Further the decision of the board on such an application also may cause new obligations on the vendee to abide by.

Hence, as far as the vendees of Transfer Deeds executed between 17.09.1996 and 17.09.1999 are concerned, the interpretation given by the Court of Appeal affects the substantive rights of them that existed prior to the amendment causing the amending act to be retrospective.

As per the references quoted above from Maxwell on Interpretation of Statutes and Bindara's Interpretation of Statutes:

- A court shall not give a retrospective operation to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without' doing violence to the language of the enactment.
- If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed prospectively
- The intention to take away a vested right without compensation or any saving is not to be imputed to the Legislature unless it be expressed in unequivocal terms.
- Furthermore, when a statute deprives a person of his right to sue or affects the power or jurisdiction of a Court in enforcing the law as it stands, its retrospective character must be clearly expressed.
- Statutes which have the effect of impairing contracts and affect vesting rights must be strictly construed and in interpreting such laws the Courts must lean against giving retrospective effect to their provision.
- Unless there is something in the language of an Act showing a contrary intention the duty and the practice of the Court of Justice is to presume that the Act is prospective and not retrospective.

In **Attorney General Vs Vernazza** [1960] 3 All E. R. 97 at 100, Lord Denning stated as follows;

"*If the new Act affects the respondent's substantive rights, it will not be held to apply to proceedings which have already commenced, unless a clear intention to that effect is manifested: see* ***Colonial Sugar Refining Co. Vs Irving [1905] A.C. 369****. But if the new Act affects matters of procedures only, then, prima facie, it*

applies to all actions pending as well as future;" The aforementioned statement has also been referred to in **Kanagasabai Vs Seevaratnam** 76 NLR 517 at 520.

When one looks at the Court of Appeal's decision in the light of what has been discussed above it is clear that, as far as the deeds of transfers executed in between 17.09.1996 and 17.09.1999 are concerned, the impugned decision of the Court of Appeal has an impact on the Vendees of those deeds not as a matter of procedure but on their substantive rights creating new obligations and duties or attaches new disability in respect of a past transactions while subjecting them to a new Jurisdiction. Thus, the interpretation given by the Court of Appeal affects the substantive rights of the Vendees of aforesaid deeds executed between 17.09.1996 and 17.09.1999. As said before, the interpretation given by the Court of Appeal has a retrospective effect on the rights of the said vendees. The language used in the amending act as well as the speech made by the relevant minister in the Parliament indicate that the intention of the legislature was to overcome the mischievous strategies of unscrupulous money lenders. However, the circumstances or the language do not clearly indicate without ambiguity that the legislature intended to affect the rights of the Vendees of deeds of transfer executed prior to the date of commencement of the amending Act. Hence, the view of this Court is that the Court of Appeal partly erred in coming to the conclusion that the aforesaid amendments are applicable to the deeds of transfers executed on or after the 17th of September 1996.

Therefore, answer to the case stated to the Court of Appeal by the Chairman and Members of the Debt Conciliation Board, Requestor- Applicant- Respondent should have been "No, Section 19A (1A) of Debt Conciliation (Amendment) Act No. 29 of 1999 is not applicable to debts secured by transfers made prior to 17th September, 1999."

Thus, the answer to the question of law allowed by this Court shall be ' Yes, the Court of Appeal misconstrued the proviso to Section 19(A) (1A) of the Debt Conciliation Amendment Act No 29 of 1999 in providing the opinion sought by the Debt Conciliation Board by coming to the conclusion that the amendments are also applicable to the deeds of transfer executed after 17.09.1996 and before 17.09.1999, when they only apply to the deeds of transfer executed after 17.09.1999.

Hence, the appeal is considered and the opinion of the Court of Appeal expressed in relation to the case stated shall be amended as per the decision made by this Court. In other words, the answer to the case stated should be “No, Section 19A (1A) of Debt Conciliation (Amendment) Act No. 29 of 1999 is not applicable to debts secured by transfers made prior to 17th September, 1999.” The Court of Appeal is directed to answer the case stated accordingly. However, since this Court is of the opinion that the amendments are not applicable to the deeds of transfer executed prior to 17.09.1999, this court cannot enter judgment in favour of the Substituted Debtor Applicant as prayed for in the prayer iv of the petition dated 15.11.2012.

No Costs.

……

Judge of the Supreme Court.

Jayantha Jayasuriya, PC, CJ

I agree

……

The 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 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 5A of the said Act.

S C Appeal No. 138/2012

SC/HCCA/LA No. 270/2011

CP/HCCA/CA/885/2002

DC Gampola case No. 1551/X

Sewgan Sivapakyam,
No. 90,
Mahakumbura,
Nawalapitiya.
Presently at
196/31,
Pannaloka Mawatha,
Peiris Road,
Dehiwala.

DEFENDANT - RESPONDENT - APPELLANT

-Vs-

Indrani Sinnaiah,
No. 56,
Kotmale Road,
Nawalapitiya. (now deceased)

PLAINTIFF - APPELLANT - RESPONDENT

1A. Sinnaih Muththalagu

1B. Sinnaih Manoharan

Both of
No. 92,
Mahakumbura,
Soysakele 6,
Nawalapitiya.

1C. Ramachandran Haridas,
Soysakele Road,
Mahakumbura,
Nawalapitiya.

SUBSTITUTED PLAINTIFF - APPELLANT - RESPONDENTS

Before: **BUWANEKA ALUVIHARE PC J**

P PADMAN SURASENA J

S THURAIRAJA PC J

Counsel: Rohan Sahabandu PC for the Defendant - Respondent - Appellant

L M K Arulanandam PC with Premasiri Perera and Devika Panagoda for the 1C substituted Plaintiff - Appellant - Respondent

Argued on: 19-06-2019

Decided on: 21-05-2020

P Padman Surasena J

The Plaintiff – Appellant - Respondent (hereinafter sometimes referred to as the Plaintiff) who filed the plaint in this case, in the District Court of Gampola, has, inter alia, stated in her plaint;

i. that she had conditionally transferred to the Defendant - Respondent - Appellant (hereinafter sometimes referred to as the Defendant), the land more fully set out in the schedule to the said plaint, subject to the condition that the said Defendant will transfer it back to the Plaintiff upon payment of the value mentioned in the said deed together with a 5% interest (per month) thereon,
ii. that the Plaintiff had failed to pay back the money as undertaken,
iii. that the Plaintiff had then made an application to the Debt Conciliation Board,

iv. that the Debt Conciliation Board, having inquired into the said application,

a) concluded by its order dated 09-11-1990, that the said conditional transfer is a mortgage in terms of the provisions of Debt Conciliation Ordinance;

b) accepted as reasonable, the proposed undertaking by the Plaintiff to pay back the interest at a reduced rate of 20% per annum instead of 5% per month which is the rate mentioned in the deed that had effected the said conditional transfer;

c) issued to the Plaintiff, a certificate under section 32(2) of the Ordinance (produced marked **P 2**) to that effect.

The Plaintiff in her plaint, had prayed *inter alia* that,

(i) the deed No. 270 attested on 05-06-1988 by Mangalika Hesle Jayasundera Notary Public be annulled;

(ii) a declaration that the Plaintiff is the owner of the property be granted;

(iii) the Defendant be directed to transfer the property in the name of the Plaintiff;

(iv) the Plaintiff be restored in the possession of the land in extent of 13 perches described in the schedule of the plaint dated 07th June 1995.

The Defendant filed his answer dated 20th January 1997. The Defendant in his answer has;

1) admitted that the Plaintiff made an application to the Debt Conciliation Board and that the said application was dismissed;

2) admitted that the deed of lease was executed between the Plaintiff and the Defendant;
3) taken up the position that the Plaintiff has failed to pay the sum due to the Defendant within six months of the issuance of the certificate by the Debt Conciliation Board and therefore the Plaintiff is not entitled to maintain this case.

At the conclusion of the trial, the learned District Judge has delivered judgment dated 27.06.2002, dismissing the plaint on the basis that the Plaintiff has not proved her case on the balance of probability and that the action by the Plaintiff is out of time as per the provisions of Prescription Ordinance.

The Plaintiff being aggrieved by 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 14.06.2011, has set aside the judgment of the learned District Judge and held that the Plaintiff is entitled to the relief as prayed for in the Plaint.

The Provincial High Court has taken the view;

i. that the Defendant has failed to plead the prescription in his answer;
ii. that the Defendant has failed to frame an issue pertaining to the above position in the trial before the District Court and that the Defendant had taken up the position of time bar against the maintenance of the plaintiff's action only in his written submissions;

iii. that the conclusion by the learned District Judge that Plaintiff has failed to comply with the order of the Debt Conciliation Board is erroneous as it is based on "misevaluation of the evidence" as submitted by the Plaintiff;

iv. that there is no basis to infer that the failure to pay costs in the previously filed case bearing No. X 1503 would be a bar for the institution of case No. 1551.

The Provincial High Court having regard to the substantial relief prayed by the Plaintiff in the instant action has taken the view that the Debt Conciliation Ordinance has provided for such relief, which could be granted by the District Court to the Plaintiff.

It was on the above basis that the Provincial High Court has reversed the conclusion of the learned District Judge.

This Court, when the leave to appeal application pertaining to the instant appeal was supported, having heard the submissions of the learned President's Counsel for the Defendant and the learned Counsel for the Plaintiff, by its order dated 31-07-2012, has granted leave to appeal only in respect of the following two questions of law.

1) Could the Plaintiff have and maintain the present action without depositing the consideration referred to in Deed 270 dated 05.06.1988 together with the legal interest thereon?
2) Is the certificate relied upon by the Plaintiff binding between the parties?

Thus, I would consider the judgment of the Provincial High Court within the scope of the above two questions of law.

It is the position of the Defendant that the Debt Conciliation Board has imposed a condition on the Plaintiff to deposit the amount payable to the Defendant within six months of the said order. The said order (dated 09-11-1990) has been produced marked **P 02**.

Perusal of the judgment of the learned District Judge shows clearly that he had taken the view that the plaintiff had undertaken to repay the loan along with the accrued interest within six months of the certificate issued by the Debt Conciliation Board. He has arrived at this conclusion based on the contents of the certificate issued by the Debt Conciliation Board produced marked **V 02** and the document marked **P 02**.

However, it is clearly mentioned in those two documents that the Defendant had rejected the proposal put forward by the Plaintiff for the settlement of the loan in the way specified therein. It is also clearly mentioned in the said documents that the Defendant had demanded 40% interest as against the interest agreed by the Plaintiff. Therefore, it is clear that the certificate does not contain any mutually agreed method of settlement of the debt. This is because both parties had not converged on a mutually accepted method of either re-payment or re-conveyance of title of the land to the Plaintiff. The certificate issued by the Debt Conciliation Board is to the effect that "the debtor has made the creditor a fair offer which the creditor ought to reasonably have accepted". It is not a certificate containing a settlement arrived at between parties.

Thus, I am of the view that it has only certified the fact that the debtor has made the creditor a fair offer which the creditor ought to reasonably have accepted. The effect of

the certificate must be confined only to the above fact. For the above reasons, the answer I provide to the question of law No. (2) would be 'the certificate relied upon by the Plaintiff would be binding between the parties only to the above extent.'

Section 39(2) (a)[1] of Debt Conciliation Ordinance states as follows;

"Where a certificate has been granted under this Ordinance in respect of a debt secured by a conditional transfer of immovable property and subsequent to the granting of that certificate an action is instituted in any court for the recovery of that property, the court-

a) *may, notwithstanding that the title to that property has vested in the creditor in relation to that debt, make such appropriate orders as are necessary to re-convey title to, and possession of, that property to the debtor, in relation to that debt, on the payment by the debtor of the debt together with the interest thereon in such instalment and within such period not exceeding ten years as the court thinks fit; and …"*

Indeed, it is to obtain the benefit of the maximum possible time of ten years provided for by law, that the Plaintiff has invoked the above jurisdiction of the District Court. One of the reasons the leaned District Judge has given in his judgment when he decided to dismiss the action of the Plaintiff is the failure of the Plaintiff to deposit any money in Court to be paid to the Defendant. However the leaned District Judge has failed to observe that the main purpose of the action was to obtain the benefit of the maximum

[1] Before the Amendment by Act No. 29 of 1999.

possible time of ten years for the repayment of the relevant debt as provided for in section 39(2) (a) of Debt Conciliation Ordinance. In the above circumstances, insisting that the Plaintiff should deposit money to be paid to the Defendant would clearly be unnecessary unreasonable and defeat the primary purpose of the action.

Thus, I am of the view that in the circumstances of the instant case, there is no impediment for the Plaintiff to maintain the instant action in the District Court. For the above reasons, the answer I provide to the question of law No. (1) would be 'the Plaintiff can maintain the present action without depositing the consideration referred to in Deed 270 dated 05.06.1988 together with the legal interest thereon.'

For the foregoing reasons, I affirm the judgment of the Provincial High Court dated 14th June 2011 and proceed to dismiss this appeal with costs.

JUDGE OF THE SUPREME COURT

BUWANEKA ALUVIHARE 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 from an Order of the Provincial High Court

SC Appeal No. 148/2012

R. Chandrasena
392, Siri Parakumba Mawatha,
Makola South, Makola.
Applicant

SC/HCLA No. 111/2011

HC Colombo No. HCALT 68/2008

LT Application No. LT 1/320/2002

Vs

The Monetary Board,
Central Bank of Sri Lanka,
30, Janadhipathi Mawatha,
Colombo 01.
Respondent

And

R. Chandrasena
392, Siri Parakumba Mawatha,
Makola South, Makola.
Applicant-Appellant

Vs

The Monetary Board,
Central Bank of Sri Lanka,
30, Janadhipathi Mawatha,
Colombo 01.
Respondent-Respondent

And

The Monetary Board,
Central Bank of Sri Lanka,

30, Janadhipathi Mawatha,
Colombo 01.

Respondent-Respondent-Appellant

Vs

R. Chandrasena
392, Siri Parakumba Mawatha,
Makola South, Makola.

Applicant-Appellant-Respondent

And Now Between

Bethmage Premawathie Chandrasena
(nee Perera),
392, Siri Parakumba Mawatha,
Makola South, Makola.

Petitioner

Vs

The Monetary Board,
Central Bank of Sri Lanka,
30, Janadhipathi Mawatha,
Colombo 01.

Respondent-Respondent-
Petitioner-Appellant

Before: Buwaneka Aluwihare PC, J.
Vijith K. Malalgoda PC, J. &
Murdu N. B. Fernando PC, J.

Counsel: Geoffrey Alagaratnam PC with Suren Fernando instructed by Ishara Gunawardena for the Respondent-Respondent-Appellant.

Murshid Maharoof with Ruchira Gunasekera and Shamir Zavahir for the Applicant-Appellant-Respondent.

Appellant's Written Submissions
tendered on: 20.10.2014 & 16.07.2018

Respondent's Written Submissions
tendered on: 04.12.2014

Argued on: 30.11.2018

Decided on: 21.09.2020

JUDGEMENT

Aluwihare PC. J.,

1. The Applicant-Appellant-Respondent (hereinafter referred to as the 'Applicant') invoked the jurisdiction of the Labour Tribunal alleging that his services were unjustly terminated by the Monetary Board, the Respondent-Respondent-Petitioner-Appellant (hereinafter referred to as the 'Respondent').

2. After inquiry the Learned Labour Tribunal President by the order dated 16th October 2009 held that the termination of the services of the Applicant was justified.

3. Aggrieved by the order of the Labour Tribunal, the Applicant canvassed the said order by way of an appeal before the High Court, and the Learned High Court Judge upon considering the appeal, set aside the order of the Learned Labour Tribunal President, holding that the Applicant's services were wrongfully terminated, and granted the following relief;
    a) The Applicant was held entitled to the salary up to the age of retirement (60 years)
    b) Compensation in the sum of Rs. 1,000,000/= (one million) and his pension rights

4. Aggrieved by the judgement of the Learned High Court Judge, the Appellant-Respondent sought Special Leave to Appeal against the said judgement. Consequently, this court granted Special Leave to Appeal on the following questions of law (*vide* SC Minutes 08.08.2012);
    i. Did the Learned High Court Judge err in placing reliance on the evidence of two domestic inquiries or matters related thereto without considering the nature of and conduct of the proceedings before the Labour Tribunal?
    ii. Did the Learned High Court Judge err in failing to consider his appellate role when reviewing the order of the Labour Tribunal, which can only be on a question of law?
    iii. Did the Learned High Court Judge err in making an order that the Respondent is entitled to the relief of compensation in lieu of reinstatement in addition to payment of back-wages and pension?

The Factual Matrix

5. The Applicant who had joined the Central Bank as a non-staff officer in the year 1969, and having gained several promotions, had been serving in the

capacity of Senior Analyst Programmer (Grade 2-Staff Class) when his services were terminated on 25th July 2002.

6. It is in evidence that at the point of terminating his services, the Applicant was entrusted with the task of preparing staff salaries and this exercise included the preparation of the Applicant's salary as well. It is also in evidence that this process (of preparing salaries) was carried out with the aid of a computer software called "Payroll Module of Integrated Human Resource Management-AS 400".

7. It is alleged that the Applicant, who was not entitled to a "Floor Allowance", had prepared his own salaries for the months of February and March 2000, in such a way that an additional sum of Rs. 5000/= was added to his salary for the said months. It is also in evidence that in crediting salaries to the respective employees of the Central Bank, based on the data entered by the Applicant, he caused to have an additional sum of Rs. 10,000/= credited to his bank account.

8. Towards the end of March, what the Applicant had done had been detected and consequently, with effect from 23rd March 2000 he had been suspended from service followed by being charge sheeted. Subsequent to a domestic inquiry, the services of the Applicant had been terminated in 2002.

9. As referred to earlier, the Learned President of the Labour Tribunal, having considered the evidence led at the inquiry on behalf of the Monetary Board, had come to a finding that the Applicant had committed a fraudulent act by causing to have two additional sums of Rs. 5000/= each credited to his account and had acted in a manner not befitting to an officer of the Central Bank. The Learned President of the Labour Tribunal held that the termination of the services of the Applicant was reasonable and justified under the circumstances.

Consequently, the application of the Applicant was dismissed by the Learned President of the Labour Tribunal.

10. The Learned High Court Judge, however, by his judgement dated 30th September 2011, set aside the order of the Labour Tribunal and held that the termination of the services of the Applicant was wrongful. The Learned High Court Judge also held that the Applicant is entitled to receive his salary up to the point of the Applicant reaching the age of 60 (up to 31st July 2005), Rs. 1,000,000/= (one million) as compensation and granted his pension rights.

The High Court Judgement

11. The Learned High Court Judge has set aside the order of the Learned President of the Labour Tribunal on the basis that the Labour Tribunal President has failed to evaluate the evidence led at the inquiry (page 11 of the judgement).

12. As reasons for the conclusion referred to in the preceding paragraph, the Learned High Court Judge has stated the following;

    a) The Learned High Court Judge had considered extensively the two domestic inquiries held against the Applicant wherein at the first inquiry the Applicant had been exonerated and in the subsequent domestic inquiry the applicant had been found guilty.

    b) The inquirer who held the domestic inquiry had carefully analysed the evidence led in the inquiry and had very correctly exonerated the Applicant and that there was no necessity to have a second domestic inquiry on fresh charges. The Learned High Court Judge had held that the Learned President of the Labour Tribunal had failed to consider the

evidence led and order made at the domestic inquiries. Again, at page 15 of the judgement the Learned High Court Judge had reiterated the fact that there was no justification to have the Applicant subjected to a second domestic inquiry after he was exonerated at the first.

c) The Learned High Court Judge has also referred to the numerous hardships the Applicant had undergone as a result of losing his job, and had reproduced in his judgement (at page 15) the contents of a letter addressed to the Director-Establishments, Central Bank by the Applicant in that regard.

d) Further the Learned High Court Judge had referred to the evidence given by a witness at the domestic inquiry (at page 17) and had reproduced the questions put and answers given by the witness verbatim. The Learned High Court Judge had concluded that this witness who testified before the domestic inquiry had given contrary evidence, before the Labour Tribunal (at page 18).

e) The Learned High Court Judge also referred to the fact that the same Inquirer who held the initial domestic inquiry against the Applicant and exonerated him had, at the subsequent domestic inquiry, held that the Applicant was guilty of the three charges and by changing the conclusion, had caused a serious prejudice to the Applicant.

f) The Learned High Court Judge had found fault with the Learned President of the Labour Tribunal for not paying due attention to the fact that the domestic inquiry had not been held in a just manner.

13. It appears from the above, that the sole reason for the Learned High Court Judge to set aside the order of the Labour Tribunal had been the "unjust manner", as

the Learned High Court Judge says, in which the domestic inquiry against the Applicant was held.

14. Nowhere in his judgement had the Learned High Court Judge referred to or considered any evidence given either on behalf of the Respondent (Monetary Board) or the Applicant, before the Labour Tribunal. All what the Learned High Court Judge had considered is the material placed before the domestic inquiry (pages 11-24). On pages 1-10, the Learned High Court Judge had stated the positions taken up at the argument before him, by the respective parties.

The Two Domestic Inquiries

15. As one of the questions this court is called upon to answer is whether the Learned High Court Judge erred in placing undue weightage/reliance on the evidence led at the domestic inquiry to arrive at the conclusion, I feel- although it might not be directly relevant- that for the sake of completeness, it would be pertinent to refer to the "two" domestic inquiries referred to by the Learned High Court Judge.

16. In the first charge sheet served on the Applicant, it is alleged that the Applicant facilitated the crediting of Rs. 5000/= for the month of February and March 2000 in favour of his bank account in the People's Bank. The Inquirer had come to a finding that this charge against the Applicant had not been established (document marked as 'R32 (a)' before the Labour Tribunal).

17. The Central Bank, acting in terms of Rule 33 of the Central Bank Classification, Control and Appeal Rules requested a further inquiry into certain specific aspects. Two of them were; "whether it can be established in which module the

change in data which facilitated the alleged fund transfer to take place i.e. the payroll module or the SLIPS module" and "In the event the change affected was in the payroll module, whether any person other than the accused officer had access to that module" ('R33').

18. In response to the request for a further inquiry the Inquirer had re-opened the inquiry and had recalled two of the witnesses who had given evidence earlier, in order to clarify the queries raised; and the Applicant had taken part in the inquiry represented by his Defending Officer. At the conclusion of the further inquiry the Inquirer had concluded that the change of data has occurred in the "payroll module" (paragraph 19 of 'R34') and only the Applicant had the opportunity to work on the "payroll module".

19. Before proceeding to consider the questions of law that this court is called upon to answer, I wish to state the factual position with regard to the preparation of staff salaries at the Central Bank as evidenced before the Labour Tribunal.

    a) The process consists of two stages according to witness Jayawardena; "payroll module" handled by the Applicant, and the "SLIPS module" handled by the witness. According to Jayawardena's testimony salary particulars are entered by the Applicant, and once that step is completed, based on the data entered, the witness ensures that the salaries are credited to the respective bank accounts of the staff members.

    b) In response to questions directed by the Labour Tribunal, the witness has said that it was the Applicant who entered the data and further, in relation to the amount that should be credited in favour of the Applicant for the month of March 2000, data was entered by the

Applicant, and that this witness is incapable of changing them once the data is entered.

c) According to the document marked as 'R17', a report compiled by witness Mala Dayaratne, she had carried out a periodic system test run on "salary" and "other payments" categories on 22nd March 2000, when the witness had compared the total figures generated on the 21st March and 22nd March, had detected a discrepancy of Rs. 5000/= in the "payroll" live run. As an initial step, the witness had checked for any "bugs" in the system and found no defects.

d) Eventually she had traced the discrepancy, in the net salary figure of employee bearing ID No. 2083 which was of the Applicant. The net salary figure of the Applicant on 21st March 2000 was recorded as Rs. 9371/= and on the following day it had been changed and the salary figure reflected as Rs.4371/= (a deficit of Rs.5000/=). According to witness Mala Dayaratne, once the "payroll" and the "SLIPS" processes are completed, the person who is in charge of the "payroll module" can change the data without the permission of anyone and during the relevant period, the "payroll module" had been under the control of the Applicant

e) It had been established that the Applicant was entitled to a salary of Rs. 4371/= and not for a salary of 9371/= for the month of March 2000. A further inquiry had led to the detection of a similar occurrence in the previous month (February) as well in favour of the Applicant.

f) The Applicant in his evidence had admitted that he was in charge of the "payroll module" in the month of March. On the other hand, the Applicant had not disputed the fact that although his salary entitlement

for the month of February and March were Rs.5, 542.52 and Rs.4, 371.41 respectively, that sums of Rs.10, 542.52 and Rs.9341.41 had been credited to his account.

g) In fact, the Applicant's due salary was Rs.28, 554.98 and Rs.28, 644.52 for the months of February and March 2000, due to the deductions of Rs.23, 012.46, and Rs.24, 273.11 for those two months, his residual salary had been low as referred to in paragraph (f).

h) If the crediting of the extra amount (Rs.5000) in the favour of the Applicant was a mistake or due to the intervention of a third party, the Applicant ought to have noticed it when more than double the amount due to him as salary, got credited to his account in the month of February. The Applicant, on the contrary, admitted that he withdrew Rs.8000/= in February.

Questions of Law

20. The issue before the Learned President of the Labour Tribunal was, whether the termination of the services of the Applicant by the Central Bank was unjust or not, taking into account all the facts and circumstances under which the services were terminated.

21. On the other hand, the mandate of an Inquirer, holding a domestic inquiry relating to a worker is to determine whether the specific charges levelled against the worker had been established or not.

22. It is needless to state that these two exercises cannot be equated, although one might argue that the same set of evidence more or less might be relevant in both processes.

23. The Labour Tribunal is required to hold an inquiry before determining this factor and is further required to consider the oral testimonies and other material placed before it, in this exercise.

24. Section 31(C)(1) of the Industrial Disputes Act dealing with duties and powers of the Labour Tribunal stipulates that; "*Where an application under section 31B is made to a labour tribunal, it shall be the duty of the tribunal* **to make all such inquiries into that application and hear all such evidence as the tribunal may consider necessary** *and thereafter make, not later than six months from the date of such application, such order as may appear to the tribunal to be just and equitable.*" [Emphasis added]

25. The Learned President of the Labour Tribunal had considered the oral evidence led on behalf of the Central Bank (pages 2-5 of the order) and the documents produced at the inquiry and had arrived at the conclusion that the termination of the services of the Applicant was just and equitable.

26. The judgement of the Learned Judge of the High Court must be viewed in the context of the provision referred to above. I wish to observe that the Learned President of the Labour Tribunal had adhered to the requirements of the said statutory provision. However, the same could not be said of the High Court judgement.

27. It is in this backdrop that this court needs to consider whether the Learned High Court Judge erred in placing reliance on the evidence of the "two" domestic inquiries in overturning the order of the Labour Tribunal.

28. At the outset, it must be said that there is no statutory requirement to conduct a domestic inquiry prior to the imposition of disciplinary action, however,

courts have emphasized on its desirability, especially to establish the bona fides of the employer [see **St. Andrews Hotels Ltd. v. Ceylon Mercantile Union** CA 138 /85 Court of Appeal minutes 01.04.1993].

29. In the case of **The Batticaloa Multi-Purpose Co-operative Societies Union Ltd., v. Velupillai** 76 NLR 60, Justice Alles considered the relevance of the use of evidence given at a domestic inquiry and commented;

"*I see no objection to Presidents of Labour Tribunals examining or even acting on the evidence led at the domestic inquiry, after satisfying themselves that the evidence has been properly recorded, ensuring that the workman had a fair opportunity of meeting the allegations made against him and seeking support for his findings from the evidence so led. No doubt, in certain matters the President has naturally to be cautious in accepting the deposition of a witness who has not been called at the inquiry before.*"

30. Whilst holding that the President is expected to act judicially, Justice Alles commenting on the duty cast on the President of a Labour Tribunal in terms of Section 31(c) of the Industrial Disputes Act went on to hold "*Needless to say that does not mean that Presidents must not conform to the elementary principles of natural justice and evaluate the evidence in a judicial manner before making proper orders.*"(at page 66 of the judgement).

31. Thus, it appears that the *ratio* in the case of **Velupillai** (*supra*) is that the Labour Tribunal President holding an inquiry in terms of Section 31(c) of the Industrial Disputes Act is vested with the **discretion** as to the extent of the evidence led at the domestic inquiry that may be used, in deciding the issues before the Labour Tribunal.

32. It is my view that the evidence led at the domestic inquiry might have a corroborative value or may be used to evaluate the credibility of the testimonies of

the witnesses who had testified at the inquiry, but should not be considered as substantive evidence to decide the issue of "justification" for the termination.

33. In that context the learned High Court Judge had clearly misdirected himself in holding that, the failure on the part of the learned Labour Tribunal President to consider the unfairness in holding a "second domestic inquiry" is a serious lapse on the part of the President.

34. In fact, there had not been a second domestic inquiry, but rather a reopening of the domestic inquiry in terms of the Central Bank rules and the Applicant do not appear to have objected to or challenged the direction to have the domestic inquiry reopened.

35. Furthermore, the learned High Court Judge had made a sweeping statement that the Respondent had failed to prove the case against the Applicant on a balance of probability. The learned Judge, however, had not substantiated that statement by reference to any shortcomings of the Respondent's case or the credibility of the witness on whom the learned President had relied on.

36. Upon the consideration of the facts referred to above and the legal position stated, I hold that the learned High Court Judge erred in placing reliance on the manner in which the domestic inquiry was conducted, in order to overturn the order of the learned President of the Labour Tribunal, and accordingly answer the question of law referred to (i) above, in the affirmative.

Right of Appeal is Limited to Questions of Law

37. In terms of Section 31D (2) of the Industrial Disputes Act, a party dissatisfied with the order of the Labour Tribunal has a right of appeal on a **'question of law'.**

38. It was contended on behalf of the Respondent-Appellant [The Monetary Board] that the learned High Court judge erred in reviewing the impugned order of the Labour Tribunal which is opened to be reviewed only on a question of law.

39. In the case of **Ceylon Transport Board v. W. A. D. Gunasinghe** 72 NLR 76 Justice Weeramantry held; "*Where a Labour Tribunal makes a finding of fact for which there is no evidence-a finding which is both inconsistent with the evidence and contradictory of it-the restriction of the right of the Supreme Court to review questions of law does not prevent it from examining and interfering with the order based on such a finding if the Labour Tribunal is under a duty to act judicially.*"

40. Justice A.R.B. Amerasinghe in **Jayasuriya v. Sri Lanka State Plantations Corporation** (1995) 2 SLR 379, based on the evaluation of the findings of a number of cases, identified instances in which the appellate courts could review the findings of a Labour Tribunal treating it as a question of law; *"The Industrial Disputes Act No. 43 of 1950 S. 31D states that the order of a Labour Tribunal shall be final and shall not be called in question in any court except on a question of law.* ***While appellate courts will not intervene with pure findings of fact, they will review the findings treating them as a question of law****: if it appears that the Tribunal has made a finding wholly unsupported by evidence, or which is inconsistent with the evidence and contradictory of it; or where the Tribunal has failed to consider material and relevant evidence; or where it has failed to decide a material question or misconstrued the question at issue and had directed its attention to the wrong matters; or where there was an erroneous misconception amounting to a misdirection; or where it failed to consider material documents or misconstrued them or where the Tribunal has failed to consider the version of one party or his evidence; or erroneously supposed there was no evidence."* [emphasis added]

41. From the above cited judgments it is clear that- in the context that the decision of a Labour Tribunal can be reviewed by an appellate court only on a question of

law- the Supreme Court has identified certain permissible instances where the findings of fact made by a Labour Tribunal can be considered as a question of law and reviewed by an appellate court. In the instant case the learned President of the Labour Tribunal has given due consideration to the evidence led before him and the documents produced at the inquiry. Even the learned High Court Judge had not found fault with the Learned President of the Labour tribunal in that regard. I have considered the order made by the Labour Tribunal and hold that the findings of the Labour Tribunal in the present case does not fall within any of the permissible instances referred to in the case of ***Jayasuriya*** (*supra*) and thus I conclude that the Learned High Court Judge erred in reviewing the impugned order of the Labour Tribunal.

42. Accordingly, I answer the question of law referred to (ii) above also in the affirmative.

The Correctness of the Relief ordered by the Learned High Court Judge

43. As I have concluded that the first two questions of law on which Special Leave to Appeal was granted should be answered in the affirmative, the correctness of the relief ordered by the Learned High Court Judge cease to be of any consequence. The Learned High Court Judge has on an erroneous assumption reviewed the decision of the Labour Tribunal and granted relief on the finding that the Applicant was wrongfully terminated. Thus, I do not wish to proceed in answering the question of law referred to (iii) above.

44. Accordingly, I set aside the judgement of the learned High Court Judge dated 30-09-2011 and affirm the order of the learned president of the Labour Tribunal dated 16-10-2009.

In the circumstances of this case I do not wish to order any costs and further this judgement will not affect any statutory dues the Applicant might be entitled to.

Appeal Allowed

JUDGE OF THE SUPREME COURT

JUSTICE VIJITH. K. MALALGODA PC

I agree

JUDGE OF THE SUPREME COURT

JUSTICE MURDU FERNANDO PC

I agree

JUDGE OF THE SUPREME COURT

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

In the matter of an Appeal in terms of section 14 (2) of the Maintenance Act No. 37 of 1999 with leave of the Provincial High Court

Kudaanthonige Rasika Damayanthi
No. 106, FC02 Yaya 18,
Agunakolapelessa.

Applicant

SC Appeal 151/2017

Provincial High Court Tangalle
Case No. 01/ 2016
MC/ Agunakolapelessa Case No. 9731

Vs,

Hewa Walimunige Gamini
Yaya 15, D3 Ela,
Hakmanagedara, Yakawala,
Agunakolapelessa.

Respondent

And then between

Kudaanthonige Rasika Damayanthi
No. 106, FC02 Yaya 18,
Agunakolapelessa

Applicant-Appellant

Vs,

Hewa Walimunige Gamini
Yaya 15, D3 Ela,
Hakmanagedara, Yakawala,
Agunakolapelessa.

Respondent-Respondent

And Now between

Hewa Walimunige Gamini
Yaya 15, D3 Ela,
Hakmanagedara, Yakawala,
Agunakolapelessa.

Respondent-Respondent- Appellant

Vs,

Kudaanthonige Rasika Damayanthi
No. 106, FC02 Yaya 18,
Agunakolapelessa

Applicant-Appellant-Respondent

Before: **Justice Vijith K. Malalgoda PC**
Justice P. Padman Surasena
Justice E.A.G.R. Amarasekara

Counsel: Widura Ranawaka for the Respondent-Respondent-Appellant

W. Dayaratne, PC with Ms. R. Jayawarene for the Applicant-Appellant-Respondent

Argued on: 16.12.2019

Decided on: 11.03.2020

Vijith K. Malalgoda PC J

Respondent-Respondent-Appellant (hereinafter referred to as the Respondent-Appellant) before this court had filed the instant appeal with leave obtained from the Provincial High Court of Tangalle under section 14 (2) of the Maintenance Act No 37 of 1999 on the following questions of law,

1) Did the learned High Court Judge err in deciding the required level of burden of proof with regard to the income of the applicant when making a maintenance order under section 2 (1) of the Maintenance Ordinance?
2) Did the learned High Court Judge err when she had only considered the amount referred to as the Appellant's monthly income, when deciding the monthly maintenance to the Applicant-Respondent?
3) Has the Applicant refused to live with the Appellant as required under section 2 (1) of the Maintenance Ordinance?
4) Has the learned High Court Judge failed to appreciate the correct income and the capacity of the Respondent-Appellant to pay the maintenance under section 2 (1) of the Maintenance Ordinance?
5) Did the learned High Court Judge err in law when she conclude that the Respondent-Appellant had to establish his income?
6) Did the learned High Court Judge err in deciding that it is the duty of the Respondent-Appellant to establish his income when considering the provisions in section 102 and 103 of the Evidence Ordinance?

As revealed before this court, the Applicant-Appellant-Respondent (hereinafter referred to as Applicant-Respondent) had commenced proceedings before the Magistrate's Court of Angunakolapelessa under the provisions of the Maintenance Act No 37 of 1999 for obtaining maintenance for herself and her 5 years old child. During the inquiry before the Magistrate, the Applicant-Respondent, her eldest sister as well as her eldest daughter had given evidence for the Applicant-Respondent. At the conclusion of the inquiry the learned Magistrate had dismissed her application and refused granting any maintenance both to the Applicant and her five years old child.

Being dissatisfied with the said order of the learned Magistrate dated 24.11.2015, the Applicant-Respondent had preferred an appeal to the Provincial High Court of the Southern Province Holden in Tangalle.

In consideration of the said appeal, the learned High Court Judge by her order dated 08.05.2017, had allowed the appeal and granted maintenance in sum of Rs. 10,000/- with regard to the child and Rs. 5000/- to the mother (Applicant-Respondent) and ordered the effective date as 24.11.2015 for the maintenance order.

The Respondent-Appellant being dissatisfied with the said order had moved for leave under section 14 (2) of the Maintenance Ordinance on the questions of law referred to above.

However, during the appeal before this court, the learned counsel who represented the Respondent-Appellant agreed to restrict his appeal to two questions of law contained in sub paragraphs (1) and (4) which reads as follows;

1). Did the learned High Court Judge err in deciding the required level of burden of proof with regard to the income of the Applicant when making a maintenance order under section 2 (1) of the Maintenance Ordinance

4) Has the learned High Court Judge failed to appreciate the correct income and the capacity of the Respondent-Appellant to pay the maintenance under section 2 (1) of the Maintenance Ordinance

As observed by this court the entire case for the Appellant and the Respondent relied upon the provisions of sections 2 (1), 2 (2) of the Maintenance Act No. 37 of 1999 which reads as follows:

Section 2 (1);

> 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.

Section 2 (2);

> Where a parent having sufficient means neglects or refuses to maintain his or her child 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 refusal, order such parent to make a monthly allowance for the maintenance of such child at such monthly rate the Magistrate thinks fit, having regard to the income of the parents and the means and circumstances of the child.

When going through the provisions referred to above, it is clear that the legislature had expected the Magistrate who acts under the above provision, when considering an application before him for maintenance of a spouse and/or a child, to satisfy himself

a) With regard to the spouse whether he or she is unable to maintain him or herself, proof of such neglect or unreasonable refusal, such monthly rate as the Magistrate thinks fit having regard to the income of such person, and means and circumstances of such spouse,
b) With regard to the child whether the child is unable to maintain him or herself, such monthly rate the Magistrate thinks fit having regard to the income of the parents and the means and circumstances of the child,

when ordering maintenance against the errant spouse or the parent

In addition to the above requirement, it is further observed that there is a general requirement under section 2 of the Maintenance Ordinance that, "such person against whom the maintenance order is made should have sufficient means" and then neglects to maintain the spouse or the child as the case may be.

However, the legal provisions with regard to the awarding of maintenance to the wife prior to 1999 was not identical to the present legal provisions referred to above. The Maintenance Act No. 37 of 1999 was enacted by parliament in the year 1999 and came in to effect from 22nd October 1999. The Maintenance Ordinance which amended the law relating to vagrants came in to effect on 31st December 1889 by Ordinance 19 of 1889 which was subsequently amended by Ordinance 13 of 1925 and Act No. 2 of 1971 and 19 of 1972.

Section 2 of the said Ordinance (as amended) which provided for the maintenance for wife as well as children (legitimate or illegitimate) reads as follows;

> "If any persons having sufficient means neglects or refuses to maintain his wife, or his legitimate or illegitimate child unable to maintain itself, the Judge of the family Court may,

> upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child at such monthly rate, as the Judge of the Family Court thinks fit, having regard to the income of the defendant and the means and circumstance of the Applicant or such child and to pay the same to such person as the Judge of the Family Court may from time to time direct. Such allowance shall be payable from the date on which the application for maintenance is made".

When awarding maintenance, almost an identical question of law was raised from time to time, "whether a married woman having sufficient means of her own is entitled to claim maintenance from her husband even under the said Ordinance."

This matter was once again raised in the case of ***Sivasamy V. Rasiah (1943) 44 NLR 241*** and a divisional bench presided by *Soertsz SPJ* was nominated, since there was a difference of opinion on this issue.

In this case, the two contrary views taken by *Macdonell CJ* in ***Silva V. Senaratne (1931) 33 NLR 90*** purports to follow an old case ***Carder Umma v. Calendran (1863- 1868) Ram 141*** which was based on the old Vagrant's Ordinance, and view taken by *Wood Renton CJ* in ***Goonewardene v. Abeywickreme (1914) 17 NLR 450*** was considered by *Soertsz SPJ*.

As observed by *Soertsz SPJ*, the view taken by *Wood Renton CJ* was not considered in his Judgment by *Macdonell CJ*. However as observed by *Soertsz SPJ*, one of the main issues to be considered was the ambiguity in the use of the word "itself" in section 2 of the Maintenance Ordinance.

Whilst observing the view taken by *Wood Renton CJ* in ***Goonewardene v. Abeywickreme***, and the provisions in section 2 and 10 of the Maintenance Ordinance, *Soertsz SPJ* had resolved the ambiguity in the following terms,

> "The first question that arises for consideration is whether, so far as wives are concerned, the Maintenance Ordinance provides a certain measure of relief to indigent wives alone, and it seems to me that there need be no difficulty in answering that question if we guide ourselves by the plain words of the relevant sections of that Ordinance. Section 2 says: -
>
> > "If any person having sufficient means neglects or refuses to maintain his wife, or his legitimate or illegitimate child unable to maintain itself…. The Magistrate may order

such person to make a monthly allowance for the maintenance of his wife or such child ……"

"These words, correctly interpreted, can only mean that while the right of children to maintenance depends on both their inability to maintain themselves and on the possession of sufficient means by the father, the right of the wife to maintenance is conditioned only on the possession of sufficient means by the husband and is not affected by the fact that she has sufficient means of her own."

……..

"In the case of *Goonewardene v. Abeywickreme*, as well as in this case, counsel for the husband sought to interpret the words "unable to maintain itself" as qualifying both the antecedent words "wife" and "child", and in support of that interpretation, they relied on Form 2 in the Schedule of the Ordinance. Wood Renton C.J., appears to have agreed that in that form "inability to maintain" was applicable to the wife also, but he disposed of the argument with the word of Lord Penzance in *Dean v. Green 8 P.D. 89*, that "it would be quite contrary to the recognized principle upon which Courts of Law have to construe Acts of Parliament to restrain the operation of an enactment by any reference to the words of a mere form given for convenience sake in a schedule." But, for my part, I am unable to agree that in the Form, inability to maintain is made applicable to the wife. What, in my opinion, the Form does is to change he neuter "itself" in section 2 into the masculine "himself" and the feminine "herself" to be applied in that way to the case of a male or female child respectively. Be that as it may, the words of the section are clear and they must govern the question"

……..

"I read section 2 of the Ordinance as entitling a wife to claim maintenance in virtue of her wifehood alone and to obtain it by proof that her husband has sufficient means.

Section 3 and 4 follow and state the only circumstances in which a husband, although possessed of sufficient means, may repel his wife's claim to maintenance. Except in those circumstances, there are no words in the Ordinance that debar a wife from asking for maintenance, notwithstanding the fact that she is able to support herself.

But, is contended that by the implication of section 10 of the Ordinance a wife must satisfy the Court that she has no means of her own in order to obtain an order against her husband. I have scrutinized that section, but I cannot find that there is, necessarily, such an implication."

……..

"For these reasons, I am of opinion that, on a correct interpretation of the various provisions of the Ordinance itself, a wife possessed of means is entitled to claim maintenance from her husband provided he has sufficient means himself.

And that is as it should be for, as observed in the Judgment delivered by Creasy C.J. and Thomson J, in *Ukku v. Thambia (Ram, 1863-1868, p 71)*:

> "the husband, by the marriage contract, takes upon himself the duty of supporting and maintaining his wife so long as she remains faithful to the marriage vow."

……..

However, when going through the provision of the Maintenance Act No. 37 of 1999 it is clear that, the said ambiguity resolved by *Soertsz SPJ*, had been cleared by the legislature by introducing specific provisions with regard to the maintenance of the spouse and the child separately.

As already discussed in this Judgement, under section 2 (1) of the Maintenance Act No. 37 of 1999 there is unambiguous provisions requiring that the learned Magistrate may order such person to pay maintenance, upon proof of,

"a person who is having sufficient income, neglects or unreasonably refuse to maintain the spouse, whether the spouse is unable to maintain her/himself, having regard to the income of that person and means and circumstance of the spouse" and all these requirements are necessary ingredients in making a maintenance order under the provisions of the Maintenance Act No. 37 of 1999.

In establishing the said requirements, sections 11 and 12 of the Maintenance Act No 37 of 1999 provides the procedure to be followed before the learned Magistrate.

Section 11 (1) of the above act provided,

> "Every application for an order of maintenance or to enforce an order of maintenance shall be supported by an affidavit stating the facts in support of the application, and the Magistrate shall if satisfied that the facts set out in the affidavit are sufficient, issue a summon together with a copy of such affidavit, on the person against when the application is made to appear and to show cause why the application should not be granted."

Section 12;

> "The Magistrate may proceed in the manner provided in Chapter V or Vl of the Code of Criminal Procedure Act No 15 of 1979 to compel the attendance of the person against whom the application is made and of any person required by the applicant or the person against whom the application is made or by the Magistrate to give evidence, and the production of any document necessary for the purpose of the Inquiry."

When considering the procedure referred to above, it appears that, when an application for maintenance was made before the Magistrate with an affidavit by the Applicant, the Magistrate is required to act upon the affidavit if the material submitted are sufficient to act upon, and thereafter once the Respondent appear before him, to hold an inquiry in the manner provided in Chapter V or VI of the Code of Criminal Procedure Act No. 15 of 1979.

As further observed by this court, there are several provisions in the Maintenance Act, which provides the Magistrate to obtain the necessary details for him to come to a correct conclusion as required in section 2 of the said Act.

The above provisions introduced to the Maintenance Act will clearly demonstrate the extent to which the legislature had expected the Magistrate to satisfy when making a maintenance order as provided by the said Act.

During the argument before us the learned Counsel who represented the Respondent-Appellant took up the position that the Applicant-Respondent had failed in establishing,

a) That the Applicant-Respondent is unable to maintain herself and
b) The income of the Respondent-Appellant

and submitted that the learned High Court Judge erred in law when she reversed the Judgment of the learned Magistrate, contrary to the prevailing provisions of the Maintenance Act and the evidence available in the case in hand.

As already observed in this Judgement, the provisions of the Maintenance Act No 37 of 1999 had cleared the ambiguity with regard to the maintenance of the spouse and the child by introducing specific provisions with regard to each category and also introduce the legal frame work to hold an inquiry for the court to satisfy when making a maintenance order.

However, when going through the evidence of the Applicant-Respondent before the Magistrate, it is observed that except for the following portion of the evidence, no evidence was placed before the Magistrate with regard her inability to maintain herself and the income of the Applicant-Respondent.

> "දැනට මගේ භාරයේ දරුවන් දෙදෙනෙක් ඉන්නවා. දැන් ලොකු දරුවත් තුන්වෙනි දරුවත් ඉන්නවා ලොකු දරුවා ගාමන්ට් යනවා. මට රැකියාවක් කරන්න හැකියාවක් නැහැ. ස්වාමිපුරුෂයා ඒ වෙන කොට ත්‍රීවිල් 6 ක් ගෙනාවා යන කොට ත්‍රීවිල් එකක් ගෙනාවා. රු. 392000/-කට ට්‍රැක්ටරයක් ගෙනාවා. ත්‍රීවිල් රථ 7ම මිලට ගත්තේ සල්ලි බැඳලා. කොම්පැනියෙන් ගත්තේ. ඒවා ගෙදරින් යනකොට අරන් ගියා. ත්‍රීවිල් එකක්, අත් ට්‍රැක්ටරයක්, බයික් එකක් තියෙනවා. වාහන මිලට ගන්නේ කුඹුරු කරලා දැනට කුඹුරු කරනවා..... පොඩි දරුවා දැන් මොන්ටිසොරි යනවා. ලොකු දරුවා ගන්න පඩියෙන් තමයි ජීවත් වෙන්නේ."

But however, under cross examination the applicant had admitted the following;

Page 67;

ප්‍ර: දැනට කුඹුරක් වැඩ කරනවා නේද?

උ: ඔව්

ප්‍ර: තමුන් වැඩ කරන කුඹුර කාගේද?

උ: මගේ සල්ලිවලට ගත්තේ

ප්‍ර: කාගෙන්ද ගත්තේ?

උ: ගෙවල් කිට්ටුව සුනිල් කියලා මහත්තයෙක් ගෙන්

.....

ප්‍ර: මම යෝජනා කරන්නේ තමුන් මේ විත්තිකාරයාගේ කුඹුර දැනට අස්වද්දමින් වැඩ කරනවා කියලා?

උ: ඔව්

During the inquiry the Applicant-Respondent's eldest daughter too had given evidence on behalf of her. This witness too had admitted the following when she was cross examination at the inquiry;

Page 76;

ප්‍ර: තමුන් පොඩි කාලෙ ඉඳලා අම්මා තාත්තා එකට ජීවත්වුනේ 'දිලංකා' කියන නිවසේ?

උ: ඔව්

ප්‍ර: දැනට තාත්තා කොහෙද ඉන්නේ?

උ: තාත්තගේ අම්මගේ ගෙදර මගේ ආච්චිලාගේ ගෙදර

ප්‍ර: දැනට මෙම නඩුව පවරන්න කලින් මීට පෙරත් අම්මා තාත්තට විරුද්දව නඩත්තු නඩුවක් පවරා තිබුනා කියලා දන්නවාද?

උ: ඔව්

ප්‍ර: ඒ නඩුව ඉල්ලා අස්කරගත්තා කියලා දන්නවාද?

උ: ඔව්

ප්‍ර: ඒ නඩුව පවරන කාලයේ තාත්තා කොහෙද පදිංචි වෙලා හිටියේ?

උ: ආච්චිලාගේ ගෙදර හිටියෙ තාත්තගේ අම්මගේ ගෙදර හිටියේ

ප්‍ර: සාක්ෂිකාරිය මීට පෙර නඩත්තු නඩුව පවරනකොට තාත්තට යෝජනා කලා නේද තාත්ත ඉන්න 'දිලංකා' නිවස හා තාත්තා වැඩ කරන කුඹුර අම්මට දෙන්න?

උ: තාත්තාට කුඹුරු නැහැ.

ප්‍ර: පෙර නඩුව පවරනකොට සාක්ෂිකාරිය දුව හැටියට තාත්තගෙන් ඉල්ලීමක් කලානේද 'දිලංකා' නිවසත් තාත්තා වැඩ කරන කුඹුරත් අම්මට දෙන්න කියලා?

උ: ඔව්

ප්‍ර: එතකොට ඒ අනුව එම නඩුව ඉල්ලා අස්කරගත්තා නේද?

උ: ඔව්

ප්‍ර: එතකොට මේ කුඹුරෙ තාත්තා වැඩ කරනවාද?

උ: නැහැ

ප්‍ර: අද වැඩ කරන්නේ කව්ද?

උ: මම

ප්‍ර: අම්මා නෙවිද කරන්නේ?

උ: නැහැ

ප්‍ර: අම්මා වෙනුවෙන්ද කරන්නේ?

උ: ඔව්

When considering the above evidence it is clear that as a settlement in a previous maintenance action between the same parties, the Respondent had given his house and the paddy field he worked to his wife, the Applicant in the case in hand and at the time his eldest daughter gave evidence, the said eldest daughter admitted that she is working the paddy field given by her father on behalf of her mother. It is further revealed that neither the Applicant-Respondent, nor the witness placed any material before the Magistrate to the effect that the Applicant-Respondent is unable to maintain herself except for the following evidence

Examination in chief at page 61

> "දැනට මගේ භාරයේ දරුවන් දෙදෙනෙක් ඉන්නවා. දැන් ලොකු දරුවත් තුන්වෙනි දරුවත් ඉන්නවා ලොකු දරුවා ගාමන්ට් යනවා. **මට රැකියාවක් කරන්න හැකියාවක් නැහැ.** "

Other than the above evidence both the Applicant-Respondent and her daughter (witness No.02) had admitted under cross examination that they engaged in cultivation in the paddy field belonging to them.

Cross examination of the Applicant at page 67;

ප්‍ර: දැනට කුඹුරක් වැඩ කරනවා නේද?
උ: ඔව්
ප්‍ර: තමුන් වැඩ කරන කුඹුර කාගෙද?
උ: මගේ සල්ලිවලට ගත්තේ

Cross examination of witness No.2 at page 78;

ප්‍ර: පෙර නඩුව පවරනකොට සාක්ෂිකාරිය දුව හැටියට තාත්තගෙන් ඉල්ලීමක් කලානේද 'දිලංකා' නිවසත් තාත්තා වැඩ කරන කුඹුරත් අම්මට දෙන්න කියලා?

උ: ඔව්

ප්‍ර: එතකොට ඒ අනුව එම නඩුව ඉල්ලා අස්කරගත්තා නේද?

උ: ඔව්

ප්‍ර: එතකොට මේ කුඹුරෙ තාත්තා වැඩ කරනවාද?

උ: නැහැ

ප්‍ර: අද වැඩ කරන්නේ කව්ද?

උ: මම

ප්‍ර: අම්මා වෙනුවෙන්ද කරන්නේ?

උ: ඔව්

From the above evidence, it is clear that both witnesses were engaged in cultivation and the 2nd witness is cultivating the paddy field given to the Applicant-Respondent by the Appellant-Respondent.

However as observed by this court both the Magistrate as well as the High Court Judge had failed to consider the above fact in their respective Judgments. In other words, both the Magistrate and the High Court Judge were not mindful of the fact, whether the Applicant-Respondent had submitted sufficient evidence before the Magistrate, that she is unable to maintain herself, before coming to a conclusion.

When refusing maintenance, the learned Magistrate had mainly considered the income of the Respondent-Appellant and had come to a conclusion that the Applicant-Respondent had failed to establish the correct income of the Respondent. As already discussed in this Judgment, Maintenance Act No. 37 of 1999 had provided several provisions to facilitate the court as well as the Applicant to bring evidence with regard to the income of the Respondent but, as further observed by this court, the above provisions will help an Applicant who claims that the Respondent is employed at an institution or drawing a steady income from known sources. But it is difficult to establish the income of an ordinary villager who is not employed but depend on daily income he gets from odd jobs. In the said circumstances there is a duty cast upon the Applicant to bring evidence through witnesses who can speak about the Applicant, and in the instant case I observe that, some effort had been taken to establish this fact but, the Magistrate had not seen the importance of the said evidence.

When reversing the Judgment of the Magistrate the learned High Court Judge had correctly considered the evidence led on behalf of the Applicant with regard to the income of the Respondent-Appellant but had failed to consider whether there is sufficient material before the Magistrate to conclude that the Applicant is able to maintain herself or not, which is an important ingredient that has to be established by an Applicant when requesting a maintenance order in support of the said party.

As referred to in this Judgment, the Respondent-Appellant had agreed to restrict his appeal to the questions of law contained in questions one and four which refers to a maintenance order made

under section 2 (1) of the Maintenance Act No. 37 of 1999 but it does not refer to an order made under section 2 (2) of the said Act.

As observed by me, the learned High Court Judge when reversing the order of the Magistrate, had made order under both the above provisions, i.e. under section 2 (1) and 2 (2) of the Maintenance Act No. 37 of 1999.

Since the Appellant had only challenged the order made under section 2 (1) of the Maintenance Act No. 37 of 1999, I will not be going in to the validity of the order made under section 2 (2) of the said Act, making a maintenance order directing the Appellant-Respondent to pay Rs. 10,000/- for the child of them.

For the reasons given in this Judgement, I quash the maintenance order made under section 2 (1) of the Maintenance Act No 37 of 1999 which granted Rs. 5000/- as maintenance to the Applicant-Respondent but make no order with regard to the maintenance order made under section 2 (2) of the Maintenance Act No 37 of 1999.

The appeal is allowed as far as the order made under section 2 (1) of the Maintenance Act of 37 of 1999 is concerned.

Judge of the Supreme Court

Justice P. Padman Surasena

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

An appeal against the judgment of the Learned Judges in case No. PHC Kegalle (Civil) 334/2007 of the High Court of Province (Civil Appellate), Kegalle dated 27.04.2011 under the High Court of Provinces (Special Provisions) Amendment Act No. 54 of 2006.

Seneviratne Mudiyanselage Kirihamy Seneviratne of Senani, Panagamuwa, Ambulugala, Mawanella.

SC Appeal No. 151/2016 **Plaintiff**

SC HCCA L/A No. 192/2011

PHC Kegalle (Civil) 334/2007 **Vs.**

DC Mawanella No. 608/L

1. Ihala Wahumpurayalage Emalin
2. Viyannalage Kusuma
3. Viyannalage Wimalawathi
4. Viyannalage Nishshanka
5. Viyannalage Cyril
6. Viyannalage Gamini Gunathunga
7. Viyannalage Sita
8. Viyannalage Sunil
9. Viyannalage Lesly Wijethunge
10. Viyannalage Somaratne

all of Nayawetunuhena, Attanagoda (Panagamuwa), Ambulugala, Mawanella.

Defendants

And Now

Seneviratne Mudiyanselage Kirihamy Seneviratne of Senani, Panagamuwa, Ambulugala, Mawanella.

Plaintiff-Appellant

Vs.

1. Ihala Wahumpurayalage Emalin
2. Viyannalage Kusuma
3. Viyannalage Wimalawathi
4. Viyannalage Nishshanka
5. Viyannalage Cyril
6. Viyannalage Gamini Gunathunga
7. Viyannalage Sita
8. Viyannalage Sunil
9. Viyannalage Lesly Wijethunge
10. Viyannalage Somaratne

all of Nayawetunuhena, Attanagoda (Panagamuwa), Ambulugala, Mawanella.

Defendant-Respondents

And Now Between

1. Ihala Vahumpurayalage Emalin (Deceased)

1A. Viyannalage Kusuma

2. Viyannalage Kusuma
3. Viyannalage Wimalawathi
4. Viyannalage Nishshanka
5. Viyannalage Cyril
6. Viyannalage Gamini Gunathunga
7. Viyannalage Sita
8. Viyannalage Lesly Wijethunge
9. Viyannalage Somaratne

all of Nayawetunuhena, Attanagoda (Panagamuwa), Ambulugala, Mawanella.

Defendant-Respondent-Appellants

Vs.

Seneviratne Mudiyanselage Kirihamy Seneviratne of Senani, Panagamuwa, Ambulugala, Mawanella.

Plaintiff-Appellant-Respondent

Viyannalage Sunil (deceased)

Nayawetunuhena, Attanagoda (Panagamuwa), Ambulugala, Mawanella.

8. Defendant-Respondent-Respondent

Subhasinghe Mudiyanselage Ranjani Kumari of Ehawatte, Atanagoda, Ambulugala, Mawanella.

8A. Substituted Defendant-Respondent-Respondent

Before: Buwaneka Aluwihare, PC. J.
Priyantha Jayawardena, PC. J.
L. T. B. Dehideniya, J.

Counsel Sunil Abeyrathne with Buddhika Alagiyawanna for Defendant-Respondent- Appellant.

H. Withanachchi for the Plaintiff-Appellant-Respondent.

Argued on: 15. 11. 2018

Decided on: 14.12.2020

JUDGEMENT

Aluwihare PC. J.,

1. The Plaintiff-Appellant-Respondent (hereinafter referred to as the 'Plaintiff') filed action in the District Court of Mawanella seeking *inter alia* a declaration that the Plaintiff is the absolute owner of the land, one acre in extent, described in the second schedule to the plaint, called '*Nayawatuna Hena*' (නයාවැටුන හේන) now '*Watte Paren Yatiatha Thun Pela Paddy*' (වත්තේ පාරෙන් යටි අත වී තුන් පැලක වපසරිය) and also for an order to have the Defendant-Respondent-Petitioner-Appellants (hereinafter referred to as the 'Defendants') ejected from the land in question.

2. The Learned District Judge by his judgment dated 12th December 2005 dismissed the case of the Plaintiff subject to costs. Aggrieved by the said judgment the Plaintiff appealed to the High Court of Civil Appeals and by its judgment dated 27th April 2011, the High Court set aside the judgment of the Learned District Court and held that the Plaintiff was entitled to all the reliefs prayed for in paragraph (a) and (b) of the plaint i.e. that the Plaintiff is the absolute owner of the land depicted in the second schedule to the plaint and to have the Petitioners, their agents and servants ejected from the same.

3. In challenging the said judgment, the Defendants were granted leave to appeal on the question of law set out in Paragraph 7 (ii) of the Petition;

   "Whether the Learned Judges of the High Court of Province (Civil Appellate), Kegalle have stated in their judgment erroneously that the determination or the decision by the Conciliation Board, Wakirigala area on 14th February 1976 in the matter bearing No. 295/75 had

acquired the force of a decree entered by the District Court of Kegalle?"

4. According to the Conciliation Boards Act No. 10 of 1958 (as amended) (hereinafter sometimes referred to as 'the Act'), the Conciliation Boards have jurisdiction to settle 'disputes' regarding matters relating to immovable property situate wholly or partly within a particular Conciliation Board area.

5. The thrust of the argument on behalf of the Defendant-Appellant before this court was that; for the Conciliation Board to exercise its jurisdiction, there must foremost be a 'dispute'. It was argued that 'partitioning of a land', not being a dispute-and being provided for by specific legislation in the form of the Partition Act- cannot be effected by a 'settlement' of a Conciliation Board even when such settlement has been duly filed of record in the District Court as required by Section 13 (3) (a) of the Conciliation Boards Act.

Chronology of Events

6. One Viyannalage Malida had transferred an undivided one acre from and out of the land called '*Nayawetuna Hena*' upon a conditional transfer, to one Jane Nona Hettiarachchi, the wife of the Plaintiff, by Deed No. 54895 dated 25th May 1963, reserving the right to repurchase the same within 4 years. Two years later, however, by Deed No. 56097, said Malida had transferred the right to repurchase that he had retained under earlier Deed (No. 54895). Thereby, in 1965, Jane Nona became the absolute owner of the said land, one acre in extent.

7. Jane Nona, subsequently, went before the Conciliation Board of Wakirigala to have her one acre of land demarcated and carved out of the larger land, *Nayawatuna Hena*. Consequent to the decision of the Conciliation Board of Wakirigala in case No. 296/75, the divided portion of land, one acre in extent, had been surveyed and demarcated by Licensed Surveyor K. S. Panditharatne and the Plan No. 2679 dated 18th May 1976 prepared. The said divided portion is more fully described in the second schedule to the plaint. It has been submitted on behalf of the Plaintiff that Jane Nona had thus possessed a defined and a divided portion of land as a distinct and a separate land, from that point onwards.

8. In 1982, Malida had filed an action in the District Court of Kegalle against Jane Nona (case No. 2419/L) seeking a declaration that the above-mentioned deeds No. 54895 and No. 56097 are null and void and to recover the possession of the land Jane Nona was in possession of. The judgment in this case had been entered in favour of Malida.

9. Aggrieved by the aforesaid judgment, Jane Nona had appealed to the Court of Appeal. While the case was pending before the Court of Appeal Malida had passed away and Malida's wife and children were substituted. The said decision of the District Court had been set aside by the Court of Appeal. Thereafter, leave to appeal had been sought against the judgment of the Court of Appeal, which application had been refused by the Supreme Court by its order dated 26th March 1996.

10. In the year 1996, Jane Nona had transferred the said land to her husband, Kirihamy Seneviratne, the Plaintiff, by Deed No. 3946 ['P27'].

11. Undeterred by the unsuccessful attempt to have the deeds executed in favour of Jane Nona annulled, the 1st and 2nd Defendants (the wife and a child of Malida) had filed a Partition action in the District Court of Mawanella. The court had dismissed this action (case No. 201P) because the case had not been diligently prosecuted.

12. Trouble appears to have arisen again in 2003. The Plaintiff alleges that on or about 31st January 2003, the Defendants had forcibly entered the land in question and threatened the Plaintiff ordering not to enter the land, leading to the filing of the present case before the District Court, which, as referred to earlier, was dismissed by the Learned District Judge.

The Judgment of the High Court of Civil Appeals

13. The High Court of Civil Appeals, by its judgment of 27th April 2011 set aside the decision of the Learned District Judge and determined that the Plaintiff is the sole owner of the portion of land described in the second schedule to the plaint and that the Plaintiff is in fact entitled to eject the Defendant-Respondents and their agents and those who are claiming under them from the possession of the said land.

14. The High Court had held in its judgment that; "*It is clear upon the perusal of the document marked* ***P35****, that the determination made by the Conciliation Board on 14th February 1976 and the Certificate of settlement issued on 20th November 1976, in accordance of provisions of section 13(2) of the Conciliation Board Act has been filed of record, in accordance with the provisions of section 13(3)(a) of the said act, in the case bearing number* ***2498/Sama Mandala*** *of the District Court of Kegalle."*

"In the circumstances, the determination or the decision made by the Conciliation Board of Wakirigala area on 14th February 1976 in the matter bearing no 295/75 had acquired the force of a decree entered by the District Court of Kegalle."

"We are of the opinion that the learned District Judge had erred himself in law by holding that the Conciliation Board Act did not vest authority with the Conciliation Board to partition a land." (Page 10-11 of the judgment)

15. In arriving at their decision, the Learned Judges of the High Court relied on Section 13 of the Conciliation Boards Act. Here, it would be useful to consider Section 13 within the make and mechanism of the Conciliation Board as formulated by the Act.

Make and Mechanism of the Conciliation Board

16. Conciliation Boards as established by the Conciliation Boards Act functioned until such time as they were abolished and subsequently replaced with Mediation Boards constituted under the Mediation Boards Act No. 72 of 1988. The purpose of Conciliation Boards was to provide a forum to settle minor disputes at the community level without the time consuming and costly process of litigation before a formal court. The make and mechanism of the Conciliation Boards are such that the dispute between the parties need not be settled by an application of the rules of law. Panels of Conciliation are not constituted by persons learned in the law, but rather by any person resident in a Conciliation Board area or any public officer engaged in any work in that Conciliation Board area fit to be a member of such panel, in the

opinion of the recommending body or person (See Sections 3 (3) and 3 (4)). No pleadings or precise definition of legal issues takes place.

17. Section 13 of the Conciliation Boards Act reads thus;

Section 13. (1) Any party to a civil dispute which is settled by a Conciliation Board in any Conciliation Board area may, within thirty days after the date of settlement of such dispute, in writing notify to the Chairman of the Panel of Conciliators constituted for such Conciliation Board area that, with effect from such date as shall be specified in the notification, the settlement effected by such Board will be repudiated by him for the reasons stated in the notification, and, where such notification is made with such reasons stated therein, such settlement shall cease to be in force from the date specified in such notification.

(2) Where the written notification referred to in subsection (1) is not received by such Chairman within thirty days after the date of settlement of such dispute, such ***Chairman shall forthwith transmit to the District Court*** *or the Court of Requests or the Rural Court, as the case may be, having jurisdiction to hear and adjudicate upon such dispute,* ***a copy of the settlement recorded by that Board.*** *Such copy shall be signed and certified by the President of that Board.*

(3) (a) Immediately upon the receipt by the District Court or the Court of Requests, as the case may be, of the copy of the settlement referred to in subsection (2), the District Judge or the Commissioner of Requests of that court shall cause such copy to be filed of record in such court. ***Such settlement shall, with effect from the date of such filing, be deemed to be a decree of that court, and such of the provisions of the***

Civil Procedure Code as relate to the execution of decrees shall, as far as may be practicable, apply mutatis mutandis to and in relation to such settlement which is deemed to be a decree……

18. Section 13 of the Act- on which the decision in the High Court pivoted- has the effect of bestowing on a settlement of a Conciliation Board, the force of a decree of the District Court, once it is duly registered in the District Court. However, we are of the opinion that Section 13 of the Conciliation Boards Act, rather than being read in isolation, should be read together with the other provisions of the Act and applied.

Jurisdiction of the Conciliation Boards

19. Section 6 of the Conciliation Boards Act sets out the offences or disputes that can be brought before a Conciliation Board thus;

Section 6. The Chairman of the Panel of Conciliators constituted for any Conciliation Board area may, and ***shall, upon application made to him*** *in that behalf, refer for inquiry to Conciliation Boards constituted out of that Panel the following* ***disputes*** *and offences:-*

(a) any ***dispute*** *in respect of any movable property that is kept,* ***or any immovable property that is wholly or partly situate, in that Conciliation Board area;*** (emphasis added)

(b) …..

20. Section 6 delineates that where the subject matter is any immovable property wholly or partially situate in the particular Conciliation Board area, a '**dispute**' regarding such property can be brought before the Conciliation Board. R. K. W. Goonesekere and Barry Metzger in their

research evaluating the role of the Conciliation Boards, titled *'The Conciliation Boards Act: Entering the Second Decade'* appearing in **'The Journal of Ceylon Law'** (Volume 2, June 1971) in reference to Section 6 of the Act, have expressed the opinion that ***"… regard must be had for the terms used in Section 6, particularly the use of the word "dispute". It suggests a deliberate restriction of the Board's jurisdiction to something less than all matters which can be brought before a civil court. A dispute implies that there is an area of conflict which, if not resolved will lead to an action by one party against the other. The facts should reveal the existence of a dispute…."*** (at page 53). The writers have gone on to express the view that *"certain matters which properly may be brought before the court do not involve a dispute. For example,* ***a partition action is founded on the inconvenience of co-ownership, not on there being a dispute between parties as to their respective rights.".*** The authors say that, as these matters do '***not necessarily involve a dispute***', they cannot, therefore, be inquired into by a Conciliation Board.

21. The learned counsel for the Defendant-Appellants presented his argument on a basis similar to that which is set out in the preceding paragraph. The learned Counsel contended that; the Conciliation Boards are not vested with the power to partition lands, since partition actions do not come under the category of 'civil disputes' and they are special matters, as explained in the then Partition Act No. 16 of 1951, and drew the attention of court to Section 2 of the Partition Act, the law that was applicable at the point of time relevant to the dispute in issue.

22. Section 2 of the Partition Act of 1951 states; " *Where any land belongs in common to two or more owners, any one or more of them may institute an action for partition or sale of the land in accordance with the provisions of this Act".*

23. On the basis of the aforestated, it was argued that the settlement reached before the Conciliation Board (No. 295/75) and the District Court of Kegalle, by causing the said settlement to be filed of record (2498/සාම මණ්ඩල), cannot be considered as a partition action under the Partition Act. Thus, it was contended on behalf of the Defendant-Appellants, that the learned judges of the High Court of Civil Appeals erred in holding that the decision of the Conciliation Board has acquired the force of a decree.

24. It is true that in the case of **R. Arnolis v. R. Hendrick** 75 NLR 532 it was held that an action for partition of land can be instituted without the production of the certificate from a Conciliation Board, which is referred to in Section 14 (1) of the Conciliation Board Act. I do not see a conflict between the decision in **Arnolis** (*supra*) and the jurisdiction of the Conciliation Board to entertain a complaint relating to a land dispute. On one hand any co-owner of a land, to obtain relief against the inconvenience of common possession has the right to make an application to a District court for relief and may do so, not necessarily due to the existence of a dispute. K.D.P. Wickremesinghe in his work "The Law of Partition in Ceylon" states that *"a Partition action is* ***not founded*** *upon a 'wrong'* (page 24)."

25. The law, on the other hand, would not stand in the way if co-owners decide to have a co-owned land partitioned amicably without the intervention of the court. Where similarly, two co-owners may enjoy the property, provided they know what each is entitled to. If a **dispute arises** in relation to the enjoyment of land under any of the arrangements referred to, their right to refer such matter to the Conciliation Board (presently Mediation Board) for a settlement cannot be denied, for the simple reason that, now there exists **a dispute relating to immovable property**.

26. If the disputing parties reach a settlement and that settlement is not repudiated by a party within the 30-day period provided by Section 13(1) of the Act and consequently once it is forwarded to the relevant District Court and filed of record in terms of Section 13(3) of the Act, the settlement so reached would be deemed to be a decree of that District Court by operation of law.

27. One needs to appreciate, however, the **distinction** between a Partition decree and a settlement entered before a Conciliation Board. The settlement, once it acquires the status of a decree of court, would **only bind the parties** to the settlement or anyone who claims rights under those parties and no other. As opposed to that, the essence of a Partition decree is that the persons declared under it obtains a title good against the whole world, it being an action *in Rem*. Thus, proceedings before the Conciliation Board cannot be equated to the partition proceedings contemplated by the Partition Act.

28. On the other hand, whenever parties seek the assistance of the Conciliation Board to resolve any 'dispute' relating to immovable property, the objectives of the Act demand that the Conciliation Board makes every endeavour to mediate and bring about a settlement to the dispute within the framework of the Act. In my view, it would be artificial to argue that 'partitioning' of land cannot strictly be considered a dispute thereby ousting the jurisdiction of the Conciliation Board and driving the parties to litigation continuing for generations, wringing them dry of resources. Thus, whether the parties approached the Conciliation Board due to a subsisting dispute or not is a matter to be determined based on the facts and circumstances of each case.

29. It is pertinent to note here that the above reasoning finds support in the continuation of the research (alluded to before) by Goonesekere and Metzger published in the December 1971 Volume (2) of **'The Journal of Ceylon Law'** titled '*The Conciliation Boards Act: Necessary Amendments and Administrative Reforms'* Expressing the opinion that although it would be prudent to say that certain civil actions, including partition actions "*for differing reasons are inappropriate for Conciliation*", the writers observed that the jurisdiction of Conciliation Boards could nevertheless be invoked "*as to partition actions requiring an attempt at reconciliation"* while making clear that the Boards have no power to enter settlements partitioning land with the in rem effect of a decree under the Partition Ordinance.

30. The writers went onto state that, "*It is desirable, as much as possible, to encourage amicable partitions by conveyances rather than by judicial decree. This may be encouraged by conciliation; according to J. S. C. statistics already 15 per cent of all partition actions filed are settled. The settlement of partition disputes may not prove as successful as might be hoped, however, because of the frequent desire of the parties, even if they are in agreement as to their shares, to have a judicial partition nonetheless to settle title and thus remedy any flaws in their paper pedigrees. Where parties are willing to partition amicably, but there is a dispute as to the shares or the manner of partition, proceeding before a Conciliation Board can help resolve the differences. Jurisdiction of the Conciliation Boards should therefore require these matters to be brought before the Boards and settlements should be confined to enabling the parties to conclude any of the non-judicial modes of partition recognized by law. Boards' experience under such a rule should be closely monitored because of the strong possibility such jurisdiction will not yield the substantial benefits hoped for.*" (at page 295).

31. The facts of the case before us, therefore, must be considered in the backdrop of the legal position referred to above.

Did a Dispute Subsist, within the parameters of the Conciliation Board?

32. A certified copy of the case record in District Court of Kegalle case no. 2419/L was marked and produced as 'P3', in the proceedings before the District Court in the instant case. Kirihamy had testified to the effect that after Malida transferred the land to Jane Nona in 1965, one acre was demarcated and fenced with the assistance of the Grama Niladari on 19th February 1965. Since then he and his wife Jane Nona had improved and enjoyed the portion of the land so demarcated (page 169 of the brief). Subsequently, however, they had been harassed by one of Malida's sons and the fence had been damaged by removing the barbed wire. At this point Kirihamy maintains that his wife went to the Conciliation Board as they wanted to carve out their one acre with a proper boundary. The relief sought from the Conciliation Board had been to separate the land belonging to Jane Nona and formally fix the boundary. Thus, Jane Nona sought the assistance of the Conciliation Board, owing to her peaceful possession being disturbed by Malida's son Nissanka, who, according to Kirihamy, was residing with Malida (page176 of the brief).

33. From the facts, it appears that there had been a dispute between the Defendant-Appellants and the Plaintiff at the point of time the matter was referred to the Conciliation Board. The Conciliation Board having entertained the complaint, had directed surveyor Panditharathne to survey the land. He had done so on 19th April 1976 and had prepared the plan No. 2679 dated 27th July 1976, which had been marked and produced as 'P12' in the instant case and the same refers to the Wakirigala conciliation case

No. සෘම 295/75. The plan clearly depicts a one-acre land carved out of *Nayawatuna Hena*. The surveyor Panditharathne in his evidence in the case 2419/L has stated that he received a commission from the Wakirigala Conciliation Board to carve out, an extent of one acre, from and out of the land called *Nayawatuna Hena*. Accordingly, he had gone to the land and had explained to Malida the manner in which he intends to separate one acre from the larger land. He had added that, having surveyed, he prepared the plan No. 2679 depicting the boundaries of the one-acre lot, separated from the larger land of *Nayawatuna Hena*. He also had stated that he surveyed the portion of land which one party had enjoyed possession (page 160 of the brief).

34. Ironically the Defendant-Appellants themselves had taken up the position that ***"there was only a decision to carving of a portion, ONE ACRE of this land and to give same to the Respondent"***. (Paragraph 7 of the written submissions dated 13th September 2016, filed before this court on behalf of the Defendant- Appellants). There is no doubt, this is exactly what was done by the Conciliation Board and the order of settlement clearly reflects this position.

35. The settlement recorded by the Conciliation Board clearly states that the *"the parties agreed to settle the dispute on 14.02.1976"* and it is further recorded that *"pursuant to the survey carried out by the licensed surveyor K.S.D. Panditharathne on 19.04.79, land in extent of 1-acre owned by D.J. Hettiarchchi was surveyed and separated."* (...මැන වෙන් කරන ලදී.)

36. The facts of the instant case not only belie this argument but in fact conclusively prove that the case does not come within the ambit of the Partition Act as well, in as much as by deeds 54859 and 56097, executed by the original owner Malida, Jane Nona became the absolute owner of the

property, exclusively possessed it and the one acre of Nayawatuna Hena in question ceased to be part of the common property.

The action that was filed by the heirs of Malida was nothing more than a covert attempt to bring the case within the ambit of the Partition Act, deprive Jane Nona and her successors of property which was rightfully theirs and give the Defendants a title in rem.

In two cases century apart, this court has come down hard on the practice. In **Selenchi Appuhamy v. Livinia and Others** 9 N.L.R.59, Layard CJ stated *"I have never come across a more manifest attempt to abuse the Partition Ordinance …..the object being to obtain good title against all the world in respect of a land not held in common Plaintiff's action must be dismissed"*

37. The above position was followed by a series of decisions that followed after **Selenchi Appuhamy** (*supra*) and notably the pronouncement made by his Lordship Justice Weerasuriya in the case of **Angela Fernando v. Devadeepthi Fernando and Others** 2006 2 SLR 188 where his Lordship succinctly stated;

"It is a prerequisite to every partition action that the land sought to be partitioned ***must be held in common*** *as seen from the provisions of section 2 (1) of the Partition Law. What is understood as* ***common ownership is*** *where* ***persons do not hold on separate and distinct titles or where land is not held as separate and divided lots.*** *When land is not held in common, but exclusively by a party even though under prescriptive title, no action can be maintained to partition such land.*

It is imperative that the investigation of the title must be preceded by a careful examination of the preliminary issue whether the land sought to be partitioned is commonly owned as required by section 2 (1) of the Partition Law. Learned District Judge having carefully examined this question had

correctly held that the land was dividedly possessed as from 1938 and proceeded to dismiss the action without resorting to a full and exhaustive investigation as to the rights of the parties, which in the circumstances was lawful and justified."

It is manifestly clear that even in the instant case, both Malida and Jane Nona had enjoyed distinct portions of land since 1965.

38. When one considers the totality of the facts relating to this matter, it is apparent that the incident had had all the hallmarks of a 'dispute' relating to 'immovable property' between Malida and Jane Nona Hettiarchchi and the Conciliation Board has acted well within the jurisdiction vested in it, to resolve the dispute.

39. I am also of the view that, when the learned judges of the High Court of Civil Appeals stated that *"We are of the opinion that the learned District Judge had erred himself in law by holding that the Conciliation Board Act did not vest authority with the Conciliation Board to partition a land."* The learned judges did not refer to the word 'partition' in the context of the partitioning land in terms of the Partition Act (Partition Law) but in a literal sense.

40. Considering the reasoning referred to above, I answer the question of law on which leave to appeal was granted in the negative. The judgement of the High Court of Civil Appeal dated 27th April 2011 is affirmed.

41. Accordingly, I make order dismissing this appeal.

The Respondents are entitled to the cost of this appeal.

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 under section 5C (1) of the High Court of the Province (Special Provisions) Act No. 19 of 1990 read with the Supreme Court Rules 1990 from the Judgment pronounced on 22.05.2012 by the High Court of the Central Province sitting in Kandy in Civil Appeal No. CP/HCCA/ KAN/183/2010 (F) in terms of section 5A (1) High Court of the Province (Special Provisions) Amended Act No. 54 of 2006 and now an Appeal upon leave having been granted on 04.09.2012.

SC Appeal 152/2012

SC/HCCA/CA No. 242/12

CP/HCCA/ KAN No. 183/2010 (F)

DC Kandy No. L. 19332

1. Kulasinghe Mudiyanselage Silindu Menike
2. Kulasekera Mudiyanselage Godapele Gedara Sandya Kumari Swarnalatha Ekanayake
3. Kulasekera Mudiyanselage Godapele Gedara Wasantha Kalyani Ekanayake
4. Kulasekera Mudiyanselage Godapele Gedara Prabhath Mangala Ekanayake
5. Kulasekera Mudiyanselage Godapele Gedara Pulasthi Kumara Raveendra Ekanayake

All of

Putuhapuwa, Watapana,

Godapolawatta

PLAINTIFFS

Vs.

1. Kulasekara Mudiyanselage Abeyratne alias Abeysinhe Banda (**Dead)**

1A. Kulasekera Mudiyanselage Godapele Gedara Jayawardena

1st AND 2nd DEFENDENTS

3. Kulasekera Mudiyanselage Godapele Gedara Biso Menike

3rd DEFENDANT

All of

Putuhapuwa, Watapana,

Godapolawatta

AND

2. Kulasekera Mudiyanselage Godapele Gedara Jayawardena

2nd DEFENDANT-APPELLANT

Vs.

1. Kulasinghe Mudiyanselage Silindu Menike

2. Kulasekera Mudiyanselage Godapele Gedara Sandya Kumari Swarnalatha Ekanayake

3. Kulasekera Mudiyanselage Godapele Gedara Wasantha Kalyani Ekanayake

4. Kulasekera Mudiyanselage Godapele Gedara Prabhath Mangala Ekanayake

5. Kulasekera Mudiyanselage Godapele Gedara Pulasthi Kumara Raveendra Ekanayake

All of

Putuhapuwa, Watapana, Godapolawatta

PLAINTIFF-RESPONDENTS

Kulasekera Mudiyanselage Godapele Gedara Biso Menike

3rd DEFENDANT-RESPONDENT

And NOW BETWEEN

1. Kulasinghe Mudiyanselage Silindu Menike

2. Kulasekera Mudiyanselage Godapele Gedara Sandya Kumari Swarnalatha Ekanayake

3. Kulasekera Mudiyanselage Godapele Gedara Wasantha Kalyani Ekanayake

4. Kulasekera Mudiyanselage Godapele Gedara Prabhath Mangala Ekanayake

5. Kulasekera Mudiyanselage Godapele Gedara

Pulasthi Kumara Raveendra Ekanayake

All of

Putuhapuwa, Watapana,

Godapolawatta

PLAINTIFF-RESPONDENT-PRETIONER-APPELLANTS

Vs,

Kulasekera Mudiyanselage Godapele Gedara

Jayawardena

2nd DEFENDANT-APPELLANT-RESPONDENT-RESPONDENT

Kulasekera Mudiyanselage Godapele Gedara Biso

Menike

3rd DEFENDANT-RESPONDENT-RESPONDENT-RESPONDENT

Before: **Justice Buwaneka Aluwihare PC**

Justice Vijith K. Malalgoda PC

Justice P. Padman Surasena

Counsel: Chandana Prematilake for Plaintiff-Respondent-Petitioner-Appellants

Jacob Joseph with Ms. Sandamali Madurawala for 2nd Defendant-Appellant-Respondent

M. D. J. Bandara for 3rd Defendant-Respondent-Respondent

Argued on: 16.01.2020

Decided on: 11.03.2020

Vijith K. Malalgoda PC J

The Plaintiff-Respondent-Appellants (herein after referred to as the Plaintiff-Appellants) instituted proceedings before the District Court of Kandy against the 1st and the 2nd Defendant-Appellant-Respondents (hereinafter referred to as 1st and the 2nd Defendant-Respondents) for declaration of title and ejectment from the land more fully described in the schedule to the plaint.

As revealed before us, the said proceedings were commenced only against the 1st and 2nd Defendant-Respondents but, at a later stage of the trial the 3rd Defendant-Respondent-Respondent (hereinafter referred to as 3rd Defendant-Respondent) too had intervened in the proceedings pending before the District Court.

The trial before the District Court proceeded with one admission and 25 issues raised by the parties and at the conclusion of the said trial, the learned District Judge entered the judgment in favour of the Plaintiff-Appellants, answering issues 1-9 and 11 in favour of them.

Being dissatisfied with the said decision of the District Court, the 1st and the 2nd Defendant-Respondents appealed to the Civil Appellate High Court of the Central Province, holden in Kandy. By Judgment dated 22.05.2012, Judges of the Civil Appellate High Court of the Central Province, holden in Kandy, had allowed the appeal and dismissed the Plaintiff ‘s case with costs.

The said decision of the Civil Appellate High Court was challenged before the Supreme Court by the Plaintiff-Appellants by the instant application and when the instant application was supported before the Supreme Court, Court granted leave on the following questions,

a) Did the Provincial High Court (exercising Civil Appellate Jurisdiction) factually err in concluding that the boundaries of the land described in the schedule to the Plaint and those shown in Plan No. 1901 (P1) are different except the northern boundary by comparing the two sets of boundaries?

b) Did the Provincial High Court factually err in assuming that the Plaintiffs' Land described in the schedule to the plaint is only "Dambuhena" though their deeds refer to "Western portion of Kosgahamulahena" and "Dambuhena" when the said schedule clearly refers to both Gale Kosgahamulahena and Dambuhena?

c) Did the Provincial High Court also err in stating that according to P-1 Dambuhena is to the north of the land shown in P-1 when the surveyor had clearly identified the land in P-1 as the amalgamated land of Gala Kosgahamulahena and Dambuhena?

d) Did the Provincial High Court thus err in concluding that the Plaintiffs have not been able to identify the land claimed by them?

e) Did the Provincial High Court err in concluding that the finding of the District Judge that the subject matter of the action is depicted in plan "P-1" as lots 1, 2 and 3 is not supported by evidence?

f) Did the Provincial High Court err in allowing the appeal which includes a prayer that the relief claimed by the 2nd Defendant in the answer be granted without citing any reasons whatsoever to grant the said relief?

According to the plaint dated 1st September 1998 filed before the District Court of Kandy the Plaintiff-Appellants had sought declaration of title of a land referred to in the schedule to the plaint as;

> "amalgamated land of "Gale Kosgahamulahena" of one Nelly of Kurakkan Sowing extent and 'Dambuhena' of seven Nelly of Kurakkan Sowing extent"

which consist of lots 1, 2 and 3 of Plan No. 1901 dated 13.07.1996.

As revealed before us, a commission plan was not prepared in the case in hand (DC Kandy L 19332) but the Plaintiff- Appellants had relied on Plan No. 1901 dated 13.07.1996 to identify the land in question. The Plan No. 1901 which was produced marked P-1 at the District Court trial was a Commission plan prepared by the Licensed Surveyor G. Heenkenda in District Court Kandy Case No. L 17966.

During the hearing before us, it was revealed that District Court Kandy L 17966 was an action filed by the 1st Plaintiff-Appellant in the case in hand, against the same defendants but withdrawn, since it was revealed that she only had the life interest to the property in question under the Kandyan Law and instituted the present action along with her four children who are the heirs of their late father.

When the trial commenced before the District Court, all parties admitted that the previous action filed before the District Court was on same cause of action and was withdrawn with liberty to file a fresh action. Except for issue No. 22 raised on behalf of the 3rd Defendant-Respondent to the effect,

> "පැමිණිල්ලේ 8 වෙනි ඡේදයේ දක්වා ඇති අංක 1901 දරණ පිඹුරේ උපලේඛනයේ සඳහන් ඉඩම පෙන්වා නොමැත්තේද?"

none of the parties challenged the identity of the corpus.

At the conclusion of the District Court trial, whilst entering the judgment in favour of the Plaintiff-Appellant, the District Judge had answered the above issue in the affirmative.

However when going through the questions of law under which the leave was granted and the submissions placed before this court by the learned Counsel for the Appellant, it appears that the

question of identity of the land in question was one main ground for reversing the decision of the District Court, by the Civil Appellate High Court of the Central Province holden in Kandy.

As observed by this court, whilst referring to some boundaries, the Judges of the Civil Appellate High Court had concluded, that

> "In these circumstances it cannot be said that the Plaintiffs have been able to identify the land to which they claimed title. The finding of the learned trial Judge, that the subject matter of this action is depicted in Plan P-1 as lots 1 to 3 is not supported by evidence and therefore is incorrect."
>
> and proceeded to dismiss the plaintiff's action.

In the above circumstances, it is important to consider the evidence placed before the District Court and ascertain whether the learned District Judge had correctly assessed the said evidence, and in the said circumstances, the decision by the Judges of the Civil Appellate High Court to interfere with the finding of the trial Judge, who had the opportunity of observing the demeanor and deportment of the witnesses, and to go through the plans and documents submitted before him by their makers, was taken correctly, in the light of long line of authorities by Appellate Courts including the decision in the case of ***Alwis Vs. Piyasena Fernando (1993) 1 Sri LR 120 at 122*** where his Lordship G.P.S de. Silva (CJ) observed that;

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

According to the plaint, the Plaintiffs (before the District Court) title to the land referred to in the schedule to the plaint as, "amalgamated land of Gale Kosgahamulahena of 01 Nelly of Kurakkan sowing extent and Dambuhena of 07 Nelly of Kurakkan sowing" which consist of lots 1, 2,and 3 in Plan

No. 1901 dated 13. 07. 1996 to the extent of 3 roods and 11 perches had devolved on the Plaintiffs as explained in paragraphs 5 and 6 to the plaint; As submitted by the Plaintiffs' the 1st and the 2nd Defendants have allegedly created a dispute of the Plaintiffs' land along the Western boundary, which is part of lot 1 in Plan No. 1901.

Whilst disputing the above position, the 1st and the 2nd Defendants (before the District Court) took up the position that a land about 1 Acre including the disputed area belongs to them and submitted a cross claim for a declaration in respect of the said disputed area of land called Dambuhena Watta.

The 3rd Defendant, (before the District Court) who intervened in the District Court trial, had claimed entitlement for a part of the land called Dambuhena through several deeds produced along with the papers filed before court.

Whilst giving evidence before the District Court, summoned by the Plaintiff, one Gamini Heenkenda a Licensed Surveyor had admitted preparing the Plan No. 1901 on a commission he received from the District Court in case No. L 17966. By the single admission recorded during the trial, parties admitted that,

> "L 17966 which was pending before the District Court in respect of the same cause of action, was withdrawn with liberty to file fresh action"

Whilst explaining the plan he prepared, the witness took up the position that he identified the corpus, referred to in the schedule to the said plaint, included in the commission he received in case No. L 17966.

According to witness Heenkenda the plan he prepared was referred to the land called "the amalgamated land of Gale Kosgahamulahena and Dambuhena" and in preparing the said plan he took guidance from the boundaries given in the schedule to the plaint.

During his evidence, the plaint in L 17966 and its schedule was produced marked P-2 and P-2a respectively. According to P-2a the boundaries of the disputed land are as follows;

To North - boarder of Appuhamy's land

To East - outer canal (පිට අටැළ)

To South - boarder of Godapale Gedara Dingiri Banda's land

To West - ditch (අගුල)

As observed by me, these are the same boundaries referred to in the schedule to the plaint in the instant case.

In his evidence witness Heenkenda had said that he could identify the land in the ground, and prepared the Plan No. 1901 based on his findings. It was his evidence that, the ditch referred to above had been cut and converted to a road by the 1st and 2nd Defendants. The said area was at the West edge of lot 1 of the commissioned plan and it was marked as X-Y in Plan No.1901. The 1st Plaintiff who was present at the inspection had pointed out lot 01 and the area identify as X-Y as the encroachment by the 1st and the 2nd Defendants.

As further revealed from the evidence of witness Heenkenda, one Godapale Gedara Seveviratne Banda the 3rd Defendant in DC Kandy Case No. L 17966 (who is the 1st Defendant in the instant case) was also present during the survey and submitted plan bearing No.2967 dated 03.09.1992 prepared by A. B. Weerasekara licensed Surveyor and he made use of the said plan when making 1901. The said plan was produced at the instant case marked P-3.

The learned District Judge when analyzing the evidence placed before him had referred to both the plans submitted before him marked P-1 and P-3 and had correctly observed that the land depicted in Plan 2967 (P-3) is the Northern boundary of the disputed land identified in Plan No.1901.

Even though the Judges of the Civil Appellate High Court had stated that they have a doubt with regard to the other boundaries, according to P-1 the plan bearing No. 1901, the Eastern boundary had been identified as “outer canal”. The Southern boundary to the said land in question is, “land earlier belongs to Dingiri Banda and presently belongs to the 1st Defendant” (in case No. L 17966) and the Western boundary is “the ditch said to have cut by 3rd Defendant” (in case No. L 17966) when compared the said boundaries with boundaries referred to in schedule to the plaint in the instant case, the position taken up by the learned Judges of the Civil Appellate High Court, that “except for the Northern boundary the other boundaries do not tally with each other” does not appear to be correct.

The learned Counsel, who represented the Plaintiff-Appellants before us, had also submitted that nowhere in the plaint or in the proceeding before the District Court, the Plaintiff had referred to the land in dispute as “Danduhena” but always referred to it as, amalgamated land of Gale Kosgahamulahena of one Nelly of Kurakkan sowing extent and Dambuhena of seven Nelly of Kurakkan sowing extent”

However, according to the impugned Judgment of the Civil Appellate High Court, the Judge had further observed that,

> “It is pertinent to note that assuming the land claimed by the Plaintiffs is not “Danduhena” as referred to in the schedule to the plaint but “Dambuhena” the deeds relied on by the Plaintiffs to establish their title do not refer to a separate allotment of land called “Dambuhena.” The deeds refer to two contiguous allotments of land that is “Southern portion of Kosgahamulahena” and “Dambuhena” but according to the plain P-1 Dambuhena is to the north of the land surveyed by him. In these circumstances it cannot be said that the Plaintiffs have been able to identify land to which they claimed title.”

When considering the material already discussed by me, I am reluctant to agree with the above observation made by the Civil Appellate High Court when reversing the findings of the learned District Judge.

I further observed that the Judges of the Civil Appellate High Court had erred in law by reversing the findings of the District Judge of Kandy when the evidence placed before the District Court support the said finding of the District Court.

In the said circumstances, I answer the questions (a) – (e) raised on behalf of the Petitioner-Appellants in affirmative. There is no material before me to answer questions (f) and therefore I will not answer the said question.

The Judgment dated 22.05.2012 by the Judges of the Civil Appellate High Court of Central Province is set aside and the Judgment dated 27.06.2007 by the District Judge, Kandy is affirmed. The learned District Judge of Kandy is directed to enter decree accordingly.

Appeal allowed.

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 an application for Special Leave to Appeal under Section 9 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 (as amended) read with Articles 128 & 154P3(b) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC Appeal 154/14

SC SPL LA 21/14

CA Appeal 283/2012

HC Colombo 4546/2009

Democratic Socialist Republic of Sri Lanka

Complainant

Vs

Rosemary Judy Perera

Accused

And between

Rosemary Judy Perera

Accused-Appellant

Vs

Democratic Socialist Republic of Sri Lanka

Complainant-Respondent

And now between

Rosemary Judy Perera

Accused-Appellant-Appellant

Vs

Democratic Socialist Republic of Sri Lanka

Complainant-Respondent-Respondent

Before: Buwaneka Aluwihare PC, J.
L. T. B. Dehideniya J. &
Preethi Padman Surasena J.

Counsel: Rienzie Arsecularatne PC with Chamindri Arsecularatne for the Accused-Appellant-Petitioner.

Ayesha Jinasena PC ASG for the Attorney-General.

Argued on: 21.03.2019

Decided on: 14.12.2020

JUDGEMENT

Aluwihare PC. J.,

1. The Accused-Appellant-Petitioner (hereinafter referred to as the 'Accused-Appellant') was indicted for the offence of 'procuration' under Section 360A (1) of the Penal Code (as amended). By judgement dated 9th November 2012, the Appellant had been convicted by the High Court and a sentence of 3 years simple imprisonment and a fine of Rs. 25,000/- carrying a default sentence of a further 6 months simple imprisonment was imposed on her. Aggrieved by the said judgement and sentence, the Accused-Appellant appealed to the Court of Appeal. By judgment dated 17th January 2014, the Court of Appeal dismissed the appeal and affirmed the conviction and sentence imposed by the High Court. The Accused-Appellant had preferred the present appeal to this Court and was granted Special Leave to Appeal on the following questions of law;

    (a) Whether their Lordships of the Court of Appeal misdirected themselves in law by holding that the words "whoever procures or attempts to procure any person to become a prostitute" in Section 360A (1) of the Penal Code mean that the procurement is done to do the work of a prostitute.

    (b) Whether their Lordships of the Court of Appeal misdirected themselves in law by holding that the Prosecution can establish the charge of procuration of Priyangika to become a prostitute under Section 360A(1) of the Penal Code without calling Priyangika as a witness to testify she was not engaging in prostitution or she was not a prostitute at the time of the alleged procuration.

    (c) Whether their Lordships of the Court of Appeal misdirected themselves in law by failing to consider that in order to prove a charge

under Section 360A (1) of the Penal Code it is essential that the said Priyangika in fact engaged in prostitution as a result of the alleged procuration.

(d) Whether their Lordships of the Court of Appeal misdirected themselves in law by holding that even a prostitute can be procured to become a prostitute.

The Facts

2. Acting on an information received, the officers of the Colombo Crime Division [CCD] had arrested the Accused-Appellant, for providing women for sexual intercourse for a payment. She had been arrested together with eight other women in an apartment of the Liberty Plaza Shopping Complex in Kollupitiya. The raid had been carried out by using a decoy who obtained one of the women present there, for sexual intercourse by payment of Rs. 3000/-. Police Constable Douglas, who acted as the decoy and Police Constable Rohana who accompanied him had been allowed admission into the said premises by the Accused-Appellant. Upon the payment of Rs. 3000/- being made to the Accused-Appellant, eight women had been called out from an inner room. The decoy having chosen one of them, the Accused-Appellant had taken the decoy and the woman he had chosen to another room within the apartment down a flight of stairs. After entering the room with the woman [later identified as one Priyangika] and locking the door, PC Douglas had given a call (a "ring cut" as commonly referred to) to the main investigating officer Inspector of Police, Indra Deepal, which was the pre-arranged signal. IP Deepal had then entered the apartment with other officers and arrested the Accused-Appellant, as well as Priyangika, seven other women, and six men who were suspected of having come there for the purpose of obtaining the services of a Prostitute.

The Offence of 'Procuration' and its Legislative Development

3. Before I proceed to consider the questions of law on which Special Leave to appeal was granted, it would, in my view, be pertinent to consider at the outset whether the impugned "conduct" of the Accused-Appellant is caught up in the '*actus reus'* contemplated in Section 360A (1) of the Penal Code.

4. The Penal Code (Amendment) Act No. 22 of 1995 sought to update the law on various offences including procuration among other offences such as rape, incest, sexual harassment and trafficking.

Pre-amendment, Section 360A

5. Subsection (4) of Section 360A of the Penal Code [prior to the 1995 amendment] corresponds with subsection (1) of Section 360A introduced by the 1995 Amendment.

   The original subsection (4) of Section 360A reads as follows;

   > *"Any person who- procures or attempts to procure any girl or woman (whether with or without her consent) to become, within or without Sri Lanka a common prostitute;"*
   >
   > [Legislative Enactments 1956]

   After the 1995 Amendment, subsection (1) to Section 360A reads as follows;

   > *"Whoever- procures or attempts to procure, any person, whether male or female of whatever age (whether with or without the consent of such person) to become, within or outside Sri Lanka, a prostitute; commits the offence of procuration."*

6. Thereby the offence of procuration has been made gender neutral, widening the scope of the victims of procuration to include "any person, whether male

or female of whatever age". Further the term 'common prostitute' was replaced with 'prostitute'. The proviso to Section 360A, requiring corroboration in some material particular, has also been done away with.

7. It is significant to note that Section 360A was not in the original Penal Code, but was added by way of an amendment in 1924 and the Indian Penal Code, which is substantially the same as ours (prior to independence) does not carry a penal provision that corresponds to Section 360A.

Analysis of the Constituent Elements of the Offence of 'Procuration'

8. In the instant case, if the evidence of the police officers is to be accepted and acted upon, it is apparent that the Accused-Appellant had offered women [prostitutes] for the purpose of the commission of sexual acts and/or for sexual intercourse, for a fee. Broadly speaking, the issue before this court is, as to whether the said act or acts done by the Accused-Appellant, could be said to be '***procuring a person to become a prostitute'*** as contemplated in Section 360A (1) of the Penal Code. Both the High Court as well as the Court of Appeal has determined that it is so.

9. The issue, as I see it, is bereft of complications; **if it can be said** with certainty that the 'act of offering women for lewdness [sexual acts or sexual intercourse] in return for a payment', is subsumed within the meaning of *'procuring a person to become a prostitute'* then the Accused-Appellant should be guilty as charged. It also must be noted that there is no legislative definition given to the term 'procuring' and in the circumstances, the construction that can be given to this legislative provision is a literal one. In the twelfth edition of Maxwell on the Interpretation of Statutes by St. J. Langan [at page 28] it is stated that *" the most elementary rule of*

construction is that, it is to be assumed that the words and phrases of technical legislation are used in the technical meaning if they have acquired one, and ***otherwise in their ordinary meaning."*** In the absence of a 'technical meaning', the word 'procuring' must be construed in its ordinary meaning.

10. At this point it would be apt to consider provisions in other legislation which have been enacted to solve mischief of a similar kind from which the legislative intent could be gleaned.

11. In this context, Section 9(1) of the Vagrants Ordinance No.4 of 1841 appears to be relevant to appreciate the legislative thinking behind the mischief it intended to address. Archaic one may say, but this legislation is very much a part of the prevailing law.

    Section 9(1) of the Ordinance is as follows;

    "Any person who-

    (a) Knowingly lives wholly or in part on the earnings of prostitution;

    (b) Systematically procures persons for the purpose of illicit or unnatural intercourse shall be deemed to be an incorrigible rouge within the true intent and meaning of this Ordinance, shall be liable…"

12. What is clear from the above penal provisions is that the legislature had prohibited two distinct courses of conduct, that is, **one**; making earnings out of prostitution, [in technical terms, a person who lives on the avails of prostitution] and **the other**; procuration of persons for prostitution. If one argues that the former [conduct] is subsumed in the latter, I do not see a reason for the legislature to enact a separate provision in order to prohibit the conduct in paragraph (a) of Section 9(1) of the Ordinance.

13. In the instant case, when one considers the facts presented before the trial court, what is apparent is that the Accused-Appellant had been living on the avails of prostitution by offering women for prostitution, clearly, a conduct prohibited under Section 9(1)(a) of the Vagrants Ordinance and I do not think one could say that she had also violated Section 9(1)(b) of the Ordinance for the reason that the conducts are distinct and carry separate elements.

14. However, what we are now called upon to do is to consider Section 360A(1) of the Penal Code. In the absence of any precedents directly on the issue by our courts, I have considered decisions by courts in other jurisdictions, in particular common law jurisdictions.

15. **The Sexual Offences Act 1956 in the UK**, Section 22(1)(a), makes 'causing prostitution of women' an offence.[This section has now been replaced by Section 52 of the Sexual Offences Act 2003, which makes "causing or inciting prostitution for gain" an offence.]

Section 22; Causing prostitution of women

(1) It is an offence for a person
(a) to procure a woman to become, in any part of the world, a common prostitute; or
(b)…..
(c)…..
(2) ……..

16. The words highlighted in Section 22 (1) (a) above, occurs in Section 360A (1) of the Penal Code as well and as such any interpretation of the provision would be relevant in deciding the meaning that should be attributed to Section 360A (1).

17. In the case of **R v. Joseph James Broadfoot** (1977) 64 Cr. App. R. 71 where the accused was charged under Section 22 referred to above, Cusack J. was of the opinion that "Procuring" in the said Section *"could perhaps be regarded as bringing about a course of conduct which the girl in question would not have embarked upon spontaneously of her own volition."* (at page 76). His Lordship, having noted that it is essential that the interpretation of the word [**procuration**] is a matter of common sense, held that "*this court can see nothing wrong in the judge having suggested to the jury the word "recruited" as being a useful expression to consider in deciding what they **[the jury]** thought on this particular issue"* (emphasis is mine). Cusack, J. further observed that "*The Act is not aimed at brothel-keepers who give girls an opportunity, if they come in there, of carrying on that trade. **It is aimed at people who get girls by some fraud or persuasion.**"* (emphasis is mine) Cusack J.'s conclusion was based on **Attorney General's reference (No. 1 of 1975)** (1975) 61 Cr. App. R. 118, [1975] Q. B. 773 which stated- though not specifically in relation to the offence of procuration- *"To procure means to **produce by endeavour**. You procure a thing by setting out to see that it happens and taking the appropriate steps to produce that happening."* Thus, the legal position would be, where a person becomes a prostitute of that person's own free will, the question of procuration does not arise.

18. In **Regina v. Morris-Lowe** 1985 1 WLR 29, where the accused was again charged under Section 22(1)(a) of the same Act, the court considered the case of **Broadfoot** *(supra)* in deciding the meaning that should be attached to the word "procure". It was stated that *"The word "procure" in these particular circumstances may simply mean to persuade…"*. The thinking referred to, fortifies the position that the word 'procure' should be given its plain meaning. This, to my mind leads to the interpretation that 'procure' as used in Section 360A(1) refers to a situation where a person who was not

previously engaged in prostitution is obtained or persuaded to engage in the profession of prostitution.

19. There is another aspect of the offence [360A(1)] that needs to be focused on. If a person is to be found guilty under this offence, it is also necessary to establish that the procuration must have been done for that person to ***"become, within or outside Sri Lanka, a prostitute"***. Thus, the question arises if a person who is already engaged in the profession [of prostitution] is offered to a person seeking the services of a prostitute, as in the instant case, whether that could amount to *procuration* as contemplated in Section 360A(1) of the Penal Code.

20. In this regard, the consideration given to this aspect in the case of **R v. Ubolcharoen (Phanda) and Thonarin (Buppha)** (2008) [2009] EWCA Crim 3263, is worthy of reference. Both Ubolcharoen and Thonarin were charged for several counts under the Sexual Offences Act 2003 [UK] including the count of arranging or facilitating the arrival in the United Kingdom of a person for sexual exploitation and the count of intentionally causing or inciting another person ***to become a prostitute*** in any part of the world pursuant to Section 57(1) and Section 52 of the said Act.

21. The facts [in Ubolcharoen], albeit, briefly, are as follows; The accused, with the help of Thonarin's sister Puwi in Singapore, had arranged and facilitated the arrival into the United Kingdom of two women, known as June and Sindy both of whom were of Thai nationality, to work as prostitutes in the United Kingdom and control them as such. Both June and Sindy had been working in massage parlours in Singapore.

22. The Court held that, to make a finding of guilt in respect of the offence, one has to be sure of two things: first, that June and Sindy had ***never acted previously anywhere in the world as a prostitute***, even on a single occasion; and secondly, that the ***accused knew that June and Sindy had not done so***. Otherwise the Appellants (Accused) could not have caused or incited June and Sindy ***"to become prostitutes"***.

23. Taking into account the rationale in the cases referred to above, I shall now address the questions of law on which Special Leave was granted.

The Questions of Law

24. I find that the questions of law referred to in (a) and (d) are interwoven and as such wish to consider both these questions together.

25. In its judgment the Court of Appeal stated that the "*words in Section 360A(1) of the Penal Code 'whoever procures or attempts to procure any person to become a prostitute' mean that the procurement is done to do the work of a prostitute. The words in Section 360A (1) of the Penal Code* ***'to become a prostitute'*** *mean to do the work of a prostitute. Thus, even a woman who had done prostitution can be procured to do the work of a prostitute. Therefore, the contention that a prostitute cannot be procured to become a prostitute fails. For the above reasons, I hold that 'any person' in Section 360A (1) of the Penal Code includes even a prostitute."*

26. Considering the wording of Section 360A(1) of the Penal Code and the decisions referred to above, I am of the view that this reasoning of the Court of Appeal cannot stand when one resorts to a plain reading of the Section as

supported by the definitions of the words 'prostitute' and 'procuration' as applicable to the context of the Section.

27. As decided in the case of **R v. Ubolcharoen** (*supra*) referred to earlier, a Section 52(1) offence {Sexual Offences Act 2003 [UK]} which is similar to that of Section 360A(1), cannot be committed if the complainant [the person] has already been involved in prostitution, either home or abroad.

28. I am of the view that the same interpretation as above, is applicable in the Sri Lankan context as well. In the Penal Code (Amendment) Act No. 22 of 1995, Section 360A(1) is placed under the heading **'Of kidnapping and abduction'.** This classification also supports the meaning which can be derived from a plain reading of Section 360A(1); that the offence of procuration is committed where a person who is not a prostitute is employed anew in prostitution rather than a person who is already a prostitute.

29. It has further been submitted by the learned President's Counsel for the Accused-Appellant that the words 'to become' as interpreted in the case of **Shaw Wallace and Hedges Ltd v. Palmerstone Tea Co. Ltd. And Others** 1982 2 SLR 427 mean a change of condition i.e. entering into a new state or condition and that in the present case "to become" has to be interpreted as a person who is not a prostitute changing their status or condition to become a prostitute.

30. The learned President's Counsel for the Accused-Appellant cited 'Archbold Criminal Pleading, Evidence and Practice' 1997 Edition, pages 1745-1746 "*If a woman is already a common prostitute, she cannot become one and accordingly cannot be procured to become one.*" Albeit regarding the offence

of procuration in terms of minor girls, a similar stance was taken in the Indian case of **Ramesh v. The State of Maharashtra** 1962 AIR 1908, 1963 SCR (3) 396;

> *"But where a woman follows the profession of a prostitute, that is, she is accustomed to offer herself promiscuously for money to "customers", and in following that profession she is encouraged or assisted by someone, no offence under S. 366A [procuration of minor girl] is committed by such person, for it cannot be said that the person who assists a girl accustomed to indulge in promiscuous intercourse for money in carrying on her profession acts with intent or knowledge that she will be forced or seduced to illicit intercourse."*

31. Thus, from the three judgments cited immediately above, it follows that the offence of procuration cannot be committed with regard to a person who is already a prostitute.

32. Considering the above, I answer both, the question (a) and (d) on which special leave to appeal was granted, in the affirmative.

The Question of Law Referred to in Paragraph (b)

33. The Prosecution did not call Priyangika as a witness. The learned President's Counsel for the Accused-Appellant argued that the person alleged to have been procured must be called to testify if it is to be established that she was not a prostitute at the time of alleged 'procuration' by the Accused-Appellant. It was also contended on behalf of the Accused-Appellant, the fact that Priyangika came and stood in front of the decoy along with the other women indicates that she was already engaged in prostitution at the time the alleged procuration was made. Briefly stated, it was the position of the learned

President's Counsel that the evidence of the 'person procured' is *sine qua non*, to establish a charge of procuration.

34. The learned Additional Solicitor General argued that it is unnecessary to lead the evidence of the victim as the burden on the prosecution can successfully be discharged by leading either direct and/or circumstantial evidence on this point. It has been submitted that the only requirement of the penal provision is to establish that 'a person' had been procured and, in the instant case the procuration of a person has been established by the Prosecution through the evidence of the decoy PC Douglas and the main investigating officer IP Deepal and as such there was no necessity to call Priyangika to testify. The Respondent in their written submissions has pointed out that, if it is mandatory to lead the evidence of the person alleged to have been procured in order to prove the charge, then a charge of procuration can never be preferred under Section 360A(1) where a victim had been sent abroad subsequent to procuration.

35. As I have set out earlier in this judgment, in order to establish the offence of procuration it must be proved that the person procured was not a prostitute before the alleged procuration. The burden is on the prosecution to establish that fact beyond reasonable doubt, the degree of proof required in criminal cases, which is an evidentiary burden. I do not think that one could say that there is a legal burden to establish that fact by placing the testimony of the person procured before the court. This court also appreciates the challenge the prosecution may face in discharging its burden in instances where a person may fairly be said to be living in whole or in part on the earnings of prostitution, that is to say when there is parasitic relationship between the prostitute and the "tout", "the bully", "protector" or "the pimp" as one may

call the other. In the case of **Canada (Attorney General) v. Bedford** (2012) ONCA 186, this aspect [the need for the prostitute to testify] was considered. The court observed *"This question is complicated by s. 212(3) of the Criminal Code, which establishes a rebuttable presumption that a person who lives with, or is habitually in the company of, a prostitute, lives on the avails of prostitution:*

> *Evidence that a person lives with or is habitually in the company of a prostitute or lives in a common bawdy-house is, in the absence of evidence to the contrary, proof that the person lives on the avails of prostitution, for the purposes of paragraph 1 (j)…."*

36. The court went on to observe that *"This presumption is intended to facilitate* ***the prosecution of pimps without the need for the affected prostitute to testify.*** *This is important because prostitutes are notoriously, and understandably, reluctant to testify against the people who control them."*

37. In view of these considerations, I do not think that this court should set down a rule that in proving a charge of procuration under Section 360A(1) of the Penal Code, that it is necessary to lead the evidence of the affected prostitute and accordingly I answer the question of law (b), in the negative.

The Question of Law Referred to in Paragraph (C)

38. In the case of **Regina v. Johnson (Gerald)** 1964 2 QB 404 cited on behalf of the Accused-Appellant, it was the opinion of the Court of Criminal Appeal of England, that in order to prove the offence of ***procuring a woman to become a common prostitute***, it must be clearly established that she became a prostitute. It was contented by the learned President's Counsel for Accused-Appellant that accordingly, to establish a charge under Section 360A(1) it

was necessary to prove that Priyangika in fact became a prostitute and that was as a consequence of her being procured by the Accused-Appellant to become a prostitute.

39. It was submitted on behalf of the Accused-Appellant that their Lordships of the Court of Appeal misdirected themselves in law by failing to consider that it is necessary for the prosecution to establish that Priyangika, after procuration, in fact had engaged in prostitution in order to prove the offence under Section 360A(1). The way the case for the prosecution was presented in the instant case, the position taken on behalf of the Accused-Appellant appears to be correct when one considers the words in Section 360A(1) "procures…any person…. to become……a prostitute." I say so for the reason that if it can be established that an attempt was made to procure for the same purpose, still the offence is constituted. The court of Appeal, however, had held that even if a prostitute is procured, the offence is established, a conclusion with which I respectfully disagree. For the reasons stated earlier in this judgement, I answer the question of law referred to in paragraph (c) also in the affirmative.

40. Upon an analysis of Section 360A (1), it appears to me that the desire of the legislature had been in safeguarding the public interest in morality than the chastity of the individual. The objective [of the legislature] is to impose penal sanctions, to discourage people from luring or inducing persons who are hitherto not engaged as prostitutes to join the profession of prostitution.

41. For the reasons set out above, I answer the questions of law referred to in paragraphs (a), (c) and (d) in the affirmative and the question of law referred to in paragraph (b) in the negative.

42. In view of my finding above, I set aside the conviction and the sentence imposed on the Accused-Appellant by the High Court and acquit the Accused-Appellant.

Appeal Allowed.

Judge of the Supreme Court

JUSTICE L. T. B. DEHIDENIYA

I agree.

Judge of the Supreme Court

P. Padman Surasena J.,

I had the previledge of reading in draft form, the judgment of His Lordship Buwaneka Aluwihare PC J. I regret my inability to agree with the conclusion and reasoning set out in His Lordship's judgment. I would therefore pronounce my views separately in this judgment.

The Accused-Appellant-Appellant (hereinafter referred to as the "Accused-Appellant") was indicted under S. 360 A (1) of the Penal Code as amended by Act No. 22 of 1995. After the trial, the learned High Court Judge convicted the Accused-Appellant and sentenced her to three years simple imprisonment and also to a fine of Rs. 25,000/= to which a default sentence of six months simple imprisonment was also attached.

Being aggrieved by the said conviction, the Accused-Appellant had appealed to the Court of Appeal. At the conclusion of the argument of the appeal, the Court

of Appeal by its judgment dated 17-01-2014, dismissed the appeal and affirmed the conviction and the sentence imposed on the Accused-Appellant.

The learned President's Counsel who had appeared for the Accused-Appellant had sought to argue in the Court of Appeal that if a woman is already a prostitute she cannot be procured to become a prostitute. Another argument advanced on behalf of the Accused-Appellant was that the prosecution failed to prove the charge as it failed to call Priyangika as a witness to testify. The Court of Appeal rejecting the above contentions has taken the following views in its judgment.

i. The words "whoever procures or attempts to procure any person to become a prostitute" in Section 360 A of the Penal Code mean that the procurement is done to do the work of a prostitute.
ii. Thus, even a woman who had done prostitution can be procured to do the work of a prostitute.
iii. Therefore, the contention that a prostitute cannot be procured to become a prostitute fails.
iv. 'Any person' in Section 360 A (1) of the Penal Code includes even a prostitute.
v. Under Section 360 A (1) of the Penal Code, the prosecution should prove that the accused procured or attempted to procure any person to do the work of a prostitute.
vi. To prove the above, it is not necessary for the prosecution to call the woman who agreed to perform the work of a prostitute. This can even be proved with the evidence of the male person.

Being aggrieved by the judgment of the Court of Appeal, the Accused-Appellant filed an application for special leave to appeal in this Court. This Court, when the said special leave to appeal application was supported, having heard the submissions of the learned Counsel for both parties, by its order dated 04-09-

2014, has granted special leave to appeal in respect of the following questions of law.

a) *Whether their Lordships of the Court of Appeal misdirected themselves in law by holding that the words "whoever procures or attempts to procure any person to become a prostitute" in Section 360A (1) of the Penal Code mean that the procurement is done to the work of a prostitute.*
b) *Whether their Lordships of the Court of Appeal misdirected themselves in law by holding that the prosecution can establish the charge of procuration of Priyangika to become a prostitute under Section 360 A (1) of the Penal Code without calling Priyangika as a witness to testify she was not engaging in prostitution or she was not a prostitute at the time of the alleged procuration.*
c) *Whether their Lordships of the Court of Appeal misdirected themselves in law by failing to consider that in order to prove a charge under Section 360 A (1) of the Penal Code it is essential that the prosecution establishes that said Priyangika in fact engaged in prostitution as a result of the alleged procuration.*
d) *Whether Their Lordships of the Court of Appeal misdirected themselves in law by holding that, even a prostitute can be procured to become a prostitute.*

Before I commence focusing on the above questions of law let me briefly set down below, the facts of the case.

The Accused-Appellant was arrested consequent to a raid organized by Inspector of Police Deepal (hereinafter referred to as 'IP Deepal') attached to the Colombo Crimes Division. This was sequel to a receipt of an information.

Police Constable Douglas (hereinafter referred to as 'PC Douglas') was arranged to be sent as a decoy, together with Police Constable Rohana (hereinafter referred to as 'PC Rohana') to the 11th apartment situated in the 8th floor of the Liberty Plaza building in Kollupitiya.

Responding to the ringing of the bell (by the two police constables clad in civil clothes) the Accused-Appellant had opened the front door of the said apartment. Upon being briefed regarding the purpose of the visit, the Accused-Appellant had wanted a payment of Rs. 3000/= to supply a woman. As the two Police officers had agreed to the offer, the Accused-Appellant had offered them a seat on the settee in the front hall.

After few minutes, the Accused-Appellant had brought before them, eight females for their selection. PC Douglas then had selected the female with a lean body. The Accused-Appellant had then asked PC Rohana as to whether he too was in need of another female. However, PC Rohana had responded in the negative. Thereafter, PC Douglas had made the payment of Rs. 3000/= to the Accused-Appellant who was then seen depositing the cash received, in a drawer behind the counter.

PC Douglas was then led by the Accused-Appellant into a room on the floor below them through a wooden staircase. After closing the room door, PC Douglas had instructed the female to go to the bathroom and return after cleaning herself. It was during that time PC Douglas, through his mobile phone had passed a signal to IP Deepal who was the team leader of the raid. PC Douglas had then started talking to the female who returned from the bathroom clad in a white towel. This was to spend more time to facilitate the arrival of his team in the room. A few moments later, PC Douglas upon hearing a tapping on the door, had opened the door of the room. IP Deepal, the Accused-Appellant and WPC Liyanage had entered the room. IP Deepal having arrested the Accused-Appellant had also recovered from the drawer behind the counter, the currency notes handed over to the Accused-Appellant by PC Douglas.

Let me now focus on the questions of law a glance through which, would show that the Accused-Appellant has not sought to canvass the facts of this case. This is because the said questions only revolve around the ingredients of the offence, which the prosecution is obliged to prove. Thus, for the purpose of this

judgment, it would suffice to state that the evidence adduced in this case, has established that the Accused-Appellant, on the request of PC Douglas (the decoy), had made available a female ("Priyangika") to engage in sexual activities with PC Douglas for a payment of Rs. 3000/=.

As all questions of law are centred around the interpretation of section 360 A (1) of the Penal Code as amended, it would be convenient at the outset, to reproduce the said section as amended.

360 A.

Whoever-

1) *Procures, or attempts to procure, any person, whether male or female of whatever age (whether with or without the consent of such person) to become, within or outside Sri Lanka, a prostitute;*
2) *……;*
3) *…..;*
4) *…..;*
5) *……;*
6) *……,*

commits the offence of procuration and shall on conviction be punished with imprisonment of either description for a term of not less than two years and not exceeding ten years and may also be punished with a fine."

In interpreting the above section for the purposes of the instant judgment, it would be opportune first to ascertain the meaning of the words *"procure"* and *"prostitute"* as they are the key words in the section. In addition, I also have to advert to the question as to what is meant by "to become" in the section.

Black's Law Dictionary (11th Edition) defines those two words in the following manner.

Procure. *1. To obtain (something), especially by special effort or means. 2. To achieve or bring about (a result). 3. To obtain a sexual partner for another, especially an unlawful partner such as a minor or a prostitute.*

Prostitute. *Someone who engages in sexual acts in exchange for money or anything else of value. – Also termed sex worker.*

When I consider the facts of the instant case in the light of the above definitions I have no doubt that the Accused-Appellant, on the request of PC Douglas (the decoy), had procured a female ("Priyangika").

The purpose of the said procuration of said female ("Priyangika") is for PC Douglas to engage in sexual activities with her. It is also clear that PC Douglas had already paid Rs. 3000/= for this purpose. This clearly means that said female ("Priyangika") became a prostitute for PC Douglas for that time.

In my view, "to become, within or outside Sri Lanka, a prostitute" cannot necessarily refer to a person who was not engaging in prostitution (or she was not a prostitute) at the time of the procuration referred to in the section. Such an interpretation would amount to a substitution of the words "any person who was not engaging in prostitution before" in place of the words "any person" in the section. In my view that it is not the plain meaning of the section.

Moreover, as per the plain meaning of the section, it is clear that the intention of Parliament is to prohibit persons being procured for the purpose of becoming an unlawful sexual partner for another. (i.e. to become a prostitute for the latter). It does not refer to a period of time during which such former person must remain as a prostitute. What matters is that the person must be procured to do the work of a prostitute. Moreover, the section does not qualify the term "any person" but merely states, "*Procures, or attempts to procure,* ***any person,***[1]*"*. Therefore, there is no justification to exclude persons who are already engaging in prostitution from the meaning of the words "*any person"* in section 360 A (1) of the Penal Code. Thus, the question whether that person was engaging in prostitution before, does not become relevant. For the above reasons, I am of the view that even a prostitute can be procured to become a prostitute within the

[1] Emphasis is mine.

meaning of section 360 A (1) of the Penal Code. Therefore, I answer the questions of law set out in paragraphs (a), (b) and (d) in the negative.

What remains for me to consider is the question of law set out in paragraph (c). Section 134 of the Evidence Ordinance states that no particular number of witnesses shall in any case be required for the proof of any fact. Section 3 of the Evidence Ordinance defines the term 'proved' in the following manner.

"A fact is said to be proved when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."

Thus, the fact that the Accused-Appellant, had procured a female ("Priyangika") to become a prostitute for PC Douglas, is proved when, the court after considering the matters before it, either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the case, to act upon the supposition that it exists. One must bear in mind that the charge has focused on the procuration of a prostitute and not on engaging in prostitution as such.

Therefore, I am of the view that it is not essential that the prosecution establishes that said Priyangika in fact engaged in prostitution as a result of the alleged procuration in order to prove a charge under section 360 A (1) of the Penal Code. What must be proved by the prosecution under Section 360 A (1) of the Penal Code is that the accused procured or attempted to procure any person to do the work of a prostitute. Once such procuration is done, the commission of the offence is completed.

In the light of the above, I proceed to answer the question of law set out in paragraph (c) also in the negative.

For the foregoing reasons, I proceed to affirm the judgment of the Court of Appeal dated 17th January 2014.

Before I conclude, I would briefly state here the grounds, which led me to refrain from agreeing with the conclusion and reasoning, set out in the judgment of His Lordship Justice Aluwihare PC.

His Lordship Justice Aluwihare PC, has relied on the judgment in the case of Shaw Wallace and Hedges Ltd Vs. Palmerston Tea Co. Ltd and Others [2] in interpretting the words 'to become' in section 360 A (1) of the Penal Code. It is section 42(B)(5)(a) of the Land Reform Law which was to be interpretted in that case. It reads thus:-

"42(B)(5)(a) Subject to the provisions of paragraph (b), where any estate land is vested in the Commission, the rights and liabilities of the former owner of such estate land under any contract or agreement, express or implied, which relates to the purposes of such estate land and which subsist on the day immediately prior to the date of such vesting, and the other rights and liabilities of such owner which relate to the running of such estate land and which subsist on such day, ***shall become***[3] *the rights and liabilities of the Commission; and the amounts required to discharge all such liabilities shall be deducted from the amount of compensation payable in respect of such estate land."*

At the outset, it must be noted that the above section refers to the transition of the rights and liabilities of the former owners of the estates vested in the Land Reform Commission by operation of law. Thus, one must bear in mind that the 'change of condition' referred to in that case is a change that enters into a new state or condition which implies a sense of permanency in the said change.

However, the question arises as to whether it is possible for a human being to change permanently entering into a new state or condition. For example, a prostitute as a person will not be engaging in prostitution while engaging in its personal matters (such as, attending to domestic work, children and family matters, shopping in a supermarket, visiting parents etc). Furthermore, a prostitute

[2] 1982 2 SLR 427.
[3] Emphasis is mine.

can also engage in prostitution intermittently leaving longer durations of time in between. It is possible for a person to engage in prostitution only once or twice during that person's lifetime. Such an engagement could occurr due to a sudden but short-lived urgent financial need. As a prostitute will engage in prostitution only when there is money exchanged for that specific service,[4] becoming a prostitute cannot presuppose becoming a prostitute for ever.

Thus, it stands to reason to conclude that the words 'to become' in section S. 360 A (1) of the Penal Code is a reference only to the specific moments of one's engagements in the acts of prostitution. Therefore, in my view, there is no justification to adopt the interpretation given to section 42(B)(5)(a) of the Land Reform Law in the above case to interpret the words 'to become' in section S. 360 A (1) of the Penal Code.

His Lordship Justice Aluwihare PC, in presenting his view, has also placed much reliance on the judgments of Courts in UK. This could be seen particularly from paragraphs 15, 16 and 17 of His Lordship's judgment.

The genesis of the phrase "*The Act is not aimed at brothel-keepers who give girls an opportunity, if they come in there, of carrying on that trade. It is aimed at people who get girls by some fraud or persuasion"* referred to by His Lordship Justice Aluwihare PC, could be traced back to the judgment in Rex v. Christian and Another.[5] It is a case where the Defendant in that case had been indicted under section 2 of the Criminal Law Amendment Act 1885 (48 and 49 Vict. C 69). The said section is as follows.

"2. Any person who-

1. Procures or attempts to procure any girl or woman under 21 years of age, ***not being a common prostitute, or of known immoral character,***[6] *to have unlawful carnal connexion, either within or without the Queen's dominions, with any other person or persons; or*

[4] As per Black's Law Dictionary (11th Edition) definition of "Prostitute".
[5] (1913) 23 Cox C.C. 541.
[6] Emphasis is mine.

2. Procures or attempts to procure, any woman or girl to become, either within or without the Queen's dominion, a ***common***[7] *prostitute; or …" .*

This is a case, which was heard in the Central Criminal Court in 1913. It was in the course of interpreting the above section that the following remarks were made by Bosanquet, common sergeant.

"…… The girl wanted no procuring at all. It must, be real procuration. No one could have sat in this Court so long as I have without knowing that there are girls who do not want procuring at all. There is no need to stretch this statute; if you have got facts to meet it, well and good. This girl says she went of her own free will. The Act is not aimed at brothel-keepers who give girls an opportunity, if they come in there, of carrying on that trade. It is aimed at people who get girls by some fraud or persuasion, or by inviting them to it if they cannot get money in any other way—turning them on to the streets. It would be absurd to stretch this Act to meet the case described by the girl herself. …."

The above phrase may hold true as regards several provisions of that Act.[8] Section 2(1) is one such provision, which deals with a procurement of *"any girl or woman under 21 years of age, not being a common prostitute, or of known immoral character".* It can also be seen that separate and distinct offences are defined for the situations where procuring is done by threat, fraud or administering drugs. Section 3 of the said Act defines one such offence. It is as follows.

Section 3

"Any person who-

1) *By threats or intimidation procures or attempts to procure any woman or girl to have any unlawful carnal connexion either within or without the Queen's dominions; or*

[7] Emphasis is mine.
[8] Criminal Law Amendment Act 1885 (48 and 49 Vict. C 69).

2) By false pretences or false representations procures any woman or girl, not being a common prostitute or of known immoral character, to have any unlawful carnal connexion, either within or without the Queen's dominions; or

3) Applies, administers to, or causes to be taken by any woman or girl any drug, matter, or thing, with intent to stupefy or overpower so as thereby to enable any person to have unlawful carnal connexion with such woman or girl,

shall be guilty of a misdemeanour, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour.

Provided that no person shall be convicted of an offence under this section upon the evidence of one witness only, unless such witness be corroborated in some material particular by evidence implicating the accused."

However, it is significant that section 2(2) of the Act has deliberately omitted any such qualification to the phrases *"any woman or girl"* or *"Procures"* found in that section. Thus, one should not interpret section 2(2) in the same way as section 2(1) or 3 of the above Act. This is because of the deliberate omission of any phrase such as *"any girl or woman under 21 years of age, not being a common prostitute, or of known immoral character"* in section 2(2) and the presence of only the word *"procures"* without any descriptions thereto, as in section 3 of that Act. Therefore, in my view the mischief section 2(1) is attempting to remedy is not the same mischief that is sought to be remedied by section 2(2) or 3 of the above Act.[9] Thus, in my view the remarks of Bosanquet, common sergeant which is a common reference to the above Act as a whole, cannot be adopted to interpret the provision in section 360A (1) of the Penal Code of Sri Lanka.

As stated by His Lordship Justice Aluwihare PC in paragraph 17 of his judgment, section 22 of the Sexual Offences Act 1956 in the United Kingdom states;

[9] Criminal Law Amendment Act 1885 (48 and 49 Vict. C 69).

Section 22

1) It is an offence for a person

a) to procure a woman to become, in any part of the world, a ***common prostitute;*** [10] *or*

b) …….

c) …….

Section 22 (1) (a) of the Sexual Offences Act of 1956 in the United Kingdom is more or less the same as section 2(2) of the Criminal Law Amendment Act 1885 (48 and 49 Vict. C 69). Thus, for the same reasons mentioned above, in my view, the remarks of Bosanquet, common sergeant in Rex v. Christian and Another,[11] is also not applicable to interpret the provision in section 22 (1) (a) of the Sexual Offences Act of 1956 in the United Kingdom.

As observed by His Lordship Justice Aluwihare PC in paragraph 5 and 6 of his judgment, the term "common prostitute" in section 360 A (4) of the Penal Code in its original form has been deliberately dropped by the Sri Lankan legislature.

The above facts indicate that the mischief that is sought to be remedied by section 360A (1) of the Penal Code of Sri Lanka is not exactly those of the United Kingdom referred to above. This is further clear from the phrase *"(whether with or without the consent of such person)"* in section 360 A (1) of the Penal Code as amended.

Further, it is the duty of our Courts to suppress the mischief the section 360A (1) of the Penal Code of Sri Lanka is aimed at and advance the remedy.

In Sri Lanka, section 2 of the Brothels Ordinance No. 5 of 1889 states that any person who keeps or manages or acts or assists in the management of a brothel to be committing an offence. Indeed the Brothels Ordinance No. 5 of 1889 states at its very commencement that it is an ordinance to provide for the suppression of

[10] Emphasis is mine.
[11] (1913) 23 Cox C.C. 541.

brothels. Thus, whatever may be the legal status in England and Wales, the procuration of sexual services is certainly illegal in this country.

Therefore, in my view we should not place undue reliance on the interpretation provided by UK Courts to section 22 of the Sexual Offences Act of 1956 of the United Kingdom in interpreting section 360 A (1) of the Penal Code of Sri Lanka, the deep rooted culture of which is different from that of the United Kingdom. For those reasons, I respectfully beg to disagree with the views expressed by His Lordship Justice Buwaneka Aluwihare PC.

JUDGE OF THE SUPREME COURT

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

In the matter of an Appeal under the provisions of the High Court of the Provinces (Special Provisions) (Amended) Act No. 54 of 2006.

Pitihuma Ralalage Tennakone Banda,
Maligatenna,
Thunthota,
Dedigama.

Plaintiff.

Supreme Court Appeal No. 162/10
Supreme Court Leave to Appeal
Application No. HC/HCCA/LA/342/09

Civil Appellate High Court Kegalle
Appeal No. SP/HCCA/KAG/170/2007/(F)

D.C. Mawanella
Case No. 132/L.

1. Wickramasinghe Mudiyanselage Podi Menika alias Punchi Manika,
   Ihala Daswatte,
   Mawanella.
2. Pitihuma Ralalage Premaratne Menike,
   Ihala Daswatte,
   Mawanella.
3. Pitihuma Ralalage Kuda Menike,
   Wegiriya Veediya,
   Hondiya Deniya,
   Udunuwara.
4. Pitihuma Ralalage Illangaratne Menike,
   320B, Menikagara Road,
   Korathota,
   Kaduwela.

Defendants

And Between

Pitihuma Ralalage Tennakone Banda,
Maligatenna,
Thunthota,
Dedigama.

Plaintiff – Appellant.

Vs.

1. Wickramasinghe Mudiyanselage Podi Menika alias Punchi Manika,
   Ihala Daswatte,
   Mawanella.
2. Pitihuma Ralalage Premaratne Menike,
   Ihala Daswatte,
   Mawanella.
3. Pitihuma Ralalage Kuda Menike,
   Wegiriya Veediya,
   Hondiya Deniya,
   Udunuwara.
4. Pitihuma Ralalage Illangaratne Menike,
   320B, Menikagara Road,
   Korathota,
   Kaduwela.

Defendants – Respondents.

And Between.

Pitihuma Ralalage Premaratne Menike,
Ihala Daswatte,
Mawanella.

2ND Defendant – Respondent – Petitioner.

Vs.

Pitihuma Ralalage Tennakone Banda,
Maligatenna,
Thunthota,
Dedigama.

Plaintiff – Appellant-Respondent

1. Wickramasinghe Mudiyanselage Podi Menika alias Punchi Manika,
   Ihala Daswatte,
   Mawanella.

2. Pitihuma Ralalage Kuda Menike,
   Wegiriya Veediya,
   Hondiya Deniya,
   Udunuwara.

3. Pitihuma Ralalage ILLangaratne Menike,
   320B, Menikagara Road,
   Korathota,
   Kaduwela.

1st, 3rd and 4th Defendant – Respondent Respondents.

AND NOW BETWEEN.

Pitihuma Ralalage Premaratne Menike,
Ihala Daswatte,
Mawanella.

2ND Defendant – Respondent – Petitioner-Appellant.

Vs.

Pitihuma Ralalage Tennakone Banda,
Maligatenna,
Thunthota,
Dedigama.

Plaintiff – Appellant – Respondent-Respondent.

1. Wickramasinghe Mudiyanselage Podi Menika alias Punchi Menika,
   Ihala Daswatte,
   Mawanella. (Deceased)

1A. Pithuma Ralalage Upananda Gamini Wickramasinghe
1 B. Pitihuma Ralalage Dissanayake
Both of Ihala Dawatte,
Mawanella.

2. Pitihuma Ralalage Kuda Menike,
   Wegiriya Veediya,
   Udunuwara.

3. Pitihuma Ralalage Illangaratne Menike,
   320 B, Meniagara Road,
   Korathota,
   Kaduwela.

Substituted 1A and 1B and, 3rd and 4th Defendant -Respondent- Respondent-Respondents.

Before : Priyantha Jayawardena, PC, J
P. Padman Surasena, J &
E.A.G.R. Amarasekara, J

Counsel : Ms. L.M.C.D Bandara Instructed by Ms. Minoly De Zoysa for the 2nd Defendant – Respondent – Petitioner - Appellant.
Rohan Sahabandu, PC, with Chathurika Elvitigala for the Plaintiff – Appellant- Respondent- Respondent.

Argued On : 11.03.2019

Decided on : 28.02.2020

E.A.G.R. Amarasekara, J

This action was instituted in the District Court of Mawanella by the Plaintiff - Appellant- Respondent above named (herein after sometimes referred to as the plaintiff) against the 2nd Defendant Respondent Petitioner (hereinafter sometimes referred to as the 2nd Defendant) and the 1st , 3rd, 4th Defendant Respondent Respondents (hereinafter sometimes referred to as 1st, 3rd and 4th Defendants respectively) for a declaration of title to the land more fully described in the schedule to the plaint and to eject the 2nd Defendant and the said 1st , 3rd, 4th Defendants and their agents, servants and all those holding under them and for damages. The Plaintiff also prayed for a sum of Rs. 150,000/- jointly and severally from the Defendants being the value of the trees felled by them but could not be used for the purposes of the Plaintiff due to the actions of the Defendants.

The learned District Judge of Mawanella dismissed the plaint and granted some of the reliefs prayed for in the amended answer. However, in appeal, the learned Civil

Appellate High Court Judges allowed the appeal and granted reliefs to the Plaintiff. Being aggrieved by the said judgment of the Provincial High Court (Civil Appeal) of the Sabaragamuwa Province holden at Kegalle, the 2nd Defendant preferred a leave to appeal application to this court and leave was granted on the following questions of Law mentioned in paragraph 25(c), (d) and (f) of the Petition.

25."(c). Has the Civil Appellate High Court come to a erroneous finding that in view of the facts placed before Court, the main issue to be decided is whether the Lot No.1 depicted in Plan 2V1 is a part of the land described in the Schedule to the Plaint or not?

(d). Has the Civil Appellate High Court erred in law failing to consider whether the Plaintiff has identified the land in dispute with reference to the metes and bounds given in the Plaint and the boundaries specified in the schedules to the deeds that the 1st Respondent relied upon?

(f). Has the Civil Appellate High Court failed to consider whether the 1st Respondent has proved a case against the Petitioner and the 4th Respondent by identifying the land he claimed and by proving title thereto?" [Sic]

The Plaintiff in his amended Plaint pleaded that;

- The land described in the schedule to the plaint belongs to him and his title is based on 3 deeds, namely deed No. 12970 attested on 16.10.1942, deed No. 9306 attested on 10.11.1954 and deed No. 3674 attested on 10.11.1983.

- He also has prescriptive title to the said land since he and his predecessors have been in long, continuous and uninterrupted possession of the land for a period more than 10 years.
- He planted the land with Mahogany and Pepper worth of Rs. 500,000.00 and enjoyed the fruits of his plantation.
- When, in 1995, he felled a number of trees among his plantation, the 2nd Defendant lodged an entry at the Mawanella Police and from there onwards even the other Respondents disputed the Plaintiff's title to the land in question. Thus, he was denied of his rights to enjoy his land and its plantation.
- Thereafter, the Mawanella Police Station referred the dispute to the Mawanella Primary Court and filed the case bearing No. 27525 where the learned Magistrate directed the plaintiff to file a civil case to resolve the dispute over title.

Thereafter, the Defendants filed the amended answer and pleaded inter alia;

- That the Plaintiff was living away from the corpus for more than 14 years, and has not had long and continuous possession of the said land; thus, does not have a right to claim prescriptive title under the Prescription Ordinance.
- That the Plaintiff had never cultivated the land described in the schedule to the plaint or any other land.
- That the valuation of the trees felled down is not accurate since the value of the same which was deposited to the credit of the primary Court case was only Rs. 15,000/-

- That the Plaintiff forcefully entered the said land for which he did not have any right or possession and felled trees without any right to do so, giving rise to the dispute between the parties.
- That the Defendants' land described in the 1st schedule to the answer was originally owned by Pitihuma Ralalage Dasanayake Banda (herein after sometimes referred to as Dasanayake Banda), father of the 2nd Defendant, by virtue of deed No. 16830 dated 14.7.1961, attested by W. Manamperi Notary Public. Dasanayake Banda enjoyed the land until his death upon which the title devolved on the Defendants as heirs to Dasanayake Banda.
- That the land described in the Plaint is adjacent to the land described in the 1st schedule to the amended answer and the Plaintiff has no right to claim the reliefs as prayed for in the plaint.
- That initially the land claimed by the Plaintiff and the land described in the 1st schedule to the amended answer existed as one land and said 2 lands are called by the same name while there was no fence of permanent nature separating the two lands.
- That the Plan No. 1201 dated 17.01.1998 made by A.D. Sirisooriya, licensed surveyor depicts clearly the nature of the 2 lands and the Lot 1 of the said Plan is the land described in the 1st schedule to the amended answer.
- That Lot 2 of the said Plan No.1201 together with Lot 1 has been in the possession of the Defendants over a period of more than 25 years and at no point of time, the Plaintiff possessed the said land.

- That, the Defendants owned and possessed the said lot 1 as per the title obtained through aforesaid deed no.16830, and they have prescriptive title to aforesaid lot 2 through the possession over a period exceeding 25 years.
- That the above stated amount (Rs. 15,000/-) deposited in courts belongs to them since the trees were from aforesaid lot 1.

It appears that in the original answer dated 23rd September 1996, the Defendants had stated that the Defendants have no title to the land described by the Plaintiff but to the land described in the schedule to the answer which is the same land in the 1st schedule to the amended answer. However, by amending the answer the Defendants have claimed not only the land in the 1st schedule to the answer but the land in the second schedule to the answer which as per evidence of the 2nd Defendant(Petitioner in this Application) is the land bought by Dasanayake Banda from Muthubanda – vide pages 171- 173 of the Brief; In other words, to the land claimed by the Plaintiff. On the other hand, as per the evidence of the 1st Defendant, mother of the Plaintiff as well as of the other Defendants, what is surveyed by both surveyors, namely aforesaid A.D. Sirisooriya, Licensed Surveyor on a commission taken by the Defendants and M.D. Senavirathne, Licensed Surveyor on a commission taken by the Plaintiff, is the land bought from said Muthubanda. Thus, it appears, the Defendants craftly had changed their stance with regard to the land claimed by the Plaintiff in their amended answer by claiming prescriptive title to it in the amended answer though they have clearly stated in their original answer that they have no title to the land described in the plaint. If this change of stance was revealed it might have affected the permission for the amended answer.

The trial at the District Court commenced on the 24 issues raised by the contesting parties, namely the Plaintiff and the 1st and 2nd defendants, out of which 14 were raised by the Plaintiff and 10 issues were by the 1st and 2nd Defendants and there was no admission made at the commencement of the trial. Trial was taken exparte against 3rd and 4th Defendants.

The Plaintiff in his amended plaint avers that the land in the schedule to the amended plaint was one time owned and possessed by one H.M. Muthubanda on the strength of a deed dated 16.10.1942 attested by P.C.M.Molligoda, Notary Public and said Muthubanda sold it by deed no. 9306 dated 10.11.1954 (P3) to Pitihuma Ralalage Dasanayake Banda who came to the peaceful and undisputed possession and enjoyed the said land. As per the amended plaint, said Pitihuma Ralalage Dasanayake Banda has sold the said land to the plaintiff by deed no. 3674(P4) dated 10.11.1983 attested by A. Rajasinghe, Notary public.

As per the schedule to the amended plaint, the land claimed by the plaintiff is described as “Gira Ambe Watta” which is in extent “one pela of paddy sowing” and the boundaries are as follows:

North and West – The ditch of the lands that belong to Pinhami and others (පින්හාමිට හා තවත් අයට අයිති ඉඩම් වල අගල)

East – “Gal Enda” seperating Girithale Watte (ගිරිතලේ වත්ත වෙන්වන ගල් ඇන්ද)

South – Arambe Deniya paddy field (අරඹේදෙනිය කුඹුර)

The aforesaid boundaries included and described in the schedule to the amended plaint are in conformity with the schedules to the deeds relied by the Plaintiff for his title to the land.

As per the said schedule in the amended plaint aforesaid land is depicted in the plans made for this case, namely as lot 1 in the plan no. 1057 made by M.D. Senaviratne, Licensed surveyor and also as lot 1 and 2 in the plan no. 1201 made by A.D. Sirisooriya, Licensed surveyor.

The Plan No. 1057 marked as P1 at the trial describes the boundaries as follows;

North; Gira Ambe Watte

East; Girithale Watte

South; Arambe Deniya

West: Hitinawatte

Moreover, the diagram therein depicting the land surveyed clearly shows a "Gal Enda"(ගල් ඇන්ද) on the eastern boundary separating Girithale Watte and a ditch running through the western boundary towards the north, extending to some extent to the northern boundary but the rest of the northern boundary that reaches the eastern boundary is not depicted by a ditch. The plaintiff admits in evidence that there is a fence made of Enderu trees ,about 30 feet in length on the northern boundary where there is no ditch and that part is not compatible with the description in the deeds and the schedule to the plaint since as per the Plaintiff's deeds and the schedule to the plaint the northern boundary is a ditch- vide pages 105 and 106 of the brief). However, the presence of an 'Enderu' Fence at the time of survey covering a portion of the northern boundary cannot be considered as a

serious discrepancy since ditches can be filled up with soil and decaying parts of trees and other things with the passage of time and people may plant trees to fix the boundaries. Such changes of the nature of boundaries is evidenced even by the description of the southern boundary of the land described in the first schedule of the amended answer. It describes the southern boundary as 'Ditch, presently by Land belonging to Punchirala and Others' indicating that once there was a ditch but at present the relevant land is bounded on the south by the land identified with the said description. Thus, a change in the description of part of the Northern boundary in the plan made by M.D.Senavirathne, licensed surveyor for the case after many years of executing the original deed that contains the same schedule in the plaint shall not be considered as a serious discrepancy with regard to the identity of the land when all other boundaries are compatible with the schedule in the plaint as well as with the schedules in the plaintiff's deeds. Notaries Public generally follow the descriptions in the old deeds unless there is a new plan or instruction with regard to the change of the nature of the given boundary. Furthermore, the Plaintiff while giving evidence had indicated that the lands separated by the boundaries to the west and the north shown in plan no. 1057 made by said surveyor, M.D. Senavirathne are lands owned by Pinhamy and his brothers – vide page 107 of the brief. This fact has not been controverted by the contesting defendants in their evidence. As per the schedules to the plaint and the deeds of the plaintiff, the lands adjoining the boundaries to the West and North belonged to Pinhamy and others. In fact the evidence of the first witness of the defendants, the 1st Defendant Wickramasinghe Mudiyanselage Podimenike who is the mother of contesting 2nd Defendant as well as the Plaintiff supports the contention of the Plaintiff that the land surveyed by M. D. Senavirathne the licensed surveyor on the commission

taken by the Plaintiff is the land claimed by the Plaintiff in his plaint. As per her evidence recorded at page 151 of the brief the said witness Podimenika during cross examination admits that the Plaintiff got the land within the four boundaries described by him surveyed and again at page 154 of the brief states that both the surveyors surveyed the correct four boundaries and it is the land that was given to Dasanayake Banda by Hearath Mudiyanselage Muthu Banda (both are predecessors in title of the plaintiff as per the stance taken by the Plaintiff) by deed marked as P3. Thus, while giving evidence the 1st Defendant very clearly has indicated that the land surveyed by M.D. Senaviratne as one lot is the land bought by Dasanayake Banda, brother of her husband who lived in an associated marriage, in other words fraternal polyandry, with her and her husband Biso Banda.

Being a person who closely associated Dasanayake Banda as one of her husbands in the polyandrous union, she should have a better knowledge of the land bought by said Dasanayake Banda from Muthu Banda. Thus, her admissions made while giving evidence should not be lightly looked upon. It is true that at certain occasions this witness,1st defendant Podimenika has tried to convince the trial court that there are 2 lands within the boundaries of the land surveyed by M.D. Senavirathne , licensed surveyor; one of 10 Lahas of paddy sowing in extent and the other of 9 Lahas of paddy sowing in extent – vide evidence in chief and re-examination of her evidence. However, during the cross-examination, questions have been put to her referring to the boundaries and, as mentioned before, she has clearly admitted what has been surveyed by both the surveyors is the land bought from Muthu Banda by Dasanayake Banda. The 2nd defendant also in her evidence has tried to establish that Dasanayake Banda bought two lands, namely 9 lahas of paddy sowing in extent from one Yaso menika and One Pela (10 lahas) of paddy sowing from

Muthubanda and the said lands are shown in the plan made by A.D .Sirisooriya, Licensed Surveyor as Lot 1 and lot 2 respectively- vide page 164 of the brief. Now I will proceed to see whether there was sufficient material to accept this stance as correct. As per the evidence given by the 2nd Defendant lot 1 in Sirisooriya's plan is the 9 lahas- land Dasanayake Banda bought from Yasomenika by deed marked 2v3 at the trial and lot 2 is the one Pela- land bought by said Dasanayake Banda from Muthubanda- vide pages 164,165,171 and173. Thus, when evidence of 2nd Defendant and 1st Defendant are taken together, the lot 2 of Sirisooriya's plan must either be the land bought from Muthubanda which is the land claimed by the Plaintiff on deeds marked P3 and P4 or part of it. Hence, there cannot be any disagreement that the land situated to the south of it is the same land described as the southern boundary in the schedule to the plaint and plaintiff's deeds, namely Arambedeniya Kumbura. Similarly there cannot be any disagreement that "Gal Enda" shown as the eastern boundary to lot 2 of Sirisooriya's plan no.1201(2v1) is the same 'Gal Enda' described in the schedule to the plaint as the eastern boundary and the land described as Korale Mahaththayage Watte by the defendants to the surveyor Sirisooriya in 2v1 is the same Girithalewatte mentioned in the schedule to the plaint as the boundary to the East. On the same footing, the land to the east of lot 2 should be the same land described in the schedule to the plaint as land belonging to Pinhamy and others, even though it was described as Hitinawatte by the Plaintiff and as Pansalewatte by the Defendant to the surveyor Sirisooriya. It is also observed that the 'Gal Enda' on the eastern boundary of lot 2 of 2v1 extends further towards the north and becomes the eastern boundary of the lot 1 and similarly land to the west of lot 2, which should be land of Pinhamy and others as aforesaid, extends further towards the north and becomes the western boundary

of lot 1 of 2v1. This makes it more probable that lot 1 is also a part of the land claimed by the plaintiff owing to the fact that when taken together the boundaries are compatible with the descriptions in the plaint on 3 sides without any issue except for the area of about 30 feet in length mentioned above.

If the second Defendant's evidence stating that only the lot 2 of 2v1 is the land bought from Muthubanda by Dasanayake Banda is correct, lot 1 should be a land once belonged to Pinhamy and others as per the northern boundary described in the deed marked P3. However, there is no evidence to show that lot 1 was ever owned by Pinhamy. Further it is pertinent to note that the name of the lot 1 as per the evidence of the second Defendant is also Gira Ambe Watte. If the land pertaining to the Deed marked P3 (land bought from Muthu Banda) was limited to lot 2, northern boundary of the land in P3 should have been described as Gira Ambe Watte, which is not the case.

On the other hand, if lot 1 of 2v1 is the land bought from Yasomenika by said Dasanayake Banda, the boundaries mentioned in the schedule to the deed no.16830 marked as 2v3 must match with the boundaries of lot 1 of 2v1. As per 2v3, the northern boundary of Gira Ambe Watte of 9 lahas is the land that belongs to Kawrala and others and as per the plan marked as 2v1 said boundary is described as Kawralalage Watte by the Defendant and as Gira Ambe Watte by the Plaintiff. However, as mentioned before, the Plaintiff in his evidence had indicated that it is a land belonging to Pinhamy and brothers. Furthermore, as said before even the first defendant had clearly admitted in evidence that the land surveyed by both the surveyors is the land bought from Muthubanda. If so, what is shown as Kawrallage Watte or Gira Ambe Watte as aforesaid has to be the land once belonged to

Pinhamy and others as per the plaintiff's schedule. According to 2v3 the western boundary is 'Gal weta' (Stone Fence) which connotes a man-made structure but what is found in 2v1 as the westen boundary is the "Gal Enda" mentioned before in this judgment. "Gal enda" connotes a natural setting of a kind of rock. Thus, western boundary shown in 2v1 does not match with the description of western boundary in 2v3. As explained above, as per the evidence led at the trial, there cannot be any doubt that the land separated by the "Gal Enda" to the west is Girithale Watte though it had been described as Koralemahaththyage Watte by the defendants to the surveyor Sirisooriya.

As per the schedule to 2v3, the southern boundary of Gira Ambe Watte of 9 lahas in extent is described as "By Ditch, presently land belonging to Punchirala and others". The deed marked as 2v3 was executed in July 1961.Thus, it is clear that during 1961 Punchirala should have been the owner of the land on the southern boundary of the land described in the schedule to the deed marked as 2v3. However, as per the evidence led at the trial, southern boundary of lot 1 in 2v1 is lot 2 which is undisputedly the Gira Ambe Watte of 10 Lahas (one Pela) or part of that land, which was bought from Muthubanda by Dasanayake Banda. There was no evidence to show that the said lot 2 was ever owned by Punchirala and, since P3 was executed in 1957 and P4 was executed in 1983, said Dasanayake Banda who is also the vendee in 2v3, should be the owner of lot 2 of 2v1 in 1961. Hence, the southern boundary of lot 1 of 2v1 definitely does not match with the southern boundary of the land in 2v3 as in 1961 the owner of the land to the south was not Punchirala but Dasanayake Banda. This supports the stance that the lot 1 of 2v1 is not Gira Ambe Watte of 9 lahas of paddy sowing. The land to the west of lot 1 of Sirisooriya's plan is described as Pansale Watte (according to the Defendants) and

Hitinawatte (according to the Plaintiff). However, as stated before, as per the evidence led at the trial it should be the land belonging to Pinhamy and others referred to in the Plaintiff's schedule, since lot 2 in Sirisooriya's plan is undisputedly is or is part of Gira Ambe Watte of one pela bought from Muthu Banda.

Surveyor Sirisooriya, has shown a "Gal weta" and a ditch separating lot 1 and 2 of his plan 2v1 but surveyor Senavirathne who made plan P1 about 6 months prior to that have not seen such a boundary on the land. Even the Plaintiff does not admit that there was such a boundary. If there was a such boundary the defendants could have shown that to surveyor Senaviratne who made the 1st plan. No suggestion was made to surveyor Senaviratne during cross examination that such a boundary was shown to him and he had evaded in showing it in his plan P1. Surveyor Sirisooriya does not indicate how old this ditch and the Galweta he found in between lot 1 and 2 of his plan are. It appears that the defendants have been in possession after the Primary Court case and as such, it is not improbable that this "Gal Weta" and ditch might have even come into existence after the first survey as a result of an afterthought. Furthermore, as per the averments in their own amended answer, there was no fence of permanent nature separating the two lands; Namely the land of one Pela and the land of 9 lahas. The court should not lightly regard the admission made by the 1st Defendant in cross examination that land surveyed by both surveyors is the land bought from Muthubanda which is the land of one Pela in extent.

As explained before the southern boundary and eastern boundary of lot 1 of 2v1 plan cannot be the southern boundary and eastern boundary mentioned in the deed marked 2v3 by which Dasanayake Banda bought the 9 Lahas of Gira Ambe

Watte. On the other hand, as per the evidence led except for the non-existence of a ditch for about 30 feet in length on the northern boundary, all the boundaries surveyed by both surveyors are compatible with the plaintiff's schedule in the plaint and in deeds he relies on. As mentioned before in this judgment disappearance of the ditch in the above area of 30 feet in length may happen with the passage of time.

As per the plaintiff, the land he claims is a land of one Pela (10 Lahas) of paddy sowing in extent and as per the defendants what is surveyed is two lands containing 19 lahas. It appears that one of the reasons to dismiss the plaintiff's action in the District Court was the conclusion of the learned district judge that the plaintiff has surveyed in excess than he is entitled.

The Plaintiff's written submissions refers to the Ferguson Directory and admits that according to it one pela of paddy sowing in extent is similar to 2 roods and 20 perches in English measurements but the Plaintiff relies on the following two reported judgments.

1. **Gabriel Perera Vs. Agnes Perera** and others 43 CLW 82. There it was held that where in a deed the portion of land conveyed is clearly described and can be precisely ascertained a mere inconsistency as to the extent thereof should be treated as mere falsa demonstratio not affecting that which is already sufficiently conveyed.
2. **Ratnayake and Others V Kumarihamy and Others** 2002 (1) SLR 65 – where it was held that the system of land measures computed according to the extent of land required to sow with paddy or kurakkan vary due to the interaction of several factors. The amount of seed required could vary

according to the varying degrees of the soil, the size and quality of the grain, and the peculiar qualities of the sower. In the circumstances it is difficult to correlate extent accurately by reference to surface areas.

The factual position of the matter at hand as discussed above can be summarized as follows,

- Except for 30 feet area on the northern boundary, other boundaries match with the land claimed by the Plaintiff.
- The 1st defendant who lived and had conjugal relationship (whether legal or illegal) with Dasanayake Banda, the predecessor in title of both the parties admits in cross examination that the land surveyed by the plaintiff is the land bought from Muthubanda by said Dasanayake Banda.
- Lot 1 of the plan made by the defendants cannot be the land bought from Yasomenika by said Dasanayake Banda as claimed by the defendants, especially due to the incompatibility of southern and eastern boundaries.
- It is common ground that the land surveyed is called Gira Ambe Watte and the entirety was owned by said Dasanayake Banda and there was no evidence to indicate that there was another Gira Ambe Watte (other than the one Pela-land and 9 lahas-land) owned by the said Dasanayake Banda.

If one looks at the above factual positions in the light of above decisions, even though there is a difference in extent as per the measurements in Ferguson Directory, the land surveyed by the Plaintiff cannot be any other land than Gira Ambe Watte of 1 Pela bought from Muthubanda by said Dasanayake Banda. One also should look at the usage within the relevant region where the land is situated. As per the cross examination of the plaintiff recorded on page 96 of the brief, on

behalf of the Defendants it has been suggested that in measuring high lands extent of 8 lahas is equal to 1 acre, for which the plaintiff has answered that he had not heard so. Though the Plaintiff was not aware about it, it shows the instructions given for cross examination by the Defendants. Furthermore, the 1st Defendant giving answers in cross examination has admitted that with regard to high land, 8 lahas in extent equals to 1 Acre in English measurements. Though she has denied her knowledge with regard to the same in her re-examination, as shown before, on behalf of the Defendants similar proposition has been suggested in cross examination by the Defendants. Thus, her denial with regard to the knowledge of correlation between Sinhala Measurements and English Measurements as far as lahas and acres are concerned cannot be relied upon. Thus, it appears in the relevant region 8 lahas of paddy sowing is considered equal to 1 acre and 1 pela is similar in extent to 1 acre and 1 rood. Even the Surveyor Sirisooriya, who gave evidence for the Defendants has stated that, in that area, there are 8 lahas for a one-acre land. In that context the difference between the extent surveyed by the plaintiff and extent considered as equivalent to the traditional measurement is around 57 perches which is very much less than the calculations done according to the aforesaid correlated measurements indicated in Ferguson directory.

The above shows that the learned District Judge erred in evaluating evidence and coming to the conclusion that the Plaintiff failed in identifying the land and had surveyed in excess than his entitlement by his deeds. Since the 1st Defendant admitted while giving evidence that the land surveyed by the Plaintiff is the correct land and even the contesting 2nd Defendant admitted while giving evidence that lot 2 of 2v1 is the land bought from Muthubanda by Dasanayake, in other words land claimed by the Plaintiff, the learned High Court was not in error in finding that in

view of the facts placed before Court, the main issue to be decided was whether the Lot No.1 depicted in plan 2v1 is part of the land described in the schedule to the plaint or not. Thus, the first question of law has to be answered in the negative.

As far as the Judgment of the Civil Appeal High Court is concerned this court observes that learned judges have not given elaborate reasons to its conclusion that lot 1 in 2v1 is part of the land described in the schedule to the plaint and thus to show that the land surveyed by the plaintiff is the land in the schedule to the plaint. However, for the reasons elaborated above this court is of the view that the learned high court judges have however come to the correct finding that the identity of the land is proved by the Plaintiff. Thus, the answer to the second question of law allowed by this court is that there may be infirmities and insufficiencies in giving reasons but the final finding that the land in the schedule to the plaint is identified and proved by the plaintiff is not flawed.

Before considering to answer the third question of law allowed by this court, I proceed to consider whether the claim of prescription by the Defendant is sustainable. As per the deed no.9306 marked as P3, said Dasanayake Banda has bought the land in the schedule to the plaint from Muthubanda. The title of Dasanayake Banda obtained through aforesaid deed is not in dispute. Both contesting parties claim through Dasanayake Banda. Said Dasanayake Banda has sold the said land to the Plaintiff by deed no.3674 marked as P4 at the trial. Thus, the Plaintiff has proved the paper title to the land claimed by him. He has led the evidence of his brother, Pitihuma Ralalage Disanayake, to say that he possessed and enjoyed the property through him. This witness has stated that he possessed the land for about 15 years till he was prohibited from entering the land by the

Primary court. It is pertinent to note that during the cross examination of this witness nothing was suggested to indicate that this witness was lying with regard to the possession of 15 years except for the suggestions made to indicate that he was lying by stating that he received income from selling pepper and denying the ditch in the middle of the land surveyed. Even though the witnesses for the Defendant speak of the possession of the Defendants, they have not stated anything refuting the evidence given by the Plaintiff's brother with regard to the possession or enjoyment of the land. Thus, during the trial, there was no proper challenge of the possession of the plaintiff through his brother. The Defendants position is that they inherited this land from Dasanayake Banda since 1st defendant is the wife and other defendants are children of the associated marriage- vide issue no.18 framed at the trial. If so, not only the Defendants but the plaintiff and the Plaintiff's brother who gave evidence for the plaintiff should inherit their title through inheritance as they are also children of the same relationship. As per the Plaintiff's stance title to the land devolves only on him. Thus, the plaintiff's brother, who gave evidence for the Plaintiff, should be considered as a witness who gave evidence against a stance which is beneficial to him. As such it can be assumed that the plaintiff's brother was truthful in giving evidence. On the other hand, rights of Dasanayake Banda could not have directly devolved on the children or wife of the associated marriage since associated marriages are illegal since 1859 (vide ordinance No. 13 of 1859 and page 147 of Kandyan Law and Buddhist Ecclesiastical Law by Dissanayake and Collin De Soysa) and as per the oral evidence legal marriage was with his brother Biso Banda. If there is any inheritance it should have taken place by Dasanayaake Banda dying issueless and his rights devolving upon Biso Banda as the brother and through him to his wife and children. However, there

cannot be any right passed through inheritance with regard to the land of 1 Pela in extent since Dasanayake Banda had transferred his rights to the plaintiff through the deed marked P4. Since the Defendants rely on inheritance from Dasanayake Banda, their alleged possession of the land has to be in the pretext of an existing co-ownership. As such, their animus possidendi (Intention of Possession) cannot be considered as adverse to the Plaintiff without a proof of an overt act, as he too should be a co-owner in that context.

On the Other hand, as per the evidence of the 1st Defendant she had a conjugal relationship, whether legal or illegal, and lived with Dasanayake Banda. Thus, her and her children's possession (if any) of the One - Pela land owned by Dassnayake Banda should be presumed as one commenced as licensees of Dasanayake Banda. Dasanayaka Banda had transferred his rights to the Plaintiff. Thus, without proving an overt act that changes the nature of possession or the circumstances that give rise to a presumption of such an overt act and 10 years adverse possession there onwards, the Defendants cannot claim prescriptive title to the One- Pela land. No such evidence has been led to prove such an overt act and adverse possession by the Defendants.

For the foregoing reasons, this court is of the view, the plaintiff was successful in proving his case against the Defendants by identifying the land he claimed and by proving title there to and the Defendants failed in proving the identity of the land they claimed and title to it or title by prescription to the land claimed by the Plaintiff. As such, this court has to answer even the third question of law in the negative.

Thus, the answers to the questions of law allowed by this court are as follows;

1. No
2. No, even though there may be infirmities and insufficiencies in giving reasons.
3. No

Hence, the appeal is dismissed with costs as all three questions of law have been answered in favour of the Plaintiff (1st Respondent in this application).

……

E.A.G.R.Amarasekara, J

Judge of the Supreme Court

I agree

……..

Priyantha Jayawardene, 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 Special Leave to Appeal under and in terms Article 128 (2) of the Constitution

Daintee Limited,
No. 72C, Kandawala Road,
Ratmalana

Plaintiff

SC Appeal 163/2017

SC SPL LA 95/2016
CA Appeal 545/97 (F)
DC Colombo Case No. 3822/SPL

Vs,

Uswatte Confectionery Works Limited
No.437, Galle Road,
Ratmalana

Defendant

And

Uswatte Confectionery Works Limited
No.437, Galle Road,
Ratmalana

Defendant-Appellant

Vs.

Daintee Limited,
No. 72C, Kandawala Road,
Ratmalana

Plaintiff-Respondent

And Now Between

Uswatte Confectionery Works Limited

No.437, Galle Road,

Ratmalana

Defendant-Appellant-Appellant

Vs,

Daintee Limited,

No. 72C, Kandawala Road,

Ratmalana

Plaintiff-Respondent-Respondent

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

Counsel: Geethaka Goonewardena PC with Chanaka Weerasekera instructed by Julius and Creasy for Defendant-Appellant-Appellant
Basheer Ahamed with Lakshman Jayakumar for Plaintiff-Respondent-Respondent

Argued on: 03.03.2020

Judgment on: **26.06.2020**

Vijith K. Malalgoda PC J

The Defendant-Appellant-Appellant (hereinafter referred to as the Defendant-Appellant) had challenged the decision of the Court of Appeal, dated 28. 04. 2016, by way of a Special Leave to

Appeal application filed before the Supreme Court. This court by its order dated 26. 01. 2017 granted Special Leave on the following questions of Law contained in sub paragraphs (v), (vi), (vii) and (x) of Paragraph 12 of the Petition dated 07. 06. 2016.

1. Did the Court of Appeal err by failing to take cognizance of the fact that the dominant feature of the Petitioner's wrappers was the name "Uswatte" which was the registered trade mark and the distinctive of the Petitioner, while the dominant feature of the Respondent's wrappers was the word "Daintee" which was its name?
2. Did the Court of Appeal err by failing to consider the material question of whether the wrappers of the Petitioner were, visually, entirely different to the wrappers of the Respondent and failed to realize that the word "Uswatte" on the Petitioner's wrappers was both visually and phonetically entirely different to the word "Daintee" of the Respondent's said wrappers?
3. Did the Court of Appeal err in affirming the finding of the learned District Judge that, the evidence of the Respondent in respect of damages was undisputed and unchallenged, when the evidence was to the country?
4. Did the Court of Appeal err in its failure to arrive at the finding that, in any event, the damages awarded to the Respondent was excessive in the light of the evidence?

As revealed before us, the Plaintiff-Respondent-Respondent (hereinafter referred to as the Plaintiff-Respondent) a manufacturer of sweets under the brand names 'DAINTEE' and 'CHIX' since 1992 filed an action against the Defendant-Appellant another manufacturer of sweets and confectionary before the District Court of Colombo on the basis of unfair competition namely under Section 142 of the Code of Intellectual property Act No 52 of 1979. In the said plaint which was filed before the District Court of Colombo on the 4th October 1993 the Plaintiff-Respondent had alleged that,

a) The Plaintiff-Respondent had been manufacturing and selling confectionary such as sweets and toffees since 1985 under the brand names 'DAINTEE' and 'CHIX'

b) The Plaintiff-Respondent had employed designer artist and designed new wrappers to be used to sell its sweets and toffees and commenced using these newly design wrappers in various colours in January, 1992 (P-10, P-11, P-17 and P-18)

c) The Defendant-Appellant is an established company and a major manufacturer of sweets and confectionary, and in this trade for many years under the brand name USWATTE, even prior to the Plaintiff-Respondent commenced its operations in the year 1985.

d) The Defendant-Appellant observing the market, that the Respondent's sweets with its newly designed wrappers were selling fast, had imitated the design of those wrappers and started using the new wrappers with the Plaintiff-Respondent's design in September 1993.

e) The Plaintiff-Respondent by letter of demand dated 20th September informed the Defendant-Appellant to cease and desist selling the Defendant-Appellant's sweets imitating and using the Plaintiff-Respondent's design

As referred to above the action before the District Court was based on Section 142 (1) and 2 (a) of the Code of Intellectual Property Act No 52 of 1979 which reads as follows;

142 (1) Any act of competition contrary to honest practices in Industrial or Commercial matters shall constitute an act of unfair competition

(2) Act of unfair competition shall include the following

(a) All acts of such nature as to create confusion by any means whatever with the establishment, the goods, services or the Industrial or Commercial activities of a competitor.

Based on the above provision the Plaintiff-Respondent had further submitted that the said imitation of the design used by the Plaintiff-Respondent by the Defendant-Appellant created a confusion among the buyers and thereby causing irreparable loss and damage to the business and good will of the Plaintiff-Respondent.

However whilst denying that the Defendant-Appellant had not imitated the design used by the Plaintiff-Respondent, the Defendant-Appellant had further taken up the position that he too had employed a third party when developing the new designs to their wrappers and that the said wrappers do not resemble the designs used by the Respondents. The Appellant being one of the leading manufactures of confectionary since 1962, it is the owner of the Trade Mark "USWATTE" which is the main feature of their sweets.

The trial before the District Court proceeded with eleven issues raised on behalf of the Plaintiff-Respondent and seven on behalf of the Defendant-Appellant. At the conclusion of the said trial, the learned Additional District Judge Colombo had entered the judgment in favour of the Plaintiff-Respondent. Being dissatisfied with the said judgment, the Defendant-Appellant appealed to the Court of Appeal, but the said appeal too was dismissed by the Court of Appeal by its judgment dated 28. 04. 2016.

As observed by this court, the Defendant-Appellant's appeal before this court is based on two grounds. Firstly the Defendant-Appellant relied on the ground that both the learned District Judge as well as their lordships of the Court of Appeal err in law when they conclude that there was sufficient evidence before the District Court to conclude that there was unfair competition within the meaning of Section 142 of the Code of Intellectual property Act No 52 of 1979.

The next ground the Defendant-Appellant relied before this court was based on “damages” awarded by the District Court.

With regard to the first ground of appeal, the Defendant-Appellant whilst denying that the conduct referred to in the plaint amounts to unfair competition, took up the position that it was healthy competition between two rivals, which is an essential practice in the market.

In this regard the Defendant-Appellant heavily relied on the decision by this court in the case of ***Distiller’s Company of Sri Lanka V. Randenigala Distillers Company (pvt) Limited SC (CHC) Appeal 38/2010*** SC minute dated 19. 12. 2014.

One of the central issues that was to be resolved in the said case was whether the labels and/or bottle used by the Appellant’s were, misleading the consuming public and thereby violates Section 142 of the Code of Intellectual property Act No 52 of 1979, insofar as it constitutes an act or act of unfair competition.

In the said judgment court considered the term ‘confusion’ in the light of healthy and fair competition as against unfair competition as follows;

> “The difficulty for this court is that the breadth of this provision needs to be balanced, against the commercial interests of healthy and fair competition. The wide parameters in which this definition is couched is not designed for the purposes of this section being used and manipulated for the commercial benefit of excluding competition and securing monopolistic interests. Therefore, the scope of acts that cause ‘confusion’ must be carefully considered. It must be noted that copying simpliciter does not prevent freedom of competition. Only when there is undue advantage gained as the result of the act of copying, will a party be entitled to the relief on the premise of unfair competition. It is not designed to protect a parties market

> position, nor is it designed to regulate market affairs. It is simply a means of ensuring that there is a fairness in the market place. It is therefore the view of this court upon the reflection of the comparison made above between the physical appearances of the goods of the Appellant and the Respondent, that the Respondents have failed to establish that the Appellant engaged in unfair trade practices for the purposes of *section 142 of the Code of Intellectual property Act No 52 of 1979*."

When observing the above, the Court had gone into the facts and circumstances of the said case and as observed by me, the Plaintiff in the said case was one of the market leaders in the respective industry where as the Defendant was almost a newcomer. The Court having observed several differences mainly in the labels of the product in question (page 07 of the Judgment) was of the view that there was an attempt to monopolize the market in the name of unfair competition under Section 142 of the Code of Intellectual Property Act No. 52 of 1979.

However, as observed by me the circumstances under which the Plaintiff-Respondent had come before the District Court are quite different in the instant case. As evident before the District Court, the Plaintiff-Respondent having commenced its operations in the year 1985, designed new wrappers in a colourful design, to be used to sell its sweets and toffees and commenced using them in January 1992. The Defendant-Appellant being one of the leading manufacturer of sweets and confectionary since 1962 and the owner of the trade mark "USWATTE" claimed that, the main feature of their sweets is their Trade Mark even though they too have introduced wrappers in a colourful design almost similar to the Plaintiff-Respondent's products having their trade name "USWATTE" printed on the wrapper instead of 'DAINTEE' and 'CHIX' printed on Plaintiff-Respondent's wrappers. It is common ground that these toffees are sold mainly to small children and they are stored in bottles.

It is the colourful design which is the prominent feature in these sweets when they are sold to children and not the trade mark or the name printed on it.

The importance of the ultimate consumer or the purchasers was discussed by Narayanan as follows;

> "In deciding the similarity, the ultimate purchasers of the goods are more important than the manufacturers or traders. But it is not a person who carefully looks at the mark who is to be regarded. It is a person who only looks at it in the ordinary way who has to be considered." (**Narayanan on Law of Trade Marks and Passing-off 5th Edition para 17.72**)

This position was considered by *Fernando (J)* in the case of ***Society Des Products Nestle S.A Vs, Multitech Lanka (pvt) LTD (1999) 2 Sri LR 302*** as follows;

> "A case of this sort cannot be decided by simple totting up and weighing resemblances and dissimilarities, upon a side- by-side comparison; the issue is a person who one in the absence in the other and who has in his mind's eye only recollection of the other, would think two were the same."

The learned Trial Judge was mindful of the above when he was analyzing the evidence placed before him. Appellate Courts are always reluctant to interfere with the findings of trial court unless there is good reason to do it. In this regard I am mindful of the decision in ***Alwis vs. Piyasena Fernando (1993) 1 SLR 120 at 122*** where *G.P.S. de Silva CJ* had observed that,

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

The learned District Judge in his Judgment concluded that,

> "The Managing Director estimated his Company's damages as Rupees 5 Million and Stated how he claimed the amount. Evidence in respect of his claim remains unchallenged and uncontradicted."

Whilst affirming the judgment of the District Court the Judges of the Court of Appeal in their judgment had also observed that,

> "The volume of sales of the Respondent was not challenged by the Appellant. Therefore, it is not necessary for the Respondent to prove the volume of sales. The damages claimed was decided on the volume of sales. The District Judge has analyzed the evidence correctly when arriving at the quantum of damages.
>
> On perusal of the judgment it could be said that the evidence placed before the District Judge had been carefully analyzed. The District Judge has said the damages claimed went undisputed and unchallenged, after hearing and observing the witnesses and perusing the documents marked before him."

I have referred above, are two paragraphs one from the judgment of the District Court and the other from the judgment of the Court of Appeal, and as observed by me the latter is the full analysis by the Court of Appeal with regard to the decision of the District Court awarding damages to the Plaintiff-Respondent. In the said analysis there is reference to the District Judge carefully analyzing the evidence placed before him when granting damages.

I too have carefully gone through the Judgment of the Learned District Judge and observed that he had carefully analyzed the evidence led at the trial with regard to the question of unfair competition

but when it comes to the awarding of damages, except for the paragraph I have already referred to above, I only found him referred to the volume of sale after introducing the new wrappers in the following manner (page 5 of the Judgment)

> "He gave the sales of his company's sweets with wrappers from January 1992 to August 1993 as Rs. 63,965,817.50 and the break down for it."

As revealed from the evidence led before the District Court, the Defendant-Respondent had started the using of the imitated wrappers in September 1993 and a letter of demand was sent on 20th September 1993. By 4th October 1993 the plaint was filed before the District Court of Colombo and an interim injunction too was obtained preventing the sale of sweets using new wrappers.

In these circumstances two distinct positions were taken by the parties with regard to the awarding of damages in the instant case.

As submitted by the Plaintiff-Respondent, he claimed estimated damages in the instant case. The learned District Judge as well as the Judges of the Court of Appeal upheld the said claim as justifiable, awarded estimated damages for a sum of Rs. 5 Million. Whilst challenging the award of Rs. 5 Million as estimated damages, the Defendant-Appellant took up the position that there is nothing called estimated damages but the only damages the court could grant is either nominal damages or actual damages.

When considering the plaint filed before the District Court, this court has already observed that the said plaint was filed under the repealed law, i.e. under the provisions of Code of Intellectual Property Act No.52 of 1979 and not under the new law, which is under the Code of Intellectual Property Act No. 36 of 2003.

Section 179 of the Code of Intellectual Property Act No. 52 of 1979 provides for damages as "May award damages and such other relief as the Court appears just and appropriate." However, the new Act which came to operate in the year 2003 provides for two types damages under Section 170 (10) of the said Act which reads as follows;

> "Any owner of the rights protected under this Act may, notwithstanding any provision in the Act relating to the award of damages, elect at any time before final judgment to recover, instead of proved actual damages, an award of statutory damages for any infringement involved in the action a sum not less than Rs. 50,000/- and not more than Rs. 1,000,000/- as the Court may consider appropriate adjust. "

When considering the new regime introduced by the Act introduced in the year 2003, it is clear that the Act has clearly identified two regimes in awarding damages. The party comes before court has a duty to prove actual damages, if the party intends claiming actual damages. Otherwise the party can elect to receive statutory damages, but the amount that can be awarded is restricted between Rs. 50,000/- and Rs. 1000,000/-. The new Act does not identify the award of estimated damages to any party.

However, in the absence of specific reference to any kind of damages, under section 179, question arises as to whether the District Court is empowered to grant such damages to a victimized party.

In this regard the Plaintiff-Respondent relied on the decision in ***Sumeet Research and Holdings Limited Vs. Elite Radio and Engineering Co. Limited [1997] 2 Sri LR 394*** where Fernando (J)'s observation with regard to unfair competition;

> "…… this branch of law……..originated in the conscience, justice and equity of common law judges…….it is a persuasive example of the law's capacity for growth in response to the

> ethical, as well as in economic needs of society. As a result of this background, the legal concept of unfair competition has evolved as a broad and flexible doctrine with a capacity for future growth to meet changing condition."

and argued that in the said context damages cannot be confined to proved damages but it can be estimated damages as well.

However, I cannot agree with the said argument of the Plaintiff-Respondent for the simple reason that the legislature whilst identifying unfair competition in the new version of the Code of Intellectual Property Act, had restricted the damages to proved damages and statutory damages.

The need to establish the damages before the District Court was considered in the case of ***Distilleries Company of Sri Lanka Vs. Randenigala Distilleries Lanka (pvt) Limited SC (CHC) Appeal 38/2010*** SC minute dated 19. 12. 2014 by this court as follows;

> "This court is of the view there are several ways in which the Respondent may have sought to prove the damage sustained in an action of this nature, which will be briefly expanded on below for the sake of completeness. In this instance, both parties operate in a common field of activity, namely, the supply of distilled coconut blended arrack. One type of evidence of damage would be proof of the diversion of sales. This, in the court's view, may be illustrated by way of evidence to show a drop in sales of the Respondent's goods and a corresponding increase in the sales of the Appellant's goods. This would have gone to show that the Appellant's misrepresentation induced the public to buy the Appellant's products instead of purchasing the Respondent's as they usually would. It appears from the evidence before court that the Respondent has traversed only part of the distance in establishing damages in this manner. It would appear that the Respondent was relying purely on the increase in the

volume of sales of the Appellant's products as evidence of damage. This is observed in the oral evidence given by the Respondent's sole witness during cross examination; stating that the claim is hinged on the fact that the Appellant has experienced higher sales. I am of the view that this evidence simpliciter is insufficient without more, since an increase in sales of the Appellant's products can be attributed to a whole range of other factors. There needs to be a linkage established by cogent evidence between the increase in sales of the Appellant's goods and the decrease in sales of the Respondent's goods in order to show with reasonable certainly that there has been a drop in the volume of sales of the Respondent's product which is attributed to the Appellant having passed off his goods as those of the Respondent. It would have been, therefore, an indispensable adjunct, to place the sales record of the Respondent for the consideration of the court. It is the view of this court that the failure to place such evidence must necessarily place the Respondent at a disadvantage…."

As observed by this court the only evidence placed by the Plaintiff-Respondent with regard to the damage caused to him was that;

Q: what is the damage caused to you?

A: we have estimated as Rs. 5 Million

Q: how do you say that?

A: because they have copied our wrappers and we have lost the market that will come to us and we got a bad name because they used an inferior toffee

(under cross examination)

Q: you say you have suffered damages in Rs. 5 Million?

A: we have estimated the damages

Q: you have not produced any books in this case?

A: I can produce my books

Q: you are a chartered Accountant and you have not brough any books to prove the alleged damage?

A: I can produce

but no books or documents were produced to show as to how the estimates were done. In this regard both the District Court as well as the Court of Appeal observed the failure by the Defendant-Appellant to challenge the above evidence. However, in the cross examination it was questioned with regard to the documentary proof to establish the alleged damage, but no documents had been produced by the Plaintiff-Respondent even though the witness had said that he can produce relevant books. In the absence of such material before the District Court, the only evidence placed before the District Court was the sales revenue for the period between January 1992 to August 1993 a period of 18 months.

If the actual damages caused to the Plaintiff-Respondent for the period the Defendant-Appellant used the alleged imitated wrappers were to calculate, the actual sales for the said period (most probably for the months of September and October 1993) will have to be considered as against the sales prior to the said period. In fact, the actual damage is the sales that were fraudulently taken over by the Defendant-Appellant and that can either be calculated by the loss of sales during the time in question or the additional sales acquired by the Defendant-Appellant during the same period. If the estimated damage is calculated by only considering the previous sales of the Plaintiff-

Respondent, the said calculation cannot be accurate, since the actual loss is not shown in the previous sales. On this basis the Plaintiff-Respondent is not entitled to claim as estimated damages, the sales to persons who have not been misled, since the Plaintiff-Respondent has suffered no loss in respect of those sales. If he were to recover such amounts as “estimated damage” he would be over-compensated.

Even though the learned District Judge had failed to indicate as to how the said damages were calculated, the Court of Appeal while affirming the damages granted by the District Court had said, “The damages claimed was decided on the volume of sales. The District Judge has analyzed the evidence correctly when arriving at the question of damages.” (page 6 of the Judgment)

In these circumstances, it is observed that the District Court as well as the Court of Appeal err when awarding Rs. 5 Million as estimated damages to the Plaintiff-Respondent.

As already discussed in this judgment, Section 179 of the Code of Intellectual Property Act No. 52 of 1979 permitted awarding damages, but was not specific on the requirements in granting such damages. However, it is the duty of court to satisfy when granting such damages since the purpose of awarding damages is to compensate the victim in an unfair competition practice. However, it is the duty of court, when granting such damages, not to over compensate him.

Whilst referring to Section 170 (10) of the Code of Intellectual Property Act No. 36 of 2003 the Defendant-Appellant argued that the maximum amount that could be awarded by the District Court was an amount between Rs. 50,000/- and 1,000,000/- in the absence of any proof of actual damages before court. The Counsel further argued that even though the new Act has no binding effect on the provisions of the old Act, it is nothing wrong to consider the statutory damages as “nominal

damages" that can only be granted in the absence of specific evidence with regard to "actual damages."

However as already observed by me the District Court had awarded damages after going through the entirety of the case before the District Court. Section 170 (10) of the Code of Intellectual Property Act No. 36 of 2003 provides to grant statutory damages as referred to above, if the parties elect at any time before the final judgment.

In these circumstances' provisions of the Code of Intellectual Property Act No. 36 of 2003 cannot bind this court when deciding the damages that has to be awarded in the instant case but, certainly the court can be guided by them.

With regard to awarding damages "Kerly" states,

> "Where the claimant fails to clear this low threshold, the court may award nominal damages or fix a sum without ordering an account or an inquiry as to damages. In exceptional circumstances that course may be followed if the evidence of damage is not sufficient to justify the cost of an inquiry."

[*Kerly's Law of Trade Marks and Trade Names,* James Mellor Sweet & Maxwell, 15th Edition (2011)]

For the reason given in my judgment I answer the questions of law before this court as follows;

1) No
2) No
3) Yes
4) Yes

I affirm both, the Judgment dated 31. 01. 1997 by the Additional District Judge, Colombo and the Court of Appeal dated 28. 04. 2016 subject to the variation of the damages awarded by the learned District Judge. I make order directing the Defendant-Appellant to pay as damages Rs. 2 Million to the Plaintiff-Respondent from the date of the District Court Judgment i.e. 31. 01. 1997. The Plaintiff-Respondent is entitled to receive legal interest for the said damages and cost, fixed at Rs. 50,000/-.

District Judge, Colombo is directed to enter the Judgment accordingly.

Appeal partly allowed.

Judge of the Supreme Court

Justice Sisira J. de Abrew

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

Bulathsinhalage Edwin Cooray,
No. 08, Mahinda Place,
Kirulapona, Colombo 06.

Plaintiff

-Vs-

Bulathsinhalage Harschandra Wasantha Cooray,
No. 11/3, Vihara Mawatha, Narangoda Paluwa, Ambalama Junction, Ragama.

Defendant

AND

SC Appeal No. 174/2014
SC Application No: SC (SPL) 66/2014
Court of Appeal No. CA 549/98 (F)
District Court of Mt. Lavinia No. 605/96/L

Bulathsinhalage Harschandra Wasantha Cooray,
No. 11/3, Vihara Mawatha, Narangoda Paluwa, Ambalama Junction, Ragama.

Defendant-Appellant

Vs

Bulathsinhalage Edwin Cooray
No. 08, Mahinda Place,
Kirulapona, Colombo 06.

Plaintiff-Respondent (Deceased)

Tamara Indrani Cooray,
No. 08, Mahinda Place,
Kirulapona, Colombo 06.

Substituted Plaintiff–Respondent

AND NOW BETWEEN

Bulathsinhalage Harschandra Wasantha Cooray,
No. 11/3, Vihara Mawatha, Narangoda Paluwa, Ambalama Junction, Ragama.

Defendant-Appellant-Appellant

Vs.

Tamara Indrani Cooray,
No. 08, Mahinda Place,
Kirulapona, Colombo 06.

Substituted Plaintiff – Respondent - Respondent

Before: Buwaneka Aluwihare, PC. J.,
Vijith K. Malalgoda, PC. J. and
Murdu N.B.Fernando, PC. J.

Counsel: M.S.A. Wadood with Palitha Subasinghe, Tharanga Edirisinghe and J. Beruwalage for the Defendant-Appellant-Appellant.
Daya Guruge with R. Wimalaweera for the Substituted Plaintiff-Respondent-Respondent.

Argued on: 10.07.2018

Decided on: 18.02.2020

Murdu N.B. Fernando, PC. J.

The Defendant-Appellant-Appellant has come before this Court challenging the judgment of the Court of Appeal dated 19-03-2014. The Court of Appeal dismissed the appeal and affirmed the judgment of the District Court of Mount Lavinia dated 05-06-1998 granted in favour of the original plaintiff.

On 25-09-2014 this Court granted Special Leave to Appeal on the following questions of law: -

(i) Have the learned judges of the Original Court and the Hon. Court of Appeal erred in law in coming to the conclusion that the plaintiff-respondent-respondent is entitled to revoke the said deed of gift according to the facts, circumstances and/or evidence adduced in this case.

(ii) Has the learned judge of the Original Court erred in law in concluding that the defendant- appellant-petitioner had acted in gross ingratitude of the respondent by scolding the respondent in foul language and/or by intimidating him.

(iii) In determining that a single blow was sufficient to constitute gross ingratitude did the learned judges of the Original Court and the Hon. Court of Appeal err in law in not considering the state of mind of the Donee as held *in Krishnaswamy Vs Thillaiyampalam (1957) 59 NLR 265.*

(iv) Have the learned judges of the Original Court and the Hon. Court of Appeal fail to fairly, objectively and judicially analyze the evidence adduced in this case according to the facts and circumstances of this case in holding that the respondent is entitled to revoke the said Deed of Gift.

According to the Petition of Appeal filed before this Court, the deceased plaintiff-respondent ("the plaintiff") bestowed upon the defendant-appellant-appellant ("the defendant/appellant"), his youngest son, the dwelling house, the plaintiff was living at Kirulapone, Colombo by way of an irrevocable deed of gift retaining for himself the life interest.

In view of the subsequent conduct of the defendant in demanding the house, using foul language, assaulting the father and threatening him with death, the plaintiff moved the District Court to set aside the said deed of gift upon the ground of gross ingratitude of the defendant.

The defendant denied the allegation of gross ingratitude and assault of the father.

The learned trial judge, gave judgment as prayed for and held that the quarreling and speaking in filth to the father who gifted the property would amount to ungrateful conduct which necessitates the revocation of an irrevocable deed of gift on the ground of ingratitude.

The learned trial judge went on to hold that the actions and attitude of the defendant being a son towards a father cannot be condoned.

The learned Judge of the Court of Appeal upheld the said decision, and in his judgment referred to the opinion expressed in **Podinona Ranaweera Menike Vs Rohini Senanayake [1992] 2 SLR 180** and **Krishnaswamy Vs Thillaiyampalam 59 NLR 265**, that an atrocious injury to the donor by the donee is a reason to have a deed of gift revoked and that the commissioning of a single act of ingratitude was sufficient for a donor to revoke a deed of gift.

Upon the said background, I wish to now collate and consider the questions of law raised before this court. These questions centre around the failure of the original court and the Court of Appeal to fairly, objectively and legally analyse the evidence adduced in holding that the plaintiff was entitled to move court to revoke an irrevocable deed of gift.

The revocation of an irrevocable deed of gift has been considered and analysed in depth by our courts in the multitude of reported judgments wherein deeds of gift have been executed by parents upon children, grandparents upon grandchildren, one spouse upon the other, one sibling upon the other.

In all these instances, the law governing the revocation of a gift was based upon the principles of Roman Dutch Law, referred to and interpreted in the statements of law and the commentaries of eminent jurists.

In **Krishnaswamy and another Vs Thillaiyampalam 59 NLR 265** Basnayake, C.J. quotes from Voet (Gane's translation) as follows:-

> "Such a *donatio inter vivos* cannot from its own peculiar nature be hastily revoked, not even on a rescript from the Emperor, nor if the donor avows that he made the gift in fraud of another. Nevertheless, five just causes of ingratitude are listed for which, if the donee has offended against the donor in regard to them, there is room for revocation, that is to say for change of mind.
>
> This is so although it had been arranged by agreement at the time of the donation, even by agreement confirmed on oath, that the gift would not be withdrawn on the ground of ingratitude. Such a covenant is void as being a temptation to wrongdoing, and as involving the forgiveness of a future offence.

These causes are when the **donee has laid wicked hands upon the donor, or has contrived a gross and actionable wrong,** or some huge volume of sacrifice or a plot against his life, or finally has not obeyed conditions attached to the donation." (emphasis added)

In the said judgment, Basnayake, C.J. also quotes Perezius (Wickramanayake's transtation) as follows: -

"The causes of ingratitude are five in number, namely, **if the donee outrageously insults the donor, or lays impious hands on him**, or squanders his property or plots against his life or is unwilling to fulfill the pact which was annexed to the gift." (emphasis added)

Basnayake, C.J. in the said judgment compares and analyzes the views of many other jurists including Van Leeuwen whose views he says is precise and brief when he opines,

"that a duly constituted gift can never be revoked by the donor, unless the **donee has turned out to be ungrateful**, as for instance, **when he damaged the honour of the donor, has used personal violence towards him, or has made an attempt on his life,** or has wasted his property, or has not observed the agreement or conditions attached to the gift" (emphasis added)

and finally at page 269 states thus,

"It would be unwise to lay down a hard and fast rule as to what conduct on the part of a donee may be regarded as ingratitude for which a donor may ask for revocations of his gift. Voet's view is that ingratitude for which a donation may be revoked must be ingratitude which a court does not regard as trifling. He says "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 ways in which a donee may show that he is ungreatful being legion, it is not possible to state what is 'slight ingratitude' and what is not except in regard to the facts of the case.

There is nothing in the books which lays down the rule that a revocation may not be granted to the commission of a single act 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 a series of acts".

In the said Krishnaswamy case, a husband and a wife filed action to revoke a deed granted to the husband's brother, conveying the wife's dowry property at the request of the defendant, to obtain some advantage from the income tax authorities by showing he was the owner of the property. The plaintiffs' contention was that the deed was not meant to be acted upon but re-conveyed and when the defendant refused to re-convey, and all efforts failed, obtained the good office of a respected elder and at the said discussion the defendant spoke to the plaintiffs in filth and raised his hand to assault the brother and Basnayake, C.J. went on to state thus-

> "What greater ingratitude could there be than to treat the plaintiffs as the defendant has done? It may be one instance, but the donee must take the consequences of his conduct if the donor is unwilling to forgive him."

Thus, it is apparent, that our courts have quite categorically held that a revocation of a deed of gift may be granted on the commission of a single act of ingratitude and there is no hard and fast rule as to what conduct on the part of a donee may be regarded as ingratitude for which a donee may ask for revocation of a gift, and that what is ingratitude and what is not can only be inferred based upon the facts of each case.

In an earlier case **Manuelpillai Vs Nallamma 52 NLR 221** where a wife who was assaulted, from whom moneys were extracted and forced to execute a transfer of property, filed action against her husband to revoke the properties she transferred to him reserving life interest. Basnayake, J. (as he was then) after quoting extensively from the writings of jurists stated as follows: -

> "I have quoted extensively from the commentators both ancient and modern in order to show that there is no difference of opinion among them on the question before us. Whether the latin word 'impairs' is rendered 'impious' as de Sampayo [*de Sampayo's translation of Voet*] has done or "sacrilegious" as Krause has done, the legal position is the same. It is impious or sacrilegious for a donee who has derived benefits from a donor to strike him or use personal violence on him." (emphasis added)

and held that the donor wife is entitled to an order of court revoking the deed of gift, since the donee husband used violence on the donor.

In coming to the said finding in the above referred Manuelpillai's case, Basnayake, J. distinguished yet an earlier case, **Sivarasipillai Vs Anthonypillai 40 NLR 47**, where Soertz, J. referred to five instances in which a gift could be revoked for ingratitude as being:- (i) the laying of impious hands of the donee on the donor, (ii) the donee outrageously defaming the donor, (iii) the donee causing the donor enormous loss, (iv) the donee plotting against the donor's life, and (v) the donee failing to fulfill the conditions annexed to the gift and held that the ground of cruelty and desertion averred to by the donor wife was not sufficient to revoke a deed of gift granted to a donee husband for the reason that the wife had 'nomadic habits' leading to a 'cat and dog life'.

The counsel for the appellant in Manuelpillai's case relied on the judgment of Soertz, J. and the law laid therein to contend, that an assault committed by the husband on a wife did not come within the said grounds referred to by Soertz, J. which submission was rejected by Basnayake, J. who emphatically held, that even between spouses a deed can be revoked for ingratitude.

In **Dona Podi Nona Ranaweera Menike Vs Rohini Senanayake 1992 (2) SLR 180** Amerasinghe, J. referred to the above 1937 judgment of Soertz, J. in Sivarasipillai Vs Anthonypillai case (supra) and many other decided cases in respect of a revocation of an irrevocable deed of gift on account of ingratitude and laid down the grounds upon which a donor is entitled to revoke a gift as follows:-

- If the donee lays *manus impias* on the donor;
- If he does him an atrocious injury;
- If he willfully causes him great loss of property;
- If he makes an attempt on his life;
- If he does not fulfill the conditions attached to the gift; and
- for other equally grave causes.

Amarasinghe, J. at page 220 specifically emphasised on the 1st ground in the following manner-

> "However, the laying of personally violent, impious, wicked, sacrilegious hands (judges and jurist translate *manus impias* in these, and perhaps other, different ways) on the donor is, without question one of the five specified causes of ingratitude warranting 'just' revocation."

In the said case, Dona Podi Nona and her husband, gifted their only child Rohini Senanayake, Apaladeniya Estate reserving their life interest, on the occasion of her marriage. Twelve years hence, the donee daughter assaulted her donor parents and the parents filed action to seek revocation of the gift on the ground of gross ingratitude manifested by assault.

In a lengthy judgment Amerasighe, J. having analyzed the law pertaining to *donatio propter nuptias,* thereafter referred to and discussed an act of ingratitude and at page 219 held, an act of ingratitude sufficient to warrant revocation, must vary with the circumstances of each case and at page 221 went on to hold that assault of the donor parents by a donee daughter, no doubt was in the words of Voet "the foul offence of ingratitude" which justified seeking the assistance of a court and allowed the revocation of the deed of gift.

In a subsequent case, **Stella Perera Vs Margaret Silva 2002 (1) SLR page 169** Amerasinghe J. re-iterated that a gift could be revoked on the ground of ingratitude even between spouces.

In the instant appeal before us, the Court of Appeal referred to the judgment of Amerasinghe, J. in the case of Podi Nona (supra) and judgment of Basnayake, C.J. in the case of Krishnaswamy Vs Thillaiyapalam (supra) and looked at the evidence led before the trial court, afresh, to ascertain whether or not an act of ingratitude had been committed by the donee son towards the donor father and held that the evidence pertaining to the assault had not been controverted at all and thus held that the act of assault was sufficient to have the deed of gift revoked on the basis of ingratitude towards the donor father.

In another reported case, **Fernando Vs Perera 63 NLR 236** Basnayake, C.J. set aside a deed of gift granted by a foster mother to her adopted son on the ground of ingratitude, namely an assault on her with a broom stick and a threat to cause bodily harm and injury to her, notwithstanding the trial court holding that the said acts do not constitute an act of ingratitude.

Thus, our courts have consistently considered and analyzed the evidence led before the trial court in coming to a finding, sometimes varying with the decision of the trial Court with regard to revocation of a deed of gift. In the instant case, the trial court held that quarrelling and speaking in filth itself amounted to ingratitude. The Court of Appeal upheld the said finding and held further, that the assault too was a ground to revoke the gift. In the said circumstances I do not see merit in the submission of the counsel for the appellant that the

Court of Appeal erred in coming to a finding with regard to the act of assault which was an additional reason to revoke the gift.

The act of assault referred to in the instance appeal before us is an incident that took place a few months prior to the filling of the District Court case. The original plaintiff's version was that his son, the defendant, on the day of the assault came to his residence and persisted with the demand of the house and when he refused to give a date of vacating the house, scolded him in filth. The sister admonished the defendant not to speak to the father in the said manner and the defendant hit the sister with a stool and the plaintiff who intervened to settle the melee was hit by the defendant with the stool and suffered injuries to his forehead and lips.

We observe that the learned Judge of the Court of Appeal having referred to the opinion expressed in the case of Podi Nona(supra) and the grounds referred to therein by Amerasinghe, J. and the case of Krishnaswamy (supra) considered and analysed in detail the evidence on the above referred assault, in order to ascertain whether or not an atrocious injury had been committed by the donee on the donor. The learned judge analysed the evidence of the plaintiff, his cross-examination, the evidence of the witnesses which had not been controverted and held that the defendant assaulted the plaintiff with a stool causing injury to his forehead and that such an act itself was sufficient to have the deed revoked on the basis of ingratitude. We see, no reason to reverse the said finding.

The submission of the counsel for the appellant was that the learned judge of the Court of Appeal misdirected, erred and contradicted himself when he came to a totally different conclusion to that of the trial judge who was hesitant to come to a finding on the assault and at the conclusion of the judgment, upheld the judgment of the District Court when he pronounced 'I do not see any error in the findings of the learned District Judge'. We observe that the trial Judge gave judgment as prayed for by the plaintiff, having accepted that the quarrelling and speaking in filth amounted to acts of ingratitude and had categorically condemned the actions and attitude of the donee towards the donor father and clearly and precisely held that the ungrateful conduct necessitates the revocation of the deed of gift on the ground of gross ingratitude.

Thus, we observe that the counsel is placing too much reliance on the concluding words and his contention is too farfetched. He is playing on words and placing undue weightage on a general statement made in concluding the judgment and making an issue of a non-existing matter. Hence, we see no merit or reason in the said submission.

The next submission of the counsel for the appellant was with regard to use of foul language. The learned counsel relied on the 1914 judgment of **Woodrenton, C.J.** in **Hamine Vs Gunawardene 17 NLR 507** and submitted before this Court that scolding a donor using an 'infamous word' was no ground for revocation of a gift. The learned counsel failed to distinguish nor consider the more recent judgments, specifically the Krishnaswamy case referred to earlier in which diametrically opposite views had been expressed by this court when the same 'infamous word' was uttered by a donee.

In the instance case before us, not only the donor father was scolded in filth, the donee son continuously intimidated the donor father to instantaneously part with the property which had been gifted to him subject to the life interest of the father. Thus, we see no merit or reason to set aside the judgment of the learned District Judge solely based upon the said submission of the learned counsel for the appellant, with regard to the use of an 'infamous word' based on a 1914 case, whereas subsequent judicial pronouncements had distinguished and held otherwise.

In the said circumstances, we answer the 2nd question of law raised before this court, that the learned District Judge erred in law in concluding that the defendant had acted in gross ingratitude by scolding in foul language and/or intimidating the plaintiff, in the negative.

The 3rd question of law raised before this Court was whether the trial court and the Court of Appeal erred in not considering the state of mind of the donee as held in Krishnaswamy's case in determining that a single blow was sufficient to constitute ingratitude?

The state of mind of the donee, as we observe from the evidence led is very clear and precise. Prior to the execution of the deed, the defendant who was employed overseas provided for the father and financially attended to the matters of the ancestral home where the father resided. This property was subsequently gifted to the son by the impugned deed of gift.

However, what is material is the state of mind of the donee and the attitude or the conduct of the defendant towards the father, after the execution of the deed by which the property was gifted reserving life interest. The evidence led at the trial categorically indicated the continuous intimidation and harassment of the father, use of foul language, assault or a single blow on the father. It is very apparent that the state of mind of the son was to obtain the possession of the gifted property whilst the life interest was still with the father.

In Krishnaswamy's case discussed above, Basnayake, C.J. categorically held that 'an ingratitude is a frame of mind which has to be inferred from the donee's conduct and I may add, especially after the execution of the deed. The frame of mind can be gathered either by a single act or by a series of acts, and I observe, that the many acts of the defendant after the execution of the deed, especially the assault on the father or the 'single blow' as the counsel for the appellant contends, does amount to an act of ingratitude contemplated under Roman Dutch Law, succinctly referred to in the wrtings of Voet, Perezius, Van Leeuwen and other jurists referred to in the said Krishnaswamy's case. Hence, I answer the 3rd question of law raised before this Court also in the negative and in favour of the plaintiff-respondent.

The 1st and the 4th questions of law raised before this Court is whether the trial court and the Court of Appeal erred in law and failed to analyse the evidence led in coming to the conclusion that the plaintiff-respondent is entitled to revoke the irrevocable deed of gift given in favour of the defendant-appellant?

Based upon the facts of this case and specifically the intimidation, use of foul language, the assault and the law pertaining to revocation of an irrevocable deed of gift for gross ingratitude more fully discussed in detail earlier, it is the considered view of this Court that the District Court and the Court of Appeal have correctly held that the acts and actions of the defendant the donee son, towards the original plaintiff the donor father, amounts to ingratitude which justifies the revocation of the irrevocable deed of gift, given and gifted to a son with love and affection by a father.

The assault or the single blow on the father may have been only in one single instance, but the attitude, actions, and conduct of the son, the persistent demand of the house, using foul language and intimidation and harassment of the father by the son cannot be condoned, justified nor excused under any circumstances.

This Court condemns such acts in no uncertain terms and without any hesitation holds that the said acts falls within the grounds referred to by the great jurists and morefully analysed and discussed by our courts. This Court further holds that the said acts falls within the first two grounds, being 'laying of impious hands of the donee on the donor' and 'causing an atrocious injury' wherein a donor could move court to revoke an irrevocable deed of gift.

This Court is also in agreement with the opinion expressed by Amerasinghe, J. in the case of Dona Podi Nona (supra) that *manus impias* on the donor warrants 'just' revocation of an irrevocable gift. In the aforesaid circumstance, actions of the donee son the defendant-

appellant on the donor father the plaintiff-respondent, falls within the term *manus impias* which justifies revocation of the irrevocable deed of gift granted in favour of the defendant-appellant.

Thus, we answer the 1st and 4th questions raised before this Court also in the negative and holds that the trial court and the Court of Appeal after analyzing the facts, circumstances and evidence came to a correct finding and conclusion that for gross ingratitude, the plaintiff-respondent is entitled to revoke the irrevocable deed of gift executed in favour of the defendant-appellant.

For the reasons morefully set out in this judgment, the four questions of law raised before this Court are answered in the negative and in favour of the plaintiff-respondent.

We affirm the Judgment of the Court of Appeal and the Judgment of the District Court and dismiss this appeal with costs fixed at Rs. 25,000/=.

The appeal is dismissed.

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

1. Niriellage Jayamini Keerthisheeli
   No.106/2, Wattegedera Road,
   Maharagama.

2. Niriellage Dhammadevamittha Upasena alias
   Devamittha Upasena Niriella.
   No.174/9, Balika Nivasa Road, Rukmale
   Pannipitiya.

3. Niriellage Aruna Kumara Upasena alias
   Kumara Upasena Niriella.
   No.662/A, Eeriyawatiya Road,
   Kiribathgoda

Plaintiff

SC Appeal 179/2014
SC/HC(CA)/LA No. 465/2013
WP/HCCA/MT/143/07 (F)
DC Mt. Lavinia Case No. 33/03/Trust

Vs

Niriellage Shanthi Mangalika Upasena alias
Shanthi Mangalika Upasena Niriella.
No.130/8, Wijeya Mawatha,
Wattegedera Road,
Maharagama.

Defendant

AND NOW

Niriellage Shanthi Mangalika Upasena alias
Shanthi Mangalika Upasena Niriella.
No.130/8, Wijeya Mawatha,
Wattegedera Road,
Maharagama.

Defendant-Appellant

Vs

1. Niriellage Jayamini Keerthisheeli
   No.106/2, Wattegedera Road,
   Maharagama.

2. Niriellage Dhammadevamittha Upasena alias
   Devamittha Upasena Niriella.
   No.174/9, Balika Nivasa Road, Rukmale
   Pannipitiya.

3. Niriellage Aruna Kumara Upasena alias
   Kumara Upasena Niriella.
   No.662/A, Eeriyawatiya Road,
   Kiribathgoda

Plaintiff-Respondents

AND NOW BETWEEN

Niriellage Shanthi Mangalika Upasena alias
Shanthi Mangalika Upasena Niriella.
No.130/8, Wijeya Mawatha,
Wattegedera Road,
Maharagama.

Defendant-Appellant-

Petitioner- Appellant

Vs

1. Niriellage Jayamini Keerthisheeli
   No.106/2, Wattegedera Road,
   Maharagama.

2. Niriellage Dhammadevamittha Upasena alias
   Devamittha Upasena Niriella.
   No.174/9, Balika Nivasa Road, Rukmale
   Pannipitiya.

3. Niriellage Aruna Kumara Upasena alias
   Kumara Upasena Niriella.
   No.662/A, Eeriyawatiya Road,
   Kiribathgoda

Plaintiff-Respondent-
Respondent- Respondents

Before: Sisira J. de Abrew J
P.Padman. Suresena J
Gamini Amarasekera

Counsel: Rassika Dissanayake with Rajitha Haturusinghe
for the Defendant-Appellant-Petitioner-Appellant
L.B.J. Peiris with A.D.G. Rubasinghe for the
Plaintiff-Respondent-Respondent-Respondents

Written submission
tendered on : 12.12.2014 by the Defendant-Appellant-Petitioner-Appellant
23.2.2015 by the Plaintiff-Respondent-Respondent-
Respondents

Argued on : 8.7.2020

Decided on: 9.9.2020

Sisira J. de Abrew, J

The learned District Judge by his judgment dated 13.12.2007 held the case in favour of the Plaintiff. Being aggrieved by the said judgment of the learned District Judge, the Defendant appealed to the Civil Appellate High Court of Mount Lavinia and the learned Judges of the Civil Appellate High Court by their judgment dated 2.10.2013 dismissed the appeal. Being aggrieved by the said judgment of the learned Judges of the Civil Appellate High Court, the Defendant appealed to this court and this court by its order dated 1.10.2014 granted leave to appeal on questions of law set out in paragraphs 10(a) to (c) of the petition of Appeal dated 11.11.2013 which are set out below.

1. Whether the learned District Judge and the Honourable High Court Judges have erred in law holding that there was a Constructive Trust established in favour of the Respondents despite the fact that the Respondents had no *locus standi*/legal standing to file an action as constituted in their plaint.

2. Whether the learned District Judge and the Honourable High Court Judges have erred in law holding in favour of the Respondents despite the fact that the alleged cause of action to obtain a decree of a Constructive Trust does not fall to any category of Constructive Trust contemplated in Chapter IX of the Trust Ordinance.

3. Whether the learned District Judge and the Honourable High Court Judges have failed to evaluate the evidence adduced at the trial in coming to the said conclusion as the evidence revealed that in fact late

K.A. Upasena had no intention whatsoever either to retain the beneficial interest for himself or to pass on to the Respondents.

Facts of this case may be briefly summarized as follows. The three plaintiffs and the defendant in this case are sisters and brothers.

Niriellage Upasena who is the father of the Plaintiff-Respondent-Respondents (hereinafter referred to as the Plaintiff-Respondents) and the Defendant-Appellant-Appellant (hereinafter referred to as the Defendant-Appellant) gifted the property in question by Deed No.529 dated 11.6.2001 to the Defendant-Appellant. This was an irrevocable gift and the donor Niriellage Upasena did not keep the life interest of the property. Niriellage Upasena died in June 2002. After the death of Niriellage Upasena, the Plaintiff-Respondents filed this case in the District Court of Mount Lavinia against the Defendant-Appellant seeking, inter alia, a declaration that the Defendant-Appellant holds the property in question in trust in favour of the Plaintiff-Respondents and to retransfer ¾ share of the property in question to the Plaintiff-Respondents. It was the contention of the Plaintiff-Respondents that the property in question was gifted to the Defendant-Appellant for her to get visa to go to Canada and that their father never intended to transfer the beneficial interest to the Defendant-Appellant. Therefore, the most important question that must be decided in this case is whether the Defendant-Appellant held the property in question in trust in favour of her father. The 1st Plaintiff-Respondent Niriellage Jayamini Keerthiseeli says in her evidence that the property in question was gifted to the Defendant-Appellant for her to get visa to go to Canada. The Notary Public who attested the relevant Deed of Gift (Deed of Gift No.529) says, in his evidence, that he was informed that there was a

necessity to produce the relevant deed to the relevant Embassy in order to obtain visa. It is interesting to find out as to who gave this information to the Notary Public. Mr.Ranawaka the Notary Public says, in his evidence, that it was the 1st Plaintiff-Respondent who gave this information. Mr.Ranawaka the Notary Public, in his evidence, further says the following matters.

1. He (the Notary Public) is a neighbour of the donor Niriellage Upasena.
2. The donor Niriellage Upasena told him (the Notary Public) that he wanted to gift the property in question to her youngest daughter.
3. The donor Niriellage Upasena did not tell the Notary Public that he wanted to get the property back after gifting the same to her youngest daughter.
4. He (the Notary Public) prepared the Deed of Gift No.529 on the instructions given by the donor.

It has to be noted here that the above evidence of the Notary Public was not challenged in the cross-examination. From the above evidence of the Notary Public it is clear that the donor Niriellage Upasena had fully gifted the property in question to the Defendant-Appellant with clear intention of gifting and that he did not have an intention to reclaim the property in question from the donee. The above evidence clearly demonstrates that the Defendant-Appellant was not holding the property in question in trust in favour of the donor who is her father. If the Defendant-Appellant was not holding the property in question in trust in favour of the donor who is the father of the Defendant-Appellant and the Plaintiff-Respondents, then the Defendant-

Appellant was not holding the property in question in trust in favour of the Plaintiff-Respondents. Further, the Plaintiff-Respondents have failed to adduce any evidence to show that there were attendant circumstances to establish any constructive trust between the donor and the Defendant-Appellant. When I consider all the above matters, I hold that the Plaintiff-Respondents are not entitled to the relief claimed in the plaint. The learned District Judge and the learned Judges of the Civil Appellate High Court have failed to consider the above evidence of the Notary Public and come to the wrong conclusion that the Defendant-Appellant was holding the property in question in trust in favour of the donor.

In view of the conclusion reached above, I answer the 3rd question of law in the affirmative and answer the 1st question of law as follows. "The learned District Judge and the learned Judges of the Civil Appellate High Court have come to the wrong conclusion that the Defendant-Appellant was holding the property in question in trust in favour of the Plaintiff-Respondents. The Defendant-Appellant was not holding the property in question in trust in favour of the Plaintiff-Respondents."

In view of the answers given to the 1st and the 3rd questions of law, the 2nd question of law does not arise for consideration.

For the above reasons, I set aside both judgments of the learned District Judge and the Judges of the Civil Appellate High Court and allow the appeal. I dismiss the action of the Plaintiff-Respondents. The learned District Judge is

directed to enter decree in accordance with this judgment. The Defendant-Appellant is entitled to the costs in all three courts.

Appeal allowed.

Judge of the Supreme Court.

P. Padman Surasena J

I agree.

Judge of the Supreme Court.

Gamini Amarasekera J

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 9 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990.

SC Appeal 181 / 2016

SC/Spl/LA No. 72/2014

Provincial High Court (Trincomalee)

Case No. HCT/APP/MC 59 / 2009

Magistrate's Court Trincomalee

Case No. 19035/99

Wewala Patabendige Somapala,

Army Camp,

Clappanburge,

China Bay.

Presently at

E 13,

Temple Road,

Aranayake,

Talgaspitiya.

ACCUSED - APPELLANT - APPELLANT

-Vs-

1. Hon. Attorney General,

   Attorney General's Department,

   Colombo 12.

   RESPONDENT - RESPONDENT

2. Officer-in-Charge,

   Traffic Branch,

   Police Station,

   Trincomalee.

   COMPLAINANT - RESPONDENT - RESPONDENT

Before: **PRIYANTHA JAYAWARDENA PC J**

MURDU N. B. FERNANDO PC J

P. PADMAN SURASENA J

Counsel:

S A Collure with A P Jayaweera and Ravindra S de Silva for the Accused - Appellant - Appellant.

Induni Punchihewa SC with Kalana Kothalawala for Attorney General.

Argued on : 21 - 01 - 2020 and 11 - 02 -2020

Decided on : 17 - 06 - 2020

P Padman Surasena J

The Accused - Appellant - Appellant (hereinafter sometimes referred to as the Appellant) stood charged in the Magistrate's Court of Trincomalee on four counts, which stated;

1. that he, on 20-10-1998 negligently drove the truck bearing No. යූ හ 6969, causing the death of Shanmugan Udaya Kumar and Rasaiya Sri Rangan, an offence punishable under section 298 of the Penal Code;

2. that he, at the same time and at the same place, failed to avoid the said accident, an offence punishable under section 149(1) read with sections 214 (1)(a) and 224 of the Motor Traffic Act;

3. that he, at the same time and at the same place, drove the said truck යූ හ 6969 negligently or without reasonable consideration for the other persons using the highway causing the deaths of Shanmugan Udaya Kumar and Rasaiya Sri Rangan, an offence punishable under section 151(3) read with section 217 (2) of the Motor Traffic Act;

4. that he, at the same time and at the same place, drove the said truck යූ හ 6969 without a valid driving license, an offence punishable under section 123 (1)(a) read with sections 214(1)(a) and 224 of the Motor Traffic Act.

The Appellant had pleaded not guilty to the said charges.

At the trial, the witness Sinnaiya Kandadas, few witnesses who have identified the bodies of two dead persons, Liyadipitiya Rathnayake Muudiyanselage Thilakarathna who is the other soldier who had travelled in the truck driven by the Appellant, Police Constable 29429 Bowaththa Gamaralalage Gamini Sisira Kumara (an officer from Trincomalee Police Station) and the Interpreter Mudaliyar of the Court had given evidence for the prosecution. After the prosecution closed its case, the Appellant had given evidence on his behalf.

Learned Magistrate at the conclusion of the trial, pronounced the judgment dated 18-05-2005, convicting and sentencing the Appellant on all four counts.

Being aggrieved, by the said judgment of the learned Magistrate, the Appellant appealed to the High Court of Eastern Province holden at Trincomalee. The said Provincial High Court, by its judgment dated 26-03-2014, had affirmed the conviction of the Appellant on the first, second and third counts and acquitted him from the fourth count. The Appellant, in this appeal, seeks to canvass before this Court, the said affirmation of his conviction on the first, second and third counts.

At the time of the argument, learned counsel for both parties agreed before this Court that they would confine their submissions only to the following question of law for the purpose of the instant appeal. The said question of law is as follows.

> 'Did the Appellant cause the deaths of Shanmugan Udaya Kumar and Rasaiya Sri Rangan, by doing any rash or negligent act not amounting to culpable homicide in terms of section 298 of the Penal Code?'

In order to answer the above question of law, it would be necessary to turn, albeit briefly, to the evidence adduced before Court.

The witness Sinnaiya Kandadas is a person who was riding a bicycle at that time at a place somewhat close to the place of this accident. He has stated in his evidence before the learned Magistrate;

i. that this incident occurred around 1400 hrs. on 20-10-1998;

ii. that he was riding a bicycle at that time;

iii. that he saw an Army truck coming on the road;

iv. that he jumped to the sea abandoning his bicycle upon seeing the said Army truck;

v. that he did not see anything else, in particular, a collision;

vi. that he saw Sri Rangan being taken out from the sea and taken to a three wheeler;

vii. that he saw Sri Rangan riding a bicycle in front of him before he was taken out from the sea.

Answering the questions posed to him in cross-examination, this witness has categorically stated that he did not see any collision with the Army truck. He had also stated that he did not see the person who drove the truck. When inquired from him about the speed of the truck, his answer was that he could not comment on the speed of the truck.

Thus, evidence of Sinnaiya Kannadas taken at its highest, does not indicate any rash or negligent act on the part of the Appellant. Indeed, it is his evidence that he did not see how this accident occurred.

In addition to the witnesses called by the prosecution to establish the identities of the dead bodies, [1] the prosecution has led the evidence of Liyadipitiya Rathnayake Muudiyanselage Thilakarathna who is the other soldier who had travelled along with the Accused in the Army truck at the time of this accident. His evidence has established;

i. that this accident had occurred on 20-10-1998;

ii. that the truck bearing No. යූ හ 6969 driven by the Appellant had been fully loaded with explosives;

iii. that they were transporting the said explosives by the said truck to the Trincomalee Navy Camp;

iv. that this accident occurred around 1440 hrs.; and he was at that time seated on the left side front seat of the truck;

v. that when the truck was moving ahead, a cyclist had suddenly emerged from a by lane on to the main road at which time the Appellant had taken the truck to his right side of the road;

vi. that it was at that time that the said cyclist collided with the front side of the truck;

vii. that at the same time several other cyclist also came at high speed, the said cyclist was looking at the sea and collided with the truck;

[1] I would not deal with the said evidence because they are neither relevant to the question of law under consideration nor contested by the Appellant.

viii. that another cyclist who came towards the truck abandoned his cycle and jumped into the sea; however, he did not suffer an injury;

ix. that thereafter, he saw the cycles fallen and the cyclists injured.

Answering the questions posed to him in cross-examination, he had stated;

i. that the truck was driven carefully, particularly to avoid any collision as it was fully laden with explosives;

ii. that this accident had occurred because a cyclist had suddenly emerged on to the main road from a by lane;

iii. that the speed of the truck at that time was approximately about 40 Kmph.

The Accused Wewala Patabendige Somapala had also given evidence under oath. His evidence has established;

i. that he was the driver of the said Army truck;

ii. that in addition to him, Lance Corporal Thilakarathna also travelled in the said truck;

iii. that the said truck was fully laden with explosives and ammunition which he was in the process of transporting to the Trincomalee Navy Camp;

iv. that this accident occurred at the junction where Inner Harbour Road and Telecom Road meet;

v. that he was driving the truck from the direction of Trincomalee Police Station towards the Trincomalee Navy Camp on Inner Harbour Road;

vi. that a cyclist suddenly came from Telecom Road and entered in to the main road;

vii. that there were threats of suicide bomb attacks during that time;

viii. that he thought the cyclist who suddenly emerged from the said by road would be a suicide bomber;

ix. that he therefore, took the truck to the right side of the road because of the said fear;

x. that the cyclist however, collided with the truck;

xi. that he saw another cyclist at that time jumping in to the sea;

xii. that the area was a built up area on either side of the road and he could not afford to allow the truck to collide with any parapet wall on either side of the road as the truck was laden with explosives;

xiii. that he drove the truck at a speed of approximately 35 Kmph at the time of the accident;

xiv. that the other cyclist had died because he had drowned in the sea.

It is to be noted that the Appellant had provided straight answers to all the questions posed to him by the prosecution during the cross-examination. Further, perusal of his evidence shows clearly that the prosecution has not been able to assail his evidence even after subjecting it to lengthy cross-examination.

Another notable feature in this case is that the evidence of the Appellant has been corroborated by the evidence of a prosecution witness namely, Lance Corporal Thilekeratna. It is the prosecution which called the witness Liyadipitiya Rathnayake Muudiyanselage Thilakarathna (Lance Corporal Thilekeratna) to give evidence in the trial on its behalf. Thus, as a matter of fact, the prosecution has clearly relied on his evidence.

Apart from said Thilakarathna's evidence, the prosecution is left only with the evidence of witness Sinnaiya Kannadas who gave evidence about the accident. As has already been mentioned above, he denies having seen as to how this accident occurred. Thus, it is clear that the prosecution has failed to establish any rash or negligent act for which the Appellant could be held responsible.

Lord Atkin in delivering the House of Lords judgment in the case of Andrews vs Director of Public Prosecutions[2] stated as follows.

"The principal to be observed is that cases of manslaughter in driving motor cars are but instances of a general rule applicable to all charges of homicide by negligence. Simple lack of care such as will constitutes civil liability is not enough. For purposes of criminal law there are degrees of negligence, and a very high degree of negligence is required to be proved before the felony is established. Probably of all the epithets that can be applied 'reckless' most nearly covers the case. It is difficult to visualize a case of death caused by "reckless" driving, in the connotation of that term in ordinary speech, which would not justify a conviction for manslaughter, but it is probably not all-embracing, for "reckless" suggests an indifference to risk, whereas the accused may have appreciated the risk, and intended to avoid it, and yet shown in the means adopted to avoid the risk such a high degree of negligence as would justify a conviction."

The above paragraph of Lord Atkin's judgment has been cited by Howard CJ in the judgment of Lorenze vs Vyramuttu[3], The King vs Leighton[4] and in more recent times by Priyasath Dep PC J (as he then was) in the case of Chandrasiri vs Attorney General.[5]

When considering the evidence adduced at the trial by the prosecution, it is amply clear that the prosecution has failed to establish any of the charges against the Appellant beyond reasonable doubt. Further, the evidence of the Appellant has proved his innocence. Therefore, the conclusion by the learned Magistrate that the prosecution has proved the charges framed against the Appellant cannot be supported by the evidence led in the case. Similarly, the conclusion by the learned High Court Judge too is not justifiable. Therefore, I answer the aforementioned question of law in the negative. Thus, the Appellant is entitled to succeed in his appeal.

In these circumstances and for the foregoing reasons, I set aside the judgment dated 18-05-2005 of the learned Magistrate of Trincomalee and the judgment dated 26-03-2014

[2] 1937 2 All E R 552.
[3] 42 NLR 472.
[4] 47 NLR 283.
[5] 2011 (1) Sri L R 10.

by the learned High Court Judge of Trincomalee. I direct that the Appellant be acquitted and discharged from all the charges framed against him.

Appeal is allowed.

JUDGE OF THE SUPREME COURT

PRIYANTHA JAYAWARDENA PC J

I agree,

JUDGE OF THE SUPREME COURT

MURDU N. B. FERNANDO PC J

I agree,

JUDGE OF THE SUPREME COURT

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

In the matter an application for Special Leave to Appeal in terms of Article 128(2) of the Constitution Constitution of Sri Lanka.

Subramaniam Asokan
15, 4th Cross Street, Colombo 11
But residing at
No. 44, 36th Lane, Colombo 06.

Appellant

SC Appeal 185/14
Court of Appeal No. CA 53 A&B/99/F
DC Colombo No. 16029/L

Vs.

Alawala Dewage Premalal Siriwardana of
No. 496/5, Ihala-Karagahamune
Kaduwela.

Respondent

Before	:	Hon. Jayantha Jayasuriya, PC, CJ Hon. L.T.B. Dehideniya, J Hon. S. Thurairaja, PC, J.
Counsel	:	Hijas Hisbulla for the Petitioner. H. Withanachchi for the Respondent.
Argued on	:	31.10.2019
Decided on	:	04.03.2020

Jayantha Jayasuriya, PC, CJ

The Plaintiff-Appellant-Respondent (hereinafter called the Plaintiff) sued the Defendant-Respondent-Appellant (hereinafter called the Defendent) in the District Court of Colombo for declaration of title to the premises, which is the subject matter of the action and for the ejectment of the Defendent from the said premises. The property in question as described in the schedule is a land of one perch and thirty eight decimal in extent situated at 4th Cross Street of Pettah and the building bearing assessment number 15 situated thereon. The Defendent resisted the action and preferred a claim in reconvention.

Both parties admitted that the Plaintiff's father who was the owner of the premises in question rented out the said premises to the father of the Defendent, E Subramaniyam in 1954. Thereafter the Defendent came in to occupy the said premises, after the demise of his father.

The Plaintiff claimed, that his father died intestate in 1985, leaving his mother and three siblings along with him, as heirs. Thereafter in 1988, three siblings and the mother alienated their undivided rights from and out of the property in question to him and, the plaintiff became the sole owner of the premises in question as from the year 1988. Three years thereafter, in 1991 the plaintiff requested the Defendant to attorn and pay the rent. However the Defendant did not attorn as per the said request. In 1992 the Plaintiff instituted action under consideration in the District Court.

Before the District Court, the Defendant refused to admit the ownership of the Plaintiff. Therefore one of the issues the Plaintiff raised, – issue no 4 – is whether the plaintiff is the owner of the property as pleaded in the plaint.

The Defendent *interalia* pleaded that the Plaintiff had no status or cause of action to institute the action and that the Plaintiff's action was debarred by section 547 of the Civil Procedure Code. One of the issues raised by the Defendent - issue number 14 – was whether the plaintiff could maintain the proceedings without the estate of the deceased A.D.P. Siriwardane, being properly administered.

At the conclusion of the evidence presented by both parties, the Learned District Judge answered issue number 4 as 'not proved' and issue no 14 in the negative.

The Learned District Judge by her judgment dated 23 November 1998 dismissed the plaint subject to costs and denied the claim in reconvention of the Defendent. The Learned Judge held that no order can be made declaring the Plaintiff as the owner of this property as the father of the plaintiff had died without a last will and no testamentary proceedings had been instituted in relation to this property.

Both parties appealed against the Judgment of the District Court. The Court of Appeal by its judgment dated 26 August 2014 allowed the appeal of the Plaintiff and directed the learned District Judge to enter decree accordingly. In their Judgment the Learned Judges of the Court of Appeal held that the Learned District Court judge's finding, that no title has passed onto the plaintiff by reason of the fact that the estate

of his deceased father had not been administered is a misstatement of law and amounts to a misdirection.

The Defendant, being dissatisfied with the Judgment of the Court of Appeal sought leave of the Court of Appeal to appeal to the Supreme Court and the Court of Appeal by its Order dated 03 September 2014, allowed the leave to appeal application of the Defendant.

The substantial question on which the Court of Appeal granted leave, reads as follows. "Where the action is to recover immovable property on the basis of non-attornment and the defendant has put in issue and challenged the plaintiff's right to recover the property in view of the bar contained in section 547 of the civil Procedure Code, can judgment be entered in favour of the plaintiff without taking into consideration, particularly the pleas of the defendant that the property is of the value of Rs 3,000,000/- but pleaded that the father of the plaintiff died and did not leave and estate of administrable value".

The Defendan's main position before this court is that the plaintiff has no legal status to sue the Defendant as there is a failure to obtain administration of the property in question and therefore fail to satisfy the pre condition imposed by section 547 of the Civil Procedure Code.

The Plaintiff submitted that the plaintiff's action cannot be treated as either a *'rei vindicatio'* or an action for declaration of title. It is his position that he had to institute action treating the Defendant as a trespasser even though initially the

defendant was treated a tenant by attornment. It is his position, that the learned trial judge erred when these proceedings were equated to a typical declaration of title case.

The Plaintiff further claims that the property rights of a deceased person would pass to the heirs by the operation of common law, in the absence of a testamentary disposition such as last will. He relies on the judgment in **Silva v Silva,** 10 NLR 234. He also submits that heirs of the deceased landlord become vested with the contractual rights and obligations in respect of the premises with the demise of the landlord. It is his submission that this legal proposition can be deduced from the judgment of this court in **Mohamed v Public Trustee**, 1978-1979-80 I SLR 01. It is his contention that the provisions of Section 547 of the Civil Procedure Code would not debar the proceedings in question as this is not an action for a declaration of title or a *rei vindicatio* action.

Two main aspects will be considered in deciding this matter. Firstly the scope of Section 547 of the Civil Procedure Code and secondly the nature of the proceedings that were before the District Court. For convenience, section 547 of the Civil Procedure Code as it was in force in the year 1992, is reproduced below.

"No action shall be maintainable for the recovery of any property, movable or immovable, in Sri Lanka belonging to or included in the estate or effects of any person dying testate or intestate in or out of Sri Lanka within twenty years prior to the date of institution of the action, where such estate or effects amount to or exceed in value the sum of twenty thousand rupees unless grant of probate or letters of administration shall first have been issued.

In the event of any such property being transferred in any manner other than under the provisions of subsection (1) of section 539B of this Ordinance or under section

28 of the Estate Duty Ordinance or section 22 of the Estate Duty Act, as the case may be, without such probate or administration being so first taken out, every transferor or transferee of such property shall be guilty of an offence, and in addition to any penalty imposed under this Ordinance, it shall be lawful for the State to recover from such transferor and transferee or either of them, such sum as would have been payable to defray estate duty. The amounts so recoverable shall be a first charge on the estate or effects of such testator or intestate in Sri Lanka or any part of such estate or effects, and may be recovered by action accordingly."

It is pertinent to observe that one of the issues framed before the trial court was "whether the plaintiff is the owner of the property as pleaded in the plaint". The learned District Judge answered this issue as 'not proved'. The learned District Judge held that no determination can be made declaring the plaintiff as the owner of the property. The reason being that no proper inheritance can take place from a transfer without having testamentary proceedings in place, in a situation where the initial owner of the property had deceased intestate.

It is settled law that succession of the property of a deceased person does not depend on the institution of testamentary proceedings. Succession and inheritance of the property of a deceased person will have to be determined in accordance with the legal principles governing the same. It had been held that "On the death of a person his estate, in the absence of a will, passes at once by operation of law to his heirs, and the *dominium* vests in them. Once it so vests they cannot be divested of it except by the several well-known modes recognised by law" (Grenier A.J in **Silva v Silva *at el*** (Full Bench) 10 NLR 234 at 242.). It was further observed that "An administrator in Ceylon deals with immovable property and applying the English Law it seems clear that no conveyance from an administrator is necessary to pass title to the heirs, for that has already passed by operation of law" (**Silva v Silva *at el***, 10 NLR 234 at 244).

Section 547 of the Civil Procedure Code does not deal with either inheritance or succession of the property of a deceased person. Therefore, this section has no impact on a title derived through succession or inheritance. However it is important to note that the plaintiff in this case claims title in two different lines.

It is admitted that the plaintiff was not the sole heir of the deceased. He was a joint heir with the other heirs namely the mother and three siblings. Therefore with the death of the father, the plaintiff derived co-ownership of the property along with the other four heirs. Section 547 has no application or impact on this aspect of succession.

Three years thereafter the other co-owners transferred their rights to the plaintiff. It is admitted that the aforesaid transfer between the co-owners had taken place without a grant of probate or letters of administration first have been issued. The plaintiff did not reject the suggestion that the value of the property concerned at the time the co-heirs gifted to him, is approximately two million rupees even though the Deed of Gift dated 1.6.1988 which was produced marked P3 has given the value as sixty five thousand rupees.

Section 547 of the Civil Procedure Code is in two parts. The first part deals with regard to the maintainability of certain types of actions. The scope of this part of the section will be dealt with later in this decision. The second part deals with situations of the transfer of property belonging to the estate of a person dying testate or intestate, where such transfers had taken place without a grant of probate or letters

of administration first have been issued where the value of such property exceeds twenty thousand rupees. According to this provision, both the transferor and the transferee are guilty of an offence unless the transfer had taken place within the limited instances recognised by the provision it self.

An examination of the facts of this case reveal that both the plaintiff and the co-heirs have breached this provision and therefore are guilty of an offence. However, it is necessary to consider whether section 547 invalidates any transfer that had taken place in breach of that provision?

In **Hassen Hadjiar v Levane Marikar** (15 NLR 275 at 279) Wood Renten J held "Section 547 of the Code does not prohibit the transfer of property which ought to have been, but has not been, administered. It penalizes such a transfer, but the language in which the penalty is imposed as well as that of the section as a whole point, in my opinion, to the conclusion that the Legislature did not intend to do anything more than this".

I see no reason to deviate from this view. Therefore I hold that the Plaintiff has derived title to the property in question lawfully.

However the remaining issue to be resolved is whether there is any bar imposed on the Plaintiff in the context of these proceedings by operation of Section 547. Limitation imposed in the first part of section 547 relates to property of a deceased person, which is twenty thousand rupees, or more in value. It's applicability in scope is in relation to the *'actions for the recovery of (such) property'* (emphasis

added). The said provision deals with the *'maintainability'* (emphasis added) of such actions. Restriction imposed on the maintainability of such action is that the need to have the grant of probate or letters of administration have been issued first, or a period of twenty years have lapsed since the death of the initial owner.

The issue that arises therefore is whether the plaintiff, even he is the rightful owner, could he have maintained these proceedings?

It is held that "..section 547 in unmistakable language rendered an action not maintainable without due administration for the recovery of any property included in an intestate estate. In interpreting that section this court laid down that it formed a statutory bar which could not be got over by the mere acquiescence, or even by the express agreement of the parties to any particular litigation" - Wendt J in **Gunaratne v Perera Hamine** 6 NLR 373 at 376.

Plaintiff's position in this regard is that the action in the District Court is not an action 'for the recovery of property'. It is his position that the Plaintiff's case cannot be treated in law as either a *'rei vindicatio'* or an action for declaration of title and therefore the limitation in Section 547 is not applicable. I am not inclined to decide in favour of this assertion of the plaintiff. Examination of the prayers in the plaint and the issues raised by the plaintiff, clearly reflect that the action concerned is to recover the property from the defendant. Infact in **Ponnamma v Arumugam** (8 NLR 223) the Privy Council held that the limitation in Section 547 of the Code of Civil Procedure is applicable to a partition action. In **Kandiah v Karthigesu** 31 NLR 172 even an action to declare that the signature of the deceased in two deeds are

forgeries was considered as ‘action to recover property’ coming within the purview of Section 547. Therefore the proceedings relating to this matter is an action for the recovery of property as coming within the purview of Section 547 of the Civil Procedure Code.

In view of these findings taken together with the admitted facts in the case I hold that the action initiated by the Plaintiff in the District Court comes within the purview of Section 547 of the Civil Procedure Code.

Therefore the substantial question of law upon which leave was granted to this Court should be answered in the negative.

However, in deciding the remedy that can be granted, this court has to consider another issue namely the effect of Section 547 on the proceedings before the District Court.

The Learned trial judge having come to the conclusion that no order can be made declaring the plaintiff as the owner of the property due to non-satisfaction of Section 547 proceeded to dismiss the plaint. It is pertinent to note that the trial judge’s decision to dismiss the plaint is not in accordance with the jurisprudence on this matter.

In **Alagakawandi v Muttumal** 22 NLR 111, recognised “that the words ‘no action shall be maintainable’ did not amount to the same thing as ‘no action shall be instituted’. In **Ponnamma v Arumogam (PC)** it is observed that “whenever it

appears in the course of a case which a Court is trying, that administration is necessary, it becomes the duty of that Court to see that the provisions of Section 547 are complied with before the litigation proceeds any further" (8 NLR 223 at 225). In **Hassen Hadjiar v Levane Marikar** Court acknowledged that the jurisprudence recognised "while section 547 of the Code is imperative it was open to the Court to give the party suing an opportunity of taking out the necessary administration." The court further held that "The primary object of Section 547 is to protect the revenue. That object is obviously secured by the refusal of the Courts to allow an action for the recovery of property liable to administration, but not administered, to proceed until a grant of administration has been obtained. We ought not to place upon section 547 an interpretation which its language does not compel us to adopt, and which, as in the present case, can only serve to support purely technical objections" (15 NLR 275 at 280). In **Jayawickrama v David Silva**, Supreme Court cited with approval the following finding of the trial Court in relation to Section 547 of the Civil Procedure Code - "this section does not say that action cannot be instituted. The action cannot be maintained without obtaining letters of administration. The decree can be entered after such letters of administration have been obtained" (76 NLR 427 at 430).

In relation to the proceedings under consideration, the father of the plaintiff died intestate in the year 1985 and the co-heirs transferred their rights to the plaintiff in the year 1988. Action to recover the property in question was instituted in 1992. Therefore the proper course of action that should have been adopted by the trial judge was to have given an opportunity for the Plaintiff to satisfy the requirements of Section 547.

The learned trial judge in entering the judgment mainly focused only on this issue. The judgment does not reflect any evaluation of the evidence and decisions relating to other issues. It is also pertinent to note that the time limitation recognised under Section 547 namely twenty years had elapsed now. Therefore the limitation under Section 547 is no longer in operation relating to the property in question.

The main issue that had been addressed both by the trial court as well as the appeal court is whether the plaintiff could have maintained these proceedings. However, the Court of Appeal has come to the conclusion that the Plaintiff should have succeeded in the District Court and answered the issues raised by the plaintiff in his favour. Thereafter made order directing the learned District Judge to enter judgement for the Plaintiff as prayed for. However the judgement of the Court of Appeal does not reflect a proper analysis of the evidence relating to other issues. It is also pertinent to note that no submissions were made before this Court on other issues, as the sole issue on which leave was granted had been the applicability of Section 547.

Under these circumstances this court is not in a position to make a determination on the other issues raised before the trial court. We are mindful of the fact that this is a matter where proceedings had been instituted in the District Court in the year 1992. Yet, I am of the view that the only way, justice can be served to both parties is by ordering a re-trial in this matter.

Taking into account all the factors that are enumerated hereinbefore both judgments, namely the Judgment of the Court of Appeal dated 26.08.2014 and the

judgment of the District Court dated 02.10.1998 are set aside and a re-trial is ordered. The District Court is directed to give priority to this matter and conclude proceedings without delay.

Chief Justice

L.T.B. Dehideniya, 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 from the Judgment dated 2nd of October 2014 of the High Court Kalutara in case No. HC Kalutara 623/2013 under section 14 (2) of the Maintenance Act No. 37 of 1999

Chandani Jayasinghe
"Samagi", Kalupahana,
Poruwadanda.

Petitioner

SC Appeal 203/2015
SC SPL LA 220/2014
HC-Kalutara 623/2013
MC Horana Case No. 55671

Vs,

Neelahenndi Sisira Kumara De. Silva
"Samagi", Kalupahana,
Poruwadanda.

Respondent

And between

Chandani Jayasinghe
"Samagi", Kalupahana,
Poruwadanda.

Petitioner-Appellant

Vs.

1. **Neelahenndi Sisira Kumara De. Silva**
"Samagi", Kalupahana,
Poruwadanda.

Respondent-Respondent

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

Respondent

And Now Between

Chandani Jayasinghe
"Samagi", Kalupahana,
Poruwadanda.

Petitioner-Appellant-Petitioner

Vs,

Neelahenndi Sisira Kumara De. Silva
"Samagi", Kalupahana,
Poruwadanda.

Respondent-Respondent-Respondent

Before: **Justice Vijith K. Malalgoda, PC**
Justice Murdu N. B. Fernando, PC
Justice E.A.G.R. Amarasekera

Counsel: **Mr. Saliya Peiris PC with Susil Wanigapura for the Petitioner-Appellant-Petitioner**
Mr. Shyamal A. Collure with A.P. Jayaweera, P.S. Amarasinghe and Ravindra S. de. Silva for the Respondent-Respondent-Respondent

Argued on 07.11.2019, 07.02.2020

Judgment on 26.06.2020

Vijith K. Malalgoda PC J

The Applicant-Appellant-Petitioner (hereinafter referred to as the Petitioner) had filed a Special Leave to Appeal Application before this court after her application for Leave to Appeal made under section 14 (2) of the Maintenance Act No 37 of 1999 was rejected by the learned High Court Judge of Kalutara. On 29th October 2015, the said Special Leave to Appeal Application was supported and the court granted (Special Leave) on the questions of law set out in the paragraph 19 (a), (b) and (c) of the Petition dated 13th of November 2014 which reads as follows;

(a) Did both the learned Magistrate and the learned High Court Judge err in law in failing to consider the inadequacy of evidence to establish that the Respondent–Respondent–Respondent (hereinafter referred to as the Respondent) has sufficiently maintained the children as provided by the section 2 (2) of the Maintenance Act No 37 of 1999 (hereinafter referred to as the Maintenance Act or the Act) and thereby failed to make a maintenance order in respect of the elder child?

(b) Did both the learned Magistrate and the learned High Court Judge err in law in accepting the evidence of witnesses called on behalf of the Respondent, who were interested and partial?

(c) Has the learned High Court Judge failed to consider that the amount of maintenance which has been awarded in respect of the 2nd child is inadequate in the light of the means and circumstances of the petitioner who is caring for the said child?

As revealed before this court, the Petitioner has filed a Maintenance Application in terms of the Section 2 (2) of the Maintenance Act in the Magistrate Court of Horana seeking a maintenance order of Rs 10,000/- for the eldest child and Rs 20,000/- for the youngest child who is suffering from hyperactive disorder and needs special care. The learned Magistrate having considered the

application of the Petitioner, made an interim maintenance order in terms of the section 2 (2) of the Maintenance Act to pay a sum of Rs 5000/- for each child per month.

During the inquiry before the Magistrate's Court, the Petitioner herself and one witness, namely Don Bandusena Wijesuriya representing the Bank of Ceylon gave evidence, and her case was closed. During the Respondent's case, the Respondent and four other witnesses gave evidence. At the conclusion of the inquiry, the learned Magistrate had delivered the judgment making a maintenance order of Rs 10,000/- only with regard to the younger child. The learned Magistrate made no Maintenance order with regard to the eldest child who was only 13 years old at that time.

Being dissatisfied with the said Judgment of the learned Magistrate dated 13th December 2012, the Petitioner had preferred an Appeal to the Provincial High Court of Kalutara by Petition dated 26th December 2012. The learned High Court Judge who considered the said Appeal had dismissed the Petitioner's appeal and affirmed the Judgment of the learned Magistrate.

Being aggrieved by the Judgment of the learned High Court Judge dated 02nd of October 2014, the Petitioner sought Leave to Appeal from the Provincial High Court of Kalutara in terms of Section 14 (2) of the Maintenance Act, but the said Application was refused by the High Court and the Petitioner had come before the Supreme Court by way of a Special Leave to Appeal.

As observed by this court, the entire case for the Petitioner is based on the section 2 (2) of the Maintenance Act which reads as follows;

> *"Where any parent **having sufficient means neglects or refuses to maintain** his or her child 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 refusal**, order such person to make a monthly allowance for the maintenance of such child at such monthly rate the **Magistrate***

***thinks fit**, having regard to the **income of the parents and the means and circumstance of the child**."*

[emphasis added by me]

When going through the aforementioned provision, it can be identified that in a maintenance application, filed before a Magistrate seeking a maintenance order, the discretion to decide the maintenance allowance for the children is vested upon the Magistrate who acts under the above provision. In addition to this, there is a requirement under the section 2 (2), of the Act, such person against whom the maintenance order is made should have sufficient means to maintain his or her child and then neglects or refuses to maintain the child as the case may be. With regard to the question of sufficient means, it is an admitted fact that both the Petitioner as well as the Respondent were employed as Samurdi Development Officers and drawing a monthly salary. In addition to the above, the Petitioner had taken up the position that a considerable amount from her salary was deducted as a monthly installment for a housing loan she has obtained and the Respondent had additional income by engaged in journalism and photography as part-time jobs.

Even though the Respondent had disputed some of the sources referred to above, I see no reason to consider them in my Judgment since, for me the main question that has to be considered by this court is not, "whether the Respondent had sufficient income to maintain his children" but, "whether the Respondent had neglected to maintain his children."

Accordingly, I will now proceed to consider the main question that is to be considered in the instant case, i.e. whether the Respondent has sufficiently maintained the two children as required by the section 2 (2) of the said Act.

As referred by me in this judgment, the Petitioner gave evidence before the learned Magistrate at the inquiry, that was held under sections 12 and 13 of the Act and summoned another bank official to give evidence on behalf of her.

In her evidence before the Magistrate she explained the expenditure she has to undergo for her two children with special reference to the additional expenditure she has to meet with regard to their youngest son who is taking treatment for Hyperactive disorder including medicine, doctors' charges and salary of an attendant.

Under cross examination, the Petitioner admitted that the Respondent had shared the day to day expenses including the gas bill, electricity and telephone bills and some other expenditures until August 2009 but took up the position that after August 2009 the relationship between her and her husband had deteriorated and thereafter her husband did not spend anything for their family. In April 2010, she decided to file the instant application before the Magistrate's Court. However, she continued to stay in the same house belongs to her husband.

However, when she was further cross examined with regard to the payments of utility bills, she admitted the Respondent making those payment as follows;

> ප්‍ර: ඒ විදුලි බිල් ගෙවීම නතර කල දිනය මතක නැද්ද?
>
> උ: මා නඩත්තු නඩුව ගොනු කලේ 2010 අප්‍රියෙල් මාසයේ. ඉන් පසු ඔහු විදුලි බිල ගෙව්වේ නැහැ.
>
> ප්‍ර: ඒ දක්වා විදුලි බිල ගෙව්වේ පුරුෂයා.?
>
> උ: ඔව්
>
> ප්‍ර: ඒ දක්වා දුරකථන බිල ගෙව්වේ පුරුෂයා.?
>
> උ: ඔව්

[At page 71 of the brief]

When the Petitioner was cross examined with regard to the payment of the children's School transport by her husband, she denied making any payment by her husband as follows;

ප්‍ර: තමා කිව්වා පාසැල් අධ්‍යාපන කටයුතු සඳහා වියදම් වන ප්‍රමාණය

උ: ඔව්

ප්‍ර: ඒ බිල්පත් කවිද ගෙව්වේ?

උ: මම

ප්‍ර: දිගටම ගෙව්වේ තමාද?

උ: 2010 ජනවාරි දක්වා ගෙව්වේ මම

ප්‍ර: කවිද ගෙව්වේ?

උ: මම

ප්‍ර: 2010 ජනවාරි වලට පෙර පුරුෂයා කවදාවත් වාහනවලට වියදම් කලේ නැහැ?

උ: ප්‍රවාහන වියදම් ගෙව්වේ නැහැ.

ප්‍ර: කිසිම මාසයක ගෙව්වේ නැහැ කියලද කියන්නේ?

උ: ඔව්

[At Pages 71-72 of the brief]

When she was further cross examined with regard to the medical expenditure for the youngest child, she admitted that the Respondent accompanied her and the child to several hospitals and met those expenditure. However, when the Petitioner was cross examined with regard her request, her answer was that she needs maintenance to cover the basic needs only. The said question and answer read as follows;

ප්‍ර: තමුන් නඩත්තු ඉල්ලීමට යම් යම් අංග තිබෙනවාද?

උ: මගේ දරුවන්ගේ මූලික අවශ්‍යතා සඳහා පමණයි මා නඩත්තු ඉල්ලා සිටින්නේ නිවසේ වියදම් සඳහා මම ඉල්ලන්නේ නැහැ.

Among the several witnesses summoned by the Respondent to give evidence on behalf of him, the Respondent had summoned his 13 years old eldest son Nadula Tharupathi de Silva to give evidence on behalf of him. During the examination in chief witness admitted the following

"අපි එකට ඉන්න කොටගෙදර අවශ්‍යතා සැපයුවේ තාත්තා. ගෑස් බිල, විදුලි බිල්පත් ගෙව්වේ තාත්තා. තාත්තා සහල්, තුනපහ, මස්, මාළු ගේනවා. අම්මත් එක එක වීවා ගේනවා. පාසල් යාමට අවශ්‍ය පොත්පත් අරන් දුන්නේ තාත්තා. නඩුව තිබුනට මාව සහ මල්ලිව නඩත්තු කරන එක තාත්තා නතර කලේ නෑ. අවශ්‍යතා දිගටම කලා."

[At page 213 of the brief]

With regard to the expenditure for the school transport witness gave the following evidence;

"මම යන්නේ හොරණ රාජකීය විද්‍යාලයට 10 වසරේ ඉගෙන ගන්නවා. මම ඒ විද්‍යාලයට ගියේ ස්කූල් වෑන් එකේ. දැන් යන්නේ පාරේ බස් එකේ. මම 2011 වෙනකම් පාසැල් වෑන් රථයේ ගියේ. ස්කෝලෙ ගිය දවසෙ ඉඳලා යන්නේ ස්කූල් වෑන් එකේ. මේ වෑන් එකට සල්ලි ගෙව්වේ තාත්තා. සමහර වෙලාවල් වලට මගේ අතේ සල්ලි අරිනවා. එහෙම නැතිනම් තාත්තා ඒ ගෙදරට ගිහින් සල්ලි දීලා එනවා. ඒ වෑන් එක අයිති අයගේ ගෙදරට යනවා. ඒ සල්ලි දුන්නට පස්සේ ලේඛනයක් මාක් කරනවා. මේ තියන්නේ එම ලේඛනයේ ඡායා පිටපතක්. 2009 ට අදාල කාඩ් පතේ ඡායා පිටපතක්. මුදල් බාර දුන් අත්සන තාත්තාගේ. බාර ගත් බවට අත්සන තියෙනව. (2010 වර්ෂයට අදාල කාඩ් පත පෙන්වා සිටී) 2010 මැයි දක්වා මුදල් ගෙවලා තියෙන්නේ තාත්තා. ජනවාරි සිට මැයි දක්වා මුදල් ගෙවලා තියෙන්නේ, තාත්තා. ජූනි, ජූලි දක්වා ගෙවලා තියෙන්නේ අම්මා. (2011 කාඩ් පත පෙන්වා සිටී) මේකේ මුදල් ජනවාරි සිට සැප්තැම්බර් දක්වා අම්මා ගෙවලා තියෙනව. ඔක්තෝම්බර් මුදල් ගෙවලා තියෙන්නේ තාත්තා. මම ඉගෙන ගන්නේ 10 වසරේ. 2009 සිට 2010 මැයි දක්වා තාත්තා තමයි මුදල් ගෙවලා තියෙන්නේ වෑන් එකට. මේ නඩුව දැම්මට පස්සේ අම්මා මාස කිහිපයක් ගෙවුවා. දැන් මම යන්නේ පාරේ බස් එකේ. ඒකට සීසන් අරන් දෙන්නේ තාත්තා"

[At page 214 of the brief]

When the above evidence is considered with the evidence of the Petitioner and the Respondent, it appears that the Respondent was looking after the expenditure of home as well as the two children until the maintenance action was filed in April 2010. According to the evidence of Nadula Tharupathi, the eldest son of both the Petitioner and the Respondent, the Respondent continued to look after some of their requirements including the bus season tickets even after the maintenance action was pending before the Magistrate's Court.

The Respondent whilst testifying before the Magistrate, confirmed that he met some of the expenditure at home and most of the expenditure of the children until the instant case was filed before the Magistrate's Court, and started paying maintenance based on the interim order made by the learned Magistrate thereafter.

However, during the arguments before us, the learned President's Counsel who represented the Petitioner, argued the importance of making an order based on the proportionality of the income of both parties when the Petitioner as well as the Respondent are employed and drawing monthly salaries. If one party is purposely ignoring the maintenance of his or her children, an order based on proportionality might help the other party to ease the additional burden on herself or himself but, when going through the evidence led before the Magistrate, at the inquiry held under the provision of the Maintenance Act No 37 of 1999, it is clear that there was adequate evidence to establish that the Respondent too had helped the family, even after the instant application was pending before the Magistrate's Court.

When the Respondent started paying Maintenance as per the interim order, he had stopped making certain payments but, that cannot be considered against him in the absence of any complaint that he failed to obey the court order.

In the case of the ***Sinaval vs. Nagappa (1916) Volume VI Balasingham's Note of Cases 26***, Shaw J observed:

> "Maintenance cases are in the nature of civil proceedings, and the Court of Appeal, although sitting by way of re-hearing, ought to give very great weight to the finding of fact of the Magistrate who has seen the witnesses, and ought not to reverse his decision on a question of fact unless it is clear from the evidence or from some undisputed fact that he has gone wrong"

On perusal of the facts of the instant case, it is observed that there is no necessity to interfere with the findings of the learned Magistrate who has come to a correct finding that the Petitioner has failed to provide adequate evidence to establish that the Respondent has not sufficiently maintained the children as provided by the section 2(2) of the Maintenance Act, at the time the maintenance action was filed before the Magistrate's Court.

In addition, the learned Magistrate has made an Order for the Respondent to pay Rs.10,000/- for the younger child. Such amount of maintenance allowance is not for the total refusal or neglect on the part of the Respondent to maintain the younger child, but to cover the extra expenditure to be incurred by the mother for medical expenditure of the 2nd child.

For the reasons given in my judgment I see no reason to interfere with the findings of both the learned Magistrate and the learned High Court Judge of Kalutara.

The appeal is dismissed. No Costs.

Judge of the Supreme Court

Justice Murdu N. B. Fernando, PC

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 Appeal under and in terms of Section 9(a) of the High Court of the Provinces (Special Provisions) Act No.19 of 1990 of the Democratic Socialist Republic of Sri Lanka.

SC APPEAL NO.204/2015

High Court Embilipitiya No.APL/02/2015.
MC Embilipitiya No. 94991/13.

Officer-in Charge,
Police Station,
Sewanagala.

COMPLAINANT

Vs.

Mohamed Irupan Impar,
No.30, Randola,
Balangoda.

2nd SUSPECT

AND BETWEEN

Mohamed Irupan Impar,
No.30, Randola,
Balangoda.

2nd SUSPECT-APPELLANT

Vs.

01. Officer-in Charge,

Police Station,

Sewanagala.

COMPLAINANT-RESPONDENT

02. Attorney General,

Attorney General's Department,

Colombo 12.

RESPONDENT

AND NOW BETWEEN

Mohamed Irupan Impar,

No.30, Randola,

Balangoda.

2ND SUSPECT-APPELLANT-APPELLANT

Vs.

01. Officer-in Charge,

Police Station,

Sewanagala.

COMPLAINANT-RESPONDENT- RESPONDENT

02. Attorney General,

Attorney General's Department,

Colombo 12.

RESPONDENT-RESPONDENT

BEFORE : **PRIYANTHA JAYAWARDENA, PC, J.**
L.T.B. DEHIDENIYA, J. and
S. THURAIRAJA, PC, J.

COUNSEL : Lakshan Dias with Shafnas Shanteen and Dayani Panditharatne for the 2nd Defendant- Appellant.
Chrisanga Fernando, SC for the Respondents.

ARGUED ON : 12th June 2019.

DECIDED ON : 29th January 2020.

S. THURAIRAJA, PC, J.

Background

The Second Suspect - Appellant Mohomed Irupan Impar (hereinafter sometimes referred to as Appellant) was originally charged under **Section 368 (a) of the Penal Code** by the Magistrate of Embilipitiya on the 1st of December 2012, for theft of five cows and a buffalo. The Appellant pleaded guilty. The Magistrate accepted the plea of the Appellant and sentenced him to 6 months rigorous imprisonment and imposed a fine of Rs 1500, in default one-month simple imprisonment. Being aggrieved with the said sentence, the Appellant preferred an appeal to the Provincial High Court of Sabaragamuwa and submitted that the sentence is excessive and, that he should be given a non – custodial sentence. After the matter was argued, the Learned High Court judge after giving reasons dismissed the appeal.

The Appellant being dissatisfied with the said order submitted an appeal to the Supreme Court. The matter was taken up for argument and both counsel made their submissions. The issue of law to be considered is, has the Magistrate erred in

not providing a suspended sentence to the Appellant despite him pleading guilty to the charge.

Considering all material before us, facts reveal that the Appellant was seen at around 2.00 am in the wee hours of the day, stealing cows. He was identified by the owner of the cows at an identification parade. When the matter was taken up for trial the Appellant had pleaded guilty.

I carefully considered the plea of guilty in light of the available evidence before the court. Appellant had not challenged his plea of guilt; hence we have no reason to interfere with the conviction.

Since the Appellant had pleaded guilty, he had no right under Section 14(b)(i) of the Judicature Act other than the right he had available to him to appeal against the sentence. Further, considering the sentence in light of Section 368 of the Penal Code, I find that there is no illegality or impropriety.

Issue of Bargaining of Sentence

The issue raised in this appeal was, with regard to the supposed confusion that is said to have been created towards the Appellant. The counsel for the Appellant submitted that the Appellant "*thought*" that when he said he will pay compensation of Rs. 50, 000/-, he would be given a suspended sentence.

In criminal trials in countries such as the United States and other modern Common law jurisdictions, the accused has three options as far as pleas are concerned: A) guilty, B) not guilty or C) plea of nolo contendere. As held in a US case **State ex rel Clark v. Adams [111 S.E.2d 336 (1959)]**, the plea of "*Nolo Contendere*" sometimes referred to also as "*Plea of Nolvut*" or "*Nolle Contendere*" means, in its literal sense, "I do not wish to contend", and it does not origin in early English Common Law. As per the practice (of US courts), a criminal case is disposed based on a guilty plea bargained or nolo contendere plea.

In this context there arises a necessity to differentiate and distinguish between a "plea of guilty" and "plea bargaining". The Ahmadabad High Court in **State of Gujarat v Natwar Harchandji Thakor (2005 CriLJ 2957)** (decided on 22 February 2005), brought out the distinction between "*plea of guilty*" and "*plea bargaining*". Accordingly, the courts said that both things should not have been treated, as the same. There appears to be a mix up. Nobody can dispute that "plea bargaining" is not permissible. However at the same time, it cannot be overlooked that raising of a "plea of guilty" at the appropriate stage as provided for in the statutory procedure for the accused and showing the special and adequate reasons for the discretionary exercise of powers by the trial Court in awarding sentences cannot be admixed or should not be treated the same.

Section 183 of the Code of Criminal Procedure Act explains the procedure upon which a plea of guilty is accepted by a Magistrate in a trial:

> 183(1) *If the accused upon being asked if he has any cause to show why he should not be convicted makes a statement which amounts to an unqualified admission that he is guilty of the offence of which he is accused, his statement shall be recorded as nearly as possible in the words used by him; and the Magistrate shall record a verdict of guilty and pass sentence upon him according to law and shall record such sentence*:
>
> Provided that the accused may with the leave of the Magistrate withdraw his plea of guilt at any time before sentence is passed upon him, and in that event the Magistrate shall proceed to trial as if a conviction has not been entered.

Whether a "plea of guilty" amounts to "plea bargaining" is a matter of proof. Every "plea of guilty" which is a part of the statutory process in a criminal trial, cannot be said to be a "plea bargaining" *ipso facto*. It is a matter requiring evaluation of the factual profile of each accused in criminal trial before reaching a specific conclusion of it being only a "plea bargaining" and not a plea of guilty simpliciter. It must be

based upon facts and proof, not on fanciful surmises without the necessary factual supporting profile for that.

In **State of Uttar Pradesh v. Chandrika (2000 Cr.L.J 384)** at 386, the Indian Supreme Court held that it is settled law that on the basis of Plea Bargaining the court cannot dispose of the criminal cases. Court held in this case that mere acceptance or admission of guilt should not be reason for giving a lesser sentence. The Accused cannot bargain for reduction of sentence merely because he pleaded guilty. Hence, by considering the basic principles of administration of justice merits alone should be considered for conviction and sentencing, even when the accused confesses to guilt, for it is the constitutional obligation of the court to award appropriate sentence.

In approaching the question of sentence, South African courts have taken into rumination '**the triad consisting of the crime, the offender and the interests of society**'. This was explained in **[S v Rabie 1975 (4) SA 855 (A) at 862G-H]** where the courts found the "punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances." In Rabie's case at 862A-B Holmes JA reiterated that "the main purposes of punishment are deterrent, preventive, reformative and retributive."

While it was perceived in **S v Karg 1961 (1) SA 231 (A)** at 236A, that the *"retributive aspect of punishment has tended to yield ground to the aspects of prevention and correction…The punishment should not only reflect the shock and indignation of interested persons and of the community at large and so serve as a just retribution for the crime but should also deter others from similar conduct."*

What appears from these cases is that in other countries such as South Africa retribution and deterrence are the proper purposes of punishment and they must be accorded due weight in any sentence that is imposed. Given that both South Africa and Sri Lanka follow the same systems of Roman Dutch Law with principles of English Law and other private laws respective to each nation, even in Sri Lanka it could be

said that retribution and deterrence in its proper purposes of punishment could be accorded due weight in any sentence that is imposed. In my view each of the elements of punishment is not required to be accorded equal weight, but instead proper weight must be accorded to each according to the circumstances. Serious crimes will usually require that retribution and deterrence should come to the fore and that the rehabilitation of the offender will consequently play a relatively smaller role.

It should also be reiterated that the Appellant "*thought*" that when he said he'll pay compensation of Rs. 50, 000/- that he would be given a suspended sentence. This could also be considered as some form of sentence bargaining on the part of the accused.

Gunasekara J in **Attorney General v Mendis [(1995) 1 Sri L.R 138]** was of the opinion that *"once an accused is found guilty and convicted on his own plea, or after trial, the Trial Judge has a difficult function to perform. That is to decide what sentence is to be imposed on the accused who has been convicted. In doing so he has to consider the point of view of the accused on the one hand and the interest of society on the other. In doing so the Judge must necessarily consider the nature of the offence committed, the manner in which it has been committed the machinations and the manipulations resorted to by the accused to commit the offence, the effect of committing such a crime insofar as the institution or organisation in respect of which it has been committed, the persons who are affected by such crime, the ingenuity with which it has been committed and the involvement of others in committing the crime. 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 to surrender this sacred right and duty to any other person, be it counsel or accused or any other person. Further he went on to state that whilst plea bargaining is permissible in our view, sentence bargaining should not be encouraged at all and must be frowned upon"*. It is safe to say that this view still remains as a fundamental aspect of this court and sentence bargaining is still something that is be frowned upon.

As discussed earlier, it is the duty of a Trial judge to consider all the circumstances of the case. The triad of crime, offender and the interests of the society should be taken into consideration when delivering a judgment which should ensure it incorporates the purpose of a punishment namely deterrence and retribution among other purposes.

One such aspect that is commonly considered by a Trial Judge is to grant suspended sentence to offenders as envisaged in Section 303 of the Code of Criminal Procedure. In awarding a suspended sentence the rationale of it should be considered, which was explained by the Law Commission through a Memorandum to the Minister of Justice on the 13th October 1970. Such purpose of suspended sentences was explained as follows:

> (1) that no offender should be confined in a prison unless there is no alternative available for the protection of the community and the reform of the individual;
>
> (2) that imprisonment, with its obviously criminal associations, should not bring a non-criminal offender within its ambit;
>
> **(3) that an offender is given the opportunity of responding to incentives to good behaviour accompanied by the threat of drastic penal action, should he persist in criminal conduct**;
>
> (4) that the offender is treated as an individual who, despite the nature of the offence, is subjected to penal action related to his needs, his character and the possibility of his reform.
>
> (Emphasis added)

Further in the memorandum Professor C.H.S Jayewardene, Professor of Criminology in the University of Ottawa expressed the following opinion: *"the suspended sentence with its connotation 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 behaviour again. To this is added the supportive argument that 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." (Paragraph 5 of the memorandum)

The aforementioned view expressed shows the change in how punishments are to be meted out. In my view suspended sentencing could be considered as a progressive method of sentencing as it aims to rehabilitate and restore an offender whilst still having the option of incapacitating such an offender if they regress to former ways.

In this case it should be noted that the appellant submitted the appeal to the High Court and stated that the custodial sentence is unreasonable and unacceptable. On the perusal of the judgement of the Magistrate and the records, we find, according to the finger print record dated 8/9/2011, that the Appellant has a previous conviction, namely, High Court of Hambantota in case no. 304/07 had found him guilty under Section 140 and Section 300 of the Penal Code and sentenced him for 6 months and 2 years respectively and the same was suspended for a period of 10 years. The learned Magistrate in his judgement had considered these facts and imposed the aforementioned sentence.

In the given circumstances the Appellant cannot expect the Learned Magistrate to violate the provisions of the law to impose another suspended sentence when he is already serving a suspended sentence pending against him as this would be completely unacceptable. Such will pave the way for the offenders to commit offences and get away with it by throwing money. Sentencing is a sacred right vested with the judicial officer. The Magistrate exercised the same after evaluating all the circumstances of the case. The accused can submit their concerns by way of mitigatory circumstances to the court but it is unfair and unacceptable for him to form a question of the sentence. In the present case where the Appellant has

a previous conviction he cannot expect the judge to ignore the same and to start sentencing on a clean slate.

Considering all, I find that there is no merit in the appeal. Hence the appeal is dismissed. Registrar is hereby directed to send the case record to the Magistrate of Embilipitiya to implement the sentence.

Further the Registrar is also directed to forward the details of the second conviction to the High Court Judge of Hambantota, together with this judgment to activate the suspended sentences imposed against the appellant.

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 Appeal

Pahalage Manel Malkanthi Abeygunawardane
"Rendagewatta", Paiyagala South,
Paiyagala.

Plaintiff

SC Appeal 205/2016
SC/HCCA/LA App.No. 49/2015
WP/HCCA/GAM/281/2009 (F)
DC Gampaha Case No. 428/L

Vs

1. Hettiarachchige Podi Mahaththaya
   No.69, Samagi Mawatha,
   Nittambuwa.
2. Hettiarachchige Wijesundara
   No.10, Samagi Mawatha,
   Dangollawatta,
   Nittambuwa.

Defendants

AND

Hettiarachchige Wijesundara
No.10, Samagi Mawatha,
Dangollawatta,
Nittambuwa.

2nd Defendant-Appellant.

Vs

Pahalage Manel Malkanthi Abeygunawardane
"Rendagewatta", Paiyagala South,
Paiyagala.

Plaintiff-Respondent

Hettiarachchige Podi Mahaththaya
No.69, Samagi Mawatha,
Nittambuwa.

1st Defendant-Respondent

AND NOW BETWEEN

Hettiarachchige Wijesundara
No.10, Samagi Mawatha,
Dangollawatta,
Nittambuwa.

2nd Defendant-Appellant-Petitioner-Appellant

Vs

Pahalage Manel Malkanthi Abeygunawardane
"Rendagewatta", Paiyagala South,
Paiyagala.

Plaintiff-Respondent-Respondent-Respondent-Respondent

Hettiarachchige Podi Mahaththaya
No.69, Samagi Mawatha,
Nittambuwa. (Deceased)

1st Defendant-Respondent-Respondent-Respondent-Respondent

Hettiarachchige Wijesundara
No.10, Samagi Mawatha,
Dangollawatta,
Nittambuwa.

Substituted 1st Defendant-Respondent-Respondent-Respondent-Respondent

Before: Sisira J. de Abrew J
Vijith Malalgoda PC J &
Gamini Amarasekara J

Counsel: Rasika Dissanayake for the
2nd Defendant-Appellant-Petitioner-Appellant
M P Rajapakshe for the
Plaintiff-Respondent-Respondent-Respondent-Respondent

Argued on : 17.1.2020

Written submission
tendered on : 5.5.2017 by the 2nd Defendant-Appellant-Petitioner-Appellant

Decided on: 26.2.2020

Sisira J. de Abrew, J

Plaintiff-Respondent-Respondent-Respondent (hereinafter referred to as the Plaintiff-Respondent) filed this action inter alia seeking to get a declaration that the Deed of Transfer No.2199 dated 18.9.1997 is null and void.

The learned District Judge by his judgment dated 26.10.2009 granted the above relief claimed by the Plaintiff-Respondent. Being aggrieved by the said judgment of the learned District Judge, the 2nd Defendant-Appellant-Petitioner-Appellant who is the son of the 1st Defendant appealed to the Civil Appellate High Court Gampaha (hereinafter referred to as the Civil Appellate High Court). The learned Judges of the Civil Appellate High Court by their judgment dated 17.12.2014, affirmed the said judgment of the learned District Judge. Being aggrieved by the said judgment of the Civil Appellate High Court, the 2nd Defendant-Appellant-Petitioner-Appellant (hereinafter referred to as the 2nd Defendant-Appellant) has appealed to this court. This court by its order dated 1.11.2016 granted leave to appeal on questions of law set out in paragraphs 14(b),(d) and (h) of the Petition of Appeal dated 27.1.2015 which are set out below.

1. Whether the Respondent has failed to discharge the burden of proof to vindicate her title?
2. Whether the learned District Judge and as well as the learned Judges of the Civil Appellate High Court of Gampaha have erred in law by failing to appreciate the fact that the Respondent has failed to rebut the evidence of the Petitioner and as well as the Notary Public Mr. Crooz Morais who executed the said Deed bearing No.2199?
3. Whether the learned District Judge and as well as the learned Judges of the Civil Appellate High Court of Gampaha have erred in law by holding that the Respondent is entitled for damages when there was no iota of evidence

placed before the court by the Respondent to that effect?

The 2nd Defendant-Appellant is the son of the 1st Defendant. The 2nd Defendant-Appellant claims that his father had acquired title to the property in dispute by Deed of Transfer No.2199 dated 18.9.1997 attested by AERC Moraes Notary Public. The Plaintiff-Respondent claims that she acquired title to the property in dispute by Deed of Gift No.27 dated 9.12.1997 attested by Ranjika P Navaratne Notary Public. The Plaintiff-Respondent by his plaint seeks a declaration that Deed of Transfer No.2199 dated 18.9.1997 is null and void. Learned counsel for the Plaintiff-Respondent supported this position of the Plaintiff-Respondent. Learned counsel for the 2nd Defendant-Appellant submitted that Deed of Gift No.27 dated 9.12.1997 is null and void. I now advert to the above submissions. The donor in Deed of Gift No.27 dated 9.12.1997 is Sathasivam Achalingam and the vendor in Deed of Transfer No.2199 dated 18.9.1997 is also Sathasivam Achalingam. Sathasivam Achalingam on 14.7.1998 has made a statement to the police (produced as X5) to the effect that he, by Deed of Gift No.27 dated 9.12.1997 attested by Ranjika P Navaratne Notary Public, gifted the property in dispute to the Plaintiff-Respondent. He has further stated in the statement that he did not sign Deed of Transfer No.2199 dated 18.9.1997 supposed to have been attested by AERC Moraes Notary Public and that the signature found in the said deed was not his signature. Learned counsel for the 2nd Defendant-Appellant submitted that Sathasivam Achalingam had not given evidence at the trial. However we note that when the Plaintiff-Respondent made an application to the District Court to record the evidence of Sathasivam Achalingam before the commencement of the trial on the basis that Sathasivam Achalingam was an old person and a sick person, the 2nd Defendant-Appellant strongly objected to the said application. The EQD has given

evidence in this case and stated that he compared the purported signatures of Sathasivam Achalingam in both deeds with the signatures in the following documents.

1. Passport of Sathasivam Achalingam.
2. Affidavit of Sathasivam Achalingam dated 20.1.2003.
3. Statement made by Sathasivam Achalingam to the Police.
4. Passbook issued by Commercial Bank to Sathasivam Achalingam under the Account Number 8528826601.

The EQD in his evidence has stated that the purported signature of Sathasivam Achalingam in Deed of Gift No.27 tally with the signature of Sathasivam Achalingam found in the above documents but the purported signature of Sathasivam Achalingam in Deed of Transfer No.2199 does not tally with the signature of Sathasivam Achalingam found in the said documents. One of the attesting witnesses in Deed of Gift No.27 dated 9.12.1997 gave evidence and confirmed his signature in the deed. However the Defendant-Appellant did not call any of the attesting witnesses in Deed of Transfer No.2199 dated 18.9.1997 except the Notary Public who attested the said deed.

When I consider all the above matters, I hold that the learned District Judge was correct when he, in his judgment dated 26.10.2009, decided that the Deed of Gift No.27 dated 9.12.1997 is a genuine deed and that the Deed of Transfer No.2199 dated 18.9.1997 is null and void. I further hold that the learned Judges of the Civil Appellate High Court were correct when they in their judgment dated 17.12.2014 affirmed the judgment of the learned District Judge dated 26.10.2009. In view of the conclusion reached above, I answer the above questions of law in the negative.

For the aforementioned reasons, I affirm the judgment of the learned District Judge dated 26.10.2009 and the judgment of the Civil Appellate High Court dated 17.12.2014 and dismiss this appeal with costs.

Appeal dismissed.

Judge of the Supreme Court.

Vijith Malalgoda PC J

I agree.

Judge of the Supreme Court.

Gamini 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

Obawath Kankanamage Jinadasa
No.18, Bowala Road,
Mulgampola,
Kandy

Plaintiff

SC Appeal 208/2017
SC/HCCA/LA 238/2016
WP/HCCA/GAM/153/2010 (F)
DC Gampaha Case No. 859/L

Vs

1. Malwa Waduge Bandusoma
2. Manic Pura Hewage Seetha,
   Both of No. 385, 12/1,
   Shanthi Mawatha,
   Kirillawala.

Defendants

AND

1. Malwa Waduge Bandusoma
2. Manic Pura Hewage Seetha,
   Both of No. 385, 12/1,
   Shanthi Mawatha,
   Kirillawala.

Defendant-Appellants

Vs

Obawath Kankanamage Jinadasa
No.18, Bowala Road,
Mulgampola,
Kandy

Plaintiff-Respondent

AND NOW

1. Malwa Waduge Bandusoma
2. Manic Pura Hewage Seetha,
(Appearing by her Power of Attorney holder
Malwa Waduge Bandusoma)
Both of No. 385, 12/1,
Shanthi Mawatha,
Kirillawala.

Defendant-Appellant-
Petitioner-Appellants

Vs

1. Obawath Kankanamage Jinadasa (deceased)
No.18, Bowala Road,
Mulgampola,
Kandy

1A. Manic Pura Waduge Chulani
No.18, Bowala Road,
Mulgampola,
Kandy

Plaintiff-Respondent-
Respondent-Respondent

Before: Sisira J. de Abrew J
Vijith. K. Malalgoda PC J &
Gamini Amarasekara J

Counsel: S.N. Vijithsingh for the Defendant-Appellant-Petitioner-Appellants
Sudarshani Corray for the Plaintiff-Respondent-Respondent-Respondent

Argued on : 21.7.2020

Written submission
tendered on : 17.8.2018 by the Defendant-Appellant-Petitioner-Appellants
19.11.2018 by the Plaintiff-Respondent-Respondent-Respondent

Decided on: 9.9.2020

Sisira J. de Abrew, J
Plaintiff-Respondent-Respondent-Respondent (hereinafter referred to as the Plaintiff-Respondent) filed this action against the 1st and the 2nd Defendant-Appellant-Petitioner-Appellant (hereinafter referred to as the Defendant-Appellants) seeking a declaration, inter alia, that the Plaintiff-Respondent is the owner of the property in question and to eject the Defendant-Appellants from the property in question. The learned District Judge by her judgment dated 30.8.2010 held in favour of the Plaintiff-Respondent. Being aggrieved by the said judgment of the learned District Judge, the Defendant-Appellants filed an appeal in the Civil Appellate High Court. The learned Judges of the Civil Appellate High Court by their judgment dated 19.4.2016 dismissed the appeal of the Defendant-Appellants. Being aggrieved by the said judgment of the learned Judges of the Civil Appellate High Court, the Defendant-Appellants have

appealed to this court. This court by its order dated 31.10.2017, granted leave to appeal on questions of law set out in paragraphs 12(i),(ii),(iii) and (iv) of the Petition of Appeal dated 27.5.2016 which are set out below.

(i) Whether the learned High Court Judges of the Civil Appellate High Court of Gampaha erred in law by not considering the question that although Princy Smarawickrama did not have the title to the property in question at the time of entering into a lease agreement, since she had the possession of the same, she had the right to lease out the possession of the said property to the Petitioners by Deed of Lease bearing No. 2396 executed on 28.10.1992?

(ii) Despite the aforesaid question No. (i) Whether the learned High Court Judges of the Civil Appellate High Court of Gampaha erred in law by not considering that the lease agreement entered by Princy Samarawickrama with the Petitioners would become effective from 28. 10.1992 for the remainder of the lease for 99 years by applying the principle of exceptio rei vinditae et traditae or from 03.04.1997 once Princy Smarawickrama got the title back?

(iii) Honourable High Court Judges of the Civil Appellate High Court of Gampaha erred in law by holding that after the demise of the life interest holder Princy Samarawickrama the lease agreement would come to an end without considering the fact that the lease agreement is valid for 99 years and would only come to an end after the lapse of 99 years?

(iv) Whether the Honourable Judges of the Civil Appellate High Court of Gampaha erred in law in not considering the evidence placed before them in the correct and proper perspective in all the circumstances of this case?

It has to be noted here that the 1A Plaintiff-Respondent Manic Pura Waduge Chureen, the 2nd Defendant-Appellant Manic Pura Hewage Seetha and Manic Pura Hewage Anulawathi are sisters and daughters of Princy Samarawickrama. Facts of this case may be briefly summarized as follows.

Princy Samarawickrama by Deed of Gift No. 3647 dated 3.5.1988 marked P6 gifted the property in question to her daughter Anulawathi reserving her life interest to the property in question. However, Anulawathi by deed No.2831 dated 3.4.1997 marked P7 transferred the property in question to her mother Princy Samarawickrama. Therefore, it is seen that during the period commencing from 3.5.1988 to3.4.1997, the owner of the property in question was Anulawathi and not Princy Samarawickrama. However, Princy Samarawickrama leased the property in question to one of her daughters Manic Pura Hewage Seetha who is the 2nd Defendant-Appellant by Lease Agreement No.2396 dated 28.10.1992 (marked V1) for a period of 99 years. Thus, when Princy Samarawickrama executed the abovementioned Lease Agreement No.2396 dated 28.10.1992 (marked V1), she was not the owner of the property in question but she was holding the life interest to the property in question. However, said Princy Samarawickrama by Deed of Gift No 123 dated 2.12.1998 marked P8, gifted the property in question to one of her daughters Manic Pura Hewage Chureen who is the 1A Plaintiff-Respondent. (However, in the caption her name has been typed as Manic Pura Waduge Chulani). It has to be noted

here that when Princy Samarawickrama executed the said Deed of Gift No 123 dated 2.12.1998 marked P8, she was the owner of the property in question and she did not retain the life interest to the property in question. Thereafter said Manic Pura Hewage Chureen by Deed of Gift No.14523 dated 20.8.2003 marked P9 gifted the property in question to her husband Obawath Kankanamage Jinadasa who was the original Plaintiff-Respondent in this case. However, Princy Samarawickrama continued to occupy the property in question even after she gifted it to her daughter Chureen.

The Plaintiff-Respondent claims the property in question on the strength of the Deed of Gift No 123 dated 2.12.1998 marked P8 and the Deed of Gift No.14523 dated 20.8.2003 marked P9. The Defendant-Appellants claim the property in question on the strength of Lease Agreement No.2396 dated 28.10.1992 (marked V1). At the time that the Lease Agreement No.2396 dated 28.10.1992 (marked V1) was executed Princy Samarawickrama was not the owner of the property in question but was only holding the life interest to the property in question. At the time of the execution of the said Lease Agreement No.2396 dated 28.10.1992, the owner of the property was Anulawathi. At the time that the Deed of Gift No 123 dated 2.12.1998 marked P8 was executed Princy Samarawickrama was the owner of the property in question.

The most important question that must be decided in this case is whether Lease Agreement No.2396 dated 28.10.1992 (marked V1) has been proved in court. I now advert to this question. As I pointed out earlier, when Princy Samarawickrama signed the Lease Agreement No.2396 dated 28.10.1992 (marked V1), she was not the owner of the property in question and that she was only having the life interest to the property. Thus, Princy Samarawickrama is

alleged to have signed the Lease Agreement No.2396 dated 28.10.1992 (marked V1) apparently relying on the life interest to the property. The Lease Agreement No.2396 dated 28.10.1992 (marked V1) is for a period of 99 years. Princy Samarawickrama is a mother of at least three daughters. Her life interest to the property in question exists only up to her death. Thus, can it be believed that she executed a lease agreement for a period of 99 years knowing very well that she would not live for next 99 years? Therefore, this story of 99 year lease does not tally with the test of probability. In my view it is difficult to believe that Princy Samarawickrama executed a Lease Agreement No.2396 dated 28.10.1992 (marked V1) for a period of 99 years.

The Notary Public who attested the Lease Agreement No.2396 dated 28.10.1992 (marked V1) is W.D. Padmasiri Perera. He, in his attestation of Lease Agreement No.2396 dated 28.10.1992 (marked V1), does not say that he knows Princy Samarawickrama. The two attesting witnesses Weerapulige Donald Ackmon and Abdul Carder have not given evidence. W.D. Padmasiri Perera, the Notary Public in his evidence says that he does not know Princy Samarawickrama personally. He further, in his evidence, says that he, in his attestation, has not stated that he knew Princy Samarawickrama and if he knew her, it would have been stated in the attestation. Under these circumstances the question arises whether Lease Agreement No.2396 dated 28.10.1992 (marked V1) has been proved. In considering this question Section 68of the Evidence Ordinance is relevant. Section 68of the Evidence Ordinance reads as follows.

> *"If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the*

purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence."

In Wijegoonetilleke Vs Wijegoonetilleke 60 NLR 560 Basnayake CJ held as follows.

"A Notary who attests a deed is an attesting witness within the meaning of that expression in sections 68 and 69 of the Evidence Ordinance."

In Marian Vs Jesuthasan 59 NLR 348 Sinnetamby J held as follows.

"Where a deed executed before a notary is sought to be proved, the Notary can be regarded as an attesting witness within the meaning of section 68 of the Evidence Ordinance provided only that he knew the executant personally and can testify to the fact that the signature on the deed is the signature of the executant."

In Wijegoonetilleke Vs Wijegoonetilleke 60 NLR 560 Basnayake CJ delivered the judgment on 6.7.1956. In Marian Vs Jesuthasan 59 NLR 348 Sinnetamby J delivered the judgment on 20.7.1956. Therefore, it is seen that Sinnetamby J delivered the judgment after Basnayake CJ delivered the judgment in Wijegoonetilleke Vs Wijegoonetilleke 60 NLR 560. I would like to follow the judgment in the case of Marian Vs Jesuthasan (supra).

In the case of Ramen Chetty Vs Assen Najna [1909] Current Law Reports of Ceylon 256 Hutchinson CJ and Middleton J held as follows.

"The evidence of the Notary who attested a document, to the effect that the signatory and the witnesses signed in his presence and in the presence of one another, is not sufficient to prove the document, where the

signatory was not known to the Notary. To prove a document, whether notarially attested or otherwise, it must be proved that the signature of the signatory is in his handwriting."

Section 31(9) of the Notaries Ordinance reads as follows

"He shall not authenticate or attest any deed or instrument unless the person executing the same be known to him or to at least two of the attesting witnesses thereto ; and in the latter case, he shall satisfy himself, before accepting them as witnesses, that they are persons of good repute and that they are well acquainted with the executant and know his proper name, occupation, and residence, and the witnesses shall sign a declaration at the foot of the deed or instrument that they are well acquainted with the executant and know his proper name, occupation, and residence."

Sinhala version of Section 31(9) of the Notaries Ordinance reads as follows.

යම් ඔප්පුවක් හෝ නීත්‍යානුකූල ලේඛනයක් ලියා අත්සන් කරන තැනැත්තා හෝ ඔප්පුවට හෝ නීත්‍යානුකූල ලේඛනයට සාක්ෂි දරන සාක්ෂිකරුවන් යටත් පිරිසෙයින් දෙදෙනකු තමා දනිතහොත් මිස ඒ ඔප්පුවේ හෝ නීත්‍යානුකූල ලේඛනයේ තත්‍යභාවය සහතික කිරීම හෝ එය ලියා සහතික කිරීම ඔහු විසින් නො කළ යුතු ය: තව ද පසුව සඳහන් කළ අවස්ථාවේ දී ඒ සාක්ෂිකරුවන්, සාක්ෂිකරුවන් වශයෙන් පිළිගැනීමට පෙර ඔවුන් හොඳනමක් ඇති අය බවට ද ලියා අත්සන් කරන්නා හොඳින් හඳුනන බවට ද ඔහුගේ නියම නම, රක්ෂාව සහ පදිංචි ස්ථානය ඔවුන් දන්නා බවට ද නොතාරිස් සැහිමට පත් විය යුතු අතර, ලියා අත්සන් කරන්නා තමන් හොඳින් දන්නා බවට සහ ඔහුගේ නියම නම, රක්ෂාව සහ පදිංචි ස්ථානය තමන් දන්නා බවට ඒ සාක්ෂිකරුවන් විසින් ඔප්පුවෙහි හෝ නීත්‍යානුකූල ලේඛනයෙහි පහතින් ප්‍රකාශනයක් අත්සන් කළ යුතු ය.

Applying the principles laid down in the case of Marian Vs Jesuthasan (supra) and Ramen Chetty Vs Assen Najna (supra), I hold that when a deed executed

before a Notary Public is sought to be proved in evidence, the Notary Public can be regarded as an attesting witness within the meaning of section 68 of the Evidence Ordinance only if the following matters are satisfied.

1. There must be evidence from the Notary Public to the effect that he knew the executant personally at the time the executant placed his signature on the deed OR that he (the Notary Public) knew the attesting witnesses personally and the attesting witnesses knew the executant personally.

2. There must be evidence from the Notary Public to the effect that the signature found in the deed is the signature of the executant.

3. There must be evidence from the Notary Public to the effect that two attesting witnesses placed their signatures in his presence.

In the present case, although the Defendant-Appellants sought to prove the Lease Agreement No.2396 dated 28.10.1992 (marked V1), they did not call any of the attesting witnesses to give evidence. The Notary Public who attested the said deed says, in his evidence, that he does not know the executant personally.

When I consider all the above matters, I hold that the Lease Agreement No.2396 dated 28.10.1992 (marked V1) has not been proved in accordance with Section 68 of the Evidence Ordinance and it cannot be used as evidence in this case.

The next question that must be considered is whether the Deed of Gift No.123 dated 2.12.1998 (P8) executed by Princy Samarawickrama has been proved or not. I now advert to this question. The Notary Public who attested the Deed of Gift No.123 dated 2.12.1998 is T.H.D. Upul Deshappriya. He has, in his attestation, stated that he knows the donor Princy Samarawickrama, donee Manic Pura Hewagw Churanee and two attesting witnesses Ranasinghe

Archchige Don Somapala Ranasinghe and Manic Pura Hewagw Sriyani. T.H.D. Upul Deshappriya the Notary Public in his evidence too has stated that he knows the donor and donee in Deed of Gift No.123 dated 2.12.1998 and that the donor, the donee, and the two attesting witnesses placed their signatures in his presence. Manic Pura Hewagw Sriyani, one of the attesting witnesses in Deed of Gift No.123, in her evidence says that she is a daughter of Princy Samarawickrama and she signed as a witness in Deed of Gift No.123 dated 2.12.1998. When I consider all the above matters, I hold that Deed of Gift No.123 dated 2.12.1998 has been proved and it is an act and a deed of Princy Samarawickrama. Therefore, I hold that Princy Samarawickrama has gifted the property in question to her daughter Manic Pura Hewagw Chureen by Deed of Gift No.123 dated 2.12.1998. When Princy Samarawickrama gifted the property in question to her daughter Manic Pura Hewagw Chureen by Deed of Gift No.123 dated 2.12.1998, she did not retain the life interest of the property in question.

Manic Pura Hewagw Chureen, by Deed of Gift No.14523 dated 20.8.2003 marked P9 has gifted the property in question to her husband Obawath Kankanamage Jinadasa who is the original Plaintiff in this case. According to paragraph No.10 of the Answer of the Defendant-Appellant, the Deed of Gift No.14523 dated 20.8.2003 has been challenged on the basis that Deed of Gift No.123 dated 2.12.1998 was not an act and a deed of Princy Samarawickrama. I have earlier held that Deed of Gift No.123 dated 2.12.1998 was an act and a deed of Princy Samarawickrama. Thus, the Defendant-Appellant cannot challenge the Deed of Gift No.14523 dated 20.8.2003.

Further, the Defendant-Appellants argue that since the life interest of the property in question was reserved by Princy Samarawickrama when she executed the Deed of Gift No.3647 dated 3.5.1988 (P6) giving the property in question to her daughter Anulawathi, the life interest of the property in question was remaining with her and that the Defendant-Appellants are entitled to the benefit of the Deed of Lease Agreement No.2396 dated 28.10.1992 (V1) at the time of institution of this action. This argument does not hold water since this court holds that the said Deed of Lease Agreement No.2396 dated 28.10.1992 (V1) was not proved and further, no life interest of the property in question was retained by said Princy Samarawickrama when she executed the Deed of Gift No.123 dated 2.12.1998 (P8).

Considering all the above matters, I would like to make the following observation. Any act performed, on the strength of life interest to a property, by the life interest holder such as leasing of the property comes to an end with the demise of the life interest holder or when the life interest holder renounces the life interest to the property.

In the present case, Princy Samarawickrama by Deed of Gift No. 3647 dated 3.5.1988 gifted the property in question to her daughter Anulawathi retaining the life interest to the property in question. Princy Samarawickrama acting on the life interest to the property in question is alleged to have executed deed of Lease Agreement No.2396 dated 28.10.1992 for a period of 99 years in favour of the 2nd Defendant-Appellant. Thereafter, said Anulawathi, by deed No.2831 dated 3.4.1997, transferred back the property in question to Princy Samarawickrama and thereby she again became the owner of the property in question. Thereafter, Princy Samarawickrama as the owner of the property in question, by Deed of

Gift No.123 dated 2.12.1998 gifted the property in question to her daughter Manic Pura Hewage Chureen who is the 1A Plaintiff-Respondent **without retaining the life interest to the property in question**. Thus, when Princy Samarawickrama executed the Deed of Gift No.123 dated 2.12.1998, she has renounced her life interest to the property in question. I have already held that it was not proved that Princy Samarawickrama executed the deed of Lease Agreement No.2396 dated 28.10.1992 for a period of 99 years. She has, by Deed of Gift No 123 dated 2.12.1998, renounced her life interest to the property in question. Since the Lease Agreement No.2396 dated 28.10.1992 which is alleged to have been executed by Princy Samarawickrama has not been proved, when she signed the Deed of Gift No.123 (2.12.1998) full title goes to the donee of Gift No.123. Thus, the Defendant-Appellants will not be entitled to the benefit of the Lease Agreement No.2396 dated 28.10.1992 alleged to have been executed by Princy Samarawickrama.

Considering all the aforementioned matters, I hold that the Plaintiff-Respondent has proved that the owner of the property in question is the Plaintiff-Respondent.

For the above reasons, I hold that the judgment of the learned District Judge deciding the case in favour of the Plaintiff-Respondent is correct and that the learned Judges of the Civil Appellate High Court were correct when they dismissed the appeal affirming the judgment of the learned District Judge.

I have earlier held that the Lease Agreement No.2396 dated 28.10.1992 (marked V1) has not been proved. Therefore, any rights alleged to be emanating from the said Lease Agreement cannot be considered by courts. In view of the conclusion reached above, I answer the above questions of law in the negative.

For the aforementioned reasons, I affirm the judgment of the learned Judges of the Civil Appellate High Court dated 19.4.2016 and dismiss this appeal with costs.

Appeal dismissed.

Judge of the Supreme Court.

Vijith. K. Malagoda PC J

I agree.

Judge of the Supreme Court.

Gamini Amarasekara J

I agree.

Judge of the Supreme Court.

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

SC Appeal 210/2015
SC/HCCA/LA/141/2014
WP/HCCA/Avi/222/2011(Rev)
D.C. Pugoda Case No. 327/L

Udawela Pathiranehelage
Dharmasena of
Bandaranayake Mawatha,
Millathe, Kirindiwela.

Plaintiff

-Vs-

1. I.L. Malani, 19 1/3,
   Bauddhaloka Mawatha,
   Gampaha

2. Sooriya Arachchige Sandasiri Perera
   No. 247, Weerangula,
   Yakkala.

3. Polwattege Abeysinghe
   No. 65/1, School Road,
   Meddegama, Kiridiwela.

4. D.M. Leelawathi Dissanayake,
   Anuragoda,
   Pepiliyawela.

Defendants

AND

Udawela Pathiranehelage
Dharmasena of
Bandaranayake Mawatha,
Millathe, Kirindiwela.

Plaintiff- Petitioner

Vs

1. I.L. Malani, 19 1/3,
   Bauddhaloka Mawatha,
   Gampaha

2. Sooriya Arachchige Sandasiri Perera
   No. 247, Weerangula,
   Yakkala.

3. Polwattege Abeysinghe
   No. 65/1, School Road,
   Meddegama, Kiridiwela.

4. D.M. Leelawathi Dissanayake,
   Anuragoda, Pepiliyawela.

Defendants – Respondents

AND NOW BETWEEN

3. Polwattege Abeysinghe
   No. 65/1, School Road,
   Meddegama, Kiridiwela.

4. D.M. Leelawathi Dissanayake,
   Anuragoda, Pepiliyawela

DEFENDANTS-RESPONDENTS-PETITIONERS/APPELLANTS

VS.

1a. Lewwanda Pathirannehelage
    Leelawathie,

1b. Manel Ajantha Chandrakanthie,

1c. Anoma Nalini Swarnakanthie,

1d. Himali Pradeepika Malkanthie,

1e. Priyani Priyadharshini,

All of,
No. 75/16, Amuhena,
Welliwaththa Road, Papiliyawala.

SUBSTITUTED
PLAINTIFF- PETITIONER RESPONDENTS

1. I.L. Malani, 19 1/3,
   Bauddhaloka Mawatha,
   Gampaha.

   Now at

   Rathnaloka Enterprise,
   37/4, New Trade Complex,
   Gampaha.

2. Sooriya Arachchige Sandasiri Perera
   No. 247, Weerangula,
   Yakkala.

DEFENDANTS-RESPONDENTS-RESPONDENTS

Before: B.P.Aluwihare P.C. J,
Vijith K. Malalgoda P.C. J, and
Murdu N.B.Fernando, P.C. J.

Counsel: Niranjan de Silva with Kalhara Gunawardena for the 3rd and 4th Defendants-Respondents – Appellants.
Rohan Sahabandu PC with Hasitha Amarasinghe for the Substituted Plaintiff – Petitioner- Respondents.

Argued on: 30-11-2018

Decided on: 18-12-2020

Murdu N.B. Fernando, PC J.

The appeal before us pertains to an Order made by the District Court of Pugoda dated 18-08-2011 in respect of a writ of execution of a decree which was set aside by the Provincial High Court of Civil Appeal of the Western Province holden in Avissawella ("the High Court") on 05-02-2014.

The 3rd and 4th Defendants–Respondents-Petitioners ("the 3rd and 4th defendants/ appellants") being aggrieved by the aforesaid High Court Order came before this Court and were granted Leave to Appeal on 15-12-2015, on two questions of law which are as follows: -

i) **Have the learned High Court Judges erred in law in not considering that the remedy of revision should not have been exercised to the benefit of the Plaintiff- Petitioner- Respondent in the instant case?**

ii) **Have the learned High Court Judges erred in law in not considering that case No. 317/P and No. 327/L in the District Court of Pugoda are two distinct and different actions with two mutually exclusive Judgements dated 22.06.2001 and 25.04.2002 delivered by the same Additional District Judge of the District Court of Pugoda?**

Thus, the matter before us for determination is whether the High Court was correct in setting aside the Order made in the District Court case bearing No 327/L in which the learned District Judge made Order for the Plaintiff-Petitioner-Respondent ("the plaintiff/ respondent") to accept the consideration preferred by the 3rd and 4th defendants in the instant case and execute the transfer deeds and give effect to the Judgement of the District Court dated 25-04-2002 and in the event, the plaintiff fails to execute the said deeds, for the Registrar of the Court, to execute such deeds in favour of the 3rd and 4th defendants.

The learned Judges of the High Court in its Order, refer to a partition action bearing No 317/P of the District Court of Pugoda ("the partition action") and the contention of the plaintiff that the final decree in the said partition action cannot be assailed in the instant 327/L case and held, that with the entering of the interlocutory decree in the partition action, the rights of the parties were finally decided and that the District Judge was misconceived in directing the plaintiff to execute deeds in favour of the 3rd and 4th defendants and thus set aside the Order dated 18-08-2011 of the District Court of Pugoda in case bearing No 327/L.

It is observed that in the said Order, neither the contention of the 3rd and 4th defendants nor the preliminary objections raised nor the reasons to invoke the revisionary powers of the court have been considered by the Learned Judges of the High Court. Furthermore, the learned Judges have failed to refer to any judicial authority pertaining to revision, partition or execution of decrees in its Order.

Prior to adverting to the legal issues raised before this Court, I wish to refer to the facts of the two cases referred to in the aforesaid High Court Order.

Firstly, the **case bearing No 327/L, ("the land case")** the genesis of the instant appeal.

01. The plaintiff sued four defendants, the 1st and 2nd defendants, proprietor directors of a company to whom the plaintiff by agreement dated 21-07-1992 had given the land more fully referred to in the 2nd schedule to the plaint for development and sale and 3rd and 4th defendants who were in possession of the land more fully referred to in the 3rd and 4th schedules to the plaint; and prayed that the plaintiff be declared the owner of the lands described in the 2nd, 3rd and 4th schedules to the plaint.

- The plaintiff's case was that the 1st and 2nd defendants (who surveyed the land and divided it into nine lots) violated the above referred agreement by non-payment of

the consideration within the agreed time frame and claimed damages from the said two defendants.

- The plaintiff also pleaded that upon the breach of the agreement, seven lots of the land were re-possessed by the plaintiff except the lots referred to in the 3rd and 4th schedules which were occupied by the 3rd and 4th defendants and moved for an order of court to eject the said two defendants from the said lands.

- The case of the 3rd and 4th defendants was that they went into occupation of the said lots, upon part payment of the consideration to the 1st and 2nd defendants the property developer and moved that they be issued with the conveyances for the said lots upon payment of the balance sums of money.

02. The said land case 327/L, filed on 24-06-1997 was taken up for trial and by Judgement dated 25-04-2002, the learned District Judge dismissed the plaint wherein the plaintiff prayed for a declaration of ownership to the lands referred to in the 2nd,3rd and 4th schedules. Further, the learned District Judge made Order in favour of the 3rd and 4th defendants as prayed for in the answer that lots 1 and 6, the lots the said two defendants were in possession (and referred to in the 3rd and 4th schedules) be conveyed to the said two defendants upon payment of a sum of Rs 40,000/= and Rs. 47,000/= respectively.

03. The plaintiff filed a notice of appeal against the said Judgement but did not file a petition of appeal and refrained from canvasing the Judgement in 327/L dated 25-04-2002 before any forum.

04. The 3rd and 4th defendants deposited the sum mentioned in the Judgement in Court but did not take any action to execute the decree until 28-07-2010. Instead the 3rd and 4th defendants took steps referred to hereinafter in case bearing No 317/P, the partition action.

05. The said **partition action 317/P,** was also filed by the plaintiff, to partition a larger extent of land stated therein which is also referred to in 327/L, the land case discussed earlier, as the 1st schedule.

06. The partition action was filed against four defendants but the plaint referred to shares held by only the plaintiff and the 1st defendant. The 3rd and 4th defendants (who are also the 3rd and 4th defendants in the land case) were not to be beneficiaries but were named since they were in possession of a part of the corpus.

- This action was filed prior to the case discussed earlier and Judgement was entered on 24-11-2001 five months prior to the Judgement in case no 327/L the land case, the genesis of this appeal.

07. In the said partition action, the learned District Judge made Order to partition the land and further that the possession of the 3rd and 4th defendants should not be disturbed until the Judgement in 327/L case was delivered.

- In the partition action it is observed that issues bearing numbers 7 to 14, raised by the 3rd and 4th defendants were not answered by the learned District Judge upon the premise that in 327/L the land case, which was an ongoing trial, the same grounds had to be traversed and answered by the very same Judge.

08. Upon delivery of the Judgement in 327/L the land case, the 3rd and 4th defendants deposited the requisite sums of money in court and moved (unsuccessfully though) to incorporate the Judgement of 327/L the land case, in the partition action, consequent to the issuance of interlocutory decree and even moved for an alternative plan when the final plan was subjected for consideration of the parties of the partition action.

- Failing same, the 3rd and 4th defendants in June and September 2004 after final decree was entered, moved to incorporate the Judgement of 327/L the land case, in the partition action. The said applications made before successive Judges were rejected upon the ground that the land case 327/L, had no bearing upon the partition action since the 3rd and 4th defendants were not allotted any shares in the partition action.

09. Thereafter, in the year 2004, the 3rd and 4th defendants filed a revision application before the Court of Appeal against the Judgement of the partition action. The said application was dismissed by the Court of Appeal on 09.09.2009 upon the basis of delay and the 3rd and 4th defendants came before the Supreme Court by way of a special leave to appeal application which too was refused on 26-10-2010.

10. Consequent to the dismissal of the aforesaid revision application by the Court of Appeal with regard to incorporation of the Judgement in 327/L the land case in the partition action, on 28-07-2010, the **3rd and 4th defendants moved to execute the decree in the land case 327/L** which triggered the proceedings in issue in this appeal.

- Having heard the parties, the learned District Judge on 18-08-2011, made Order to give effect to the Judgement dated 25-04-2002 and to execute the conveyances in favour of the 3rd and 4th defendants and if the plaintiff fails to execute same for the Registrar of the Court to execute the deeds in favour of the 3rd and 4th defendants.

- Further the learned District Judge made Order, to avoid any unwarranted issues, that the writ of execution of decree in case bearing No 327/L the land case, should be effected consequent to the plaintiff taking possession of the extent of land allotted to the plaintiff in the partition action.

11. Being aggrieved by the said Order in the 327/L, the land case, the plaintiff filed two applications, a leave to appeal application and a revision application before the High Court. The status of the leave to appeal application filed in the High Court has not been appraised to this Court.

12. In the revision application, based upon the written submissions filed, the learned Judges of the High Court set aside the Order of the learned District Judge dated 18-08-2011 and that is the impugned Order that is now before us for determination.

Upon the said background, let me now advert to the two questions of law raised before this Court. Are the said two cases, distinct and different and the Judgements mutually exclusive; can the Judgement in 327/L the land case, assail the Judgement in 317/P the partition action; and can the extra-ordinary remedy of revisionary jurisdiction be resorted to by the plaintiff, to go before the High Court and challenge the Order made in 327/L, the land case.

Let me examine the jurisdiction issue first.

Does the High Court have jurisdiction to set aside the Order of the learned District Judge by way of a revision application?

It is settled law that the exercise of the revisionary powers of the appellate court is limited to instances in which exceptional circumstances exist, warranting its intervention.

This Court has time and again opined with regard to the exercise of revisionary powers and the observations of Ismail, J., in **Rustom Vs Hapangama and Co. [1979] 1 SLR 352** and Athukorale, J., in **Hotel Galaxy (Pvt) Ltd. and others Vs Mercantile Hotels Management Ltd. [1987] 1 SLR 5** are watershed decisions in respect of such revisionary powers.

Similarly, in **Perera Vs People's Bank [1995] 2 SLR 84** G.P.S. de Silva CJ observed:

> "In any event revision is a discretionary remedy and the conduct of the defendant is a matter which is intensively relevant."(page 87)

The Court of Appeal too in many an illuminating Judgements have considered the scope of revisionary jurisdiction and observed thus-

In **Sikander Abdul Samadh Vs Musajee [1988] 2 CALR 147,**

> "Revision is a discretionary remedy and cannot be exercised except where there is no right of appeal or there is no alternative remedy and exceptional circumstances exist to invoke the jurisdiction of the Court of Appeal." (page 148)

In **Caderamanpulle Vs Ceylon Paper Sacks Ltd [2001] 3 SLR 112,**

> "No exceptional circumstances are disclosed why this application for revisionary relief should be entertained… The existence of exceptional circumstances is a pre-condition for the exercise of powers of revision." (pages 112 - 113)

In **Dharmaratne and another Vs Palm Paradise Cabanas Ltd and others [2003] 3 SLR 24**,

> "existence of exceptional circumstances is the process by which courts select the cases in respect of which the extraordinary method of rectification should be adopted. If such a selection process is not there, revisionary jurisdiction of this Court will become a gateway of every litigant to make a second appeal in the garb of a Revisionary Application or to make an appeal in situations where the legislature has not given a right of appeal.
>
> The practice of court to insist in the existence of exceptional circumstances for the exercise of revisionary powers has taken deep root in our law and has got hardened into a rule which would not be lightly disturbed." (page 24)

In **Wijesinghe Vs Tharmaratnam Srikantha's LR (IV) at page 47,**

> "Revision is a discretionary remedy and will not be available unless the application discloses circumstances which shocks the conscience of court." (page 49)

In **Bank of Ceylon Vs Kaleel and others [2004] 1 SLR 284,**

> "In any event 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; the order complained of is of such a nature which would have shocked the conscience of court." (page 284)

The observations of the appellate courts in the plethora of Judgements referred to above, which I concur with, shed light to the guiding principles an appellate court should follow when granting relief by way of a revision application.

It is observed, that although the 3rd and 4th defendants have relied on many of the above reported Judgements in the written submissions filed before the High Court and has raised a number of preliminary objections to the maintainability of a revision application, specifically that no exceptional circumstances exist to invoke the revisionary jurisdiction when the plaintiff has already exercised the right of appeal (within time) against the impugned Order of the

learned District Judge dated 18-08-2011, none of the preliminary objections raised nor the cases cited, have been referred, analysed or considered in the impugned Order of the learned Judges of the High Court.

The most significant fact in this appeal to me, is that the plaintiff did not challenge before any forum, either by way of an appeal or revision application, the **original Judgement of the District Court dated 25-04-1992 in 327/L** the land case, by which the prayer of the plaintiff for a declaration of title to the lands possessed by the 3rd and 4th defendants (referred to in the 3rd and 4th schedules to the plaint) and the ejectment of the 3rd and 4th defendants was refused by the learned District Judge.

Whilst the Judgement of the District Court in the land case, did not allow the prayer of the plaintiff, it made order in favour of the 3rd and 4th defendants, that the said defendants were entitled to obtain the deeds executed in their names upon payment of the balance sums of money to the plaintiff. **The Order of the District Court dated 18-08-2011 is with regard to the execution of the writ pertaining to the said judgement and decree**. The plaintiff being aggrieved by the said Order exercised his right of appeal and filed a petition of appeal in the High Court and a revision application in which the impugned Order was made.

Hence, on one hand there is a Judgement, which the plaintiff decided not to appeal or move in revision, and on the other hand there is an Order against which the plaintiff had already lodged an appeal and which is pending before the High Court for determination.

In the said background, I see merit in the submission of the learned Counsel for the 3rd and 4th defendants, that there was no reason or necessity and in deed no exceptional grounds or circumstances, for the plaintiff, to invoke the revisionary jurisdiction of the High Court, since the right to appeal to the High Court against the impugned Order of the learned District Judge dated 18-08-2011 was duty exercised by the plaintiff within time. In any event, no specific reasons or grounds were given nor referred to in the petition filed in court, for the plaintiff to resort to the extra-ordinary revisionary jurisdiction of the High Court.

I wish to consider invocation of the revisionary jurisdiction of the High Court, from another perspective, i.e. even if the plaintiff has resorted to and exercised the right of appeal, were there exceptional grounds or reasons that shocks the conscience of court to merit, revising the Order of the District Court to ensure the appeal is not rendered nugatory.

In a case decided by this Court in 1939, **Atukorale Vs Samynathan 41 NLR 165,** it was held that the powers given to the Supreme Court by way of revision are wide enough to give it the right to revise any order made by the original court, whether an appeal had been taken against it or not, in exceptional circumstances, only to ensure that the decision given on appeal is not rendered nugatory. Based upon the said reasoning Soertz, J., who delivered the Judgement in the said case, stayed the writ of execution which was for recovery of damages, pending the hearing of the appeal.

The Court of Appeal in **Rasheed Ali Vs Mohammed Ali [1981] 2 SLR 29,** considered the above referred case and while re-echoing the words of Soertz, J., held that the facts of the **Rashid Ali** case, did not merit indulgence of the court to exercise the revisionary powers.

Thus, the ratio of the decisions of the Appellate Courts lays down the principle, whether an appeal lies or not, the revisionary jurisdiction of a court can be exercised only when there are exceptional grounds that shocks the conscience of court or which merits the intervention of the appellate court. The **Athukorale case** referred to above emphatically states the basis to resort to filling a revision application is not to render the appeal nugatory, when exceptional circumstances exist. Hence, the underlying requirement in a revisionary jurisdiction is exceptional grounds and circumstances.

In **Attorney General Vs Gunawardena [1996] 2 SLR 149,** a case in which the Attorney General sought to revise an order of the High Court when no provision for appeal was available, a divisional bench of this Court, analyzing the provisions of the Administration Justice Law and Section 753 of the Civil Procedure Code held,

> "that revision like an appeal is directed towards the correction of errors but it is supervisory in nature and **its object is the due administration of justice** and not primarily or solely the relieving of grievances of a party." (page 149) (emphasis added)

Hence, when exercising this special mechanism, the revisionary jurisdiction, the pivotal issue and the most essential element a court should evaluate and ascertain is 'exceptional circumstances' in order to duly administer justice.

If there are no exceptional grounds, my considered view is that revisionary jurisdiction will not lie. The correctness of an order challenged, can be determined in the appeal filed and it is not essential to resort to another channel, i.e. revisionary jurisdiction.

In the instant appeal as was discussed earlier, when the plaintiff failed to obtain the relief prayed for from the District Court, the plaintiff did not challenge the said Judgement dated 25-04-2002. But when the District Judge made Order to execute the writ, pertaining to the said Judgement and its decree, the plaintiff thought it fit to challenge the said Order, by way of a leave to appeal application and a revision application.

It is a matter of interest that in the revision application filed before the High Court, by the plaintiff, almost all the paragraphs referred to the partition action and not to the land case 327/L of which the revision was sought. The substantial relief prayed for as prayer (b) (c) and (d) were-

- revise the Order dated 18-08-2011 filed of record in this case 327/L;
- direct the learned District Judge to make an order in line with the Judgment and the orders dated 27-07-2004 and 09-09-2004 entered in the partition action in District Court, Pugoda case No 317/P and the Orders of the Court of Appeal in

CA/Rev/1832/2004 and Order of the Supreme Court dated 26-10-2010 in SC/SPL/LA 238/2009;

- call for and examine the record in the District Court Pugoda case bearing No 317/P.

It is observed that relief (c) and (d) pertains to the partition action. Moreover, the principle relief sought by the plaintiff was to revise the Order of the learned District Judge dated 18-08-2011 and not to set aside the said Order, though the learned High Court Judges by its impugned Order, thought if fit to set aside the Order of the Learned District Judge.

The said High Court Order also referred to the contention of the plaintiff that the interlocutory decree is final and conclusive and held that the learned District Judge was misconceived in directing the plaintiff to execute the deeds in favour of the 3rd and 4th defendants.

It is observed that the said Order of the High Court is devoid of any reasoning. It does not refer to the contention of the 3rd and 4th defendants; to the preliminary objections raised with regard to the maintainability of this application; to the extra-ordinary circumstances that necessitates the invocation of revisionary jurisdiction; facts that shocks its conscience; facts that would make the appeal nugatory; or even to the substantive relief referred to above and prayed for by the plaintiff, when it allowed the plaintiffs' application for revision and set aside the District Court Order.

It is also observed that the learned Judges of the High Court, by determining the revision application not in the manner prayed for, but by setting aside the Order of the learned District Judge dated 18-08-2011, in effect and in one stroke determined the pending leave to appeal application of the plaintiff pertaining to execution of the decree and negated the Judgement of the District Court delivered a decade ago, which the plaintiff in any event did not proceed to challenge or revise before any forum.

Thus, my considered opinion is that the learned Judges of the High Court exercised the revisionary jurisdiction where no exceptional circumstances existed; and which necessitated such a course of action to be followed to administer justice and hence acted in a palpably wrong and erroneous manner especially, when the essential element of facts that shocks the conscience of court or which would make an appeal nugatory were not in existence.

Thus, in my view the facts of this case, does not merit the invocation of the revisionary jurisdiction and hence, resorting to same by the plaintiff is a fundamental vice and is not warranted especially when such a right is not available to the plaintiff.

However, in the instant appeal, the revisionary jurisdiction has been invoked and a decision made. Hence, in order to determine the 1st question of law raised before this Court, the next issue that has to be answered is, **whether the learned Judges of the High Court, correctly exercised the revisionary jurisdiction to the benefit of the plaintiff**.

In order to ascertain an answer to such question, I wish to examine the 2nd question of law in detail now, since it is directly linked and interwoven with such query.

Are the two cases referred to in the Order of the High Court inter-connected or are the two cases distinct and different and mutually exclusive? If the two cases are mutually exclusive, then has the High Court correctly exercised its powers in determining the revision application to the benefit of the plaintiff or has the High Court erred in arriving at a decision, which would render the question to be determined and to be answered, in favour of the appellant.

If I may repeat the factual matrix, to recapture the most relevant issues, the plaintiff filed two cases against the 3rd and 4th defendants. One a partition action filed in 1994 and the other a land case filed in 1997 the genesis of this appeal. The partition action was in respect of partitioning a larger land in extent 3 acres, 2 roods 33 perches and by Judgement dated 22-06-2001, the plaintiff was allotted 158.6 perches for his share of the corpus and a final plan prepared incorporating the defined allotment. In the said partition Judgement, the learned District Judge made order not to dispossess the 3rd and 4th defendants who were in possession of a part of the corpus until the Judgement in the land case was determined by the same judge.

As stated in detail at the beginning of this Judgement, in the land case the plaintiff moved for a declaration of title to a land in extent 3 roods 14 perches (approximate to his allotment of land from the partition action) with metes and bounds based upon the survey plan prepared for development and sale of the said land. It is a matter of interest that prior to filling both these cases, the plaintiff handed over this land for development and sale and it was surveyed and divided into nine lots. The plaintiff re-possessed seven lots except the defined two lots the 3rd and 4th defendants were in possession from which the ejectment was sought by the plaintiff. The learned District Judge did not grant the order of ejectment in the land case but made order for the plaintiff to execute the deeds in favour of the 3rd and 4th defendants with regard to the said two lots. Subsequently, the 3rd and 4th defendants moved to execute the said decree and the learned District Judge directed the decree be executed upon the date or on a subsequent date to the plaintiff obtaining possession of the allotment of land in the partition action in order to avoid any practical problems and issues.

From the facts of these two cases, it is clearly seen that the said two cases are not inter connected. The two cases are distinct and different and the Judgements are mutually exclusive.

In the **partition action 317/P,** the plaintiff named the 3rd and 4th defendants who were in possession of a part of the corpus as defendants but did not move for any relief against them. Hence, no shares were allotted to the said two defendants.

It is settled law and the gamut of cases pertaining to partition of lands has categorically held that a transferee of a yet undermined right is not a necessary party to determine a partition action. It is also not in dispute that the rights of the parties in a partition action is determined at the time of filling of the plaint and that partition action is an action *in rem* and not an action *in personam.* Thus, with the entering of interlocutory decree followed by final decree the rights of the respective parties with regard to the shares of the corpus are determined. I do not intend to go on an academic exercise in respect of the case law governing the law of partition of land,

suffice it to say by the final decree in the partition action, the plaintiff has been allotted a defined portion of the larger land, in extent 158.6 perches.

In the **land case 327/L,** in the plaint filed, independent to the partition action, the plaintiff categorically defined the extent of land which the 3rd and 4th defendants possessed and moved that a declaration of title be entered in favour of the plaintiff which was not granted by the District Court. Instead the learned District Judge made order for the plaintiff to execute the deeds conveying the said lots to the 3rd and 4th defendants. The contention of the plaintiff was that this was an interference with the partition action. I cannot accept the said submission.

The Judgement of the learned District Judge which was (neither challenged by an appeal or a revision application) was to execute the deeds in respect of the defined two lots, possessed by the 3rd and 4th defendants more fully referred to in the respective schedules to the plaint. When the 3rd and 4th defendants moved to execute the writ in the land case, the learned District Judge made Order to do so, after the execution of the final decree in the partition action. Thus, in my view the said Order in the land case is not an interference with the partition action. It should be complied with only after the final decree in the partition action is executed. The reference to partition action is only to indicate the time frame. First, the decree in the partition action has to be executed. Thereafter, only the execution of decree in the land case should take place. One should follow the other. Thus, in my view the two cases are mutually exclusive and are distinct and different. Hence, the two questions of law should be answered accordingly.

However, when this appeal was heard before us, the learned Counsel for the Plaintiff/Respondent, defending the High Court Order, relied on the observations in three reported Judgements to elaborate his contention that the order in the land case is an interfearence with the partition decree which is an action *in rem.*

I wish to examine the said cases now.

> *Firstly*, the observation of Weerasuriya, J., in **Jayaratne and another Vs. Premadasa and others [2004] 1 SLR 340** that,
>
> "The Court had no jurisdiction to vary the Judgement. The decree is final subject to appeal under Section 48(1) and also revision or *restitution in intergrum*. The Court may also vary the Judgement under Section 48(4) only in respect of the parties and in the limited circumstances…." (head note)

The learned President's Counsel for the plaintiff, based upon the above observation, submitted that the partition decree entered in the partition action is final and conclusive for all purposes and cannot be varied by the execution of the decree in the land case since it would interfere with the final decree of the partition action.

Whilst agreeing with the aforesaid observation made in the **Jayaratne case**, I am of the view that it cannot be taken in isolation. It should be looked at from the perspective of the facts of the said case and cannot be applied out of context in each and every circumstance.

In **Jayaratne case**, the land to be partitioned was in extent 30 acres. However, the preliminary survey depicted an extent of approximately 72 acres. Judgement was delivered, interlocutory decree entered and steps taken to partition the larger extent of 72 acres, when three persons who were not parties to the case moved court to set aside the Judgement and the interlocutory decree or in the alternative to restrict the corpus to 30 acres. The District Court permitted the said application and varied the extent of land and the Court of Appeal upheld the said decision.

This Court whilst setting aside the said Court of Appeal Judgement observed, in respect of the application made by the intervening persons, who were not parties to the original partition case, in the District Court,

> "that this application was outside the scope of Section 48(4) of the Partition Law for several reasons [ ] that District Court had no jurisdiction to entertain the application of the petitioner ….to seek the relief…..and the application was misconceived. The Court of Appeal has taken the erroneous view that notwithstanding the provisions of Section 48…. the District Judge was justified in restricting the corpus to 30 acres using the inherent powers of court in terms of Section 839 of the Civil Procedure Code." (page 344)

In the instant appeal, unlike in the case referred to above, the 3rd and 4th defendants who were not strangers or 3rd parties but were parties to the partition action moved court (though unsuccessfully) to vary the partition Judgement, interlocutory decree and the final decree in the partition action. In my view that course of action of the 3rd and 4th defendants in the partition action, does not debar the 3rd and 4th defendants from taking steps to execute the decree in the land case, as provided for by the Civil Procedure Code or resorting to the due process of the law in the land case. Hence, the said course of action followed by the 3rd and 4th defendants in the partition action, should not be held against them. It has no relevance to the appeal before us. The impugned Order of the District Court is only to execute the decree in the land case, subsequent to the execution of the final decree in the partition action and thus the observation made in the **Jayaratne case** quoted by the learned Counsel for the plaintiff, should be considered in the context of the facts of the said case and specifically where the Court of Appeal referred to the inherent powers of court. Hence, in my view **Jayaratne case** can be distinguished from the instant appeal and has no relevance to the matter in issue.

The 2nd case , relied upon by the learned Counsel for the plaintiff before this Court, to substantiate that the final decree of the partition action wiped out all effects of the claim of the 3rd and 4th defendants in the land case was **De Costa and others Vs De Costa and others [1998] 1 SLR 107** a Judgement of the Court of Appeal. In this case the question that arose for determination was whether an order made in terms of Section 48(4)(a)(iv) of the Partition Law No 21 of 1977 as amended ("the Partition Law") is a Judgement within the meaning of section 754(1) and (5) of the Civil Procedure Code or an order made within Section 754(2) and (5) of the Civil Procedure Code read together with Section 67 of the Partition Law or in simpler words, was the impugned order, an interlocutory order or a final order. The observation of the

learned Judge of the Court of Appeal relied upon by the Counsel for the plaintiff was as follows:-

> "The finality of these orders must be determined according to the Partition Act. Under the Partition Act if no complaint was alleged with regard to the Judgement and consequential interlocutory decree, and if no steps were taken under Section 48(1)(a)(vi), the special provisions relating to decrees in Section 48(1), (2), (3) and Section 67 of the Partition Law would come to operate. In such a situation the only irresistible inference that could be drawn is that such an order finally disposed of all the rights of the parties and the suit was not alive but finally disposed of" (head note)

In my view, the said observation pertaining to the finality of an order was in relation to the question aforesaid and the said case should be considered in that perspective.

Even if the case before us is looked at from another angle, in my view it can be differentiated since the land case filed by the plaintiff did not challenge the final decree of the partition action. The Order of the land case is only a follow up action. It envisages the plaintiff to take certain steps to fulfill the Judgement which was in any event not challenged by the plaintiff. Hence the said case too, in my view has no relevance to the instant appeal and can be distinguished.

The 3rd case relied upon by the plaintiff was **Latheef and another Vs Mansoor and another reported in 2011 BLJ 189**. Marsoof J in an illuminating Judgement on *rei vindicatio* action and other legal principles, observe at page 210, that the primary duty of a court when deciding a case involving ownership of land is to consider whether the land has been clearly identified or not. The learned Counsel for the plaintiff relied on the said observation to argue that in the instant appeal, the land has not been clearly identified.

Contrary to the said assertion, it is seen that the plaintiff, in the plaint filed in court to obtain a declaration of title to evict the 3rd and 4th defendants, clearly and precisely identified the extent and the lots of land with its meets and bounds based upon a survey plan.

Thus, in my view, in the instant appeal, the land has been clearly identified and the contention of the learned Counsel for the plaintiff, that the lots have to be super imposed in the final plan of the partition action has no rational or merit. The two cases are distinct and different. In the partition action the corpus was partitioned according to the final plan and in the land case, from and out of the defined portion of the corpus carved out to the plaintiff, the conveyances for the two lots of lands possessed by the 3rd and 4th defendants should be executed, based upon the survey plan referred to by the plaintiff and clearly defined and identified in the plaint filed by the plaintiff himself.

Hence, whilst agreeing with the observations referred to in **Latheef's Case** referred to above that the identity of the land is fundamental for attributing ownership, the plaintiff in my view, cannot rely upon the said observation to justify the impugned Order of the High Court. In the instant case, the plaintiff in no uncertain terms, has clearly and precisely identified the

lots of land when moving court to obtain relief and thus, cannot now be heard to say that the land is not identified.

Thus, the three cases relied upon by the plaintiff to substantiate and defend the impugned Order of the High Court can be distinguished and has no relevance to the matter in issue and in my view does not assist the plaintiff in his contention, that the two cases are interwoven and the Judgement in the land case is an interference and assails the final decree of the partition action. The said two cases in my view, stand alone and are mutually exclusive.

Even if the two cases are looked at from the perspective of the extent of land, from the plaintiff's entitlement of 158.6 perches i.e. 3 roods 38 perches (out of a total of 3 acres 2 roods and 33 perches) only the two lots of land in possession of the 3rd and 4th defendants (19.5 perches and 15.5 perches totaling 35.0 perches) should be carved out and hence, the submission of the plaintiff that the land case assails the partition action in my view, has no merit.

Thus, the Order of the learned District Judge that the execution of the decree in the land case should take place, after the execution of the decree in the partition action is salutary and stands to reason and is a pragmatic approach to administer justice to the suitors before court.

Having considered the submissions of the plaintiff in this appeal, I will now move over to consider the submissions of the appellant.

Firstly, the contention of the learned Counsel for the appellant/the 3rd and 4th defendants before this Court that the 3rd and 4th defendants have in their favour a subsisting Judgement, the benefit of which the 3rd and 4th defendants have failed to reap up to date, in view of the impugned Order of the High Court.

The learned Counsel for the 3rd and 4th defendants heavily relied on the legal maxim ***actus curiae neminem gravabit***, that an Act of court shall prejudice no person, a guiding principle which needs no elaboration, to substantiate his submission.

The learned Counsel relied on the dicta of Sharvananda J (as he then was) in **Ittapana Vs Hemawathie [1981]2 SLR 476** as well as the observation of H.A.G de Silva, J., in **Madurasnghe Vs Madurasinghe [1988] 2 SLR 142** to justify his contention. The learned Counsel for the 3rd and 4th defendants also drew our attention to a more recent Judgement **Finance Land Sales Ltd Vs Perera [2005] 1 SLR 79** a Judgement of the Court of Appeal where too, the said legal maxim was examined and followed.

Sharvananda, J., in the **Ittapana Case** referred to above, (at page 485) echoed the words of Lord Carins in **Rodge Vs Comptoir D' Escomple de Paris [1871] 3 PC 465** as follows:-

> "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…."

H.A.G. de Silva, J., in **Madurasinghe Vs Madurasinghe case** referred to above (at page 150) observed,

> "The next matter that calls for consideration is the principle of *nunc pro tunc* which is really the application of the maxim *actus curiae neminem gravabit* – an act of the Court shall prejudice no man. Broome's Legal Maxims 7th edition page 97 reads, this maxim is founded upon justice and good sense; and affords a safe and certain guide for the administration of the law".

In **Finance and Land Sales case** referred to above, Amaratunga, J., at page 82 stated as follows:-

> "However this Court has to look at the other side of the coin as well. In giving relief to the petitioner, we have to ensure that it would not result in prejudice to the plaintiff…The judgemet….is to be set aside due to the serious mistake made by Court. *Actus curiae neminum gravabit* (an act of court shall prejudice no man). Accordingly, this Court has to ensure that the Courts' mistake does not result in prejudice to the plaintiff."

I am in agreement with the said observations that the Act of Court should do no injury to the suitors before court and it is the primary duty of a court to safe guard the interests of parties before court.

Thus, in my view this proposition of the learned Counsel stands to reason. The impugned Order of the High Court has effectively negated the Judgement of the District Court and had caused grave injustice to the 3rd and 4th defendants and has given an opportunity to the plaintiff to co-laterally attack a Judgement which the plaintiff originally failed to do. It has also negated the rights of the 3rd and 4th defendants who had in their favour a legal and valid Judgement, which had not been challenged before any court by way of an appeal or a revision application.

On the other hand, the impugned Order of the High Court has effectively stalled a writ of execution of a decree, by way of a revision application, where no exceptional grounds or circumstances were pleaded, nor attributed nor found. The said Order has been made when the circumstances did not shock the conscience of Court or made the pending appeal nugatory.

Furthermore, the impugned High Court Order which set aside the District Court Order for execution of writ is a skeletal order devoid of any reasoning and is a mere repetition of facts, where no law was referred, examined nor analyzed.

It is my considered view, that the paramount duty of this Court is to safe guard the rights of the parties before Court. The legal maxim referred to above, ***actus curiae neminem gravabit*** is founded upon justice and good sense in order to administer justice. Hence, this Court must uphold and enforce the said maxim when it is evident that the act of court has caused injury to a suitor before court.

The next contention of the learned Counsel for the 3rd and 4th defendants to substantiate the appeal before this Court was that the observation of the learned High Court Judges, that the partition action and the land case cannot be reconciled, is erroneous and bad in law.

The learned Counsel submitted that the rights of the 3rd and 4th defendants to the land in issue, would only derive, from the rights of the plaintiff to the partition action and thus the rights and interests of the plaintiff and the 3rd and 4th defendants are not adverse but co-related and if the plaintiff does not obtain any right or interest, the 3rd and 4th defendants would also not derive any right or interest to the land in issue.

The learned Counsel also relied on the case of **Sirinatha Vs Sirisena and others [1998] 3 SLR 19,** a Judgement of the Court of Appeal, which examined a number of Judgements of the Appellate Courts pertaining to the provisions of the present Partition Law No 21 of 1977 as amended and the repealed Partition Act No 26 of 1951 and the earlier existing Partition Ordinances in the 1800's and also the law in respect of addition of persons as necessary parties and effect of a sale of a contingent interest and other legal issues.

The learned Counsel also made extensive submissions with regard to alienation or hypothecation of a contingent interest in a partition action viz-a-viz the prohibition of alienation or hypothecation of undivided interests referred to in section 66 of the present Partition Law, which correspond with section 67 of the earlier Partition Act and section 17 of the Partition Ordinance of 1863 and relied on many Judgements of the Court of Appeal some of which were, **Sirisoma and others Vs Saranelis Appuhamy 51 NLR 337**; **B. Sillie Fernando Vs W. Silman Fernando and others 64 NLR 401**; **Abeyratne Vs Rosalin [2001] 3 SLR 308.**

The learned Counsel drew are attention to a recent Judgement of this Court, **Abusali Sithi Fareeda Vs Mohamed Noor and another S.C. Appeal 134/2013 – S.C. Minutes dated 28-10-2014**, where it was held that the above referred prohibitions in no way affect an individual's right to alienate, obtain, transfer and hypothecate land under the common law and specifically a contingent right or a 'would acquire' right in a pending partition action, can be transferred upon the conclusion of the partition action.

I do not wish to go on an academic exercise and analyze the law pertaining to prohibition of alienation or hypothecation referred to above nor the common law right to alienate or hypothecate. Suffice is to repeat the observation of Woodrenton, A.C.J. in **Subaseris Vs Prolis 16 NLR 393** at page 394;

> "…the clear object of the enactment was to prevent the trial of partition actions from being delayed by the intervention of fresh parties whose interests had been created since the proceedings began…"

Thus, in my view, the provisions of the Partition Law should be looked at and considered from the said perspective. It is not a draconian law nor obnoxious to the common law. It only provides a mechanism to partition land among the relevant parties and is an action *in rem*. Our Courts throughout the centuries have acknowledged and accepted the said fact and there is no difference of judicial opinion with regard to it.

In the instant appeal, the rights the 3rd and 4th defendants claim, is based upon the Judgement of the land case 327/L which had not been challenged by the plaintiff. For reasons

discussed in detail earlier, the partition action and the land case are mutually exclusive. The land case 327/L does not assail the final decree of the 317/P partition action. It is a standalone case. The 3rd and 4th defendants have a legally valid and enforceable Judgement which the 3rd and 4th defendants are lawfully entitled to execute.

The learned District Judge has taken a pragmatic approach and only made order that the unchallenged Judgement of the land case 327/L, should be executed upon or subsequent to the plaintiff obtaining possession of his entitlement of land from the partition action 317/P. This is the Order the learned Judges of the High Court set aside in a revision application, where no exceptional circumstances were pleaded by the plaintiff nor existed. Thus in my view, the said High Court Order is erroneous and does not stand to reason.

In the said background, I see merit in the submission of the appellant that the impugned Order of the High Court should be set aside and the Order of the District Court pertaining to the execution of writ should be affirmed.

For the reasons adumbrated in this Judgement, I answer the two questions raised before this Court in the affirmative and set aside the Order of the Civil Appellate High Court dated 05.02.2014 holden in Avissawella.

With regard to the writ of execution of decree, I affirm the Order dated 18.08.2011 of the District Court of Pugoda in the instant land case bearing No. 327/L.

The appeal is allowed.

Judge of the Supreme Court

B.P.Aluwihare P.C. J,
I agree.

Judge of the Supreme Court

Vijith K. Malalgoda, P.C. J,
I agree .

Judge of the Supreme Court

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

In the matter of an Appeal from a Judgment of the Provicial High Cout of the Western Province [excercising Civil Appellate Jurisdiction] holden at Awissawella dated 30th March 2017 in Application No. WP/HCCA/ AV/11/ 2017 [Revision] in terms of Section 5[C][1] of the High Court of the Provinces [Special Provisions] Act No. 54 of 2006 read with Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC Appeal No. 224/2017

SC/HCCA/LA 189/2017
WP/HCCA/AV 11/2017
D.C. Homagama Case No. 15884/15/MS

Yahampath Arachchilage Niroshanee Nadumali,
No.329/3, High Level Road,
Meegoda.
PLAINTIFF

-VS-

Damitha Nalinda Bamunusinghe.
No.388/7, Baddegedara,
Meegoda.
DEFENDANT

AND

Damitha Nalinda Bamunusinghe.
No.388/7, Baddegedara,
Meegoda.
DEFENDANT-PETITITONER

-VS-

Yahampath Arachchilage Niroshanee Nadumali,
No.329/3, High Level Road,
Meegoda.
PLANTIFF - RESPONDENT

AND BETWEEN

Damitha Nalinda Bamunusinghe.
No.388/7, Baddegedara,
Meegoda.
DEFENDANT-PETITITONER-PETITITONER

-VS-

Yahampath Arachchilage Niroshanee Nadumali,
No.329/3, High Level Road,
Meegoda.
PLANTIFF-RESPONDENT RESPONDENT

AND NOW BETWEEN

Damitha Nalinda Bamunusinghe.
No.388/7, Baddegedara,
Meegoda.
DEFENDANT-PETITITONER-PETITITONER- APPELLANT

VS-

Yahampath Arachchilage Niroshanee Nadumali,
No.329/3, High Level Road,
Meegoda.
PLANTIFF-RESPONDENT RESPONDENT- RESPONDENT

BEFORE : **MURDU N.B. FERNANDO, PC, J.**
S. THURAIRAJA, PC, J.
YASANTHA KODAGODA, PC, J.

COUNSEL : J.P. Gamage for the Defendant– Petitioner-Appellant - Appellant.
Isuru Somadasa for the Plaintiff – Respondent – Respondent-Respondent.

ARGUED ON : 22nd May 2020.

WRITTEN SUBMISSIONS : Plaintiff – Respondent – Respondent- Respondent on the 17th of January 2018.
Defendant– Petitioner-Appellant - Appellant on the 15th of December 2017.

DECIDED ON : 10th September 2020.

S. THURAIRAJA, PC, J.

This is an appeal filed against the judgment of the Provincial High Court dated 30.03.2017.

Yahampath Arachchilage Niroshanee Nadumali i.e. Plaintiff – Respondent – Respondent- Respondent (hereinafter sometimes referred to as Plaintiff – Respondent) instituted the above action bearing No. 15884/15/MS under Chapter LIII of the Civil Procedure Code against the Defendant- Petitioner-Petitioner- Appellant (hereinafter sometimes referred to as Defendant – Appellant) praying for a judgment and decree in favour of the Plaintiff –Respondent to recover a sum of Rs. 3,000,000/- (Rs. Three Million) together with the interest as prayed for in the prayer to the Plaint dated 09th November 2015.

Plaintiff-Respondent contended that the Defendant- Appellant borrowed the sum of Rs. 3,000,000/- from the Plaintiff-Respondent and had given her a promissory note which was marked as "P1" in the Plaint as proof of the transaction. The Defendant- Appellant failed to settle the said Rs. 3,000,000/- as agreed upon. Therefore, this action was instituted in the District Court based on the said promissory note under chapter LIII of the Civil Procedure Code to recover the same, with interest as prayed for in the prayer to the Plaint.

The Plaintiff – Respondent supported the case before the learned District Judge on 17/11/2015 and having been satisfied the Learned District Judge directed that summons be issued on the Defendant- Appellant as per form 19 in the 1st Schedule to the Civil Procedure Code. The Defendant- Appellant having received summons appeared in Court and filed objections on 29/03/2016 supported by an Affidavit together with the annexures marked as "V1","V1(A)", V1(AA), "V2", "V3" and "V4" seeking permission from court to appear and defend the action.

The Defendant-Appellant in his statement of objections stated inter alia that, the plaint of the Plaintiff-Respondent is not supported by an accompanying affidavit as required by law in terms of Section 705(1) of the Civil Procedure Code. Further, the Defendant-Appellant stated that, the date of the Plaint is 09/11/2015 but the date of the affidavit of the Plaintiff-Respondent, available in the case record and served on the Defendant-Appellant is dated 20/11/2015, and therefore the affidavit has been tendered to Court after filing and supporting the Plaint. In response to the claim of the Plaintiff – Respondent, the Defendant-Appellant alleged that on three separate occasions he had paid back a total of Rs. One Million (Rs. 1,000,000/-) to the Plaintiff – Respondent and the Plaintiff – Respondent had acknowledged these payments by signing on photocopies of the promissory note (marked as "V2", "V3" and "V4"). The contention of the Defendant-Appellant is that, the Plaintiff – Respondent has suppressed these material facts relevant to the transaction between the Plaintiff –

Respondent and the Defendant-Appellant, and claimed the full amount namely Rs. 3,000,000/- from the Defendant-Appellant.

The Defendant-Appellant pleaded and moved Court to allow him to file answer to the Plaint of the Plaintiff – Respondent unconditionally in terms of the provisions of sections 704 and 706 of the Civil Procedure Code, since the Plaint is contrary to mandatory provisions of Section 705(1) of the Civil Procedure Code and the Defendant-Appellant has already paid Rs. 1,000,000/- to the Plaintiff – Respondent which has been acknowledged by the Plaintiff – Respondent and as such the Plaintiff – Respondent is not entitled to file action under Chapter LIII of the Civil Procedure Code. Further, the Defendant-Appellant stated that he had obtained the sum of Rs. 3,000,000/- from the Plaintiff-Respondent's husband's friend who is a money lender, and placed as security a property belonging to the Plaintiff-Respondent hence the said promissory note was given as security to the Plaintiff-Respondent.

After hearing both parties, the learned Judge of the District Court by his order dated 13/01/2017 directed the Defendant-Appellant to deposit the sum of Rs. 3,000,000/- before filing answer. The reasons for the order of the learned District Judge are as follows.

> *"රුපියල් ලක්ෂ 30 ක මුදලක් විත්තිකරු විසින් පැමිනිලිකාරියගෙන් ණයට ලබාගත් බව ඔහු විසින්ම සිය දිවුරුම් ප්‍රකාශයෙන් මෙන්ම පැ. 1 ලේඛනයෙන් ද පිලිගෙන ඇති හෙයින් විත්තිකරු ඉහත කී රුපියල් ලක්ෂ 30 ක මුදල පිලිබඳ මෙම නඩුවේදී අවස්ථා දෙකකදී ඉදිරිපත් කරන ස්ථාවර එකිනෙකට පරස්පරය. එබැවින්, හබගත රුපියල් ලක්ෂ 30 ක මුදල පැමිනිලිකාරිය විසින් විත්තිකරුට ණයට දී ඇති බව තහවුරු වී ඇත....*
>
> *එබැවින්, විත්තිකරු විසින් මෙම නඩුවේදී එකිනෙකට වෙනස් අන්දමට ඉදිරිපත් කරනු ලැබූ මෙකී විත්ති වාචකය පැමිනිල්ලේ නඩුව ප්‍රතික්ෂේප කිරීමට හෝ නිෂ්ප්‍රභ කිරීමට තරම් ප්‍රමාණවත් විත්ති වාචකයක් නොවූ බව මෙම අධිකරණයේ නිරීක්ෂණයි.*

එහෙයින්, මෙම නඩුවට චිත්තිකරු විසින් විශ්වාස කරන චිත්ති වාචකයක් ඉදිරිපත් කිරීමට හා උත්තරයක් ගොනු කිරීමට අවශ්‍ය නම් චිත්තිකරු ඊට ප්‍රථම රුපියල් ලක්ෂ 30 ක මුදල් ඇපයක් අධිකරණයෙහි තැන්පත් කළයුතු බවට නියෝග කරමි."

The English translation of the aforementioned reasoning of the District Court judgment is as follows;

"Since the Defendant himself has admitted in his affidavit and also in the document marked as 'P1' that he borrowed an amount of Rs.30 Lakhs from the Plaintiff, the position that the Defendant asserts on two occasions over the aforesaid amount of Rs.30 Lakhs seem to be contradictory. Therefore, it is confirmed that the said amount of Rs.30 Lakhs which is in dispute has been given to the Defendant by the Plaintiff as a debt……

Accordingly, it is the observation of this court that the contradictions of the aforesaid defence have not been sufficient to reject or dismiss the case filed by the plaintiff.

Therefore, I do hereby order that, if the defendant intends to submit a defence he believes and to file an answer, he should deposit a cash bail of Rs.30 Lakhs in the Court prior to that." (sic)

Being aggrieved by the said order of the learned Judge of the District Court, the Defendant- Appellant filed a Revision application in the Provincial High Court of the Western Province (exercising Civil Appellate jurisdiction) holden at Avissawella (hereinafter referred to as the "Provincial High Court") bearing No. WP/HCCA/AV/11/2017 (Revision) to revise the order of the District Court.

When the matter was taken up for support, the Plaintiff – Respondent raised preliminary objections as to the maintainability of the application, as follows.

1. Since the Defendant-Appellant failed to explain the reason as to why he could not exercise the right to appeal, the application in revision cannot be maintained.

2. The delay to make the instant application in revision has not been explained in the petition.

The learned Counsel for the Plaintiff-Respondent and the Defendant-Appellant made submissions pertaining to the aforesaid preliminary legal objections. Provincial High Court held that,

"*under section 754(2) and 757 of the Civil Procedure Code, the Defendant-Appellant must come to the Provincial High Court against the impugned order, upon a leave to appeal application, whereas the Defendant-Appellant has not availed himself of these provisions of law. In such a situation, there is a duty cast upon the Defendant- Appellant to explain the reasons as to why he did not invoke the Appellate jurisdiction of the Court.*

In this case, there is a right of appeal against the impugned order of the District Court, with the leave of the Provincial High Court. The Defendant-Appellant, however, has not exercised this right and failed to explain the reason as to why he could not exercise the right of appeal. Hence, in the light of the forgoing decisions of apex courts, Provincial High Court hold that the instant application in revision cannot be maintained.

Besides, since there is no material prejudice caused to the defendant due to the fact that the affidavit was executed on a subsequent date of the plaint, I hold that there is no any impediment for plaintiff to proceed with this case as it is instituted.

In the circumstances, it appears to this court that the order of the learned District Judge allowing the defendant to file an answer after depositing the entire amount in suit is not wrong."

The learned Judges of the Provincial High Court delivered the judgment dated 30.03.2017 and dismissed the said application of the Defendant- Appellant based on the first preliminary objection raised by the Plaintiff – Respondent.

Being aggrieved by the judgment of the learned Judges of the Provincial High Court, the Defendant- Appellant filed an application before this Court seeking leave to appeal. This matter was supported and leave to appeal was granted on 16/11/2017 on the questions of law raised in Paragraph 20(a) to (c) of the Petition dated 06/04/2017. They are as follows.

(a) Did the Learned Provincial High Court Judges err in law by not considering that a plaint presented under chapter LIII of the Civil Procedure Code must accompany an Affidavit of the Plaintiff-Respondent at the time of presenting the Plaint?

(b) Did the Learned Provincial High Court Judges err in law by not considering that the Court has no jurisdiction to issue summons in terms of Section 705 of the Civil Procedure Code if there is no proper affidavit filed by the Plaintiff-Respondent?

(c) Did the Learned Provincial High Court Judges err in law in coming to a conclusion that irrespective of the imperative provisions of the Section 705(1) of the Civil Procedure Code an Affidavit can be executed before or after the Plaint?

This matter was argued before this Court and Plaintiff – Respondent submitted that she filed her affidavit along with the petition on 09th of November 2015.

The Defendant-Appellant stated that the jurat of the Plaintiff – Respondent's Affidavit filed before the District Court depicts the date of affirmation as "වර්ෂ **2015** ක් වූ නොවැම්බර් මස **20** වන දින..." [on the date of 20th November 2015]. It was the position of the Defendant-Appellant that the 1st journal entry of the District Court case record does not reveal that the Affidavit was tendered when the Plaintiff – Respondent filed this action under Chapter LIII of the Civil Procedure Code on 09/11/2015.

In this context, I have perused the original brief of the District Court, and I observed that the impugned affidavit was filed in record on 9/11/2015. Further, I found that the same dated Rubber Stamp was placed on the Plaint, Affidavit and documents marked "ඇ 1", "ඇ 2", "ඇ 2(අ) ".

As I observed, in terms of Section 705(1) of the Civil Procedure Code, when a person (plaintiff) claims under Chapter LIII, he/she should file an affidavit along with the petition stating the sum which he/she claims is justly due to him from the other party (defendant). At this stage it will be useful to refer to the relevant section of the Civil Procedure Code. Section 705(1) reads as follows;

> "*The plaintiff who so sues and obtains such summons as aforesaid must on presenting the plaint produce to the Court the instrument on which he sues, and he must make affidavit that the sum which he claims is justly due to him from the defendant thereon*."

According to Section 705(1) of the Civil Procedure Code, the condition precedent to the issue of summons is that the documents on which the action is based must along with the presenting the plaint, be produced to the court and that the Plaintiff must make an affidavit that the sum which he/she claims is justly due to him/her from the Defendant. When this section is carefully analyzed, it becomes evident that the averments contained in the affidavit should only be supportive of the contents of the petition.

In **Kobbekaduwa vs. Jayewardene and others** [1983 1 SLR 419], in the Supreme Court, the Respondents have taken several preliminary objections to the petition and have moved that the petition be rejected or dismissed. The petitioner has not filed affidavits in support of his allegation of the illegal practice set out in paragraph 7 of the petition and that the /petition accordingly does not comply with the requirements of section 96(d) of the Presidential Elections Act, No.15 of 1981. Justice Sharvananda observed that,

"The function of an affidavit is to verify the facts alleged in the petition. The affidavit furnishes prima facie evidence of the facts deposed to in the affidavit. In an affidavit a person can depose only to facts to which he is able to testify of his knowledge and observation."

In **Kumarasinghe vs. Ratnakumara and Others** [1983 SLR - Vol 2 ,Page 393] at the commencement of the hearing of that application before the Supreme Court, a preliminary objection had been raised by the Addl. Solicitor-General that the petitioner's application does not conform to the requirements of Rule 65(1) of the Supreme Court Rules of 1978; in that, the petition of the petitioner has not been supported by an affidavit of the petitioner. He had pointed out that though the affidavits of petitioner's brother Rajasinghe Bandara and his mother Manoli Dharmadasa had been appended to the petition, the petitioner had failed to file his own affidavit verifying the facts pleaded by him in his petition. He had contended that it is an imperative requirement of the Rule 65(1) (a) and (c), that the petitioner should support his petition with his own affidavit. In that backdrop, Justice Sharvananda, A.C.J.,held as follows;

"An Affidavit in support of the application serves the purpose of proof of facts stated therein. It furnishes the evidence verifying the allegation of facts contained in the petition. Affidavit evidence carries equal sanctity as oral evidence. While a stranger cannot make an affidavit, it need not be made by the party individually, but may be made by any person personally aware of the facts."

In **Distilleries Company Ltd vs. Kariyawasam and others (**2001 SLR - Vol 3, Page 119), the matter had been taken up for hearing on the 25th June 2001 before the Court of Appeal and counsel for the plaintiff respondent (respondent) had raised two preliminary objections. His first objection had been based on the provision of section 757(1) of the Civil Procedure Code. Counsel had submitted that the affidavit filed by the 16th Defendant-petitioner (petitioner) does not support the petition as

contemplated by section 757(1) of the Civil Procedure Code, as the affidavit had been affirmed to on a date anterior to the date the petition had been subscribed to. It had been argued on behalf of the respondent, that as the date of the affidavit submitted by the petitioner precedes the date of the petition, the petitioner could not have possibly supported the contents of the petition by his affidavit, as contemplated by section 757(1) of the Civil Procedure Code. Justice Nanayakkara held as follows;

> *"In terms of S. 757(1), the Petition need not precede in point of time to that of the affidavit so as to enable a party to support the contents of the Petition. The object of the Civil Procedure Code is to prevent civil proceedings from being frustrated by any kind of technical irregularity or lapse which has not caused prejudice or harm to a party. A rigid adherence to technicalities should not prevent a court from dispensing justice." The court should not approach the task of interpretation of a provision of law with excessive formalities and technicality. A provision of law has to be interpreted contextually giving consideration to the spirit of the law*".

In the case of **Mohamed Facy Mohamed vs. Mohamed Azath Sanoon Sally and others** [SC Appeal 4/2004 –BASL Law Journal 2006 page 58] his Lordship Justice Marsoof in considering the impact of defects of technical nature of an affidavit, has observed in reference to Section 9 of the Oaths Ordinance, that the said section is a salutary provision which was intended to remedy such maladies.

In conclusion, it must be said that the infirmities and irregularities in the affidavit of the Plaintiff- Respondent referred to by the Defendant- Appellant are technical in nature, and that they can be cured by application of section 9 of the Oaths Ordinance and therefore do not impact on the validity of the affidavit.

I am of the opinion that the object of the Civil Procedure Code is to regulate the conduct of civil proceedings and prevent civil procedure from being frustrated by any kind of technical irregularity or lapse which has not caused no prejudice or harm to a party. Hence, all that is expected of a person under section 705(1) of the Civil

Procedure Code is to evidentially support matters contained in the petition by way of an affidavit. A rigid adherence to technicalities should not prevent a Court from dispensing justice. In the instant case, the learned District Judge has given his reasons for not allowing the Defendant- Appellant to defend the action unconditionally. On a perusal of the provisions of the Civil Procedure Code, it is clear that the legislature had intended to give the Judge in every such case the discretion as to imposing terms with which the Appeal Court should not unnecessarily interfere.

In the aforesaid circumstances, I hold that the cited irregularity is not sufficiently grave to have an effect on the validity of the impugned affidavit. Hence, I answer the first question of law in the negative.

On a careful consideration of Sections 704(2) and 706 of the Civil Procedure Code, it appears that when the Defendant who swears to a fact which, if true, constitutes a good defence, he/she must be allowed to defend unconditionally unless there is something on the face of the proceedings which lead the Court to doubt the *bona fides* of the Defendant. It should be mentioned here that the provision contained in section 704(2) of the Civil Procedure Code should not be made use of as a punishment for not honouring one's obligation and the words "unless the court thinks his defence not to be *prima facie* sustainable or feels reasonable doubt as to his good faith" mean that the learned trial Judge has the discretion to decide the question whether the Defendant should be allowed to appear and defend without security. When one considers the above facts, it is clear that the defence has not raised a triable issue and in such an event leave must not be given unconditionally.

In the instant case, the Defendant-Appellant had presented different defences and statements during the course of the trial. Hence, the learned District Judge has exercised his discretion on sound judicial grounds, and on a perusal of the reasons given by the learned District Judge, one cannot say that he has exercised his discretion arbitrarily or perversely. In terms of Section 706 of the Civil Procedure

Code, having deposited the amount stipulated in the order of the learned District Judge, the Defendant- Appellant has a legal right and opportunity to present all his defences by way of an answer for final adjudication. He has failed to do so.

The power of revision vested in the Appellate Court are very wide; such powers would only be exercised in exceptional circumstances. When there is an alternative remedy available to the Defendant- Appellant or if the law provides opportunities for the Defendant- Appellant to put forward his grievances, ordinarily the Court will not interfere by way of revision.

In **Rasheed Ali V. Mohamed Ali and Others** (1981 SLR Vol 1 ,Page 262) the Supreme Court observed that, *"ordinarily the Court will not interfere by way of review, particularly when the law has expressly given an. aggrieved party an alternate remedy such as the right to file a separate action, except when non-interference will cause a denial of justice or irremediable harm.'*

It *was* submitted by the learned Counsel for the Plaintiff- Respondent that the date that appears in the jurat is due to a typographical error. It is pertinent at this stage to consider Section 9 of the Oaths and Affirmations Ordinance, No. 9 of 1985, which provides as follows:

> *"Proceedings and evidence not to be invalidated by omission of oath or irregularity.*
>
> *No omission to take any oath or make any affirmation, no substitution of any one for any other of them, and* ***no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence*** *whatever in or in respect of which such omission, substitution, or irregularity took place, or shall affect the obligation of a witness to state the truth."*
>
> (Emphasis added)

Section 13 of the Oaths and Affirmation Ordinance furnishes the sanction against a false affidavit by making the deponent guilty of the offence of giving false evidence. In an affidavit a person can depose only to facts which he is able of his own knowledge and observation to testify.

Taking the abovementioned law into consideration, I find that Section 9 makes provision for an omission due to inadvertence, evasion or irregularity which took place on the part of a declarant to be cured. This contention was upheld in **K.H.S. Pushpadeva vs. Senok Trade Combine Ltd** [SC/HC/LA 02/2014 decided on 04/09/2014- Bar Association Law Journal 2015 Vol. XXI page 40]. When this case was taken up for support, counsel for the Applicant-Appellant- Respondent had raised preliminary objections and stated that the affidavit of Jerome Anil Rathnayake, is not an 'affidavit' known to law, as there was no affirmation. It had also been formulated as a mere statement and the affirmant has not specified his religion and had not taken an oath or affirmation. Justice Aluwihare, PC held that,

> "*In conclusion it must be said that the infirmities and irregularities in the affidavit of the Petitioner referred to by the Respondent are technical in nature that can be cured by application of Section 9 of the Oaths Ordinance and therefore do not impact on the validity of the affidavit*."

I find that it is not disputed that the aforementioned decision has referred to technicalities and had held that merely on the footing of a 'technical objection' a party should not be deprived of his case being heard by Court. I am quite mindful of the fact that mere technicalities should not be thrown in the way of the administration of justice and accordingly I am in respectful agreement with the observations made by Justice Dr. Amarasinghe in **Fernando v. Sybil Fernando and Others** - (1997) 3 Sri L.R. 1) in which he held that;

> "*Judges do not blindly devote themselves to procedures or ruthlessly sacrifice litigants to technicality*".

(Emphasis added)

Hence, I answer the second and third questions of law also in the negative.

Additionally, since there is no material prejudice caused to the Defendant-Appellant due to the fact that the affidavit was executed on a subsequent date of the plaint, I hold that there is no impediment for the Plaintiff-Respondent to proceed with this case in the manner it has been instituted. For the aforesaid reasons, I answer all the questions of law raised before this Court by the Respondent- Appellant in the negative, and I dismiss the appeal of the Respondent- Appellant. Accordingly, I affirm the Order of the learned Judges of the Provincial High Court dated 30.03.2017 and the learned Judge of the District Court dated 13.01.2017. I dismiss the appeal with costs fixed at Rs.50, 000/-.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

MURDU N.B. FERNANDO, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

YASANTHA KODAGODA, 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/ Leave to Appeal from a judgement of the Provincial High Court of Colombo dated 23rd August 2017 (in appeal No. HCALT 83/2014), in terms of Section 31DD (1) of the Industrial Disputes Act No. 32 of 1990 and the High Courts of the Provinces (Special Provisions) Act No. 19 of 1990 read with the Rules of the Supreme Court

SC Appeal No: 228/2017

SC Application No: SC/HC/LA 92/17

HC (Appeal) No. HC ALT 83/2014

LT Application No: 01/Add/19/2014

W.K.P.I. Rodrigo,

No. 82/10, Baptist Road,

Pitakotte, Kotte.

APPLICANT

-VS-

Central Engineering Consultancy Bureau,

No. 415, Bauddhaloka Mawatha,

Colombo 07.

RESPONDENT

AND BETWEEN

W.K.P.I. Rodrigo,

No. 82/10, Baptist Road,

Pitakotte, Kotte.

APPLICANT-APPELLANT

-VS-

Central Engineering Consultancy Bureau,

No. 415, Bauddhaloka Mawatha,

Colombo 07

RESPONDENT-RESPONDENT

AND NOW BETWEEN

W.K.P.I. Rodrigo,

No. 82/10, Baptist Road,

Pitakotte, Kotte.

APPLICANT-APPELLANT-APPELLANT

-VS-

Central Engineering Consultancy Bureau,

No. 415, Bauddhaloka Mawatha,

Colombo 07

RESPONDENT- RESPONDENT-RESPONDENT

BEFORE : **JAYANTHA JAYASURIYA, PC, CJ.**
MURDU N.B. FERNANDO, PC, J.
S. THURAIRAJA, PC, J.

COUNSEL : Applicant – Appellant – Appellant appears in person.
Indunil Bandara instructed by S.H.H.C.U. Senanayake and R. Rizwan for the Respondent- Respondent - Respondent

ARGUED ON : 24th June 2020.

WRITTEN SUBMISSIONS : Applicant-Appellant-Appellant on the 3rd of January 2018, 25th June 2020.

Respondent-Respondent-Respondent on 14th of February 2018

DECIDED ON : 02nd October 2020.

S. THURAIRAJA, PC, J.

I find it pertinent to establish the facts of the case prior to addressing the issues before us. The employee W.K.P.I Rodrigo i.e. Applicant – Appellant – Appellant, (hereinafter referred to as Employee – Appellant) was recruited by Central Engineering Consultancy Bureau i.e. Respondent – Respondent – Respondent (hereinafter referred to as Employer – Respondent) as a Civil Engineer Grade D1, in January 1986. The Employee – Appellant was suspended on a disciplinary issue on the 26th of August 2011, was found guilty upon the conclusion of the disciplinary inquiry and was terminated from employment on the 14th of October 2013.

Being aggrieved with the termination of employment, the Employee – Appellant filed a fundamental rights application in the Supreme Court bearing No. SC FR 395/2013 against the Employer – Respondent by petition dated 18.11.2013 alleging that the termination of his services was a breach of his fundamental rights enshrined in Article 12(1), 12(2) and 14(1) (g) of the Constitution. Subsequently the Employee – Appellant filed an application against the Employer – Respondent in the Labour Tribunal of Colombo on the 17.03.2014 (Application No. 01/Add/19/2014) challenging the termination of his services.

The Employer – Respondent filed its answer and raised the preliminary objection under Section 31 B (5) of the Industrial Disputes Act No.43 of 1950 (as amended), that the Employee – Appellant could not maintain an application before the Labour Tribunal due to the fact that he had first filed a fundamental rights application before the Supreme Court.

After the preliminary objection was raised, the learned President of the Labour Tribunal asked both parties to file written submissions. Thereafter the preliminary objection was upheld and the Employee – Appellant's application was dismissed.

Being dissatisfied with the order dated 03.09.2014 of the Labour Tribunal, the Employee – Appellant appealed to the High Court of the Western Province Holden in Colombo (Appeal No. HCALT 83/2014 dated 01.10.2014). The learned Judge of the High Court upheld the order of the Labour Tribunal and dismissed the appeal of the Employee – Appellant.

Being aggrieved with the said Order of the High Court, the Employee – Appellant preferred an application for leave to appeal to the Supreme Court and leave to appeal was granted on the questions of law set out in paragraph 13 (a) to (f) of the petition.

Previously, this matter was heard before a bench comprising of Hon. Chief Justice Jayantha Jayasuriya, PC, late Hon. Justice Prasanna Jayawardane, PC and myself on 17/07/2019. The Counsel for the Employee – Appellant, Geoffrey Alagratnam PC

submitted to Court detailed and comprehensive written submissions and made extensive oral submissions on behalf of the Employee – Appellant. When this case was recalled for argument the Employee – Appellant appeared in person and relied on the written submissions made on behalf of him on 03/08/2018. As this matter was previously heard, I have had the benefit of engaging in extensive discussions with my late brother regarding various issues in this matter and wish to acknowledge his invaluable contribution which was of immense help for me to capture all salient features and develop this judgment.

The learned Presidents Counsel for the Employee – Appellant submitted that the petitioner's appeal would be confined to three questions of law. They are as follows;

(a) *Did the learned High Court Judge err in law in not appreciating the scope and purpose and/ or wording of*
A – Section 31 B (3) and/or
B – Section 31 B (5) of the Industrial Disputes Act?
(b) *Did the learned High Court Judge err in holding that two cases cannot be filed on the same incident?*
(c) *Did the learned High Court Judge err in law in upholding the Order of the Labour Tribunal on the grounds stated and in deciding to dismiss the Application and petition filed by the Petitioner?*

The issue of law to be decided in this appeal is whether the provisions of section **31B (5)** of the Industrial Disputes Act No. 43 of 1950, as amended, debar the Employee – Appellant from maintaining his application to the Labour Tribunal against the termination of his services by the Employer - Respondent, for the reason that the Employee – Appellant had previously filed a fundamental rights application No. SC FR 395/2013 in this Court claiming that the said termination of his services by the Employer - Respondent violated his fundamental rights guaranteed by Articles **12 (1)**, **12 (2)** and **14 (1) (g)** of the Constitution.

The Counsel for the Employer - Respondent, relying on Section **31B (5)**, submitted that the Employee – Appellant is precluded from filing an application before the Labour Tribunal on the ground that he had first filed a Fundamental Rights Application bearing No. SC FR 395/2013. He submitted that although an employee can challenge termination of his services in several forums including the Labour Tribunal, District Court and Supreme Court, he cannot seek legal remedies from multiple forums in respect of the same issue / dispute (i.e. the termination of services).

Section 31 B (5) of the Industrial Disputes Act is reproduced below for easy reference.

Section 31 B (5)

"*Where an application under subsection (1) is entertained by a labour tribunal and proceedings thereon are taken and concluded, the workman to whom the application relates shall not be entitled to any other legal remedy in respect of the matter to which that application relates, and where he has first resorted to any other legal remedy, he shall not thereafter be entitled to the remedy under subsection (1)"*

The determination of this question requires us to ascertain the intention and purpose of the Legislature when it enacted section **31B (5)** and, in that light, to identify the proper scope of section **31B (5)**. Doing so will require an examination of the background to the introduction of Part IVA of the Act which contains the provisions relating to Labour Tribunals, including section **31B (5)**. Part IVA was introduced by the Industrial Disputes (Amendment) Act No. 62 of 1957. Part IVA initially had four sections - *ie:* sections **31A**, **31B**, **31C** and **31D**. These sections have been subjected to a few amendments since 1957. Further, new sections **31DD**, **31DDD** [later repealed] and **31DDDD** were added to Part IVA, by other Amendments to the Industrial Disputes Act.

As indicated in its long title, the Industrial Disputes Act was enacted in 1950 with the aim of preventing, investigating and settling industrial disputes and for matters connected therewith or incidental thereto. It has been long recognised that the overall purpose of the Act is to maintain and promote industrial peace. Thus, in ***Colombo***

Appothecaries Co. Ltd Vs. Wijesooriya [70 NLR 481 at p. 490], G.P.A. Silva J said that *".....there can be hardly any doubt-that the sole object of the Act is the promotion and maintenance of industrial peace."* and Tennekoon J, as he then was, observed [at p.507], *"It has been said frequently, and quite recently reiterated by their Lordships of the Privy Council that the purpose and object of the Act is the maintenance and promotion of industrial peace ....."* .

In its original form, the Act provided, *inter alia*, for the Minister to refer an industrial dispute to an Industrial Court or to Arbitration, for settlement. There was no provision for a workman who was aggrieved by the termination of his services by his employer, to unilaterally seek relief under the Act. Instead, he had to obtain the intervention of the Minister to seek relief under the Act. That *lacuna* was rectified with the enactment of the aforesaid Industrial Disputes (Amendment) Act No. 62 of 1957 which introduced a new Part IVA to the Act containing provisions for the establishment of Labour Tribunals as a special forum established by the State to enable workmen to seek relief in instances where they complain of a termination of their services. As eloquently explained by Lord Guest and Lord Devlin in their renowned dissenting judgment in the Privy Council decision of ***The United Engineering Workers Union vs. Devanayagam*** [69 NLR 289 at p.304-305]

> *"The Act thus employed the known ways of settling the ordinary trade dispute. But it did not include any simple way of remedying a grievance which an individual workman might have against his employer. Suppose, for example, that a workman was dismissed with such notice as the common law thinks reasonable but which a fair-minded employer nowadays probably accepts as inadequate; or suppose he was dismissed because of reduction in the labour force but without the ex gratia payment which a reasonably generous employer would nowadays think appropriate. The aggrieved workman in such a case could seek the help of his trade union which could threaten industrial action. Then there might be a reference which might result in the workman obtaining better treatment and in an award to govern similar cases in the future ... A swift way of dealing with an*

individual grievance without calling out the whole force of trade unionism would certainly help to promote industrial peace. It was supplied by an amending Act of 1957. This Act enlarged the definition of industrial dispute so as to make it clear that it included a dispute or difference between an individual employer and an individual workman. It inserted into the Act a new part, Part IV A, entitled `Labour Tribunals'. The function of the Labour Tribunal is to entertain applications by a workman for relief or redress in respect of such matters relating to the terms of employment or the conditions of labour as may be prescribed. The particular matters specified in the Act are those which we have already mentioned by way of example, namely, questions arising out of the termination of the workman's services and relating to gratuities or other benefits payable on termination. On such matters the Tribunal is to make such order as may appear to it to be just and equitable."

Identifying the purpose for which the Legislature introduced Labour Tribunals in 1957, S.R. De Silva, the renowned writer on Industrial Law, states [The Legal Framework of Industrial Relations at p. 293] *"In 1957 the State, by amending legislation, created bodies known as labour tribunals to ensure job security by safeguarding against involuntary termination of employment except for good cause."*.

Thus, **31A (1)** of the Act, post the aforesaid amendment, empowers the Minister to establish Labour Tribunals. Next, sections **31B (1) (*a*), (*b*)** and **(*c*)** provide that a workman [or a trade union on his behalf] may make a written application to a Labour Tribunal for relief or redress in respect of the termination of his services and/or the gratuity or benefits due to him from his employer upon the termination of his services. [Section **31B (1) (*d*)** states that a workman may make and application to a Labour Tribunal in respect of such other matters as the Minister may prescribe. However, that provision is not relevant to the question before us].

Thereafter, section **31C (1)** states that, when such an application is made to it, it shall be the duty of the Labour Tribunal to make inquiries into that application and, when

doing so, to hear all such evidence as the Labour Tribunal considers necessary and, thereafter, make an Order which the Labour Tribunal considers is just and equitable. Section **31B (4)** read with section **31C (1)** make it clear that a Labour Tribunal is not limited by the terms and conditions of the contract of service between the workman and the employer when making an Order which it considers to be just and equitable. Thus, for example, section **33 (1) *(b)*** in Part VI of the Act which contains the *"General"* provisions applicable to the Act, states that a Labour Tribunal is empowered, where it considers it appropriate, to order that a workman whose services have been terminated, be reinstated in service even though, as is well known, the relief of specific performance is unavailable in a contract for personal services other than in a few exceptional circumstances.

These provisions show that the Legislature established Labour Tribunals with the intention of giving workmen whose services had been terminated by their employer, a special forum which was constituted to determine applications against the employer for relief in respect of the termination of services and to ensure that a workman could make such an application with relative ease. It is also evident that, in order to achieve this intention, the Legislature considered it necessary to invest Labour Tribunals with substantial powers and the discretion to grant relief on a just and equitable basis, untrammelled by the terms and conditions of the contract of services and the common law of master and servant.

However, a perusal of the other provisions in Part IVA of the Act, make it clear that, when establishing Labour Tribunals, the Legislature kept in mind the overall purpose of the Act - which was to maintain and promote industrial peace for the common good of society. Thus, some of the provisions in Part IVA of the Act demonstrate that Parliament took care to ensure that, while giving workmen the right to `directly' make an application to a Labour Tribunal seeking relief in respect of the termination of services by their employers, that right is not permitted to interrupt or prejudice other proceedings in which matters relevant to the application are being considered. This safeguard is seen in section **31B (2) (*a*)**, section **31B (3) (*a*)** and **section 31B (3) (*b*)** of the Act.

Thus, section **31B (2) (*a*)** specifies that, where a Labour Tribunal is satisfied that the termination of services which is the subject matter of an application made to it, is under discussion between the employer-respondent and the trade union of which the workman is a member, the Labour Tribunal must suspend hearing the application until the conclusion of those discussions and, in the event those discussions lead to a settlement, the Labour Tribunal must make Order in terms of that settlement. It is also implicit in section **31B (2) (*a*)** that, even if the discussions do not end in a settlement, a Labour Tribunal should consider what transpired during such discussions when it makes its final Order.

On broadly comparable lines, section **31B (3) (*a*)** and section **31B (3) (*b*)** specify that: **(*a*)** where a Labour Tribunal is of the opinion that an application made to it relates to any matter which is similar to or identical with a matter constituting or included in an industrial dispute in respect of which there is an inquiry proceeding in terms of the Act and to which the same employer is a party; or, **(*b*)** where a Labour Tribunal is of the opinion that the facts affecting an application made to it are facts which affect any other proceeding under any other law; the Labour Tribunal must suspend hearing the application until the conclusion of that inquiry or proceeding and, thereafter, resume hearing the application having regard to the award or decision of the inquiry or proceeding.

It is apparent that the aforesaid section **31B (2) (*a*)** and sections **31B (3) (*a*)** and **31B (3) (*b*)** are designed to ensure that the hearing of an application made to a Labour Tribunal does not run contrary to or prejudice: (i) related discussions between the same employer and a trade union of which the applicant is a member; or (ii) related inquiries, under and in terms of the Act, into an industrial dispute, to which the same employer is a party; or (iii) proceedings under any other law which are relevant to that application. In other words, these three statutory provisions seek to harmonize a Labour Tribunal's hearing of an application made to it with other directly relevant proceedings and, thereby,

promote the overall purpose of the Act, which is to maintain and promote industrial peace for the common good of society.

At the same time, it is evident from two other provisions in Part IVA of Act - namely, section **31B (2) (*b*)** and section **31B (5)** - that, when the Legislature introduced Labour Tribunals, it wished to ensure that the right it gave any workman who is aggrieved by the termination of his services, to make an application to a Labour Tribunal with relative ease, should not permit that workman to obtain relief in respect of the termination of his services from *both* a Labour Tribunal and also from court or other forum which is empowered by law to grant relief to him in respect of the same termination of his services. Needless to say, permitting a workman to obtain relief in respect of the termination of his services from *both* a Labour Tribunal and also from court or other forum would not be conducive to the overall purpose of the Act, which is to maintain and promote industrial peace for the common good of society.

Accordingly, section **31B (2) (*b*)** specifies that, in cases where the Labour Tribunal is satisfied that the subject matter of an application made to it constitutes or forms part of an industrial dispute which is already before an Industrial Court or an Arbitration under the Act, the Labour Tribunal must dismiss that application without prejudice to those proceedings before the Industrial Court or Arbitration. It is apparent that this provision is founded on the policy that a Labour Tribunal should not proceed, under and in terms of the Industrial Disputes Act, to separately hear and determine an Industrial Dispute which has been previously referred by the Commissioner of Labour or the Minister for settlement to Arbitration or to an Industrial Court under the provisions of sections **3** or **4** of the same Act.

To turn to section **31B (5)**, it is evident that this statutory provision has two limbs. The first limb of section **31B (5)** states that a workman who has previously made an application to a Labour Tribunal in respect of the termination of his services and has had that application decided by the Labour Tribunal, *"shall not be entitled to any other legal remedy in respect of the matter to which that application relates"*. Conversely, the second

limb of section **31B (5)** states that where a workman has *"first resorted to* any *other legal remedy, he shall not thereafter be entitled to"* the remedy available under section **31B (1)** of the Act - *ie:* the remedy available in an application to a Labour Tribunal.

It is evident that the first limb of section **31B (5)** has the effect of ousting the jurisdiction of the courts [and other *fora* which are statutorily authorised to determine disputes relating to the termination of services of a workman] if the circumstances referred to in the first limb exist. In this regard, it is a long established and salutary rule that statutory provisions can have the effect of ousting the jurisdiction of the courts only if there is clear and unambiguous language to establish such an ouster. Thus, MAXWELL [3rd ed. at p.153] refers to

> *"the well-known rule that a statute should not be construed as taking away the jurisdiction of the courts in the absence of clear and unambiguous language to that effect."*.

It follows that first limb of section **31B (5)** should be given a restrictive interpretation which is confined to the specific circumstances described in this statutory provision. Next, it is evident that the second limb of section **31B (5)** has the effect of ousting the jurisdiction of the Labour Tribunal if the circumstances referred to in that statutory provision exist. However, the *rationale* and policy considerations which brought about the introduction of Labour Tribunals in 1957, which were mentioned earlier, dictate that the right of workmen to invoke the jurisdiction of a Labour Tribunal must not be restricted beyond the proper scope of the second limb of **section 31B (5).** Thus, it follows that the second limb of section **31B (5)** also should be given a restrictive interpretation which is confined to the specific circumstances described in that statutory provision.

The effect of the first limb of section **31B (5)** is clear as it explicitly precludes a workman from obtaining a determination by a Labour Tribunal of his application for relief or redress in respect of the termination of his services and, thereafter, proceeding to obtain another legal remedy in respect of the same subject matter from any other forum, whether that forum be a court of law, or a forum constituted under any of the provisions

of the Act other than those in Part IVA of the Act, or any other forum which has the legal authority to determine such complaints.

Thus, in ***Devanayagam*** [at p. 305], Lord Guest and Lord Devlin appear to have had the first limb of section **31B (5)** in mind when Their Lordships commented that

> *"The workman has to make his choice between the remedy afforded by the Act and any other legal remedy he may have; he cannot seek both. If he goes to the Tribunal, the Tribunal's order settles the matter and is not to be called in question in any court except that there may be an appeal to the Supreme Court on a question of law."*.

This view is reinforced by the statement [at p.313] made by Lord Guest and Lord Devlin in relation to section **31B (2) (*b*)** of the Act, that a dismissal of an application to a Labour Tribunal under that provision

> *"does not preclude the workman from pursuing his rights at common law since under **s. 31B (5)** they are excluded only where proceedings before the Tribunal are taken and concluded."*.

It is apparent that the question of whether the first limb of section **31B (5)** will apply and debar a workman from maintaining an action in a court [or an application to another forum], by reason of the fact that the same workman has previously received a determination in respect of the same subject matter in an application made by him to a Labour Tribunal, is a question that will have to be decided by that court [or other forum]. It is not a question that will come to the attention of a Labour Tribunal. I would also state here that, apart from section **31B (5)** being designed to maintain and promote industrial peace, it is self-evident that the first limb of section **31B (5)** is also founded on the principle of *Res Judicata*.

The second limb of section **31B (5)** states that, where a workman *"has first resorted to any other legal remedy, he shall not thereafter be entitled to"* make an application to a Labour Tribunal under section **31B (1)** of the Act. The Act does not define what is meant by the phrase *"legal remedy"*. As discussed above, the phrase *"any other legal remedy"* as

used in the *first limb* of section **31B (5),** means a legal remedy subsequently sought from any forum other than a Labour Tribunal, to obtain relief or redress in respect of the subject matter of the workman's previous application to a Labour Tribunal made under section **31B (1)** of the Act. However, unlike in the first limb of section 31B (5), in which the words "*in respect of the matter to which that application relates"* follow up and accompany the phrase "any other legal remedy", the said phrase as used in the second limb of section 31B (5) stands alone without any accompanying words to clarify its meaning. Consequently, it is necessary to identify what the Legislature meant when it used the phrase *"any other legal remedy"* in the second limb of section **31B (5)**.

In circumstances such as this, it is an established rule of statutory interpretation that a Court is entitled to look at the other related provisions of the Act to understand the context in which the phrase *"any other legal remedy"* has been used in the second limb of section **31B (5)** and, thereby, identify the correct meaning of the phrase for the purposes of section **31B (5).** As Bindra [INTERPRETATION OF STATUTES 7th ed. at p.301] states,

> *"It is, however, equally well settled that the meaning of the words used in any portion of the statute must depend on the context in which they are placed. Moreover, in interpreting an enactment all its parts must be construed together as forming one whole and it is not in accordance with sound principles of construction to consider one section, or group of sections alone, divorced from the rest of the statute. Further, so far as possible, the construction must be placed upon words used in any part of the statute which makes them consistent with remaining provisions and with the intention of the Legislature to be derived from a consideration of the enactment."*

When the approach set out above is used, it is evident that the phrase *"any other legal remedy"* in the second limb of section **31B (5)** echoes and should be understood to have the same meaning as it has in the first limb of section **31B (5)**. Thus, it can be concluded with certainty that the phrase *"any other legal remedy"* in the second limb of section **31B (5)** is limited in its meaning to *"any other legal remedy"* which the workman

has *previously* sought in a court or other forum in respect of the termination of his services *and* which had the same subject matter as his subsequent application to the Labour Tribunal.

Consequently, the second limb of section **31B (5)** applies only in instances where the *"other legal remedy"* sought by the workman in any another forum [whether that forum be a court, or a forum constituted under any of the provisions of the Act other than those in Part IVA of the Act, or any other forum which has the legal authority to determine such complaints]: (i) covered the same or similar ground and had the same or similar scope; *and* (ii) sought the same or similar substantive reliefs, as his subsequent application to a Labour Tribunal. For the reasons referred to earlier, this conclusion can be properly reached upon reading the provisions of the Act and applying the aforesaid established rule of statutory interpretation. Thus, S.R. De Silva has, referring to the second limb of section 31B (5), stated [at p.345], *"The principle of res judicata enshrined in this provision operates* ***only where the matter in dispute is the same*** *in both remedies sought by the workman."*. [emphasis added by me].

I would mention a third limitation/qualification to the circumstances in which the second limb of section **31B (5)** may be properly invoked. To my mind, this limitation follows as a corollary to the conclusion set out above. That third limitation is: the *"other legal remedy"* sought previously by the workman in a court or other forum [which has the legal authority to determine such complaints]; and the workman's subsequent application to the Labour Tribunal; would both have to be decided upon the core issue of whether the termination of the workman's services by the employer was done for good cause.

Inevitably, there might be some difference between the principles which would be applied by such court or other forum when deciding this core issue, and the principles that would be applied by a Labour Tribunal when it decides this core issue. Consequently, taking a view that the principles that are to be applied must by the court or other forum and by the Labour Tribunal, must be the *same*, will render section **31B (5)** nugatory. To illustrate by way of an example, a court of law will decide by applying the common law

and the terms and conditions of the contract of services when deciding an action relating to a workman's claim for relief consequent to the termination of his services, while a Labour Tribunal will decide an application made to it, by testing whether the termination of services was just and equitable without being confined by the terms and conditions of the contract of services. Hence, although the two forums need not necessarily apply the *same* principles for the second limb of section **31B (5)** to come into effect, the application of this provision is qualified/limited if the core issue before the court or other forum and the Labour Tribunal relates to whether the termination of the workman's' services by the employer was done for good cause, according to the principles which are to be applied by the court or other forum. When voicing this further limitation, I am fortified by broadly comparable views expressed by Tilakawardane J in ***Tri-Star Apparels Exports (Pvt) Ltd vs. Gajanayake*** [SC Appeal No. 85/2003 decided on 19th October 2004 at p.12-13] and by Sisira De Abrew J in ***Sri Lanka State Plantations Corporation vs. Dharmawansa***, [2006 1 SLR 346 at p.348-349]. These decisions are discussed later on.

It also appears that, in order for the second limb of section **31B (5)** to apply, there should not be a significant disparity between the procedure followed by the court or other forum when it determines an action or application in which a workman seeks a legal remedy is respect of termination of his services, and the procedure followed by a Labour Tribunal when it determines an application made to it by a workman. Views to this effect were expressed by G.P.S. De Silva J, as he then was, in ***Ceylon Tobacco Co. Ltd vs. Illangasinghe*** [1986 1 SLR 1 at p.4-5] and by Tilakawardane J in ***Tri-Star Apparels Exports (Pvt) Ltd vs. Gajanayake*** [at p.13-14]. Thus, if there is a material disparity or divergence between the aforesaid criteria in the *"other legal remedy"* sought by the workman and in his subsequent application to the Labour Tribunal, the second limb of section **31B (5)** cannot be applied. An attempt to apply the second section **31B (5)** even where there is a material disparity or divergence of the nature referred to in the preceding sentence, will require unduly stretching the intended effect of the second limb of section **31B (5)** beyond its proper scope, and, also, be illogical and inequitable.

Further, as I mentioned earlier, Labour Tribunals were introduced by the Legislature with the intention of providing a special forum in which a workman, who was aggrieved by the termination of his services by his employer, could seek relief or redress with relative ease of procedure. Consequently, enlarging the scope of the second limb of section **31B (5)** beyond its necessary limits which were formulated in the preceding paragraphs, will run contrary to that intention of the Legislature.

An examination of the previous decisions on the effect of section **31B (5)**, endorses the conclusions reached above. Firstly, I will consider the decisions cited by learned President's Counsel for the workman-appellant and learned counsel for the Employer-Respondent, in the course of their submissions to us. The decisions cited by learned counsel are: ***Richard Pieris and Co. Ltd. vs. Wijesiriwardena*** [62 NLR 233], ***The United Engineering Workers Union vs. Devanayagam, Mendis vs. RVDB*** [80 CLW 49], ***Ceylon Tobacco Co. Ltd vs. Illangasinghe, Construction Liason Ltd vs. Fernando*** [1988 II CALR 122], ***Independent Newspapers Ltd vs. Commercial and Industrial Workers' Union*** [1997 3 SLR 197] and ***Fernando vs. Standard Chartered Bank*** [2011 BALR 242].

In the ***Richard Pieris and Co. Ltd.*** case, T.S. Fernando J was of the view that the phrase *"any other legal remedy"* in section **31B (5)** refers to an action under the common law or to recourse to a specific statutory procedure in order to claim monies or benefits which are due to the workman from his employer upon the termination of employment. In ***Devanayagam'***s case, it is clear that Lord Guest and Lord Devlin considered that the phrase *"any other legal remedy"* in the first limb of section **31B (5)** refers to an action filed in a civil court under the common law. That view was shared by Viscount Dilhorne, who, referring to the phrase *"any other legal remedy"* in section 31B (5), said [at p.301] that a workman who makes an application to a Labour Tribunal

> "*... will get what the Tribunal thinks just and equitable and he can apply even when there has been no breach of contract. If he sues in the Courts he will have to show that he has a cause of action and he can only get what is legally due to him*."

Viscount Dilhorne also made it clear that section 31B (5) will apply only where there is a "duplication of claims by a workman".

The same approach will apply to the second limb of section **31B (5)**; in ***Mendis vs. RVDB***, De Kretser J considered that the second limb of section **31B (5)** could be applied only where the *"other legal remedy"* sought previously by the workman was *"in connection with the same subject-matter"* of the workman's subsequent application to the Labour Tribunal; in the ***Ceylon Tobacco Co. Ltd*** case, which concerned a previous application made by the workman under the Termination of Employment of Workmen (Special Provisions) Act and a subsequent application made by him to the Labour Tribunal, G.P.S. De Silva J, when His Lordship was in the Court of Appeal, based his decision that the second limb of section **31B (5)** applies, on the fact that the jurisdiction and powers to grant relief conferred upon Commissioner of Labour by the Termination of Employment of Workmen (Special Provisions) Act and the jurisdiction and powers to grant relief conferred on a Labour Tribunal by Part IVA of the Industrial Disputed Act *"are very similar"* and, further, that the procedure before both *fora* were similar. It is also evident that De Silva J considered that the phrase *"other legal remedy"* in the second limb of section **31B (5)** referred to either an action filed in a civil court under the common law or to a recourse to a specific statutory procedure; the ***Construction Liason Ltd*** case concerned similar facts and the Court of Appeal followed its previous decision in the ***Ceylon Tobacco Co. Ltd*** case; the ***Independent Newspapers Ltd*** case also concerned proceedings under the provisions of the Termination of Employment of Workmen (Special Provisions) Act and a subsequent application by the workman to a Labour Tribunal. Dheeraratne J held that the second limb of section **31B (5)** was inapplicable because the application under the Termination of Employment of Workmen (Special Provisions) Act had been made by the *employer* and *not* by the workman; the main questions before the Supreme Court in ***Fernando vs. Standard Chartered Bank*** dealt with whether the pleadings complied with provisions of the Civil Procedure Code. In any event, there was no application made by the workman to the Labour Tribunal. Accordingly, this decision is of little relevance to the issue of law which is before us in this appeal.

In addition to the above cases cited by learned counsel, the following decisions should also be considered: ***Tri-Star Apparels Exports (Pvt) Ltd vs. Gajanayake***, ***Sri Lanka State Plantations Corporation vs. Dharmawansa***, ***Ceylon Estate Staff Union vs. The Superintendent, Sunderland Estate*** [2012 BALR 9] and ***Colombo Muncipal Council Employees Co-Operative Thrift and Savings Society vs. Hettiarachchi*** [SC Appeal No. 136/2009 decided on 25th June 2012]. I have not been able to locate any other decisions which consider section **31B (5)**.

In the ***Tri-Star Apparels Exports (Pvt) Ltd*** case, the workman had instituted an action in the District Court praying for relief in respect of the termination of his services and, later, made an application to the Labour Tribunal. Tilakawardane J held that, in the circumstances of that case, the second limb of section **31B (5)** was inapplicable. Her Ladyship held that the second limb of section **31B (5)** could be invoked only where the application to the Labour Tribunal *"relates to* ***the same matter*** *which was the subject matter of the action instituted in the District Court"* [emphasis added by me]. Further, the learned Judge was of the view that section **31B (5)** could not be applied if there was difference between the *"sphere or scope"* of the *"other remedy"* sought by the workman and his application to the Labour Tribunal. Tilakawardane J was of the view that section **31B (5)** cannot be applied if there is a difference between the principles which would be applied by a court or other forum when deciding whether a workman is entitled to a *"legal remedy"* which the workman has sought from that forum in respect of the termination of his services, and the principles that would be applied by a Labour Tribunal when it decided a workman's' application. The learned judge considered that a significant difference between the procedure followed by a court or other forum when deciding a *"legal remedy"* in respect of the termination of a workman's services and the procedure followed by a Labour Tribunal when it decides a workman's' application, would deter the applicability of section **31B (5)**. Finally, Tilakawardane J recognised that a Court or Tribunal should be reluctant to apply the provisions of section **31B (5)** in a way which will unreasonably *"deprive"* the workman of the *"procedural as well as the substantive*

advantages" and the right to seek *"equitable relief"* granted to him by the Industrial Disputes Act.

In the ***Sri Lanka State Plantations Corporation*** case, Sisira De Abrew J, when His Lordship was in the Court of Appeal, held that a previous application made by the workman to the Court of Appeal for the issue of a writ, cannot sustain an objection, under section **31B (5)**, to the workman maintaining a subsequent application to the Labour Tribunal, because the application for a writ is to be decided upon *"the principles of administrative law"* while the application to the Labour Tribunal will be decided upon *"the principles of equity."*. His Lordship stated [at p.349]

> *"..... I hold that seeking a remedy under the Administrative Law does not prevent an employee from seeking relief under the Industrial Disputes Act."* and *"I am of the view that the provisions of section 31B (5) of the Industrial Disputes Act does not operate, in the circumstances of this case, as a bar to the maintainability of the case filed in the Labour Tribunal."*.

Thus, it is clear that Sisira De Abrew J was of the view that a difference between the principles applied by a forum from which the workman has sought a remedy and the principles which will be applied by a Labour Tribunal, will exclude the application of section **31B (5)**.

Finally, in the ***Colombo Muncipal Council Employees Co-Operative Thrift and Savings Society*** case, Bandaranayake CJ was of the view that section **31B (5)** could apply only if the *"other remedy"* sought by the workman and his application to the Labour Tribunal are *"in respect of the same matter or substantially the same matter."*

I should also mention here that, although the report of the decision in ***Ceylon Estate Staff Union vs. The Superintendent, Sunderland Estate*** contains a statement [at p.10] that *"S. **31B (5)** requires the Tribunal to lay by cases filed before it, if proceedings are being taken in another forum regarding the same matter"*, a perusal of the judgment shows that the learned judge was considering how a Labour Tribunal should act when there was

a pending prosecution of the workman in the Magistrate's Court for an offence which was related to the termination of the workman's employment. That fact and the reference to the Labour Tribunal being required to *"lay by"* the application made to it, leads me to think that there is a typographical error in the report and that the learned judge was, in fact, referring to section **31B (3) (*b*)** which requires a Labour Tribunal to suspend hearing an application made to it where the facts affecting that application are facts which affect any other proceeding under any other law. For those reasons, I am not inclined to rely on the report of the decision in **Ceylon Estate Staff Union vs. The Superintendent, Sunderland Estate** when determining the issue of law before us.

I have taken some pains to refer to all these decisions in order to explain why I said earlier that these decisions fortify the conclusion I reached with regard to the limitations on the circumstances in which the second limb of section **31B (5)** can be properly invoked. Thus, if I am to reiterate the conclusion reached earlier, which, as seen from the preceding discussion, is endorsed by the reasoning applied in several previous decisions, the criteria upon which the second limb of section **31B (5)** can be properly applied are that: (i) the action/application by the workman in the court or other forum must cover the same or similar ground as the application to the Labour Tribunal and have the same or similar scope; (ii) the action/application by the workman in the court or other forum should seek the same or similar substantive reliefs as the application to the Labour Tribunal; (iii) both the action/application by the workman in the other forum and the workman's application to the Labour Tribunal should be decided upon the core issue of whether the termination of the workman's' services by the employer was done for good cause, according to the principles which are to be applied by the court or other forum; and (iv) there should not be a significant disparity between the procedure followed by the court or other forum and the procedure followed by a Labour Tribunal.

In my view, the second limb of section **31B (5)** can be applied only if all these four criteria or, at least, a sufficient number of them are met, so as to satisfy the Labour Tribunal that there is no material disparity or divergence between the previous action/application

made by the workman to a court of other forum and the subsequent application made by the same workman to the Labor Tribunal.

I should mention here that, while the first limb of section **31B (5)** expressly states that it will apply to debar the workman from being entitled to a legal remedy from another forum only where a Labour Tribunal had previously determined an application he had made to it, the second limb of section **31B (5)** says that where a workman has *"first resorted to any other legal remedy"* in respect of the termination of his services, he shall not be entitled to make an application on the same subject matter to a Labour Tribunal. The phrase *"first resorted to"* has not been defined in the Act. There has been a difference of opinion on what is meant by the phrase *"first resorted to"* in the second limb of section **31B (5)**. Hence, before parting with the scope and effect of section **31B (5)**, the following question should be examined: namely, whether the phrase in the second limb of section **31B (5)** which states that where a workman *"has first resorted to any other legal remedy, he shall not thereafter be entitled"* to make an application to a Labour Tribunal, has the effect of denying a workman the right to maintain an application to a Labour Tribunal *only* where he has received a *determination* from the court or other forum in which he has previously filed an action/application in respect of the termination of his services; *or*, whether second limb of section **31B (5)** has the effect of denying a workman the right to maintain an application to a Labour Tribunal immediately upon the workman *commencing* proceedings in a court or forum other than a Labour Tribunal, despite him *not* having received a determination from that court or other forum.

In this regard, in ***Mendis vs. RVDB***, which was a decision of this Court, the workman had instituted an action in the District Court against his employer, seeking reliefs in respect of the termination of his services. The workman later made an application to the Labour Tribunal. The employer objected, under the second limb of section **31B (5)**, to the workman maintaining the application to the Labour Tribunal. De Kretser J held that the second limb of section **31B (5)** applies to debar an application to a Labour Tribunal *only* where there has been a final determination of the *"other legal remedy"* previously sought

by the workman from the court. His Lordship was of the view that the words *"resorted to"* used in the second limb of section **31B (5)** should be interpreted to mean the obtaining of a conclusive determination by the court and not merely the institution of an action in court.

However, in the subsequent decision of the Court of Appeal in ***Ceylon Tobacco Co. Ltd vs. Illangasinghe***, De Silva J stated [at p. 5-6] that he was unable to agree with the view taken in ***Mendis vs. RVDB***. His Lordship was of the view that the words *"resorted to"* should be given their ordinary meaning and be held to mean the act of commencing the other proceeding.

Thereafter, in ***Independent Newspapers Ltd vs. Commercial and Industrial Workers' Union***, which is a decision of this Court, Dheeraratne J did not refer to either ***Mendis vs. RVDB*** or ***Ceylon Tobacco Co. Ltd vs. Illangasinghe***. His Lordship was of the view [at p.199] that the word *"resorted"* in the second limb of section **31B (5)** should be given the *"ordinary meanings of that word"* and be taken to mean the commencement of proceedings in another forum and not the obtaining of a determination from that other forum. However, as mentioned earlier, Dheeraratne J's decision in ***Independent Newspapers Ltd vs. Commercial and Industrial Workers' Union*** was grounded on the learned Judge's determination [at p.199] that the workman had ***not*** *"first resorted to a legal remedy within the meaning of subsection* ***31B (5)****"*. Thus, Justice DheeraratneJ's aforesaid observation on the meaning of the word *"resorted"* in the second limb of section **31B (5)**, was made *obiter*.

With the greatest respect to the decision of the Court of Appeal in the ***Ceylon Tobacco Co. Ltd*** case and to the aforesaid *obiter* observation by Dheeraratne J in this Court in the ***Independent Newspapers Ltd*** case, I am unable to agree with the view that the words *"first resorted to any other legal remedy"* in the second limb of section **31B (5)** mean the mere *commencement* of proceedings in another forum.

Instead, I am of the view that: (i) in the absence of a definition in the Act of the phrase *"where he has first resorted to any other legal remedy"* or any of its component

parts; and (ii) upon an application of the established rule of statutory interpretation cited earlier; the phrase *"where he has first resorted to any other legal remedy,"* the workman shall not be thereafter entitled to make an application to a Labour Tribunal, in the second limb of section **31B (5)**, should be understood to have a meaning and effect which is on the same lines, *mutatis mutandis,* as the comparable phrase in the first limb of section **31B (5)**. As seen earlier, the first limb of section **31B (5)** states that, where a workman has made an application to a Labour Tribunal *"and proceedings thereon are taken* ***and concluded****, the workman to whom the application relates shall not be entitled to any other legal remedy in respect of the matter to which that application relates."* [emphasis added by me].

I see no logical reason which persuades me to think that the Legislature intended to apply *one* standard in the first limb of section **31B (5)** and limit the curtailment of a workman's right to maintain an action/application for a remedy in another forum only to instances where he has previously had an application to a Labour Tribunal finally *determined* by the Labour Tribunal; and to apply *another* and much harsher standard in the second limb of section **31B (5)** and curtail a workman the right to maintain an application to a Labour Tribunal merely because has had previously *commenced* proceedings, in another forum but has *not* yet received a *determination* from that other forum. In this connection, I do not think it can be reasonably said that a workman who chooses not to avail himself of the procedure available under Part IVA of the Act in the first instance, but later realises that he should resort to the provisions of Part IVA of the Act, should be penalised by debarring him from doing so *unless* he has received a *determination* from that other forum. I would add that debarring a workman from having access to a Labour Tribunal merely because he has, perhaps misguidedly, previously decided to refer his claim to another forum but has *not* received a determination from that forum, would go against the clear intention of the Legislature when it introduced Labour Tribunals in 1957.

Further, it has to be kept in mind that the ordinary meaning of the word *"resort"* in this context is defined in the SHORTER OXFORD DICTIONARY [5th ed. 2 at p.2550] as meaning *"Have recourse to something for aid, assistance, or as the means to an end"*, while the word *"remedy"* in this context is defined [at p.2526] as meaning *"Legal redress"*. Thus, it can be cogently contended that the ordinary meaning of the phrase *"where he has first resorted to any other legal remedy"* in the second limb of section **31B (5)**, is having obtained a *determination* from the other forum with regard to the legal redress [legal remedy] sought from it.

Accordingly, I am of the opinion that the words *"where he has first resorted to any other legal remedy"* in the second limb of section **31B (5)** should be understood in a manner comparable to the import of the first limb of section **31B (5)** - *ie:* as meaning, having first resorted to a legal remedy in a court or forum other than a Labour Tribunal and having had the *"proceedings thereon taken and concluded"* by that court or other forum. Thus, I am in respectful agreement with De Kretser J, when His Lordship stated in ***Mendis vs. RVDB*** stated [at p.50] *"It appears to me it is not the filing of the plaint or the application as the case may be that is the bar but the fact that there has been a final order or an adjudication on the remedy sought that operates as the bar to the seeking of another remedy in the same or any other forum. What is forbidden is the obtaining of more than one remedy in connection with the same subject-matter in separate proceedings and not the seeking of them"*.

It should be mentioned here that the decision in the ***Ceylon Tobacco Co. Ltd*** case is by the Court of Appeal and the aforesaid observation by Dheeraratne J in this Court in the ***Independent Newspapers Ltd*** case was made *obiter*. Thus, I would observe, with respect, that neither decision stands in the way of the view as set out by me in the preceding paragraph, which is fortified by the authority of the decision of this Court in ***Mendis vs. RVDB***.

When the second limb of section **31B (5)** is understood, as set out above, to mean that it debars a workman from obtaining a *determination* from a court or other forum of

an action or application in which he sought relief or redress from that court or other forum in respect of the termination of his services, and, thereafter, maintaining an application in a Labour Tribunal upon the same subject matter, it is self-evident that the second limb of section **31B (1)** is founded on the principle of *res judicate*, as observed by S.R. De Silva [at p.345]. That is, in addition to the fact that the second limb of section **31B (5)** had been designed to help maintain and promote industrial peace, as described earlier.

In this connection, although both the learned President of the Labour Tribunal and the learned High Court Judge correctly stated that the second limb of section **31B (5)** is founded on the principle of *res judicata*, they, nevertheless, proceeded to dismiss the workman-appellants' application to the Labour Tribunal on the ground that he had previously filed a fundamental rights application in this Court despite the fact that this Court had not determined that fundamental rights application. When they did so, both the learned President and the learned High Court Judge erred by overlooking the basic requirement that the principle of *res judicata* can operate only where a court or other body lawfully vested with the authority to determine a question has pronounced a final determination of that question, which is later made the subject matter of a subsequent proceeding in a court or other forum. It is self-evident that, when the principle of *res judicata* is to be applied to the second limb of section **31B (5)**, it will require that the words *"first resorted to any other legal remedy"* in the second limb of section **31B (5)** are taken to have the meaning and effect I have described in preceding paragraphs.

To conclude this aspect of the present judgment, it is my view that, in instances where an employer objects, under the second limb of section **31B (5)**, to a workman maintaining an application to a Labour Tribunal on the ground that the same workman has previously sought a legal remedy in a court or other forum and it is apparent that the workman has not yet received a determination from that court or other forum, the Labour Tribunal should examine whether the four criteria identified earlier, are met.

If the Labour Tribunal is of the view that these criteria are not sufficiently met and, therefore, there is a material disparity or divergence between the previous

action/application made by the workman to a court or other forum and the subsequent application made by the same workman to it, the Labour Tribunal should proceed to hear and determine the application made to it; unless the Labour Tribunal is, nevertheless, of the opinion that the facts affecting the application made to it are facts affecting the other proceeding and, therefore, this is a suitable case to act under and in terms of **31B (3) *(b*)** and suspend hearing the workman's application until the conclusion of the proceedings in the court or other forum and, thereafter, resume hearing the application and, when determining the application have regard to the determination reached in the other proceedings.

However, if the Labour Tribunal is satisfied that the aforesaid criteria are sufficiently met and that the proceedings in the court or other forum are still pending without a determination having being made by that court or other forum, the Labour Tribunal should suspend hearing the workman's application until a final determination is made in those proceedings. If a final determination is made by the court or other forum in those proceedings, the Labour Tribunal is entitled to act under the second limb of section **31B (5)** and terminate the application made to it since it is satisfied that the aforesaid criteria have been sufficiently met [*ie:* that there is no material disparity or divergence between the previous action/application made by the workman to a court or other forum and his subsequent application which is before the Labour Tribunal] and a final determination has now been made in that other proceeding. However, if the other proceedings end without a final determination being made, the Labour Tribunal should resume hearing the application made to it. In my view, the provisions in the second limb of section **31B (5)** read with **31B (3) *(b*)** give sufficient authority to the Labour Tribunal to act in this manner. Further, this approach would be consistent with the principle of *res judicata* which is inherent in the second limb of section **31B (5).**

It remains for me apply the criteria discussed earlier and determine whether the workman-appellant's fundamental rights application no. 395/2013 in this Court enabled

the application of the second limb of section **31B (5)** and the dismissal of the workman-appellant's subsequent application to the Labour Tribunal

In this regard, firstly, it is apparent that the fundamental rights application and the application to the Labour Tribunal do not cover the same or similar ground and do not have the same or similar scope. The fundamental rights application is founded on the workman-appellant's grievance that the employer-respondent [which is said to be an organ or entity of the State] has violated his fundamental rights guaranteed by Articles **12 (1), 12 (2) and 14 (1) (*g*)** of the Constitution. When determining a fundamental rights application, this Court focuses on its duty to protect fundamental rights guaranteed by the Constitution. The question before the Supreme Court is a matter of public law and its duty to uphold constitutional rights of persons, *vis-à-vis* the State. As was emphasised by Sharvananda J in ***Palihawadana v Attorney General*** [(1978) SLR Vol. 1 Page 65] the object of the Fundamental Rights Chapter

> *"Is to ensure the inviolability of certain basic rights by the state and its organs and to establish a society founded on principles of justice, equality and freedom."*

In contrast, the application to the Labour Tribunal is founded and confined within the employer-employee relationship and the Labour Tribunal will focus on the nature of the specific employer-employee relationship before it and ascertain whether the termination of services was just and equitable. It is a matter of private law. It is apt here to cite Chief Justice Sharvananda's observation [FUNDAMENTAL RIGHTS IN SRI LANKA 1st ed. at p.15] that *"An ordinary legal right appertains to private law and denotes the relationship between two private persons; a fundamental right appertains to public law and is a right which an individual possesses against the State itself"*. I should also mention that in ***Gamaethige vs. Siriwardene*** [1988 II CALR 62 at p. 73] Fernando J observed that the exercise of the Supreme Court's fundamental rights jurisdiction *"cannot be equated to the prerogative writs"*. This statement highlights the even wider gulf between the nature of a fundamental rights application and an application to a Labour Tribunal. In view of these essential differences, it cannot be said that the workman-appellant's fundamental rights

application and his application to the Labour Tribunal cover same or similar ground and have the same or similar scope.

Secondly, it appears that the Employee-Appellant's fundamental rights application and his application to the Labour Tribunal sought similar substantive reliefs.

Thirdly, the Employee-Appellant's fundamental rights application is decided by this Court by examining, *inter alia*, whether he has been subjected to unequal treatment or been denied the equal protection of the law or been made the victim of unreasonable or arbitrary or *mala fide* action on the part of the employer-respondent [which is said to be an organ or entity of the State]. The termination of the workman-appellant's services is only a part of the issue before the Supreme Court and is looked at by this Court in the context of the questions described in the preceding sentence. On the other hand, the application to the Labour Tribunal will be decided solely on the core issue of whether the termination of services was just and equitable. No doubt, Article **126 (4)** of the Constitution invests the Supreme Court with the power to grant relief which it deems just and equitable in the exercise of its fundamental rights jurisdiction. But that is only a consequential power which can be exercised, if the Supreme Courts deems fit, when granting relief. It is not the basis on which the Supreme Court will determine a fundamental rights application. Thus, it cannot be said that the core issue before the Supreme Court in the workman-appellant's fundamental rights application, was the termination of his services.

Fourthly, there is a significant disparity between the procedure followed by this Court in entertaining and determining the workman-appellant's fundamental rights application and the procedure followed by a Labour Tribunal when determining the application made to it by the Employee-Appellant. The fundamental rights application will proceed to a full hearing only if the Employee-Appellant is first able to make out a *prima facie* case that his fundamental rights have been violated by the Employer-Respondent and is granted Leave to Proceed with the fundamental rights application. The decision by this Court on whether or not to issue notice on the Employer-Respondent and whether

or not to grant Leave to Proceed, is taken based on affidavits, documents and submissions. In contrast, a Labour Tribunal is obliged to proceed to hear and determine the workman-appellant's application made to it and there is no provision for a Labour Tribunal to refuse to hear and determine that application [subject to any dismissal which may be made, after hearing both parties, on a preliminary issue of law]. Even if the Supreme Court grants Leave to Proceed and grants a full hearing of the fundamental rights application, the Court will determine the application based on affidavits, documents and submissions. In contrast, a Labour Tribunal will determine the application made to it, on the basis of the oral evidence of witnesses, including cross-examination, documents and submissions. Thus, it cannot be said that there is any similarity between the procedure which will be followed by the Supreme Court when it determines the Employee-Appellant's fundamental rights application and the procedure which will be followed by the Labour Tribunal when it proceeds to determine the Employee-Appellant's application.

It is also pertinent to note that Fundamental Rights enshrined in Chapter III of the Constitution can only be restricted by the limitations imposed by the Constitution itself and cannot be limited by any other law. Thus, provisions in the Industrial Disputes Act cannot circumscribe the scope and applicability of fundamental rights guaranteed by the Constitution. Moreover, the ability to invoke the Fundamental Rights jurisdiction of this Court is a distinct right vested in every person under Article **17** of the Constitution and such right cannot be circumscribed by a restrictive reading of the Industrial Disputes Act.

For the reasons set out above, I am of the view that a Fundamental Rights application and an application to a Labour Tribunal cannot relate to the *same* matter. Hence, I am of the opinion that a workman who has invoked the Fundamental Rights jurisdiction of this Court will not automatically be debarred from seeking relief in a Labour Tribunal by virtue of Section **31B (5)**. I hold that the Learned High Court Judge has erred in dismissing the Employee – Appellant's Labour Tribunal application on the ground that the Employee – Appellant has simultaneously resorted to invoke the Fundamental Rights Jurisdiction of this Court. In my view, the correct course of action would have been for the

Labour Tribunal to suspend its proceedings until the conclusion of proceedings in the Supreme Court under Section **31 B (3)** ***(b)*** of the Industrial Disputes Act, and, thereafter, resume hearing the application and, when making a final determination of the application, have regard to the outcome of the fundamental rights application. For the aforementioned reasons, I answer the three issues of law framed on behalf of the appellant in the affirmative and I set aside the decision of the Labour Tribunal and the judgment of the High Court dismissing the Employee - Appellant's application and direct the Labour Tribunal to rehear the application made by the Employee – Appellant.

Appeal Allowed.

JUDGE OF THE SUPREME COURT

JAYANTHA JAYASURIYA, PC, CJ.

I agree.

CHIEF JUSTICE

MURDU N.B. FERNANDO, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

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

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

SC Appeal No. 111/2015 with
SC Appeal No. 113/2015 and
SC Appeal No. 114/2015

1. Wijesiri Gunawardane
No. 122/05, Indipokunagoda, Tangalle.
1st Respondent-Respondent-Petitioner-Petitioner-Appellant

2. Lanka Deepani Muthukumarana
No. 129, Beliatta Road, Tangalle.
2nd Respondent-Respondent-Petitioner-Petitioner-Appellant

3. Mahanama Dissanayakalage
Sumanalatha
No. 117/23, Beliatta Road, Tangalle.
5th Respondent-Respondent-Petitioner-Petitioner-Appellant

Vs.

1. Chandrasena Muthukumarana
(deceased)
Pearlin Hotel, Tangalle.
4th Respondent-Appellant-Respondent-Respondent-Respondent

1A. Asith Nimantha Muthukumarana
No. 127, Beliatta Road, Tangalle.
Substituted 4A Respondent-Appellant-Respondent-Respondent-Respondent

2. Officer-in-Charge
Police Station, Tangalle.
Plaintiff-Respondent-Respondent-Respondent- Respondent

3. Palliyaguruge Nandasiri
No. 122/1, Indipokunagoda, Tangalle.
3rd Respondent-Respondent-Petitioner-Respondent- Respondent

4. Urban Council, Tangalle.
Added 6th Respondent-Respondent-Respondent- Respondent

5. Hon. Attorney-General
Attorney-General's Department,
Colombo 12.
Added 7th Respondent-Respondent-Respondent- Respondent

Parties of:

(SC Appeal No. 111/2015
SC/ (SPL) LA. No. 190/14
CA (PHC) APN No. 107/09
Provincial High Court of Hambantota Case No. HCA/13/2008
MC Tangalle Case No. 63486)

Muththettuwagama Athiralalage
Jayarathna
No 27/2, 3rd Lane, Rathmalana.

Accused-Appellant-Petitioner-Petitioner-Appellant

Vs.

1. Officer in Charge
   Special Crimes Investigations Unit,
   Mount Lavinia.

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

Respondents-Respondents-Respondents-Respondents

Parties of:

(SC Appeal No. 113/2015

SC/ (SPL) LA. No. 185/14

CA (PHC) APN No. 185/2010

Provincial High Court of Colombo Case No. MCA/123/2009

MC Mount Lavinia Case No. 39758)

Dr. (Mrs.) Ama Weeratunga
No. 368/18, Pipeline Road,
Thalangama North.

Virtual Complainant-Petitioner-Petitioner-Appellant

Vs.

Sepala Ekanayake
No. 369B, Pipeline Road,
Thalangama North.

Accused-Appellant-Respondent-Respondent-Respondent

1. Officer in Charge
   Police Station, Thalangama.

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

Respondents-Respondents-Respondents-Respondents

Parties of:

(SC Appeal No. 114/2015
SC/ (SPL) LA. No. 178/14
CA (PHC) APN. No. 204/2006)
Provincial High Court of Avissawella Case No. 69/2005
MC Kaduwela Case No. 36421)

Before:	Buwaneka Aluwihare, PC. J. Vijith K. Malalgoda, PC. J. L.T.B. Dehideniya, J.
Counsel:	Niranjan de Silva with Kalhara Gunawardena for the 1st, 2nd and 5th Respondent-Respondent-Petitioner-Petitioner-Appellants in SC Appeal 111/2015. Saliya Peiris PC with Lisitha Sachintha for the substituted 4A Respondent-Appellant-Respondent-Respondent-Respondent in SC Appeal 111/2015. Amila Palliyage with Eranda Sinharage for the Accused-Appellant-Petitioner-Petitioner-Appellant in SC Appeal 113/2015. Anil Silva PC with Dhanaraja Samarakoon for the virtual complainant-Petitioner-Petitioner-Appellant in SC Appeal 114/2015. Amila Palliyage with Eranda Sinharage for the Accused-Appellant-Respondent-Respondent-Respondent in SC Appeal 114/2015. Rohantha Abeysuriya Senior DSG for the Attorney General.
Argued on:	04.07.2018
Decided on:	27.05.2020

JUDGEMENT

Aluwihare PC. J.,

Introduction

1. The Petitioner-Appellants (hereinafter referred to as "Appellants") have come before this court challenging an order made by the Court of Appeal on 02.09.2014 upholding a preliminary objection which resulted in the refusal of their Revision applications.

2. At the outset of the hearing of this matter, the learned counsel representing the respective parties agreed to abide by a single judgement in all three appeals.

The Issue

3. The Court granted special leave to appeal on the following question of law;

> *"Having failed to exercise the right to file an appeal in terms of Section 9 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended, could a person invoke the revisionary jurisdiction of the Court of Appeal referred to in Article 138 of the Constitution of the Republic of Sri Lanka in order to canvass a decision made by a Provincial High Court exercising its appellate powers?"*

4. The question which this Court is invited to answer is as above. For the purposes of this judgment, it would not be necessary to narrate all the facts antecedent to the question. Suffice it to say, that the Appellants have filed revision applications in the Court of Appeal against judgments made by the High Courts of the respective Provinces, whereupon the applications were dismissed *in limine* on the basis that the Court of Appeal is ***not vested with revisionary jurisdiction*** over judgments and orders made by the High Court in the ***exercise of its appellate powers***.

5. The question of law elaborated above, inquires whether Section 9 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990, (hereinafter also referred to as "the Act") could result in ousting the revisionary jurisdiction of the Court of Appeal

in respect of orders, judgments and sentences given by a Provincial High Court in the exercise of its appellate jurisdiction.

6. **Section 9 of the said Act reads;**

"Subject to the provisions of this Act or any other law, any person aggrieved by,

(a) a final order, judgment, decree or sentence of a High Court established by Article 154P of the Constitution ***in the exercise of the appellate jurisdiction*** *vested in it by* ***paragraph (3)(b) of Article 154P*** *of the Constitution or Section 3 of this Act or any other law, in any matter or proceeding whether civil or criminal which involves a substantial question of law,* ***may appeal therefrom to the Supreme Court*** *if the High Court grants leave to appeal to the Supreme Court ex mero motu or at the instance of any aggrieved party to such matter or proceedings.*"

(b) a final order, judgment or sentence of a High Court established by Article 154P of the Constitution in the exercise of its jurisdiction conferred on it by ***paragraph (3)(a), or (4) of Article 154P*** *of the Constitution may appeal therefrom to the* ***Court of Appeal.***" (emphasis added)

7. For the reasons set out in this judgement the said question of law is answered as follows; **Section 9 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended, does not oust the Revisionary jurisdiction of the Court of Appeal in respect of decisions made by a Provincial High Court exercising its appellate powers. Therefore, the revisionary jurisdiction of the Court of Appeal referred to in Article 138 of the Constitution of the Republic of Sri Lanka can be invoked in order to canvass a decision made by a Provincial High Court exercising its appellate powers.**

The Reasoning

8. The crux of the Respondent's argument is that by virtue of Section 9 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990, the Court of Appeal has **no 'appellate'** powers over matters where the High Court has **exercised 'its appellate' powers.** It was the contention on behalf of the Respondents, that Section 9 of the said

Act has vested that power in the Supreme Court, thereby completely ousting the jurisdiction of the Court of Appeal in respect of such matters. They contend that the specific use of the term '*appeal*' in Section 9 of the Act, indicates that the legislature only intended to vest appellate jurisdiction with the Supreme Court in respect of such matters where the High Court has exercised its appellate powers, and not revisionary jurisdiction.

9. They seek to fortify this contention by referring to Article 138 of the Constitution which uses the term '*subject to any law*'. Accordingly, their contention is that under Section 9, there is only one recourse, which is the right of appeal to the Supreme Court; if a litigant fails to utilize the provision, they cannot seek to circumvent the procedure by resorting to a revisionary step. The Respondents have cited the cases **Merchant Bank of Sri Lanka v. Wijewardena** *S.C. Appeal 81/2010 [2010 BLR 233]* and **Australanka Exporters Private Ltd v. Indian Bank** (*2001) 2 SLR 156* in support of the said contention. Both these cases had dealt with the issues pertaining to appeals arising out of matters where the Provincial High Court had exercised its *original* jurisdiction, whereas the case before us raises issues with regard to its *appellate* jurisdiction. Therefore, I am of the opinion that these decisions do not have a direct bearing on the matter at hand.

10. The above argument is firstly premised on the assumption that the revisionary jurisdiction and the appellate jurisdiction are one and the same. It is only if the former is a subset of the latter, could the taking away of the appellate power results in automatically suspending the revisionary powers. However, historically, it has been the opinion of our Courts that the revisionary jurisdiction is distinct from appellate jurisdiction. One basic distinction would be that while the appellate rights are statutory, the exercise of revisionary power is discretionary. Although revisionary jurisdiction shares characteristics with the appellate jurisdiction, they are not one and the same.

11. In **Mariam Beebee v. Seyed Mohamed** *(1965) 68 NLR 36* at page 38, the Supreme Court observed that, "*The power of revision is an extraordinary power which is quite independent of and distinct from the appellate jurisdiction of this Court. Its object is the due administration of justice and the correction of errors, sometimes committed by this Court itself, in order to avoid miscarriages of justice. It is exercised in some cases by a Judge of his own motion, when an aggrieved person who may not be a party to the action brings to his notice the fact that, unless the power is exercised, injustice will result.*" This was later approved by a Divisional Bench in **Somawathie v. Madawela** (*1983) 2 SLR 15* and in **Gunarathna v. Thambinayagam** *(1993) 2 SLR 355.*

12. Furthermore, time to time, Courts in Sri Lanka have observed that an appellant could invoke the revisionary jurisdiction even when there is a right of appeal available (*vide* **Attorney General v. Podisingho** *(1950) 51 NLR 385)* and when there is no right of appeal available (*vide* **Sunil Chandra Kumar v. Veloo** *(2001) 3 SLR 91*) or when the said right of appeal has been exercised (*vide* **K. A. Potman v. Inspector of Police, Dodangoda** (1971) *74 NLR 115*). This in itself is sufficient evidence to sustain the claim that appellate jurisdiction and revisionary jurisdiction are two distinct jurisdictions.

13. Article 154P(3)(b) of the Constitution which confers appellate powers on the High Court of the Provinces itself makes separate reference to the term '*Appellate and Revisionary jurisdiction'*. Accordingly, there can be no confusion that appellate and revisionary powers are two distinct powers.

14. Where this is the case, *i.e.* that the appellate and revisionary jurisdiction are two separate jurisdictions, the next question that needs to be answered is whether the removal of one jurisdiction could result in the negation of the other? Or, in the context of the present appeal, whether the '*express provision of the right of appeal ousts the revisionary jurisdiction of the Court of Appeal'*. Here again I observe that historically our Courts have considered these two jurisdictions to be complementary

to each other and not necessarily antagonistic. This is amply demonstrated by the tendency of the Courts to allow revisionary applications irrespective of the right of appeal.

15. In **Podisingho** (*supra*) at page 390, the Supreme Court observed that *"the powers of revision of the Supreme Court (under the Courts Ordinance) are wide enough to embrace a case where an appeal lay but was not taken*". In **Potman** (*supra*) at page 115, it was stated that "*although the Supreme Court would be extremely hesitant and cautious before it makes any order in revision which is contrary to an order which it has already made upon appeal, relief would be granted in a case of an obvious error of fact based on an all important item of evidence not having been brought to the notice of Court at the hearing of the appeal"*. In **Veloo** (*supra*) at pages 102 and 103, the Court stated that "*Revision is a discretionary remedy, it is not available as of right. This power that flows from Art. 138 is exercised by the Court of Appeal, on application made by a party aggrieved or ex mero motu, this power is available even where there is no right of appeal*."

16. Thus, it is clear that the existence of right of appeal does not uniformly and blanketly result in undermining the revisionary jurisdiction. The right of appeal, is no doubt, a determining factor which the Court takes into account when considering a revisionary application. However, having recourse to an appeal does not *ipso facto* act as an ouster of the revisionary jurisdiction. On the contrary, it is the Court's prerogative to decide, at its discretion, to refuse a revisionary application where it appears that the existence of a parallel right of appeal does not give rise to an exceptional circumstance. Thus, where these jurisdictions are separate but complementary to each other, a negation or the express provision of right of appeal does not result in ousting the revisionary jurisdiction.

17. I pause at this point to emphasize that the above construction must not be confused as a pronouncement giving untrammeled and unfettered revisionary jurisdiction to the Court of Appeal. The Appellants in their written submissions have sought to

argue to this effect. They have cited **Atapattu v. People's Bank** *(1997) 1 SLR 208*, where Justice Mark Fernando prudently observed that an ouster clause in an ordinary law will not prevail over the Constitutional provision conferring writ jurisdiction on the Superior Court. However, I am of the view that the position enunciated in that case cannot be blindly applied to the case at hand as, unlike Article 140, Article 138 expressly refers to the words "*subject to the provisions of any law*".

18. **The said Article 138 of the Constitution reads;**

"138. (1) The Court of Appeal shall have and exercise ***subject to the provisions of the Constitution or of any law,*** *an appellate jurisdiction for the correction of all errors in fact or in law which shall be [committed by the High Court, in the exercise of its appellate or original jurisdiction or by any Court of First Instance], tribunal or other institution and sole and exclusive cognizance, by way of appeal, revision and restitutio in integrum, of all causes, suits, actions, prosecutions, matters and things [of which such High Court, Court of First Instance] tribunal or other institution may have taken cognizance."* (emphasis added)

19. In this regard I tend to agree with the decision in **Weragama v. Eksath Lanka Wathu Kamkaru Samithiya** *(1994)1 SLR 293,* where it was held (at page 299) that "*the Jurisdiction of the Court of Appeal under Article 138 is not an entrenched jurisdiction, because Article 138 provides that it is subject to the provisions "of any law"; hence it was always constitutionally permissible for that jurisdiction to be reduced or transferred by ordinary law…*" I also observe that this distinction between Article 140 and Article 138 was appreciated by Justice Mark Fernando in **Atapattu** (*supra*) where his Lordship stated that "*Where the Constitution contemplated that its provisions may be restricted by the provisions of Article 138 which is subject to "any law"* (at page 223).

20. However, an attendant concern that arises at this point is whether the phrase *"subject to the provisions of any law"* in Article 138 must be interpreted to mean 'express provisions' or whether even an implied ouster could fall within the said

words. The answer to this question is as much about Constitutional interpretation as it is about the nature of the revisionary jurisdiction.

21. At the outset, it must be borne in mind that the Revisionary Jurisdiction of the Court of Appeal is a Constitutional mandate. Its genesis lies in Article 138 of the Constitution. There is no question that the Constitution is the supreme law of the land (*vide* **In re reference under Article 125(1) for the Constitution** (2008) BLR 160 SC). In those circumstances, any ouster or restriction of a Court's jurisdiction which is founded on the Constitution, in so far as it is permitted under the Constitution, must be made in express language. In **Re the Nineteenth Amendment to the Constitution** *(2002) 3 SLR 85*, a bench of 7 judges unequivocally opined that "*This manifests a cardinal rule that applies to the interpretation of a Constitution, that there can be no implied amendment of any provision of the Constitution"* (at page 110). Therefore, it is only right and befitting that this Court insists that every provision which restricts or modifies a Court's Constitutional mandate are express and are set out in no uncertain terms.

22. In the context of all the peripheral questions that I have inquired into above, I proceed to examine whether, as contended by the Respondent, Section 9 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 could result in ousting the revisionary jurisdiction of the Court of Appeal in respect of orders, judgments and sentences given by a Provincial High Court in the exercise of its appellate jurisdiction.

23. It is clear that Section 9 of Act No. 19 of 1990 follows the scheme of Article 154P of the Constitution. It stipulates the appeals in respect of final orders, judgments or sentence decided under Article 154P(3)(a) and 154P(4) must be directed to the Court of Appeal, while appeals in respect of final orders, judgments or sentences decided under Article 154P(3)(b) must be directed to the Supreme Court.

24. I also wish to draw attention to **Section 11** of the said Act which reads;

> *"(1) **The Court of Appeal** shall have and exercise, subject to the provisions of this Act or any other law, an appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by any High Court established by Article 154P of the Constitution in the exercise of its jurisdiction under **paragraph (3)(a), or (4) of Article 154P** of the Constitution and sole and exclusive cognizance by way of **appeal, revision** and restitution interim of all causes, suits, actions, prosecutions, matters and things of which such High Court may have taken cognizance: Provided that, no judgment, decree or order of any such High Court, shall be reversed or varied on account of any error, defect, or irregularity which has not prejudiced the substantial rights of the parties or occasioned a failure of justice."* (emphasis added)

25. Section 11 in my opinion is an elaboration of Section 9(b) of the same Act, by virtue of which right of appeal in respect of orders, judgments and sentences given in the Provincial High Court's *original jurisdiction* is vested in the Court of Appeal.

26. The contention of the Respondents is that Section 9 of the Act read together with Section 11 of the same Act, rules out the Court of Appeal's revisionary powers in respect of decisions arrived under Article 154P(3)(b); i.e. orders, judgments and sentences given in the exercise of Provincial High Court's appellate jurisdiction. To put it simply, they argue that **there can only be an appeal** from an instance where the High Court has exercised appellate jurisdiction.

27. Respondents further argue that the Court of Appeal's revisionary powers are specifically referred to in Section 11 of the Act, which limits itself to an order, judgment or sentence given by the Provincial High Court pursuant to Article 154P(3)(a) and (4), exercising its original jurisdiction. They submit that the absence of any reference to Article 154P(3)(b) in Section 11, is illustrative of the legislative intent to oust the Court of Appeal's revisionary jurisdiction with regard to Provincial High Court's appellate jurisdiction.

28. The strength of this argument depends on the maxim *expressio unius est exclusio alterius* which means that the express mention of one thing implies the exclusion of another. However, it is my considered opinion that this maxim does not have absolute universal application. It is no doubt a widely used aid of interpretation. Nevertheless, as observed in **Somawathie v. Madawela and others** *(1983) 2 SLR 15* at page 29, quoting **Colquhoun v. Brooks** *(1888) 21 QBD 52, 65, "It is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents. The exclusio is often the result of inadvertence or accident, and the maxim ought not to be applied when its application, having regard to the subject matter to which it is to be applied, leads to inconsistency or injustice.*"

29. Particularly in relation to the revisionary jurisdiction, which exists to remedy miscarriage of justice, greater care must be exercised when employing the maxim. As I observed earlier, the revisionary jurisdiction of the Court of Appeal is a Constitutional mandate which, undoubtedly is subject to the provision of statutory law. Nevertheless, owing to its genesis in the Constitution, any restriction or modification which the Legislature seeks to introduce must be introduced by way of express wording. The omission to refer to 'revisionary jurisdiction' in Section 9 of Act No. 19 of 1990 cannot be taken as reducing the Court of Appeal's plenitude of powers under Article 138. Nothing less than an express removal of these powers would be required to achieve such a result.

30. This is particularly because the revisionary jurisdiction, unlike the appellate jurisdiction, *does not depend on a parallel statutory right*. It is well established in our law that an appellant cannot prefer an appeal against an order, judgment or sentence unless there is a 'right' created by statute. As Justice Jameel stated in **Martin v. Wijewardena** *(1989) 2 SLR 409,* at page 419, "*Article 138 is only an enabling Article and it confers the jurisdiction to hear and determine appeals to the Court of Appeal. The right to avail of or to take advantage of the jurisdiction is governed by several*

statutory provisions in various legislative enactments." An appeal could only result pursuant to the intersection of a forum jurisdiction and right of appeal.

31. In contrast, the Revisionary Jurisdiction is a remedy which lies at the discretion of the court. It does not require a concomitant right in this regard. There only needs to be provision conferring the forum jurisdiction. Revision is a discretionary remedy; it is not available as of right. This power that flows from Article 138 of the Constitution is exercised by the Court of Appeal, on application made by a party aggrieved or *ex mero motu*, this power is available even where there is no right of appeal.

32. The Court of Appeal has on a previous occasion specifically dismissed an attempt to restrict the revisionary jurisdiction to a corresponding statutory right. It was observed "*The Petitioner in a Revision application only seeks the indulgence of Court to remedy a miscarriage of justice. He does not assert it as a right. Revision is available unless it is restricted by the Constitution or any other law*" (*vide* Veloo (*supra*) at page 103). Although the Supreme Court is not bound by the said decision, I see no reason to disagree with the principle enunciated there. In my opinion, if the revisionary jurisdiction was also to be subject to a statutory right there would not be any difference between the two jurisdictions.

33. Since the revisionary jurisdiction is not dependent on a concomitant statutory right, I fail to observe how the maxim *expressio unius est exclusio alterius* could be applied to the present circumstances. If historically, a Court needed only the forum jurisdiction to take cognizance of a revisionary application, the assertion that the provision of only the right of appeal in Section 9 and the failure to mention 'revision' in the same Section, ousts the revisionary jurisdiction of the Court of Appeal, cannot be sustained. Indeed, there was never an 'omission' in the first place.

34. I must not be miscomprehended as advocating an unfettered conferment of revisionary jurisdiction on the Court of Appeal. For reasons adumbrated above, such a construction extending unfettered revisionary jurisdiction cannot stand, in view of

the clear reference to '*subject to the provisions of any law'* in Article 138 of the Constitution. However, the only way in which the restriction or an ouster could be introduced in this regard, is by way of an 'express removal' of the same and not by resorting to purported or implied omissions. In fact, the Legislature where it intended to ouster the revisionary jurisdiction has expressed the same in unequivocal terms.

35. This is gleaned from **Section 37 of the Arbitration Act No. 11 of 1995;**

"(1) Subject to subsection (2) of this Section, ***no appeal or revision shall lie*** *in respect of any order, judgment or decree of the High Court in the exercise of its jurisdiction under this Act except from an order, judgment or decree of the High Court under this Part of this Act."*

Section 13 of the Transfer of Offenders Act No. 5 of 1995;

"The sentence of imprisonment imposed in any specified country upon any offender who is a citizen of Sri Lanka ***shall not be subject to any appeal or revision in any court in Sri Lanka,*** *notwithstanding the fact that the order, decision or judgment imposing such sentence is deemed to be an order, decision or judgment imposed by a court of competent jurisdiction in Sri Lanka."*

36. Therefore, I hold that Section 9 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended, **does not** oust the Revisionary Jurisdiction of the Court of Appeal in respect of decisions made by a Provincial High Court exercising its appellate powers.

37. At the hearing, the counsel for the Respondents drew our attention to many pragmatic complications that could arise with such a construction. As observed by the Court in **Gunaratne v. Thambinayagam** (1993) 2 SLR 355 at page 361, "*if the multiplicity of litigation in this sphere is felt to be an anomaly, it is a matter for the legislature*" to resolve by way of amendment. This Court cannot, in the guise of interpretation, usurp the legislative function to give effect to what many would

believe a more desirable outcome. Such concerns must be resolved by resorting to the democratic process of the country.

38. In those circumstances, I answer the question of law in the affirmative.

Appeals allowed.

JUDGE OF THE SUPREME COURT

JUSTICE VIJITH K. MALALGODA 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

Benedict Raja Philip De Silva
4970, Lansing Drive, North Olmsted, Ohio
44070, United States of America and
Presently at
No.7, Station Road, Pinwatta, Panadura.

Plaintiff

SC/CHC/Appeal 12/2012
SC(HC)LA No. 68/2011
HC (Civil) 17/2006(1)

Vs

Chris Peiris
No. 518, Gale Road Colombo 3.

Chamalee Deepthika Jayawardena
No. 518, Gale Road Colombo 3.

Haritha Munasinghe
No. 58B, Salmulla, Kollonawa.

Anthony Joseph Mahinda De Silva
No.27/3, Chandralekha Mawatha,
Colombo 8.

Defendants

In the matter of an Application under Section 218, 343 and 349 of the Civil Procedure Code.

Anthony Joseph Mahinda De Silva
No. 27/3, Chandralekha Mawatha,
Colombo 8

4th Defendant-Petitioner-

Vs

Benedict Raja Philip De Silva
4970, Lansing Drive, North Olmsted, Ohio
44070, United States of America

Plaintiff-Respondent

AND NOW

In the matter of an Application for Leave to Appeal Under and in terms of Section 5(2) of the High Court of the Provinces (Special Provinces) Act No.10 of 1996 read together with Chapter LVIII of The Civil Procedure Code.

Benedict Raja Philip De Silva
4970, Lansing Drive, North Olmsted, Ohio
44070, United States of America and
Presently at
No.7, Station Road, Pinwatta, Panadura.

Plaintiff-Respondent –
Petitioner-Appellant.

Vs

Anthony Joseph Mahinda De Silva
No. 27/3, Chandralekha Mawatha,

Colombo 8

4th Defendant-Petitioner-Respondent-Respondent.

Before: Sisira J. de Abrew J
L.T.B. Dehideniya &
S. Thurairaja PC J

Counsel: Romesh de Silva PC with Manjuka Fernandopulle for the Plaintiff-Respondent-Petitioner-Appellant.
Harsha Soza PC with R. Weerasinghe
4th Defendant-Petitioner- Respondent-Respondent.

Written submission
tendered on : 9.3.2012 by the Plaintiff-Respondent-Petitioner-Appellant.
10.3.2012 by the 4th Defendant-Petitioner- Respondent-Respondent.

Argued on : 16.6.2020

Decided on: 9.9.2020

Sisira J. de Abrew, J

The 4th Defendant-Petitioner-Respondent-Respondent (hereinafter referred to as the 4th Defendant-Respondent) filed petition and affidavit in the Commercial High Court stating that his one and only residential house at 27/03, Chandralekha Mawatha, Colombo 8 had been seized in execution of the decree in this case and moved to release the said house from the seizure on the basis that the said house could not be seized in terms of Section 218 of the Civil Procedure Code. The learned High Court Judge by his order dated 1.7.2011,

released the said house from the seizure on the basis that the said house is the one and only residential house of the 4th Defendant-Respondent. Being aggrieved by the said order of the learned High Court Judge, the Plaintiff-Respondent-Petitioner-Appellant (hereinafter referred to as the Plaintiff-Appellant) filed the present Petition of Appeal in this court and this court by its order dated 30.1.2012 granted leave to appeal.

The 4th Defendant-Respondent maintains the position that the house in question is one house and it is his one and only residential house. Learned counsel for the Plaintiff-Appellant contended that the house in question consists of two condominium units and that they are Unit No.3 and 4 and that each unit could be used as a separate house. He further contended that condominium units 3 and 4 are two separate apartments and that therefore one unit could be seized. Learned President's Counsel for the 4th Defendant-Respondent contended that the house in question has a ground floor and an upper floor (upstairs and downstairs) and that it is one house. The 4th Defendant-Respondent has, in his evidence, stated the above facts. Therefore the most important question that must be considered in this case is whether the two units are used as the residential house of the 4th Defendant-Respondent. I now advert to this question. The 4th Defendant-Respondent, in his evidence, has stated the following matters.

1. This house has only one assessment number which is 27/3.
2. This house has only one electricity meter.
3. This house has only one water meter.
4. If one enters this house from the ground floor, he cannot go out from upstairs.

5. The upstairs does not have separate entrance.
6. This house has downstairs and upstairs.
7. Downstairs of this house does not have a bed room.
8. Upstairs of this house does not have a kitchen.
9. Downstairs of this house has a kitchen.

Rohini Gintota Manawadu Technical officer of the Municipal Council Colombo who was called by the Plaintiff-Appellant has, referring to the building plan of the house in question, stated in her evidence that combination of unit No. 3 and Unit No.4 of the building plan is the house bearing assessment No. 27/3, Chandralekha Mawatha, Colombo 8 which is the house in question. She has further stated in her evidence that upstairs of this house does not have an entry door and that if a person in upstairs wants to go out of this house, he has to use the entry door in downstairs. It is therefore seen that the fact that the house at No. 27/03, Chandralekha Mawatha, Colombo 8 has been one house is corroborated by this witness.

The argument of the Plaintiff-Appellant is that this house has two condominium units and each unit could be used as a separate house. If this argument is correct, how can there be one electricity meter and one water meter for the entire house? When I consider all the above matters, the argument of Plaintiff-Appellant cannot be accepted.

The learned High Court Judge has observed that the Plaintiff-Appellant had not contradicted the above evidence.

When I consider the above evidence, I hold that the house at No.27/3, Chandralekha Mawatha, Colombo 8 which is the house in question is only one house and the two units (upstairs and downstairs) are used as one house. The 4th Defendant-Respondent says, in his evidence, that the house in question is his one and only residential house. Considering all the above matters, I hold that the learned High Court Judge is correct when he decided that the house in question is one house and it is the one and only residential house of the 4th Defendant-Respondent. Section 218 (n) of the Civil Procedure Code reads as follows.

"218. When the decree falls under head (a) and is unsatisfied, the judgment-creditor has the power to seize, and to sell or realize in money by the hands of the Fiscal, except as hereinafter mentioned, all saleable property, movable or immovable, belonging to the judgment-debtor, or over which or the profits of which the judgment-debtor has a disposing power, which he may exercise for his own benefit, and whether the same be held by or in the name of the judgment-debtor or by another person in trust for him or on his behalf;

Provided that the following shall not be liable to such seizure or sale, namely-

(n) any house which is not mortgaged as security for the payment of the whole or part of the sum referred to in such decree and which is the actual residence of the judgment-debtor at the time of the execution of such decree and has been such residence from the time of the institution of the action in which such decree has been entered together with such extent of land appurtenant thereto as the court may consider necessary for its enjoyment;"

I have earlier decided that the learned High Court Judge was correct when he decided that the house in question is the one and only residential house of the 4th Defendant-Respondent. Section 218 (n) of the Civil Procedure Code says that the residential house of the judgment-debtor cannot be seized in execution of a decree of court.

For the above reasons, I hold that the house at 27/3, Chandralekha Mawatha, Colombo 8 cannot be seized in execution of the decree in this case. For the above reasons, I hold that the learned High Court Judge was correct when he decided that the said house cannot be seized in the execution of the decree in this case. For the above reasons, I affirm the order the learned High Court Judge dated 1.7.2011and dismiss this appeal.

Appeal dismissed.

Judge of the Supreme Court.

L.T.B.Dehideniya 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

Benedict Raja Philip De Silva
4970, Lansing Drive, North Olmsted, Ohio
44070, United States of America and
Presently at
No.7, Station Road, Pinwatta, Panadura.

Plaintiff

SC/CHC/Appeal 34/2011
SC(HC)LA No. 68/2011
HC (Civil) 17/2006(1)

Vs

Chris Peiris
No. 518, Gale Road Colombo 3.

Chamalee Deepthika Jayawardena
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Defendants

In the matter of an Application under Section 218,

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Anthony Joseph Mahinda De Silva
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4th Defendant-Petitioner-

Vs

Benedict Raja Philip De Silva
4970, Lansing Drive, North Olmsted, Ohio
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Plaintiff-Respondent

AND NOW

In the matter of an Application for Leave to Appeal Under and in terms of Section 5(2) of the High Court of the Provinces (Special Provinces) Act No.10 of 1996 read together with Chapter LVIII of The Civil Procedure Code.

Benedict Raja Philip De Silva
4970, Lansing Drive, North Olmsted, Ohio
44070, United States of America and
Presently at
No.7, Station Road, Pinwatta, Panadura.

Plaintiff-Respondent –
Petitioner-Appellant.

Vs

Anthony Joseph Mahinda De Silva
No. 27/3, Chandralekha Mawatha,
Colombo 8

4th Defendant-Petitioner-Respondent-Respondent.

Before: Sisira J. de Abrew J
L.T.B. Dehideniya &
S. Thurairaja PC J

Counsel: Romesh de Silva PC with Manjuka Fernandopulle for the Plaintiff-Respondent-Petitioner-Appellant.
Harsha Soza PC with R. Weerasinghe
4th Defendant-Petitioner- Respondent-Respondent.

Written submission
tendered on : 9.3.2012 by the Plaintiff-Respondent-Petitioner-Appellant.
10.3.2012 by the 4th Defendant-Petitioner- Respondent-Respondent.

Argued on : 16.6.2020

Decided on: 9.9.2020

Sisira J. de Abrew, J

Parties in this case have agreed to abide by the judgment that may be delivered in the case of SC/CHC/12/2012. Today the judgment in the case of SC/CHC/12/2012 was delivered dismissing the appeal of the Plaintiff-Respondent-Petitioner-Appellant. Thus, the appeal in this case is also dismissed.

Appeal dismissed.

Judge of the Supreme Court.

L.T.B.Dehideniya 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 Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka in respect of violation of Article 12(1) of the Constitution.

Supreme Court Application
No. S.C. (F/R) 39/2019.

1. Bamunu Arachchige Pasasna Abhinithi Bamunu Arachchi.
   Minor appearing through her Mother.

2. Wijayasinghe Arachchige Udyoga Sanwarani Wijayasinghe.
   (Mother of the 1st Petitioner)

both of
No. 215/R/6,
Anderson Flats,
Narahenpita
Colombo. 05.

Petitioners.

Vs.

1. Mrs. S.S.K. Aviruppola
   Principal,
   Visakha Vidyalaya,
   133, Vajira Road,
   Colombo 05.

2. Director – National Schools,
   Ministry of Education,
   "Isurupaya", Pelawatte,
   Battaramulla.

3. Secretary,
   Ministry of Education,
   "Isurupaya", Pelawatte,
   Battaramulla.

4. G.P Desandi Chiranthi (Minor)
   Appearing through her mother;

4A. K.M. Prabashini.
   Mother of the 4th Respondent.

both of

No. 41/14, Ekamuthu Mawatha,
Puwakwatta,
Meegoda.

5. Zonal Director of Education,
   Zonal Education Office,
   Hingurakgoda.

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

Respondents.

Before : Hon. L.T.B. Dehideniya, J.
Hon. P. Padman Surasena, J
Hon. E.A.G.R. Amarasekara, J.

Counsel : Harsha Fernando instructed by Jagath Thalgaswatte for the Petitioner.
Rajiv Goonetillake, SSC, for the Hon. Attorney General.

Argued on : 29.08.2019.

Decided On : 26.05.2020.

E.A.G.R. Amarasekara J.

The 2nd petitioner who is the mother of the 1st petitioner and the 1st Petitioner by their Petition dated 01.02.2019 have complained to this Court that their fundamental rights guaranteed by Article 12(1) of the constitution were infringed by the Respondents when the 1st Respondent wrongfully and arbitrarily refused to admit the 2nd Petitioner's daughter (1st Petitioner) to grade 1 of the Visakha Vidyalaya, Colombo 05.

The reason given for this refusal appears to be that the Petitioners had failed to obtain required minimum marks under the category they applied for the admission as per the Circular marked **P 11**. This court by its order dated 05.03.2019 granted leave to proceed under Article 12(1) of the Constitution.

On or about 1st July 2018, as the mother of the 1st Petitioner, the 2nd Petitioner, duly submitted an application for admissions of the 1st Petitioner to grade 1 of the Visakha Vidyalaya, Colombo 05, under the category "Children of persons in the staff of institutions directly involved in the school education"(for easy reference hereinafter sometimes referred to as the "Education Category") - vide clause 6(IV) of **P11** and application marked as **P12** . The 2nd Petitioner states that being a teacher of the Sri Lanka Teacher Service, the 1st Petitioner is entitled to be selected under the aforesaid category.

In addition to the application for admission made to Visakha Vidyalaya, Colombo 05, applications on behalf of the 1st Petitioner were also submitted to Sirmavo Bandaranayike Vidyalaya, Colombo and St. Paul's Girls' School, Milagiriya. The 1st Petitioner was offered admission to St. Paul's Girls' School, Milagiriya. The Petitioners state that, however, the first and the most preferred choice was Visakha Vidyalaya, Colombo 05.

Petitioners were called under the Education Category for an interview held on 25th August 2018 at Visakha Vidyalaya, Colombo 05. The 2nd Petitioner states that at the interview;

- Upon perusal of the documents produced by the Petitioners, the 1st Petitioner was awarded only 40 marks.
- The Petitioners were wrongfully and arbitrarily deprived of 15 marks that should have been awarded for the 2nd Petitioner's service in a "difficult" area i.e. at Primary Section of the Minneriya Central College/National College. *(whether what is needed is service in a difficult area or service in a difficult school will be discussed later on this judgment)*
- Above marks were not awarded arbitrarily, in spite of the 2nd Petitioner having duly earned them and such being officially certified by the relevant authorities. In this regard courts attention has been brought to **P10**.
- However, 1st Respondent has refused to grant marks under category of 'period of service in difficult schools', stating that

the Minneriya Primary School is not a difficult school as per Directive 2005/01 marked as **P19**. (*This court observes that what is mentioned in P14 is that Minneriya Primary School which belongs to Minneriya Central College is not a difficult School as per the 2005 CD*)

- Thereafter, the 2nd petitioner was given a mark sheet (**P14**) to sign which the 2nd petitioner signed as she had no choice. (vide paragraph 22 of the Petition)

The Petitioners further submitted that the temporary list (**P15**) of the students who had been selected for admission were released and displayed on or about 21st November 2018 and the 1st Petitioner had secured admission as the last child. Thus, the 2nd Petitioner did not take any action to canvass for the 15 marks that should have been awarded for the period of services in a difficult school - vide paragraph 24 of the petition.

It appears that after an appeal made by another applicant the 1st Petitioner was removed from the list to include the said applicant's child. **P17** was written to the 3rd Respondent Secretary only after the release of the final list.

The Petitioners state that on 4th January 2019, the 2nd Petitioner had been informed by the secretary to the appeals board that, upon considering an appeal under the same category, 1st Petitioner was removed from the final list which was to be released on the next day. This was evidenced by not having the 1st Petitioner's name in the final list published on 5th January 2019 (**P16**) – vide paragraphs 25 and 26 of the Petition.

Being aggrieved by the above turn of events, the 2nd Petitioner on 08th of January 2019 submitted an appeal(**P17**) to the Secretary to the Ministry of Education (3rd Respondent). The Petitioners state that they received a partial response to **P17** by the letter marked **P18** -vide paragraph 27 of the Petition. Nevertheless, letter marked **P18** itself indicates that it was issued on the request of the 2nd Petitioner. The said letter marked **P18** issued by Director of Education (Data management) reads that, they have categorized school-lists as per circular No.2005/01 (**P19**) only by way of reports of school census taken from 01.06.2005.It further reveals that, since they do not have categorization as per the facilities available prior to 01.06.2005, they cannot express whether the schools concerned (Minneriya Central College and Minneriya Primary School) were difficult schools but it clearly says that as per the census of schools in 2005 the Minneriya Central College was considered as a 'very convenient school' and as per the 2013 census Minneriya Primary School was an 'convenient school'. It is also stated in **P18** that it is advisable to check the log book of the school or to ask the opinion of the Zonal Director of Education. However, as the categorization has to be done according to the Circular No.2005/01 dated 18.01.2005, non availability of such categorization as per the said circular prior to 2005 is fathomable and further, since, as per **P9,** the Minneriya Primary College was established on 31.12.2012, availability of its categorization from 2013 can also be understood.

Further the Petitioners in their petition refers to the criteria referred to in circular marked P19 and give a self-assessment to indicate that Minneriya Primary School/Section was a difficult school during her tenure of service prior to her transfer from the same to Ananda College.

As per the Petition, it is clear that the stance of the Petitioners is that the service of the 2nd Petitioner in the aforesaid school in Minneriya should have been considered for all intent and purposes as a service in a difficult school (vide paragraph 28 of the petition) and they should have been awarded 15 marks for that. In this regard the Petitioners seem to rely on the letter marked as **P10** issued by the Principal of the Minneriya Primary School and certified by the Zonal Director of Education. (*Whether this document submitted as **P10** is supportive to establish the Petitioners' case will be discussed later in this judgment.*) However, the Petitioners argue before this court that the Petitioners were awarded only 40 marks when they should have been awarded 55 marks under the category they applied for the admission. The threshold mark was 42.5 under the aforesaid category. The Petitioners allege that the denial of admission of the 1st Petitioner to Visakha Vidyalaya, Colombo 05 is arbitrary and amounts to a violation of petitioners' fundamental rights guaranteed under Article 12 (1) of the Constitution.

However, it appears that the marks given by Sirirmawo Bandaranaike Vidyalaya is the same as Visakha Vidyalaya while St. Paul's Girls' School had given 15 marks for the 2nd Petitioner's service in difficult schools to total up the marks given to the Petitioners to be 55 marks for the application made to that school.

The Petitioners have tendered the following documents in support of their case before this court. Some of them have already been referred to above.

- **P1**- Birth Certificate of the 1st Petitioner
- **P2A**- National Identity Card of the 2nd Petitioner
- **P2B**- Marriage Certificate of the 2nd Petitioner

- **P2C** – National Identity Card of the Father of the 1st Petitioner
- **P2D**- Official Identity Card of the Father of the 1st Petitioner
- **P3**- Appointment Letter of the 2nd Petitioner dated 04.12.1998 to the Minneriya Central College which appears to be an appointment to a National School.
- **P4**- Letter of Confirmation of Appointment dated 20.02.2003
- **P4A**- Copy of the log entry dated 04.01.1999 issued on 15.09.2005 by the Principal of Minneriya National School which shows that the 2nd Petitioner reported for work at Minneriya National School
- **P4B**- Service Certificate dated 30.10.2006, issued by the Principal, Minneriya National School, which indicates that the 2nd Petitioner served in the said school from 04.01.1999 to 25.09.2005
- **P5A**- Transfer letter dated 06.09. 2005 that relates the transfer of the 2nd Petitioner from Minneriya National School to Ananda College, Colombo
- **P5B**- A letter dated 26.09.2005 which shows that the 2nd Petitioner reported to work at Ananda College
- **P6**- Postgraduate Diploma Certificate that belongs to the 2nd Petitioner
- **P7, P7A** and **P7B**- Letters relating to the transfer of 2nd Petitioner to Thurstan College, Colombo from Ananda College and her service in Thurstan College
- **P8**- Service description of the 2nd Petitioner
- **P9**- A letter confirming the establishment of Minneriya Primary School as a separate school under the North Central Provincial Council from 31.12.2012
- **P9A** to **P9D**- Google maps showing the setting of Minneriya Primary School

- **P10-** A certificate dated 20.09.2017, issued by the Principal of Minneriya Primary School and certified by the Zonal Director of Education, to certify the service of the 2nd petitioner in a difficult school
- **P11**- Circular containing the instructions and directions in relation to the admission of children to Grade 1 for the year 2019.
- **P12**- Application for the admission to Grade 1
- **P13A** to **P13D**- Certificate of Residence, Details of Leave Taken, Lease Agreement and Electoral List respectively
- **P14**- Mark Sheet in relation to the Interview held for the admission to Grade 1
- **P15** and **P16** Temporary List and Final list under the Education Category respectively of Visakha Vidyalaya, Colombo 5.
- **P 17**-An appeal to the 3rd Respondent dated 08.01.2019.
- **P 18**- A letter issued on behalf of the 3rd Respondent on the request of the 2nd Petitioner
- **P19**- Circular No.2005/01 dated 18.01.2005
- **P20**- Guidelines for Planning at School Level
- **P21A** and **P21B**- Mark Sheet of the Interview held by St. Paul's, Girls' School and Mark Sheet of the Interview held by Sirimavo Bandaranaike Vidyalaya

The 3rd Respondent filing his affidavit in objection has stated that the 2nd Respondent was appointed on 04.01.1999 to the Minneriya National School and was transferred from the said school on 06.09.2005 and transfer was done by the Ministry since the said school as a National School came under the Ministry. In

this regard he has brought this court's attention to **P3** and **P5A** and also to **P4B** service certificate which was issued by the Principal of Minneriya National School after her transfer from the said school. The stance of the 3rd Respondent is that Minneriya National School was a convenient school and generally national schools are not classified as difficult schools. The 3rd Respondent admits that the primary section of the Minneriya National school was made a separate school in December 2012.In this respect he has submitted the document marked as **R1** and **R1** states that, in 1992, the said primary section was taken away to a place about 1 Km away from the main school but was administered by the Minneriya National School till its separation as a primary school on 31.12.2012. The 3rd respondent submits that the document marked **P10** is not a valid document since it is issued by the Minneriya Primary School which did not exist prior to 2012 and does not have the service records of the 2nd Petitioner and such service certificate can only be issued by the Minneriya National School where the 2nd Respondent served till 2005. The document marked as **R2** by the said Respondent indicates that only the records of 2005/2004 census are available and as per the schedule relating to 2004 census of schools, Minneriya central college was referred to as a National School and it was also a popular school. It also reveals that the said Central College was promoted as a National School on 12.03.1996. Thus, the stance of the 3rd Respondent is that the service of the 2nd Respondent in Minneriya was at the Minneriya Central college which became a National School in 1996 and her service was not in a difficult school.

Analysis of the Case.

The issue to be determined by this court is whether the Petitioners' Fundamental Rights guaranteed under Article 12(1) of the Constitution had been violated by the 1st Respondent by the refusal to grant 15 marks to the Petitioners' application under the category of "period of service in difficult schools", taking into account the service of the 2nd Petitioner in the Minneriya Central College/ National School as a teacher in its primary section, which refusal deprived the admission of the 1st petitioner to grade 1 of the Visakha Vidyalaya, Colombo 05.

It is not in dispute that provisions in the Circular dated 31st May 2018 of the Secretary to the Ministry of Education (herein after sometimes referred to as the "Admission Circular") marked "p11" is applicable to the admission of students to Grade One of Government Schools in the respective year the Petitioners preferred their application.

As per the said circular, the Petitioners' application for the admission to grade 1 in 2019 was governed by clause 6.4 of the said circular.

In terms of Clause **6.4(b)** of the Admission Circular, marks under this Category is allocated under six main grounds,

I. Period of service as a permanent employee in the staff of an institution under Ministry of Education that directly involves in school education (one mark for one year -maximum 20 marks);

II. Period of service in difficult schools

- **For applicants presently serving in a difficult school without a break (5 marks per year -maximum 25 marks);**

- **For applicants previously served in a difficult school (3 marks per year – maximum 15 marks)**
  (half a mark is given for period of 6 months or for the period exceeding 6 months when the applicant has completed a minimum of one-year service).
  However, this service in a difficult school has to be certified by the relevant Zonal Director of Education. (*What is highlighted here is found in Clause 6.4 (b) II of the Circular marked P11 and is the most relevant provision for the matter placed before this court*)

III. Unutilized leave during the last 5 years (2 marks for each 20 days of unutilized leave per year - maximum 10 marks);

IV. For applicant's service in the same school where child's admission is sought (3 years or more 10 marks, less than 3 years 5 marks – maximum 10 marks);

V. Distance from present permanent place of residence to the school applied (Within one Km- 10 marks, Between 1Km and 3Km- 8 marks, Between 3Km and 5Km- 6 marks, More than 5 Km – 4 marks-- maximum 10 marks);

VI. Distance from present place of work to the school applied for (More than 100 Km – 25 marks, Between 70Km and 100Km – 20 marks, Between 40Km and 70 Km- 15 marks, Between 20Km and 40Km- 10 marks, Less than 20Km 5 marks--- maximum 25 marks).

On certain occasions in their petition the Petitioners state that marks were not allocated to the service of the 2nd Petitioner in difficult areas. However, this court observes that as per the clause 6.4.(b) II of circular marked as **P11** marks are considered for service in difficult schools and not for the service in difficult areas. As per the said clause service in difficult schools has to be certified by the relevant

Zonal Director of Education in accordance with the Circular No. 2005/01. The Circular No.2005/01 marked as **P19** categorizes types of schools and gives directions on how to categorize schools within different Provinces into five categories, namely very convenient, convenient, not inconvenient, difficult or very difficult. Thus, it is clear that to prove infringement of fundamental rights as alleged by the Petitioners, the Petitioners must prove that the 2nd Petitioner serves or served in a difficult school.

It is not in dispute that the 2nd petitioner at the time she tendered the application for admission was working at Thurstan College, Colombo 07 and the Petitioners do not claim said college as a difficult school, and thus, the Petitioners cannot claim maximum 25 marks or less marks given under the criteria 'presently working in a difficult school without a break for 5 years or less' as per the clause 6.4 (b)– II – a. Then, it needs to be considered whether the petitioners are coming within Clause 6.4 (b) – II – (b) of the Admission Circular as the 2nd Petitioner claims for the service in a difficult school in previous years in relation to her service In Minneriya from 1999 to 2005.

There is no disagreement that the 2nd Petitioner was appointed to the Minneriya Central College, Polonnaruwa (In some documents the name of this school is mentioned as Minneriya National School, Polonnaruwa) with effect from 4th January 1999, where she was assigned to the primary section. She served in the primary section of the above school from 4th Jan 1999 to 25th September 2005 (approximately 6 years and 8 months). It is the stance of the 2nd Petitioner that her service in the said school is a service in a difficult school and, thus, the 1st petitioner should be awarded the 15 marks as per clause 6.4 (b) – II – (b), taking

into consideration the fact that the 2nd petitioner worked in the said school for more than 5 years. However, as evident by the mark sheet marked **"P14",** the Petitioners were not awarded under the item 'period of service in difficult schools' and the reason stated therein is that the Primary School belonging to Minneriya Central College was not a difficult school as per the 2005 CD'. Thereby, the issue before this court is whether the primary section of the Minneriya Central College, Polonnaruwa/ Minneriya National School can be considered as a "Difficult school" for the purposes of allocating marks under Clause 6.4 – II – b.

A careful reading of clause 6.4 of **P 11** makes it apparent that marks are given to service in a difficult school in accordance with the classification found in the Circular No. 2005/01 (**P19**). **P19** categorizes schools and not separate sections of schools. This court observes that as per the material placed before this court the Minneriya Primary School became a separate school only in 2012 under the relevant Provincial Council – vide **P9**. Prior to that it was under the Minneriya National School as its Primary Section. In fact, the 2nd Petitioner's appointment was to the Minneriya Central College which was named as a National School in 1996 (see **P3, P4, P4A, P4B**, **P5A, R1** and **R2)**. The evidence indicates that she had worked as a primary section teacher in that national school. Even her appointment and transfer stated in **P3** and **P5A** refers to an appointment to a national school and transfer from a national school. In fact, her transfer was termed as a transfer from a National School (Jathika Pasala) to National School (Jathika Pasala)- vide **P5A**. Aforementioned documents submitted by the Petitioners themselves prove that the 2nd Petitioner's service was as a teacher of Minneriya Central College/ National School. Thus, what is relevant is whether Minneriya National School / Minneriya Central College was a difficult school as

per **P19.** The Petitioners have not placed any material to show that Minneriya Central College or National School was a difficult school as per **P19**. The document marked **P18** reveals Minneriya Central College was considered as a very convenient school as per the census made in 2005**. R1 and R2** also indicate it was considered as a popular school and became a national school in 1996. It is hard to assume that a difficult school would be given the status of a national school or become a popular school. Furthermore, as the circular marked **P19** categorizes only schools and not separate sections of schools, it is not wrong in assuming that the whole school was assessed as one unit for the classification and, as such different sections cannot be considered as having a different classification or rating. On the other hand, if the Petitioners' attempt to show that the primary section of the Minneriya Central College/National College as a separate school to succeed, they must establish at least its administration was separate from the main school by showing that it had a separate principal and an office etc. No sufficient materials were placed before this court by the Petitioners to that effect but the documents marked **P3, P4, P4A, P4B**, **P5A** and **P8** shows that the 2nd Petitioner's appointment was to the Minneriya Central College which was a National School. Her service also was to that school and she was transferred from that national school to another national school, namely Ananda college, Colombo- vide **P5A**. Hence, it is not logical to treat her service as one belonged to a different school other than the Minneriya Central College/National School, even though the primary section was situated on a different location about 1Km away from the main section.

The documents marked as **P9** and **R1** confirms that the Primary section of Minneriya Central College, which located about 1Km away from the main section,

was established as a separate Primary School governed by the Provincial Council in 2012. Based on that, it appears that the Petitioners try to contend that the primary section of Minneriya Central College had all the attributes of a separate school and it has to be considered as a difficult school due to the lack of facilities at the time the 2nd Petitioner worked there. This cannot be considered as a tenable contention for many reasons. Firstly, the aforesaid primary school was established in 2012 after 6 years from the transfer of the 2nd Petitioner from Minneriya National School ; Secondly, **P9** and **R1** establish that primary section of the Minneriya National School was under the administration of the said national school till 2012.12.31 indicating that the said primary section was part and parcel of the said national school and not a separate school. Thirdly, it appears that the Minneriya Primary School acquired the attributes of a separate school only in 2013 under a new administration, separated from the National school and as a Provincial Council School.

The Circular No, 2005/01 marked **P19** states that it rescinds the circular 1998/47 dated 11.12.1998 which was for the classification of schools for certain purposes prior to **P19**. It should be noted that for the purposes of circular marked as **P11**(Admission Circular) what is relevant is not the previous circulars or their classifications but the classification under the Circular marked **P19**. Irrespective of the fact that relevant person's service was done prior to 2005 or after, for the marks to be given the relevant school has to be a difficult school as per circular marked **P19.** Minneriya Primary School which was established in 2012 was a nonexistent entity when the circular marked **P19** came into force in 2005. What was in existence was Minneriya National School and the 2nd Petitioner was a teacher of its Primary section. Thus, as said before what is relevant for the

Petitioners' application for admission is the category of the Minneriya National School as per **P19**. However, it appears that after the establishment of the Minneriya Primary School as a separate entity in 2012, it has been classified as a convenient school in 2013 – vide **P18**. As mentioned before the Petitioners have neither placed sufficient material with the application for the interview nor before this court to show that the Minneriya National School was a difficult school as per Circular marked **P19**. What appears to have been submitted with the application for the interview as well as before this court is **P10** which refers to a nonexistent entity at the time of 2nd Respondent's service at Minneriya. This certificate marked **P10**, dated 20.09.2017 has been issued by the Principal of Minneriya Primary School and certified by the Zonal Director of Education. It states that the 2nd Petitioner served as a Primary Teacher at the Minneriya Primary School between 04.01.1999 and 25.09.2005, which was a difficult School.

Since it appears that the Petitioners are relying heavily on **P10**, it is necessary to comment why it is not acceptable to this court. The following reasons can be emphasized in that regard to show why it is not sufficient or reliable;

- As mentioned before Minneriya Primary school was established in 2012 and, as such, there cannot be a Minneriya Primary School as a separate entity prior to that. Thus, as said before, this certificate has been issued for a school which had no existence during the tenure of the 2nd Petitioner in Minneriya area.
- The content of this certificate is contrary to Petitioners own documents marked **P3, P4, P4A, P4B** and **P5A**, owing to the fact that when **P10** states

that the 2nd Petitioner was a teacher of Minneriya Primary School, the rest confirms that she was a teacher attached to Minneriya National School.

- What is required by the circular marked **P11** is a certification of service in a difficult school by the Zonal Education Director in accordance with the Circular marked **P19**, namely Circular No.2005/01. The said circular was not addressed to the principals of schools though it was also intended to be distributed among the principals but Zonal directors of Education are among the addressees of the said circular. Thus, it appears to be the duty of the Zonal Directors to classify schools as per the directions and guidance in the said circular. Therefore, it is the Zonal Director of Education who can certify whether one's service was in a difficult school or not and as shown above, that is what is expected by the circular marked **P11**. However, **P10** is basically a certificate issued by the Principal of the Minneriya Primary School. Though he expressed that it is a difficult school there is nothing to indicate whether it is his personal opinion or as per the guidance or directions of the Circular marked **P19**. The Zonal Director of Education has just certified it. It is not clear whether the Zonal Director certified it to indicate that it is a document issued by the relevant Principal, one of his subordinate officers or whether he certified what is stated there as true. However, it is clear that neither the Principal nor the Zonal Director of Education has certified that the service of the 2nd Petitioner in Minneriya was a service in a difficult school as per the circular marked **P19**. A mere statement or opinion saying that one served in a difficult school will not suffice for the marks to be allocated as per circular marked **P11**. It should be a certificate from the Zonal Director certifying that relevant person's

service was a service in a difficult school as per circular No.2005/01 marked **P19**. There is no reference to circular marked **P19** in **P10**. On the other hand, Minneriya Primary School was not an entity that existed in 2005, when the circular **P19** was issued, to be classified under the said circular. As per **P18** issued by the Office of the Director of Education (Data Management), it appears that after the establishment of the Minneriya Primary School in 2012, it has been categorized as a convenient school and even in 2005 Minneriya Central College was a very convenient school.

The Petitioners have submitted a self-assessment of the Primary School in her petition, applying criteria in Circular No.2005/01 marked P19 to a factual situation stated by them as that existed during the 2nd Petitioner's tenure in Minneriya, to indicate that it was a difficult school. In this regard this court observes as follows;

- This is a self-serving assessment and not an independent one. There is no independent evidence to confirm the factual situation they refer in that assessment.
- Self-assessment has been done by taking the primary section as a separate school but as discussed above it appears that there was no separate school during 2nd Petitioner's service in Minneriya except for a separate primary section situated 1Km away from the main school. The Circular marked P19 categorizes schools and not their separate sections and the Circular marked P11 contemplates whether the relevant school is/was a difficult school in giving marks but not its separate sections. Since the 2nd Petitioner was a teacher of the Minneriya National School

as established by P3 to P5A, what applies is the category of the said National school.

- Irrespective of whether the service of the relevant person was done prior or after the enforcement of the Circular marked P19, the circular marked P11 considers the categorization of schools as per the circular marked P19 in giving marks. One has to show, to get marks for the service done previously in a difficult school, that he worked in a school for a period exceeding one year and it was a difficult school as per the circular marked P19 (3 marks per year subject to a maximum of 15)- vide clause 6.4(b) II(b). Naturally the assessment as per the circular should have been done after the enforcement of the circular in 2005 applying the relevant criteria to factual situation that existed after the enforcement of the relevant circular. As evidenced by the P19 circular itself there had been a previous circular to categorize schools which was rescinded by P19, but what is relevant is whether the relevant school was a difficult school as per P19. As such, applying the criteria in P19 to a factual situation that existed prior to the enforcement of P19, as done in the self-assessment, cannot be considered as the correct way of assessing the school as per P19. For example, one criterion in P19 is the number of useable computers the school has. If this is applied to schools that existed in 1999 which was the year the 2nd Petitioner started her service in Minneriya, the balance with regard to assessment of most of the schools would tilt towards the 'difficult school' status. It is the view of this court that what is relevant is not applying the criteria in P19 to a situation in the past, but rather, the assessment/ category of

the school when P19 was applied after its enforcement. Thus, the way the self-assessment is done is also questionable.

- Anyhow, what is required by the Circular marked P11 is not a self-assessment but a certificate from the Zonal Director of Education with regard to the relevant school. Thus, what should have been tendered was a certificate with regard to the Minneriya National School under which the 2nd Petitioner did her service. Instead of that what was tendered is a purported certificate (**P10**) with regard to the Minneriya Primary School which came into existence as a separate entity only in 2012.

For the reasons mentioned above this court cannot rely on the self-assessment done by the Petitioners. Merely because St. Paul's Girls' School, Milagiriya gave marks for the 2nd Petitioners service in Minneriya considering it as service in a difficult school this court cannot find fault with the Respondent for not giving marks due to the reasons elaborated above. This case is not based on an alleged infringement by the provisions in relevant circulars but, on an alleged infringement caused by not giving marks by the Respondent for the 2nd Petitioner's service in the primary section of the Minneriya National School as per the relevant circulars with regard to the application made for the admission for grade one for the year 2019. It is the view of this court that the Petitioners failed in establishing that her service was for a difficult school as contemplated by the said circulars.

Thus, this court cannot find fault with the Respondents. Hence, the application is dismissed. No costs.

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.

SC/FR/39/19.

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.No.40/2019

1. Iresha Dulashini Dangolla,
Mo.10A, Meegahawatta Road, Gangodawila, Nugegoda.

2. Kandabadage Don Nadeera Wijenayaka,

Mo.10A, Meegahawatta Road, Gangodawila, Nugegoda.

For an on behalf of

Kandabadage Dona Nelisa Manuldi Wijenayaka.

PETITIONER

Vs.

1. Sandamali Aviruppola,
Principal,
Visaka Vidyalaya,
Colombo-05

2. N.H.M.Chithrananda,
Secretary,
Ministry of Education,
'Isurupaya',
Battaramulla

3. S.M. Keerthirathna,
Ananda College,
Colombo- 10

4. Hon. Attorney General,
Attorney General's Department,
Colombo-12.
RESPONDENTS

Before: Jayantha Jayasuriya, PC, CJ.

L.T.B.Dehideniya, J.

P. Padman Surasena, J.

Counsels: Uditha Egalahewa PC with Ranga Dayananda, Ms. Anuradhi Wickremasinghe & Minoli Rathnayake for the Petitioners.

Rajiv Goonetillake, SSC, for the AG.

Argued on: 24.01.2020

Decided on: 04.08.2020

L.T.B Dehideniya J.

The 1st and 2nd Petitioners being the parents of the minor child Kandabadage Dona Nelisa Manuldi Wijenayaka made an application to admit the child to Visaka Vidyalaya, Colombo. The application was based on the category of 'children of persons belonging to the staff in an institution directly involved in school education'. Under the circular 24/ 2018 (1R1), paragraph 7.5.2.2, if a parent has worked in a difficult school, that parent is entitled to obtain 03 marks for a full year, up to the maximum of 15 marks. The Petitioners' contention is that, the 1st Petitioner has worked as a teacher in the school, A/ Habarana Vidyalaya during the period from 10th June 2003 – 24th September 2007. The Petitioners claim that, this school is categorized as a difficult school. To establish that, the Petitioners have tendered the document marked P2 (XXIX) issued by the Zonal Director of Education, Kekirawa dated 06-06-2018. In the said letter, the director certified that, the 1st Petitioner served as an English teacher from 10-06-2003 to 24-09-2007 in A/ Habarana Maha Vidyalaya. He further certified that; the said school comes within Palugaswewa division which is a difficult division. The interview board headed by the 1st Respondent has not accepted this document as proof of the fact that, A/ Habarana Maha Vidyalaya is a difficult school.

Being dissatisfied with this decision, Petitioners have tendered an appeal. The Petitioners have obtained another letter from the same Zonal Director of Education dated 03-09-2018 marked as P4 where he certified that, A/ Habarana Maha Vidyalaya was categorized as a difficult school during the said period. The Petitioners, on the basis of this document argue that, they are entitled for additional 12 marks. If the said 12 marks were given to the Petitioners, they go above the cut-off mark and their minor child would have been admitted to Visaka Vidyalaya. The appeal board has not considered the document because under the

circular, the appeal board is not authorised to consider any document which was not tendered to the original interview board. Further, the 1st and 2nd Respondents submit certain documents in proof of the fact that, A/ Habarana Maha Vidyalaya is not a difficult school. (This argument will be considered at a later stage of this judgement).

The Petitioners submit that, the denial of admission to the school is an infringement of their Fundamental Rights guaranteed under Article 12(1) of the Constitution.

In this application, parties do not contest the marks given to the Petitioners on their other qualifications. The only contest is with regard to the marks that, the Petitioners claim for serving in a difficult school.

There is no contest that, the 1st Petitioner has served as a teacher in A/ Habarana Vidyalaya during the said period. The issue is whether the said school was categorised as a difficult school and the proof of it. Under Article 7.5.2 of the circular, the Zonal Director of Education has to certify that, it is categorised as a difficult school. The document tendered by the Petitioner with the application (P2, XXIX) does not certify that it is a difficult school. The document says, the school is geographically situated in a difficult educational division. The circular expects a certificate whether school is categorised as a difficult school. Its geographical situation is not considered for this matter.

The Petitioner has obtained another document from the same author to the effect that, the school is a difficult school. The Petitioners admit that, this document was obtained after the 1st interview. The appeal board has not considered this document because they were not permitted to consider any document other than the documents that were tendered at the 1st interview.

The 1st Petitioner is a school teacher and their application is to admit the child to Visaka Vidyalaya, Colombo. It is a known fact that, Visaka Vidyalaya is getting more applications than the available vacancies. Therefore, if the Petitioners wanted to admit their child to the said school, they should have tendered all the relevant documents strictly according to the school admission circular. The 1st Petitioner should have known that the document marked P2- XXIX is not in conformity with the circular for two reasons i.e. firstly the document is in simple language and secondly the 1st Petitioner being a school teacher is expected to be more familiar with the documents of the Education Department. Further she was able to obtain the document marked P4, which is in strict compliance with the school admission circular after the 1st interview. I do not see any reason why she could not have obtained it prior to the 1st

interview, if this document (P4) reflects the accurate position and had been issued in compliance with the accepted practice and procedure.

It is pertinent to note that the, contents in document P4 is also in issue. The 1st Respondent submitted the list of difficult schools marked 1R3 which was made available to the interview board by the Ministry of Education, where A/ Habarana Vidyalaya is not included.

The 2nd Respondent being the Secretary to the Ministry of Education explained further in his objection that the said school was not categorized as a difficult school.

On questioning the Zonal Director of Education Kekirawa, it has been revealed that, A/ Habarana Vidyalaya was categorised as a more convenient school. R3A, a list relation to the said school from year 2003 - 2007 shows that, it has been categorised as a more convenient school. Further in document R3, the Zonal Director of Education certifies that, the said school is categorised as a more convenient school. The document marked P2-XXIX gives a reference number and the Zonal Director of Education was able to trace the record. He confirms that, the said document was issued by the said office. (R 2 A) To the contrary, there is no reference number given in the document P4 and the zonal director has failed to trace the copy of the said letter.

The Zonal Director of Education, Kekirawa by the certification marked R3, has further confirmed the fact that, the Palugaswewa education zone is considered a difficult educational zone for the purposes of appointments within the North Central province and the transfers take place within and outside the provinces including the transfers within the Kekirawa educational zone. The contention of the Zonal Director of Education is that, A/ Habarana Maha Vidyalaya is not fallen into the category of difficult schools and the particulars mentioned in the letter dated 03.09.2018 are inaccurate.

The 1st Respondent being the Principal of Visaka Vidyalaya cannot be held liable for her conduct as the Petitioners were unable to produce a document certifying A/ Habarana Maha Vidyalaya is a difficult school at the interview. The contention of the 1st Respondent is that no document tendered at the interview in proof of the fact that, A/ Habarana Vidyalaya is a difficult school. Thus, this court sees no reason to hold the 1st Respondent liable on the breach of fundamental rights on her side as the Principal of the school. In addition to these circumstances, the 1st Respondent has produced the list of difficult schools marked 1R3 issued by the Ministry of Education where A/ Habarana Vidyalaya is not included.

Further, the Petitioners rely on the document marked P4 which in its content's states that, A/ Habarana Vidyalaya is a difficult school. But there is a clear lapse on the side of the petitioners where they have not produced the specific document at the interview. Thus, a document which has not produced at the interview is precluded from the consideration by the Appeals Board.

There is prima facie evidence against the fact that, A/ Habarana Vidyalaya is a difficult school. The certification issued by the Zonal Director of Education, Kekirawa marked R3, itself is of proof that A/ Kekirawa Vidyalaya is a more convenient school. In addition to these circumstances, the document marked P4 has irregularities on the face of it where it lacks the evidentiary value. There is no reference number given in this document and the Zonal Director of Education was unable to trace the related file where this letter was issued.

There is a clear negligence on the part of the Petitioners in not producing the correct documents at the time of the interview and also the document that they relied on does not provide any basis for a relief provided by law.

Considering these circumstances, I see that, there is no violation of fundamental rights guaranteed to the Petitioners by the Article 12 (1) of the Constitution.

Application dismissed.

Judge of the Supreme Court

Jayantha Jayasuriya, PC, CJ

I agree Chief Justice

P. Padman Surasena, J

I agree Judge of the Supreme Court

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

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

SC (FR) Application No. 73/2009

1. **Chief Inspector W.A.J.H. Fonseka**
125/41, Pannipitiya Road,
Baththaramulla.

2. **Chief Inspector W.K.J.R. Dias**
No. 126, Piyadasa Sirisena Mawatha,
Colombo 10.

3. **Chief Inspector R.A.R.N. Rajapaksha**
No. 1/2, Police Flats, Colombo 10.

4. **Chief Inspector Prasad Siriwardana [now deceased]**
No. 230, Goonawella, Kelaniya.

PETITIONERS

-Vs-

1. **Neville Piyadigama**, Chairman,
National Police Commission, 3rd Floor,
Rotunda Building, No. 109, Galle Road,
Colombo 3.

1(a) Senaka Walgampaya, P.C. – Chairman, NPC

1(a)(i) Prof. Siri Hettige – Chairman, NPC

1(a)(ii) Tilak Kollure – Chairman, NPC

1(a)(iii) P.H. Manatunga – Chairman, NPC

1(a)(iv) K.W.E. Karaliyadde – Chairman, NPC

1(A) **Vidyajothi Dr. Dayasiri Fernando** – Chairman

1(A)(i) Jus. Sathya Hettige, P.C. – Chairman

1(A)(ii) Dharmasena Dissanayake – Chairman

1(B) **Palitha M. Kumarasinghe, P.C**. – Member

1(B)(i) Kanthi Wijetunga – Member
1(B)(ii) A. Salam Abdul Waid – Member
1(B)(iii) Prof. Hussain Ismail – Member
1(B)(iv) Mrs. Sudharma Karunaratne – Member

1(C) **Sirimavo A. Wijeratne** – Member
1(C)(i) Sunil S. Sirisena – Member
1(C)(ii) Ms. D.S. Wijeythilake – Member
1(C)(iii) G.S.A. De Silva, P.C. – Member

1(D) **S.C. Mannampperuma** – Member
1(D)(i) Dr. Pradeep Ramanujam – Member

1(E) **Ananda Seneviratne** – Member
1(E)(i) Mr. V. Jegarasasingam – Member

1(F) **S. Thillandarajah** – Member
1(F)(i) Santi Nihal Seneviratne – Member

1(G) **M.D.W.Ariyawansa** – Member
1(G)(i) Dr. I.N. Zoysa – Member
1(G)(ii) S. Ranugge – Member

1(H) **A. Mohamed Nahiya** – Member
1(H)(i) Sarath Jayathilake – Member

1(I) **T.M.L.C. Senarathne** – Secretary
1(I)(i) H.M.G. Seneviratne – Secretary
1(I)(ii) M.A.B. Daya Senerath – Secretary

1(J) **H.S. Pathirana** – Member
1(J)(i) D.L. Mendis – Member

1(A) to 1(J)(i) Respondents are of;
The Public Service Commission,
No. 177, Nawala Road, Colombo 5

2. **Ven. Elle Gunawansa** – Member, NPC
2(a) P.H. Manatunga – Member
2(a)(i) Prof. Siri Hettige – Member
2(a)(ii) Gamini Nawaratne – Member

3. **Justice Chandradasa Nanayakkara** – Member, NPC

3(a) Mr. D. Dissanayake – Member

3(a)(i) Mrs. Savithri Wijesekera – Member

4. **S.P. Bandusena** – Member, NPC

4(a) Nihal Jayamanna P.C. – Member

4(a)(i) Mr. M.M.M. Mowjood – Member

4(a)(ii) Mr. Thilak Collure – Member

5. **Dr. Kopala Sundaram** – Member, NPC

5(a) Mr. R. Sivaraman – Member

5(a)(i) Mr. Anton Jeyanadan – Member

5(a)(ii) Asoka Wijethilaka – Member

6. **Chamani Munasinghe** – Member, NPC

6(a) Mr. Frank De Silva – Member

6(a)(i) Mr. G. Jeyakumar – Member

7. **Javard Joseph** – Member, NPC

7(a) Newton Gooneratne – Member

7(a)(i) Y.L.M. Zawahir – Member

8. **K.C. Logeshwaran** – Secretary, NPC

8(a) Ariyadasa Cooray – Secretary

8(a)(i) Saman Dissanayake

9. **H.A.J.S.K. Wickramaratne**
Inspector General of Police,
Department of Police,
Colombo 1.

9(a) Mahinda Balasuriya – Inspector General of Police

9(b) N.K. Illangakoon – Inspector General of Police

9(c) Pujitha Jayasundara – Inspector General of Police

9(d) C.D. Wickramaratne – Act. Inspector General of Police

10. **Sunil Sirisena**, Secretary
Ministry of Foreign Employment and Welfare
Denzil Kobbekaduwa Mawatha,

Baththaramulla.

11. **Mrs. Jayantha Rukmani Siriwardena,**
Additional Secretary, Ministry of Trade, Marketing Development, Co-operative and Consumer Services

12. **D.W. Prathapasinghe**
Senior Deputy Inspector General of Police, Police Headquarters, Colombo 1

13. **L.A. Jayasinghe**
Deputy Inspector General of Police, Police Headquarters, Colombo 1

14. **B.K.S. Raveendra**
Senior Assistant Secretary, Ministry of Public Administration and Home Affairs Colombo

15. **S.K.C.J.V. Fernando**
S.S.P. Office, Matara

16. **R.M. Gunaratna**
S.S.P. Office Polonnaruwa

17. **Mrs. D.S. Periyapperuma**
New Secretariat Building, Colombo 1

18. **Mrs. T.P.D.W. Jayawardena**
No. 10, Cambridge Place, Colombo 7

19. **M.D.K.P. Gunathilleke**
Communication Division, Mirihana.

20. **P. Balachandra**
Women and Children Bureau, Colombo 1

21. **H. Samudrajeewa**
S.P. Office, Kelaniya

22. **A.I. Hapugoda**
S.P. Office, Chillaw

23. **U.A.J. Premasiri**
Police Headquarters, Colombo 1

24. **S.P.U.N. Senanayaka**

S.P. Office, Tangalle

25. **Mayura Perera**
President Security Division, Colombo

26. **Hon. Attorney General**
The Attorney General's Department,
Colombo 12.

Respondents

Before : B.P. Aluwihare, PC, J

Priyantha Jayawardena, PC, J, and

L.T.B. Dehideniya, J

Counsel : Uditha Egalahewa, PC with Amaranath Fernando and Vishva Vimukthi for the petitioners

Indika Demuni de Silva, PC, ASG for the 1st – 9th, 9b and 26th respondents

Argued on : 26th June, 2018

Decided on : 8th September, 2020

Priyantha Jayawardena, PC, J

Facts of the case

The 1st to the 4th petitioners filed the instant application alleging that the denial to promote them to the rank of 'Assistant Superintendent of Police' [hereinafter referred to as "ASP"] is an infringement of their Fundamental Rights guaranteed under Article 12(1) of the Constitution.

At the time of filing the instant application, the 1st to 4th petitioners were serving as 'Chief Inspectors of Police' [hereinafter referred to as "CI"].

The Cabinet of Ministers had approved the 'Amended Scheme of Recruitment and Promotions of Senior Gazetted Officers of the Police Department' [hereinafter referred to as "Amended Scheme of Promotions"] on the 5th of August, 1998, and it had been communicated to the Inspector General of Police, the 9th respondent, by letter dated 20th of August, 1998. The said letter and the Amended Scheme of Promotions were produced along with the petition, marked as '**P1**'.

In terms of the said Amended Scheme of Promotions: 25% of the vacancies were to be filled on the basis of results of an '*Open Competitive Examination',* 25% of the vacancies were to be filled on the basis of the results of a '*Limited Competitive Examination'* and the balance 50% of the vacancies were to be filled on the basis of '*Merit Promotions'* from among the CIs who are confirmed in the rank.

The promotions made only on the basis of '*Merit Promotions'* will be considered in this judgment as the scope of the instant application is in respect of promotions granted on merit basis.

In terms of the said Amended Scheme of Promotions, marked as '**P1'**, the selection procedure for merit promotions was a viva voce test before a Board of Interview appointed by the Public Service Commission. Further, it stipulated that to be eligible to apply under the category of '*Merit Promotions',* the candidates should be CIs who are confirmed in the said rank and in possession of an unblemished record for the five-year period immediately preceding the closing date of applications.

Thereafter, the Inspector General of Police by Circular dated 24th of July 2007, marked as '**P2(a)',** had called applications to fill vacancies in the rank of ASP from CIs who were promoted to the said rank on or before the 1st of January, 2003 and confirmed in the said rank. The said Circular had stipulated that in order to be eligible for the said promotion the applicants should possess an unblemished record of service during the five-year period immediately before 10th of August, 2007 which was the closing date of applications.

Further, the said Circular had stated that eligible candidates should collect both the application form and the marking scheme produced marked as '**P2(b)'**, [hereinafter referred to as *'the first marking scheme'*], and that the candidates will be summoned before a Board of Interview as the method of assessment for promotions.

The petitioners stated that they submitted applications in response to the abovementioned Circular to be considered for promotion to the rank of ASP.

However, the Inspector General of Police, by Circular dated 20th of March 2008, marked as '**P3(a)',** had informed that fresh applications should be submitted on or before the 31st of March, 2008 by CIs whose names were included in an annexed list thereto to be considered for promotion to the rank of ASP on *Merit* basis.

Further, the said Circular calling for the fresh applications stated that a new marking scheme for the selection of ASPs on *Merit* basis had been approved by the National Police Commission. The said marking scheme was produced along with the Petition, marked as '**P3(b)**' [hereinafter referred to as the "*second marking scheme*"].

In view of the above, to be eligible for promotion to the rank of ASP, the candidates were required to be CIs who are promoted to the rank of CI on or before the 1st of January, 2003 and confirmed in the said rank. Further, the candidates were to possess an unblemished record of service during the past five-year period immediately before the 31st of March, 2008 which is the closing date of applications.

The petitioners stated that they submitted fresh applications for the second time as their names had been included in the said annexed list of the said Circular dated 20th of March, 2008. Both sets of said applications submitted by the petitioners had been produced along with the Petition, marked as '**P6**' to '**P9**'.

Subsequently, the Inspector General of Police had informed, by Circular dated 2nd of June 2008, that the National Police Commission once again had approved another amended marking scheme and communicated the said decision by its letter dated 30th of May, 2008 and that the said amended marking scheme was available to the CIs who had submitted applications for promotion to the rank of ASP on *Merit* basis.

Both the said Circular dated 2nd of June, 2008 and the amended marking scheme [hereinafter referred to as "the third marking scheme'] were produced with the Petition marked as **'P4(a)'** and **P4(b),** respectively.

However, the Secretary of the National Police Commission had issued another marking scheme [hereinafter referred to as "the fourth marking scheme"] for the selection of CIs to the rank of ASP under merit basis on the 16th of October, 2008. The said fourth marking scheme was

produced along with the Petition, marked as '**P5'.** The interview under reference had been held in accordance with the said marking scheme of '**P5'.**

Subsequently, all candidates had been requested to be present before a Board of Interview by Circulars dated 24th and 26th of October 2008, produced marked as '**P10(a)'** and '**P10(b)'**, respectively. The said list included both female and male candidates.

Subsequent to the conclusion of the said interviews, the list of officers promoted to the rank of ASP with effect from the 1st of January, 2008 had been released on the 1st of January, 2009 by the Inspector General of Police after the same was approved by the National Police Commission. The said list of promotees had been produced along with the Petition, marked as '**P11**'.

The petitioners stated that even though the said list did not include their names, several officers, who did not meet the eligibility criteria stipulated in the Amended Scheme of Promotions and marking scheme, marked as **'P1'** and '**P5**', had been included as promotees to the rank of ASP.

The petitioners further stated that calling for fresh applications for the same vacancies and the changing of the marking schemes were to suit the requirements of some of the selected candidates to enable them to score higher marks than the other candidates.

Further, the petitioners stated that the 17th and 18th respondents, two female CIs, despite scoring lower marks than the petitioners at the said interview have been promoted to the rank of ASP on *Merit basis*.

In the circumstances, the petitioners stated that they were discriminated against and/or were not treated equally with other candidates who were promoted to the rank of ASP under *Merit* basis. Furthermore, the petitioners stated that they were entitled to be promoted to the rank of ASP on *Merit* basis.

In the aforesaid circumstances, the petitioners stated that the failure and/or the refusal to promote the petitioners from the rank of CI to ASP was arbitrary, capricious and therefore, in violation of their Fundamental Rights guaranteed under Article 12(1) of the Constitution.

Subsequent to the filing of the instant application, the learned Deputy Solicitor General brought to the notice of court that the 1st and 2nd petitioners had been promoted to the rank of ASP, on the basis of seniority, with effect from 9th May, 2010 and that the 3rd petitioner had been

promoted to the rank of ASP, on the basis of period of service and skill, with effect from 13th January, 2014.

However, the petitioners submitted that even though the petitioners were promoted at a later date, the selection process in issue was flawed and it has adversely affected their seniority. Particularly, candidates with lower marks and who were junior to the petitioners have been promoted over them. As such, the petitioners informed court that they would proceed with this instant application.

Further, this court had been informed that the 4th petitioner was promoted to the rank of ASP, effective from the 13th of January 2014, by letter *No. PSC/APP/8/2/56/2012* dated 14th of March, 2014 issued by the Public Service Commission. However, the 4th petitioner had passed away on the 15th of March, 2014 whilst attempting to disperse a group of protestors in the Nugegoda area. Thereafter, in terms of Circular Nos. 2197/2009 and 16/2009, by letter No. MinLO/POL/12/03/2014 dated 17th of March, 2014 the 4th petitioner was promoted posthumously to the rank of Superintendent of Police (Grade II) effective from the 16th of March, 2014. In the circumstances, the learned President's Counsel for the petitioners informed court that he will not be pursuing the application on behalf of the 4th petitioner.

Thus, this judgment will only consider the alleged infringement of Fundamental Rights guaranteed under Article 12(1) of Constitution of the 1st to 3rd petitioners.

Moreover, since the petitioners had agreed not to object to the promotions already granted to the 21st and 25th respondents, this court had made order discharging the said respondents from the instant application on the 18th of December, 2015. Hence, the promotions granted to them will not be considered in this judgment.

Further, the scope of this judgment will be restricted to the rights of the petitioners, applying the principle in ***Liyanage & Another vs Ratnasiri - Divisional Secretary, Gampaha & Others, [2013] 1 SLR 6***, where it was held that "*the law assists those who are vigilant and not those who sleep over their rights".*

Affidavit/Objections of 1(I) respondent

The 1(I) respondent, the Secretary to the Public Service Commission filed an Affidavit and stated that according to the Amended Scheme of Promotions, marked as **'P1'**, applications had been called for the promotion to the rank of ASP by Circular dated 24th of July 2007, marked

as '**P2(a)',** from CIs who were confirmed in the said rank on or before 1st of January, 2003 and possessed an unblemished record of service during a period of five years prior to the closing date for applications.

Further, the 1(I) respondent stated that in response to the said calling for applications, reserved CIs who were absorbed to the Regular Force with effect from 1st of January, 2006 on a policy decision of the Government had also submitted their applications.

The 1(I) respondent further stated that the National Police Commission, in consideration of the numerous representations made to it, had directed the Inspector General of Police to prepare a consolidated seniority list of CIs and to circulate it among all stakeholders, and that until such time, it had decided to postpone the promotion process.

The 1(I) respondent stated that upon the finalisation and the circulation of the said seniority list, on the directions of the National Police Commission, the Inspector General of Police had called for fresh applications for promotion of CI to the rank of ASP by Circular dated 20th of March 2020, marked as '**P3(a)'.**

The 1(I) respondent further stated that all the candidates had been requested to submit applications on both occasions for the promotion to the rank of ASP in view of the aforementioned circumstances, and that the petitioners were not the only candidates who were requested to submit applications twice.

Subsequently, the National Police Commission had amended the marking scheme twice for the promotion to the rank of ASP on 2nd of June, 2008 and 16th of June, 2008. The said marking schemes had been produced with the petition, marked as **'P4b'** and '**P5'**, respectively.

It was stated that the said amendments to the marking scheme was made by the National Police Commission based on the representations made by, *inter alia*, the Inspector General of Police and the Police Inspectors' Association, and that on every such occasion, the amended marking schemes had been made available to all candidates, including the petitioners, through the Inspector General of Police. It was further submitted that none of the petitioners had objected to any of the revised marking schemes.

The 1(I) respondent stated that such amendments to the marking scheme had been necessitated in view of the aforesaid circumstances and not for the purpose of favouring any candidates as alleged by the petitioners.

The 1(I) respondent stated that according to the marks given at the interview the petitioners have obtained the following marks at the interview:

1st petitioner	-	61 marks	
2nd petitioner	-	65.5 marks	
3rd petitioner	-	64 marks	
4th petitioner	-	65 marks	(now deceased)

The final marks sheet was produced, marked as '**1IR2'.**

Moreover, it was stated that the cut-off mark for the said promotion had been 73 out of 100 marks and the petitioners had failed to obtain sufficient marks to secure promotions to the rank of ASP.

Further, in terms of the said marks sheet**,** the respondents had received the following marks at the said interview:

15th respondent -	73.5 marks	
16th respondent -	73.0 marks	
17th respondent -	61.5 marks	(female CI)
18th respondent -	55 marks	(female CI)
19th respondent -	73.5 marks	
20th respondent -	78.0 marks	
21st respondent -	80.5 marks	(discharged from proceedings)
22nd respondent -	73.5 marks	(discharged from proceedings)
23rd respondent -	73.5 marks	(discharged from proceedings)
24th respondent -	60.5 marks	(discharged from proceedings)
25th respondent -	unable to ascertain the marks from the pleadings (discharged from proceedings)	

The marks and other details with regard to the 21st to 25th respondents will not be considered in this judgment as they were discharged from the proceedings of the instant application.

In view of the above, the 1(I) respondent stated that the 15th, 16th, 19th and 20th respondents were duly promoted to the rank of ASP as they had obtained 73.5, 73.0, 73.5 and 78.0 marks respectively and were placed above the said cut-off mark of 73.

As stated above, the 17th and the 18th respondents had obtained 61.5 and 55 marks respectively. The 1(I) respondent stated that a cadre was specially created for female officers with the approval of the Department of Management Services and the said 17th and 18th respondents were promoted to the rank of ASP under the said special cadre.

The 1(I) respondent further stated that at present male and female officers serving in the rank of ASP are placed on a separate cadre and a separate seniority list.

However, the said separate cadre was neither produced nor were further details on the said cadre given by the 1(I) respondent.

In the circumstances, the 1(I) respondent stated that the petitioners have failed to establish any infringement of Fundamental Rights guaranteed under Article 12(1) of the Constitution.

Written Submissions of the petitioners

The petitioners submitted that a separate cadre for female officers as stated by the 1(I) respondent does not exist and that the respondents had failed to produce material to prove the existence of such a female cadre.

It was further submitted that even if approval of the Department of Management Services has been obtained to establish the said female ASP cadre as stated by the 1(I) respondent, the said Department has no authority to create cadres in the Police Service.

Further, it was submitted that consequent to a settlement reached in *SC/FR Application No. 600/2003*, the '*Seniority List'*, produced marked as **'P12'**, was used as the basis to promote 351 officers from the rank of Inspector of Police to the rank of CI effective from the 1st of January, 2003. The said *Seniority List'* had placed all the 1363 male and female officers serving in the grade of Inspector of Police as at 25th of December, 2003 in the same cadre, regardless of any gender-based classification.

Further, after the said promotion from the rank of Inspector of Police to the rank of CI, all male and female CIs, regardless of their gender differences, continued to remain in service on the same cadre and the same order of seniority.

Hence, the petitioners submitted that those who have previously been in one category cannot be treated differently for the granting of promotions to the rank of ASP.

In support of their contention, the petitioners cited the case of ***Ramupillai v. Festus Perera, Minister of Public Administration, Provincial Councils and Home Affairs and others, (1991) 1 SLR 11.***

In the circumstances, the petitioners stated that their Fundamental Rights guaranteed under Article 12(1) have been infringed by the failure to promote them to the rank of ASP along with the other selected candidates who faced the interview along with them.

Further, the petitioners submitted that D. Gurusinghe and W.S.S.P.P. De Silva, who had been awarded 71 marks and 71.5 marks, respectively, by the said Board of Interview, had challenged the marks awarded at the interview by filing *SC/FR Application No. 121/2009* and *SC/FR Application No. 68/2009*. After hearing the parties, the court has ordered the said candidates to be promoted to the rank of ASP with effect from the 1st of January, 2008 along with the other selectees of the promotions under reference.

The three main issues to be considered in the instant application are: promoting the 17th and 18th respondents over the petitioners despite scoring lower marks than the petitioners at the interview, calling for fresh applications for the second time by Circular dated 20th of March, 2008 and the continuous alteration of the marking scheme after closing of applications.

Promoting the 17th and 18th respondents

The petitioners stated that the 17th and 18th female respondents were in the same cadre along with the other candidates whilst serving in the rank of CI prior to applying for the promotion to the rank of ASP. However, they had been promoted to the rank of ASP despite receiving lower marks than the petitioners at the interview.

The 1(I) respondent stated, in paragraph 29(b) of his Affidavit, that the said "*17th and 18th respondents were promoted to the rank of ASP under a separate cadre which was specially created for female officers with the approval of the Department of Management Services*" [Emphasis Added].

However, the petitioner denied the said position and submitted that the Department of Management Services does not have the legal authority to give the final approval for the creation of a cadre.

Thus, it is necessary to consider whether there is a valid special cadre for female ASPs in the Sri Lanka Police Force at the time the 17th and 18th respondents were promoted to the rank of ASP.

Prior to the enactment of the 17th Amendment to the Constitution, the powers pertaining to the appointment, promotion, transfer, disciplinary control and dismissal of police officers were vested with the Public Service Commission.

With the enactment of the 17th Amendment to the Constitution on the 3rd of October 2001, the said powers were vested with the National Police Commission. However, subsequent to the repeal of the 17th Amendment by the 18th Amendment to the Constitution on the 9th of September 2010, the said powers of the National Police Commission were reverted to the Public Service Commission.

Further, with the enactment of the 19th Amendment to the Constitution on the 15th of May 2015, the said powers were once again vested with the National Police Commission.

The Department of Management Service is a Department in the Ministry of Finance established "[t]o provide the necessary management service assistance to the public sector organizations to maintain an optimum cadre." Particularly, to decide on the allocation of finances, and consider the financial implications of creating new cadres.

Thus, the said Department is only one of the approving agencies which has the power to grant approval to create cadre vacancies. It has no power or authority to grant the final approval for the creation of new cadre vacancies.

In the circumstances, it is evident that the Department of Management Services does not have the sole authority to approve the establishment of a separate cadre in the Sri Lanka Police Force as the said authority was vested with the National Police Commission or the Public Service Commission, as the case may be, during the period specified above.

The 1(I) respondent further stated, in paragraph 31 of his Affidavit, that "*at present there are separate cadres for female and male officers in the rank of ASP and the female officers are placed on a separate seniority list"* [Emphasis Added]. However, the 1(I) respondent did not produce any material before this court to establish that such a cadre was created for female ASPs prior to the promotions under reference were made.

In the instant application, applications for the promotion to the rank of ASP had been first called by Circular dated 24th of July, 2007 from CIs who were promoted to the said rank by the 1st of January, 2003 based on the said Amended Scheme of Promotions. The first marking scheme was issued therewith.

Subsequently, fresh applications were called for the second time by Circular dated 20th of March, 2008 and the second marking scheme had been issued therewith. The said second marking scheme had again been amended twice by the third marking scheme dated 2nd of June, 2008 and the fourth marking scheme dated 16th of October, 2008.

On both occasions, the applications were called from CIs who were promoted to the said rank on or before the 1st of January, 2003 and confirmed in the said rank, and no distinction was drawn between male and female candidates when calling for applications for the said promotions.

Thereafter, interviews have been called by Circulars dated 24th and 26th of October, 2008 whereby all candidates have been informed of the date on which they were required to come before the Board of Interview.

Upon perusal of the Circulars dated 24th and 26th of October, 2008, marked as '**P10(a)'** and '**P10(b)'**, it is evident that all female and male candidates were requested to be present before the Board of Interview to be considered for the promotion to the rank of ASP. None of the said documents refer to any special cadre based on gender or otherwise for the promotion to the rank of ASP. Further, there is no material to show that a gender-based classification was made either at the time the applications were called or at the time the interviews were held.

Further, consequent to a settlement entered in *SC/FR Application No. 600/2003,* the seniority list of Regular Police officers serving in the rank of Inspector of Police as at 25th of December, 2003 had been prepared without any gender-based classification and the officers therewith had been promoted to the rank of CI with effect from the 1st of January, 2003.

Thereafter, all the male and female officers serving in the rank of CI had continued to be in the same cadre until the applications for promotion to the rank of ASP were called and the interviews for the promotion to the rank of ASP were held.

In the case of ***Ramupillai v. Festus Perera, Minister of Public Administration, Provincial Councils and Home Affairs and others,*** **(1991) 1 SLR 11 at p.26**, it was held:

> *"It is clear: that the state is free to decide upon the sources from which either admissions to educational institutions or recruitments to the Public Sector are to be made……. :that once such selections are made, those taken in from such sources are integrated into one common class: that thereafter such appointees are "clubbed" together into a common stream of service and cannot thereafter be treated differently for purposes of promotion by referring to the consideration that they were recruited from different sources: that their genetic blemishes disappear once they are integrated into a common class and cannot be revived so as to make equals unequal once again: that there should be no further classification amongst them, except upon certain acceptable criteria such as educational qualifications".* [Emphasis Added]

In such circumstances, there is a heavy burden on the respondents to establish that even though the said documents, pertaining to the eligibility of candidates, marking scheme and the calling of interviews, were commonly applicable to all male and female candidates, there was in fact a special cadre for the rank of the female ASPs at the time the promotions under reference were made enabling female candidates to be considered separately for promotion to the rank of ASP. However, in the instant application, the respondents have failed to discharge the said burden by producing material before this court to prove the same.

Further, the position taken up by the 1(I) respondent that a female cadre was created for the rank of female ASPs with the approval of the Department of Management Services is untenable in law for the reasons stated above.

Therefore, I am of the view that the 17th and 18th respondents who were promoted to the rank of ASP had not been promoted based on a different cadre applicable to women. As such, the cut-off mark applicable to the promotions should have been applicable to all the candidates including the 17th and 18th respondents as well.

Moreover, according to the material produced in the instant application, the Sri Lanka Police Force has had the same cadre for both male and female officers and all the candidates were serving as CIs in the same cadre. Thus, even if a special cadre was created for female officers for the rank of ASP, advance notice should have been given to the candidates about the new cadre as it is a deviation from the previous scheme of promotions that was in existence in the Sri Lanka Police Force.

This court has consistently held the significance of providing advance notice when a change in an established procedure is effected by an administrative authority. In ***Guneratne and others v Sri Lanka Telecom and others [1993] 1 Sri L.R. 109 at page 118***, it was held:

> *"If it is desired to give preferential treatment to [the graduate clerks] in the interest of the service and for utilizing their skills, the Corporation could do so on the basis of relevant qualifications, with reasonable notice to those affected and without prejudicing the legitimate expectations of clerks who are on the verge of promotion under the previous schemes".* [Emphasis Added]

At the interview, the 17th and 18th respondents had scored 61.5 and 55 marks, respectively. The 1st to 3rd petitioners had scored 61, 65.5 and 64 marks, respectively.

However, the 17th and 18th respondents have been promoted over the petitioners notwithstanding the fact that the 2nd and 3rd petitioners have obtained higher marks than both the 17th and 18th respondents and that the 1st petitioner has obtained higher marks than the 18th respondent.

In the circumstances, I am of the view that the promotion of the 17th respondent who scored lower marks than the 2nd and 3rd petitioners and the promotion of the 18th respondents who scored lower marks than the 1st to 3rd petitioners are an infringement of the Fundamental Rights of the petitioners guaranteed under Article 12(1) of the Constitution.

The effect of calling for fresh applications after the closing of applications

The Amended Scheme of Promotions dated 20th of August, 1998 and the said four marking schemes, stipulated that for a candidate to be eligible to be promoted to the rank of ASP on '*Merit Promotions'*:

> "*Candidates should be,*
>
> *(a) Chief Inspectors of Police,*
> *(b) who are confirmed in the rank, and*
> (c) *in possession of an unblemished record of service during the five-year period immediately before the closing date of applications*." [Emphasis Added]

In view of the above, the requirement to have an unblemished record for a period of five years immediately before the closing date of applications had been a vital factor to be considered for the promotion to the rank of ASP under the merit scheme.

The closing date of applications as referred to in the Circular dated 24th of July, 2007 by which applications were first called was the 10th of August, 2007.

Thus, in terms of the said first marking scheme candidates who possessed unblemished records for the period from the 10th of August, 2002 to 10th of August, 2007 were entitled to apply for the said promotion.

However, applications had been called once again for the same promotions by circular dated 20th of March, 2008 and the closing date for the applications had been fixed as the 31st of March, 2008.

Therefore, in terms of the said second marking scheme, candidates who possessed blemished records from the 11th of August, 2002 to 31st of March, 2003 became entitled to apply for the said promotion.

However, it is pertinent to note that when applications were called for a second time, the requirement on eligibility pertaining to the date of promotion to the rank of CI was not changed and remained to be the 1st of January, 2003.

The petitioners submitted that calling for fresh applications for the second time allowed candidates who had been ineligible to apply for the promotion process due to blemished records in the first instance to become eligible to apply in the second instance as their blemished records have got cleared off due to the extension of the closing date of the applications for the same promotion process by nearly 8 months.

In the circumstances, calling for fresh applications for the second time and postponing the closing date of applications may have resulted in CIs who were ineligible to apply in the first instance due to blemished records becoming eligible to apply for the same promotion in the second instance.

However, even though the petitioners have referred to such matters, no material was produced to establish that any of the promotees who had blemished records at the time of closing of the applications on the 10th of August, 2007 benefitted from the postponement of the closing date of applications to the 31st of March, 2008.

In passing, I wish to note that the respondents failed to give any explanation as to why the requirement on eligibility pertaining to the date of promotion to the rank of CI remained to be the 1st of January, 2003 even though the requirement of possession of an unblemished record was advanced/extended from the 10th of August, 2007 to 31st of March, 2008.

The effect of the continuous changing of the marking scheme

The first marking scheme for the promotion process under reference was issued by Circular dated 24th of July, 2007**.** Subsequently, the said first marking scheme had been amended by the following:

a. second marking scheme dated 20th of March 2008,
b. third marking scheme dated 2nd of June 2008, and,
c. fourth marking scheme dated 16th of October, 2008.

All four abovementioned marking schemes applicable for promotions based on merit have allocated 50 marks each for two categories: '*Seniority'* and '*Merit*' basis.

The first marking scheme dated 24th of July, 2007 consisted of two main criteria under the category of '*Seniority*': i.e. '*Period of Service'* and '*Service stipulation ranging from previous rank'*.

The said criterion of '*Period of Service',* in the first marking scheme had allocated a maximum of 35 marks for the years of service in the rank of CI, and the criterion '*Service stipulation ranging from previous rank'* had allocated a maximum of 15 marks for the years of service in the rank of 'Inspector of Police'.

However, the said fourth marking scheme, marked as '**P5**', had amalgamated the said two criteria under the heading '*Period of Service'* for 50 marks. It had also:

(a) increased the marks awarded for each year of completed service in the rank of Inspector of Police from 1 mark to 2 marks,
(b) added a new heading awarding marks for the years of service in the rank of 'Sub-Inspector' with 1 mark allocated for each year of service, and
(c) removed the maximum of 15 marks allocated under the first marking scheme for the years of service completed in the rank of 'Inspector of Police'.

Further, marks were awarded to candidates at the interview by the Board of Interview based on the said fourth marking scheme dated 16th of October 2008, marked as '**P5**'**.**

Hence, the said fourth marking scheme has facilitated candidates to score more marks for periods served in the ranks of 'Inspector of Police' and 'Sub-Inspector of Police' than under the first marking scheme.

In view of the above, the alteration of the marking scheme has resulted in depriving candidates who have served a longer period in the rank of CI of scoring more marks than some of the candidates under the category of '*Seniority*' stipulated in the first marking scheme.

In the circumstances, it is evident that the alterations in the marking scheme after the closing date of the applications had placed some candidates in a more favourable position than the other candidates.

Thus, I am of the view that in order to protect the fairness and the transparency of the promotions process, the administrative authorities should not change the Scheme of Promotions and/or marking schemes after the closing of the applications unless there are compelling reasons to do so.

A similar view was expressed by Supreme Court of India in the case of ***Maharashtra State Road Transport Corporation v. Rajendra Bhimrao Mandve,*** **AIR 2002 Supreme Court 224 at page 226,** which stated:

> *"It has been repeatedly held by this Court that the games of the rules meaning thereby, that the criteria for selection cannot be altered by the authorities concerned in the middle or after the process of selection has commenced".*

Moreover, in the instant application, the Amended Scheme of Promotions, based on which the promotion process under reference was issued, had been given approval by the Cabinet of Ministers on the 5th of August, 1998. However, applications for the said promotion process were first called on the 24th of July, 2007 from CIs who were promoted to the said rank on or before the 1st of January, 2003 which was nearly 9 years after the said Amended Scheme of Promotions.

Thereafter, fresh applications had been called once again for the second time on the 20th of March, 2008 for the same promotions after closing the applications on the 10th of August, 2007.

The interviews for the said promotions were held from the 14th of November, 2008 to the 10th of December, 2008 and the list of promotees was released on the 1st of January, 2009. Thus, the promotion process under reference has taken more than a decade since the said Amended Scheme of Promotions was issued.

I am of the view that the administrative authorities who hold power in trust to perform the functions of the State shall not delay and/or neglect to fill the vacancies when and where such vacancies arise. Hence, promotions in the public sector should be filled in time without undue delays.

Referring to the need to act without delay to achieve efficiency, Leonardo da Vinci stated that: "*Iron rusts from disuse, stagnant water loses its purity, and in cold weather becomes frozen; even so does inaction sap the vigours of the mind*".

It is important to keep in mind that when an individual joins the public service, he or she entirely bases his/her life-long expectation in the public service for the betterment of his/her life. Further, given the nature of the public service, it is common for an individual serving in the public sector to expect certain benefits such as security in tenure, advancement in their career and retirement benefits.

A similar view was expressed in ***Perera and another v. Cyril Ranatunga, Secretary Defence and others***, **[1993] 1 SLR 39 at page 60,** where it was held:

> "*In effecting promotions, the State is entitled to take into consideration seniority and merit but without violating the right to equal protection of the law. The service of most public officers is life-time and the guarantee of fair treatment to them enshrined in Article 12 (1) of the Constitution would, if properly enforced, also help in maintaining a contented public service which is vital for its efficient functioning*".

Further, given the limited opportunities to obtain promotions in the public sector, the delay in giving promotions in due time will demoralize public servants in performing their duties.

Thus, the stipulated procedure must be complied with and unwanted delay must be avoided at all times to have an efficient public service. I am of the view that unreasonable and undue delay in promoting employees is a violation of Article 12(1) of the Constitution.

Other anomalies associated with the Promotions

In terms of the final marks sheet, produced marked as '**1IR2**', along with the Affidavit of the 1(I) respondent, three male officers, R.K.M.D. Jayasuandara Appuhamy, H. Karunasekara and W.D.S. Kottearachchi, and a female officer, one H.M.D.W.R. Galpotta, had been promoted to the rank of ASP after their retirement.

According to said document marked as **'1IR2'**, the said officers had retired from service on 01.11.2007, 22.05.2007, 22.02.2007 and 31.12.2007, respectively.

Two among the said retired male officers, i.e. H. Karunasekara and W.D.S. Kottearachchi who had retired on the 22.05.2007 and 22.02.2007 respectively, had retired from service even before the applications for the said promotions were called for the first time on the 24th of July, 2007.

Further, a careful consideration of the abovementioned dates of retirement, i.e. 01.11.2007, 22.05.2007, 22.02.2007 and 31.12.2007, as stated in the document marked as '**1IR2**' shows that the said officers have retired from service by the 20th of March, 2008 when fresh applications for promotion to the rank of ASP were called for the second time.

Moreover, the interviews under reference had been held during the period from the 14th of November, 2008 to the 10th of December, 2008. All the said four officers have been retired from service before the interviews for the promotion to the rank of ASP were held. The said male officers had been awarded 77.5, 73.5 and 73 marks, and the female officer had been awarded 56.5 marks by the Board of Interview.

However, the respondents have not explained how the said Board of Interview interviewed and granted marks for the said retired police officers who were not in service at the time the interviews were held for the promotions under reference. Further, the respondents have not given any explanation for promoting the said officers to the rank of ASP.

Conclusion

In the foregoing circumstances, the 1(I) respondent has failed to prove that a separate cadre was in existence for female officers in the rank of ASP at the time the impugned promotions were made.

The material before this court shows that the calling for applications twice for the same rank, changing the marking scheme applicable to the promotions under reference and inordinate delay in filling the vacancies have adversely affected the petitioners.

Further, I am of the view that the promotion of the 17th and the 18th respondents over the 1st to 3rd petitioners despite obtaining lower marks than the petitioners as stated above, is an infringement of the petitioners' Fundamental Rights enshrined in Article 12(1) of the Constitution by the State as it has adversely affected the career advancement of the petitioners. In the circumstances, I declare that the Fundamental Rights of the 1st to 3rd petitioners enshrined in Article 12(1) of the Constitution have been violated by the state.

As stated above, it was informed to court that the 1st and 2nd petitioners were promoted to the rank of ASP effective from the 9th of May, 2010 and that the 3rd petitioner was promoted to the said rank effective from the 13th January, 2014.

Thus, I direct the Inspector General of Police and/or the Secretary of the National Police Commission to backdate the promotions forthwith to the 1st of January 2008 which is the effective date of the promotions given to the other selected candidates to the rank of ASP.

I further direct the petitioners to be placed at a suitable position on the seniority list, taking into consideration of the facts and circumstances stated above.

Further, in light of the aforementioned findings, I am of the view that the petitioners are entitled to have all the annual increments with effect from the 1st of January, 2008.

The Registrar of this Court is directed to forward a copy of this judgment to the Inspector General of Police and to the Secretary of the National Police Commission to give effect to the directions forthwith.

The aforesaid directions are particular to this application and should not be used as a precedent by the other candidates who had applied for the said promotion.

There will be no costs.

Judge of the Supreme Court

B. P Aluwihare, P.C, J

I agree **Judge of the Supreme Court**

L.T.B. Dehideniya, J

I agree **Judge of the Supreme Court**

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

In the matter of an Application under and in terms of Article 126 of the Constitution for relief and redress in respect of the violation of fundamental Rights guaranteed under Article 12(1) of the Constitution .

SC FR Application No. 230/2018

1. M. Ashroff Rumy,
   Attorney-at-Law, Colombo City
   Coroner of No. 61, Meeraniya Street,
   Colombo 12.

2. Ms. Iresha Deshani Samaraweera
   Attorney-at-Law, Additional
   Colombo City Coroner of No. 36/4,
   Ketawalamulla Place, Dematagoda,
   Colombo 09.

Petitioners

Vs.

1. Hon. Thalatha Athukorale,
   Minister of Justice & Prison Reforms, Ministry of Justice,
   Colombo 12.

2. Secretary,
   Ministry of Justice & Prison Reforms, Ministry of Justice,
   Colombo 12.

3. Assistant Secretary(Administration)
   Ministry of Justice & Prison Reforms, Ministry of Justice,
   Colombo 12.

4. Ms. U.G.L. Anuththara. Of
   No.142 E.W. Perera Mawatha
   Colombo 10.

5. Ms. A.L.M. Maharoof of 29/15, School Lane, Dematagoda, Colombo 09.

6. Mr. Edward Ahangama, Attorney at-Law, formerly Colombo City Coroner, No. 141, Pannipitiya Road, Battaramulla.

7. Director of Establishments
   Ministry of Public Administration, Management and Law and Order,
   Independence Square, Colombo 07.

8. Secretary, Bar Association of Sri Lanka, Hulftsdorp, Colombo 12.

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

Respondents

Before : Hon. Jayantha Jayasuriya, PC, CJ
Hon. L.T.B. Dehideniya, J
Hon. S. Thurairaja, PC, J.

Counsel : Dr. Sunil Cooray with Heshan Pietersz for the Petitioner.

Suren Gnanaraj, SSC for the 1st – 3rd, 7th and 9th Respondents.

Nilantha Kumarage instructed by Danuka Lakmal for the 4th Respondent.
Edward Ahangama for the 6th Respondent appears in person.

Vishwa de Livera Tennakoon instructed by Lanka Dharmasiri for the 8th Respondent.

Argued on : 10.10.2019 and 10.03.2020

Decided on : 30.09.2020

Jayantha Jayasuriya, PC, CJ

Two petitioners in this matter invoked the jurisdiction of this Court under Article 126 of the Constitution. They allege that their right to equality guaranteed under Article 12(1) of the Constitution, in common with the other members of the general public of Sri Lanka, had been violated. They contend that they invoke the jurisdiction of this Court in their own interest as well as in the public interest. They further contend that such violation took place due to the wrongful conduct of the 1st, 2nd and 3rd respondents namely the Minister of Justice, Secretary Ministry of Justice and Assistant Secretary (Administration) Ministry of Justice, respectively. They *inter alia* move the Court to issue an Order quashing the letter produced marked X6, which is signed and counter signed by the Secretary, Ministry of Justice and Assistant Secretary (Administration) Ministry of Justice.

X6 is a letter that is addressed to four recipients. They are the 1st and the 2nd Petitioners and 4th and the 5th Respondents. The aforesaid four recipients by X6 have been informed to perform their duties in the capacity of Inquirers in to Sudden Death in the Division of Colombo City. The said letter assigns four days of the week namely Monday, Tuesday, Wednesday and Thursday for the 1st Petitioner and 4th Respondent.

The balance three days namely Friday, Saturday and Sunday are assigned to 2nd Petitioner and 5th Respondent.

Petitioners contend that the 4th and the 5th respondents are not "competent to function as Additional Colombo City Coroners". The basis for this contention is that both the 4th and 5th respondents are not Attorneys-at-Law.

This Court on 08 May 2019, granted leave to proceed on the alleged violation of Article 12(1). Court also has granted interim relief in terms of paragraph (d) of the prayer of the Petition dated 17 July 2018. By this order, the 4th and 5th respondents had been restrained from functioning as Additional Colombo City Coroners until the final determination of this application.

The Secretary Bar Association who is named the 8th Respondent as well as the 6th respondent, who is a former Inquirer for the city of Colombo (Colombo City Coroner) associate themselves with the submissions made in support of this application. Furthermore, the 6th respondent submits that the Ministry of Justice developed the basic qualifications for the post of Inquirer for the City of Colombo and such qualifications were made equivalent to the basic qualifications required for the post of Magistrate namely, experience as an attorney-at-law for not less than four years. This respondent and the petitioners submit that the document marked X4 is a copy of the approved scheme of recruitment. He contend that the said document marked X4 was sent to the Director of Establishments by the Secretary of Justice along with the letter dated 06 February 1981, which is produced marked X3. X3 letter titled "Approval of a Scheme of Recruitment, Inquirer into Sudden Deaths – Colombo City" has been sent in response to the letter of the Director Establishments dated 21 January 1981, which is produced marked X2 The document marked X4 sets out 6 items. Item no. 3 sets out the educational qualifications - 'an Attorney-at-Law with minimum of four years active practice'. According to X4, this post is a permanent pensionable post with a fixed salary structure.

The petitioners having listed out the powers and functions of an inquirer, claim that they should possess "the ability to read and properly understand documents (including

bed-head tickets), the ability to analyze oral and documentary evidence, the ability to act impartially and independently without being succumbed to pressure that might be exerted politicians and leaders of the under world". They further claim that the function of an inquirer into sudden deaths is a *"judicial function"* (emphasis added). The 6th Respondent also emphasizes on the importance of the functions and duties of an inquirer. It is in this context the petitioners and the 6th Respondent claim that a person functioning as the Inquirer in to sudden deaths – Colombo City who is also called "Colombo City Coroner" should be an Attorney-at-Law. Further, they claim it was the tradition and practice to appoint an Attorney-at-Law to function in the last mentioned post.

However, the 2nd respondent; the Secretary, Ministry of Justice, does not support the position taken up by the Petitioners as well as the 6th Respondent. The 2nd respondent submits that neither the originals of X2, X3 and X4 nor any other letter connected to such correspondence; or any file relating to such documents is available at the Ministry. The 2nd respondent further contend that there is no such post available called 'Inquirer in to sudden death – Colombo City' exists and there are no inquirers in to sudden deaths appointed to a permanent pensionable post in the public service. Furthermore, it is submitted that the post of an inquirer into sudden deaths is an honorary position for a fixed period of five years, without any salary attached to it, other than an allowance of rupees five hundred being paid to each inquiry, conducted.

The letter of appointment issued to the first Petitioner is with the heading "appointment as an Inquirer in to sudden deaths – Colombo City" and the letter of appointment issued to the second petitioner is with the title "appointment as a Inquirer in to sudden deaths – Colombo City (Additional)". Both appointments are termed as "permanent inquirer into sudden deaths" and valid for a period of five years ending 01 January 2019 unless cancelled before. Both these appointments were made in November 2014 to be effective from 01 December 2014. These appointments were made in consequent to the recruitment process initiated with the notice published in the Gazette No 1,838 dated 22nd November 2013 by the Secretary, Ministry of Justice (X5).

The said advertisement calls for applications to appoint Inquirers in to sudden death under section 108 of the Code of Criminal Procedure Act, to fill up the vacancy in the Colombo City limits. According to the said notice the position advertised is not a salaried permanent position in the public service. However, an allowance of rupees five hundred is paid per each inquiry. Furthermore, according to the advertisement, five persons were to be recruited and each one of them should work one day per week. Basic qualifications an applicant should possess include being an attorney-at-law with a practice of more than four years.

It is pertinent to note that the appointments of both 4th and the 5th respondents pre dates the appointments of both petitioners. Appointments of the aforesaid two respondents were made in the year 2012 (R2 - 4R3 and R3 - 5R3). Subsequently, their period of service had been extended (R2(a) - 4R6 and R3(a) - 5R6).

The recruitment process relating to the aforementioned two respondents was initiated with a notice published in the Gazette No 1,705 dated 06 May 2011 (R1 - 4R1 - 5R1). The Secretary Ministry of Justice by the said notice has called for applications to the post of Inquirers in to sudden death to fill up the vacancies in the areas listed in the said notice. Required minimum educational qualifications for the post as advertised was three passes in the G.C.E (Advanced Level) examination, where preference was given to the candidates who had passed the exam in science stream. This advertisement was to fill-up vacancies in several districts. They include Badulla, Colombo, Gampaha, Hambanthota, Kaluthara and Monaragala districts. Under Colombo District, vacancies were advertised in seven divisional secretary divisions and one such division is Colombo and the Inquirer into sudden deaths division identified is – Colombo General Hospital. In addition to above, applications had been called for Inquire in to Sudden Deaths (Muslim) in Colombo, Gampaha and Kaluthara Districts. It is in consequent to this notice the two respondents had applied and appointed to the respective positions.

On an examination of all the material placed before this court by all the parties, the court is unable to conclude that an approved scheme of recruitment for the post of Inquirer into Sudden Deaths (Colombo City) exists. Although the document marked

X4 is titled "Scheme of Recruitment - Post of Inquirer into Sudden Deaths – Colombo City", the salary structure set out under item 1 and the description provided under item 5 (that it is a permanent pensionable post) do not correspond to the notice published in the Gazette No 1,838 dated 22nd November 2013 by the Secretary, Ministry of Justice (X5). In fact, according to the notice in the said gazette, the post advertised is not a permanent position in the public service and with no salary attached but with only an allowance of rupees five hundred per inquiry is paid. These discrepancies between the 'scheme of recruitment' - X4 - and the actual description in the gazette notification - X5 - weighs in favour of the position taken up by the 2nd respondent, the secretary of the Ministry of Justice. It is his contention that the minimum qualifications set out in calling for applications to the post of Inquirer into sudden deaths had varied at different stages. In 2001, the required qualification was passing six subjects with four credit passes at the G.C.E (Ordinary Level) Examination (R6). In 2009, 2011 and 2016 the required qualification was three credit passes at the G.C.E (Advanced Level) Examination. However, in 2013, the required qualification had been an attorney-at-law with minimum of four years experience.

It is pertinent to note that while section 108 of the Code of Criminal Procedure Act No 15 of 1979 governs the appointment of Inquirers, rest of the provisions in Chapter XI of the same Code set out their powers and duties relating to investigations. Chapter XXX of the Code, govern the matters relating to Inquests of Death.

The statute does not set out the required qualifications to perform the functions of an Inquirer. The power to make the appointment and to set out the area in which they are to perform their duties is a matter left to the Minister. Therefore, a decision on the necessary minimum qualifications and the geographical area within which duties to be performed by an Inquirer should be based on objective and reasonable criteria. In this regard it is pertinent to note that powers and duties an Inquirer has to perform does not depend on the geographical area in which he has to perform the duties. All persons should be treated equally. Therefore, setting out different criteria based on the area of service per se could lead to unequal treatment unless such differentia is based

on justifiable objective criteria on valid reasons and one such criteria could be the competency in a particular language depending on the area of service. The Supreme Court in fact had accepted that classifications are allowed if they are not arbitrary and founded upon intelligible differentia. **Ananda Dharmadasa and Others v Ariyaratne Hewage and Others** ([2008] 2 SLR 19, **Tuan Ishan Raban and Others v Members of the Police Commission** ([2007] 2 SLR 351. The objective of this requirement is to treat equals equally and not unequally.

However, the material available in these proceedings do not indicate that such criteria exists to make a distinction between the minimum qualifications needed to perform duties of an Inquirer in Colombo City and duties of an Inquirer in any other part of the island. Furthermore, there is no material available to conclude that such classification has been made by administrative or executive action in the year 1981 as claimed by the Petitioners.

Under these circumstances, I see no valid grounds to challenge the appointments of the 4th and 5th respondents or the subsequent assignment of area of work to them. Both of them had been appointed in the year 2012 based on the advertisement published in the Gazette No 1,705 dated 06 May 2011. They had been attached to the Inquirer in to sudden deaths division named 'Colombo General Hospital'.

In fact the advertisement published in Gazette No 1,627 dated 06 November 2009 (R7) contain similarly named inquirer divisions in other Divisional Secretary Divisions too. 'Bandaragama Government Hospital', 'Rikillagaskada Hospital', 'Panadura General Hospital' and 'Welikanda Hospitals' are Inquirers in to Sudden Deaths Divisions in Bandaragama, Hanguranketha, Panadura and Welikanda; Divisional Secretariat Divisions, respectively.

In the year 2018, both the 4th and the 5th Respondents had been re-assigned to share work in the Colombo City division along with the two Petitioners. According to the 2nd Respondent, prior to such re-assignment of duties, series of meetings had been held with the participation of the Petitioners and 4th and 5th Respondents with regard to the delays in holding inquests at Colombo National Hospital and the impugned

reassignment of duties was initiated with the objective of reducing delays by ensuring that the Inquirers are not overburdened. Creating the geographical boundaries for a particular division is a function that would depend on many factors such as the workload and convenience of relevant stakeholders, including the general public. In fact, section 108 of the Code of the Criminal Procedure Act No 15 of 1979, empowers the Minster to appoint any person by name or office to be an inquirer for any area of which the limits are specified in the appointment.

I further observe, that the Petitioners have moved this Court, to lay down guidelines relating to the qualifications necessary for the appointment of the City of Colombo Inquirer in to Sudden Deaths and an Additional City of Colombo Inquirer into Sudden Deaths. However, the material placed before this Court through these proceedings in my view is not sufficient for the Court to embark upon a process of such nature. However, considering the content of the advertisements published calling for applications for the post of Inquirers between the period 2001 to 2016, Court observes that varying levels of education ie G.C.E (Ordinary Level), G.C.E (Advanced Level) and Attorneys-at-Law have been stipulated as minimum qualifications required to be possessed by the applicants. It is prudent and necessary to embark upon a proper study having consulted all stakeholders who have the knowledge, experience, expertise and an interest in this matter and thereafter formulate clear guidelines on the experience and qualifications a person should possess to be appointed an Inquirer, early. Petitioners as well as any other persons who have an interest in this matter including the Bar Association of Sri Lanka could make their representations during such a consultative process. Through such a transparent process a decision may be made whether a classification should be made among the Inquirers depending on the geographical area in which such duties are to be performed, provided such classification can be made on intelligible criteria without acting arbitrarily.

Honourable Attorney-General, who is the 9th Respondent in this matter and who represented several Respondents including the first three Respondents is directed to bring these observations to the attention of the 2nd and 3rd Respondents for necessary action.

In view of the foregoing findings, I am unable to hold that the rights guaranteed under Article 12(1) to the petitioners or to any other person had been infringed Therefore, I refuse to grant any relief as prayed for in the Petition. The application is, accordingly dismissed.

Chief Justice

L.T.B. Dehideniya, 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 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Lt. Col. Samitha Manojith Hewa Imaduwage,
46/4, Senanayake Avenue,
Nawala, Rajagiriya.

S.C. (F/R) Application No. 291/2016 **Petitioner**

Vs

1. Lieutenant General A. W. J. C. De Silva,
   Commander of the Army,
   Army Headquarters,
   Colombo 03.

1A. Lieutenant General Mahesh Senanayake,
   Commander of the Army,
   Army Headquarters,
   Colombo 03.

2. Major General N. J. Walgama,
   Military Secretary,
   Army Headquarters,
   Colombo 03.

2A. Major General C. W. B. Wijesundera,

Military Secretary,
Army Headquarters,
Colombo 03.

3. Brigadier K. B. R. De Abrew,
Assistant Military Secretary,
Army Headquarters,
Colombo 03.

3A. Brigadier S. K. Eshwaran,

Assistant Military Secretary,
Army Headquarters,
Colombo 03.

4. Brigadier A. L. S. K. Perera,
Director Personal Administration,
Premier Pacific Building,
No. 28, R. A. De Mel Mawatha,
Colombo 04.

5. Major General K. R. P. Rowel,
Colonel Commandant,
Sri Lanka Signal Corps,
Regiment Centre,
Army Cantonment,
Panagoda.

5A. Major General B. H. M. A. Wijesinghe,

Colonel Commandant,
Sri Lanka Signal Corps,
Regiment Centre,
Army Cantonment,
Panagoda.

6. Brigadier K. A. D. S. L. Perera,
Director Pay and Records,
Army Cantonment,
Panagoda.

6A. Colonel L. Wijesundara,

Director Pay and Records,
Army Cantonment,
Panagoda.

7. Lieutenant Colonel B. D. Fernando,
5th Commanding Officer,
Sri Lanka Signal Corps,
Regiment Centre, Army Cantonment,
Panagoda.

8. Jagath Dias,
Director General of Pensions,
Department of Pensions,
Colombo 10.

9. Karunasena Hettiarachchi,
Secretary to the Ministry of Defence,
Ministry of Defence,
15/5, Baladaksha Mawatha,

Colombo 03.

9A. Kapila Waidyaratne PC,

Secretary to the Ministry of Defence,
Ministry of Defence,
15/5, Baladaksha Mawatha,
Colombo 03.

10. 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:	Asthika Devendra with Upeksha Devinuwara for the Petitioner. Dr. Avanti Perera, SSC for the Attorney General
Argued On:	24. 07. 2018
Decided On:	20. 02. 2020

JUDGEMENT

Aluwihare PC J.,

1. The Petitioner, an Officer of the Sri Lanka Army, complained of the infringement of his rights under Article 12(1) of the Constitution, for not being granted the promotion to the rank of Lieutenant Colonel *with his contemporary intake* and not being granted the promotion to the rank of Colonel. The Petitioner claims that although he is entitled to be granted the said promotions, he has been retired as a Lieutenant Colonel.

Facts

2. The Petitioner had joined the Sri Lanka Army in 1990 with Intake 33A as a Second Lieutenant. During his tenure in the Army he had served in the conflict areas and claims that he sustained injuries in the course of an attack by the terrorists in the year 2000, while engaged in duty in the Forward Defense Lines in Chavakachcheri. In recognition of his acts of gallantry in the theatre of war, he had been awarded the *'Rana Sura Padakkama'* (RSP) in 2002 and *'Desha Putra Sammanaya'* in 2004. The Petitioner is also a recipient of the 'United Nations Medal' for the service rendered as a member of the military of the United Nations Stabilization Mission in Haiti.

3. After sustaining injuries in the battleground in the year 2000, the Petitioner had been categorized as a 'battle casualty' by a medical board. Although he had the option of retiring from service after being categorized as a battle casualty the Petitioner had opted to continue in service. In January 2016 the Petitioner had been promoted to the rank of Lieutenant Colonel on a temporary basis with effect from 10th November 2009.

4. Consequent to a decision taken by the Cabinet of Ministers on 21st July 1982 ('P2'), members of the Armed Forces or Police Officers who are compelled to retire due to medical reasons attributable to injuries received while in action or due to terrorist attacks or while enforcing the law, became entitled to be paid their salary and other allowances they were being paid at the time of sustaining injuries, until the age of 55. Further, such persons were to be granted all salary increments they would have been entitled to, had they been in active service. The Petitioner states that the 'Public Administration Circular No. 22/93 (iv)' ('P3') confirms the abovementioned decision and that it provides *inter alia* for the computation of pensions according to the salary which the Officer would be entitled to at the age of 55. Subsequently, 'Army Routine Order No. 90/2009' ('P4') had been implemented in respect of the promotions of Officers injured due to terrorist attacks. According to the said Routine Order ('P4') all battle casualties of the Sri Lanka Army were divided into 4 categories which are as follows;

Category No. 1

Officers capable of further serving their mother regiment and attending to their normal duties were placed in Category 1 and promotions were to be given under the normal procedure based on the vacancies available.

Category No. 2

Officers not capable of attending to their normal duties but capable of attending to other duties in their mother regiment or another regiment are placed in Category 2 with promotions to be awarded under the normal procedure based on the vacancies available.

Category No. 3

Officers who cannot be placed in Categories 1 and 2 due to their disability but are not willing to retire are placed in Category 3. Officers in Category 3 are to be placed in a *super numeric* cadre and promoted according to the Army Routine

Order without prejudice to the seniority of the immediate senior Officers serving in the normal cadre.

Category No. 4

Officers who cannot be placed in Categories 1 and 2 but are not opting to remain in service further under Category 3 are placed in Category 4. Officers who choose to retire under this Category will not be entitled to promotions after retirement but are entitled to be placed in the relevant salary steps of the promotions which they should be given from time to time provided in the said Army Routine Order.

5. Following the end of the war, by letter dated 13th March 2013 ('P5') issued by the Adjutant General, officers who were serving regardless of their disabilities have been allowed to retire from active service on medical grounds upon their requests. If a Board of medical officers does not recommend the relevant officer for further service in the Sri Lanka Army such officer should be retired and provided with the benefits/ entitlements set out in 'P2'.

6. The Petitioner states that after he was injured in 2000 he was considered a battle casualty and that after 'P4' came into operation in 2009 he was placed in the Category 1 aforesaid of 'P4' and that, he could have continued in service, until a request is made by him, to retire from active service.

7. In 2014 the Petitioner had been appointed the Military Coordinator of the Disaster Management Centre. The Petitioner states that during his tenure at the Centre, he brought irregularities that had taken place in the 'Disaster Management Communication and Response Capacity Building Project' to the attention of the authorities. The Petitioner alleges that after he revealed these irregularities the Officers of the Ministry of Disaster Management and the Respondents began to ill-treat him. The 2nd Respondent, by communication dated 30th October 2015 ('P7H') had appointed another Officer, in place of the

Petitioner, to the Disaster Management Centre with effect from 2nd November 2015, without discharging the Petitioner from the duties. The Petitioner had been discharged from the Disaster Management Centre later by communication dated 14th January 2016 ('P7I') and attached to the Regiment Centre with effect from 3rd November 2015.

8. The Petitioner contends that there was no rational basis to have him discharged from the post of Military Coordinator with effect from 3rd November 2015 when in fact he served in the said post until 14th January 2016, other than as an encouragement to cause him to retire. On the other hand, the Respondents, however, maintain that the Petitioner was removed from the appointment to the Disaster Management Centre due to a report made by the Director of the Centre complaining of misconduct and behavior on the part of the Petitioner that is unbecoming of an Officer. The said report dated 23rd October 2015 had been produced marked '1R7'. It states that the Petitioner's "conduct, behavior and actions during working environment tend to create divisions in the organization, hence deem to destroy the peace and tranquility within the staff members of the DMC".

9. It appears that there had been another development concerning the Petitioner. In 2013, a Court of Inquiry had been held in respect of the Petitioner, regarding an incident where the Petitioner was alleged to have employed soldiers to work at the construction site of the house the Petitioner was building. In fact the Petitioner has admitted having employed military personnel to assist in the construction of his house. The Petitioner's explanation is that, having commenced the construction of the house in 2008, he had hired a contractor in 2013 to complete the construction as he had not been able to complete it due to his professional commitments. The Petitioner states that he had been compelled to find another contractor, upon the contractor defrauding the Petitioner. Therefore, he had requested a Signalman, who was a skilled mason, to direct him to another contractor. The Signalman, however, had proposed to complete the

construction himself together with his colleagues who were on leave, to which the Petitioner had agreed. On 13th March 2013 officers of the Military Police had come to the site of construction of the Petitioner's house and had arrested the soldiers who were working there.

10. The Petitioner's contention is that no adverse findings were made at this Court of Inquiry and that he was not informed of any further steps regarding the same, leading him to believe that he had been exonerated. However, the Respondents have produced documents to the contrary and shown that the Court of Inquiry in question had been conducted according to the Army Courts of Inquiry Regulations, 1952. An extract from the Court of Inquiry ('1R9') reveals that several adverse observations had been made against the Petitioner and based on the proceedings of the Court of Inquiry, the Army Commander's decision ('1R10') had been that disciplinary action should be taken against the Petitioner as he has also been found guilty of acquiring a vehicle belonging to his wife in contravention of the relevant guidelines as Unit Commanding Officer of the Sri Lanka Signal Corps and using the said vehicle for the purposes of the construction of his private house while utilizing Sri Lanka Army's fuel and drivers, in addition to employing soldiers of the Sri Lanka Army in the construction of his house and approving leave for the soldiers for the days that they were deployed in the construction. It has been further recommended that, the fact that he had committed these offences while he was being considered for confirmations or promotions should be taken into account. The Respondents state that accordingly, the Petitioner had been warned and subjected to a probationary period of one year as evidenced by the letter '1R11' dated 07th May 2014.

11. While the inquiry was pending, in February 2014 the Petitioner's confirmation in the rank of Lieutenant Colonel also had come up for consideration by Army Board No. 2 ('1R3'). The Regimental Council of the Sri Lanka Signal Corps **had not recommended** the Petitioner for rank confirmation due to pending

Investigations against the Petitioner and therefore the Board had decided to temporarily supersede him, concluding that his career is to be determined based on the findings of the investigations.

12. While the probation period per '1R11' was running, on 09th January 2015 the Petitioner had completed the maximum permissible period in the substantive rank of Major. Despite this, the Petitioner had been granted an extension of service until 09th January 2016 upon an application to that effect by the Petitioner. Even so, the Petitioner's substantive rank had remained as that of Major.

13. During the probation period itself the Petitioner's confirmation in the rank of Lieutenant Colonel was considered for the second time on 05th February 2015 by Army Board No. 2 ('1R4'). The Petitioner again had not been recommended for rank confirmation by the Regimental Council, Sri Lanka Signal Corps on this occasion as well, since the Petitioner was under observation until 07th May 2015 due to the pending Court of Inquiry against him. Considering these facts, the Board **had not recommended** the Petitioner for rank confirmation and decided that he should be retired from the Army with pension and gratuity at the end of the service extension. On 26th May 2015 the Petitioner had been informed of this decision, a fact which is admitted by the Petitioner.

14. The Petitioner's position however is that he had been summoned by the 5th Respondent on 26th May 2015 and been informed that he had been kept under observation for a period of one year from 06th May 2014 to 07th May 2015. The Petitioner states that in order to keep an officer in the rank of Lieutenant Colonel under observation such officer should be tried in a Court Martial on the recommendation of the report of a Court of Inquiry or, such officer should be summoned before the Colonel Commandant (the 5th Respondent in respect of the Petitioner) and informed of the same. The Petitioner asserts that neither of these steps had been resorted to against the Petitioner. The Petitioner, however, has not

substantiated the procedural position referred to, by reference to any legal provision. The Petitioner had been further informed that the Petitioner's service in the Sri Lanka Army would end on 09th January 2016 since the maximum permissible period in the rank of Major would expire on that date. The Petitioner contends that this statement has no merit and that his service was not superseded (brought to an end) on that date despite being informed thus, and that he was allowed to continue serving in the Sri Lanka Army. Presumably, this may have been the reason for placing the Petitioner in the rank of Temporary Lieutenant Colonel in January 2016.

15. The Petitioner had argued that the period of probation that was imposed ended before his effective retirement date in April 2016 and that therefore the decision to supersede him should have been revised and the Petitioner should have been promoted.

16. It has been submitted on behalf of the Petitioner that he ought to have been promoted to the rank of Lieutenant Colonel while he was in service on three alternative grounds;

- The Petitioner should have been promoted to the rank of Lieutenant Colonel with his contemporary intake in 2008.

- The Petitioner is entitled to be promoted to the rank of Lieutenant Colonel as he has exceeded the maximum years permissible in the rank of Major at the time of retirement **or** had he been promoted to the rank of Lieutenant Colonel with his peers, he would have had exceeded the maximum years in the rank of Lieutenant Colonel by the time he ended his service in August 2016 and ought to have been promoted to the rank of Colonel.

- The Petitioner is entitled to be promoted to the rank under the circular 'P4' as he is a battle casualty.

The issue of time bar

17. The Respondents on the other hand assert that the Petitioner had not at any time challenged the decision taken by the 2nd Army Board on 5th February 2015, to supersede him ('1R4') despite being aware of the decision at least by 26th May 2015. However, this contention does not appear to be correct as the Petitioner, in exercise of his right of appeal to the Commander of the Army as provided for by Section 32 of the Army Act No. 14 of 1949, has appealed against the decision by the Redress of Grievance (ROG) to the 1st Respondent ('P8'). The 1st Respondent has admitted the receipt of the ROG in paragraph 28 of his Affidavit filed on 5th June 2017.

18. Thereafter, upon being informed on 12th May 2016 that his appeal was not favourably considered by the Commander of the Army, the Petitioner had preferred an appeal to the President on 2nd July 2016 ('P15'), as further provided for by Section 32 of the Army Act. The Petitioner has asserted that even at the time of filing written submissions on his behalf in the instant application on 12th September 2018; the Petitioner had received no response to his appeal to the President. Further, it has been brought to the notice of the court that although the maximum period of service in the rank of Major had come to an end and that by then a decision had been taken to permanently supersede the Petitioner, he was granted a final service extension of 3 months in the substantive rank of Major with effect from 11th January 2016 on "extreme compassionate grounds" ('1R14').

19. In ***Gamaethige v Siriwardena and Others*** **1988 1 SLR 384** it has been held that *"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."* Therefore, due to the above reasons I am of the opinion that

the preliminary objection of the application being time barred can be overruled, as there is no apparent lapse, fault or delay on the part of the Petitioner in failing to invoke the jurisdiction of this Court in time, as he was awaiting a response to the appeal that he had forwarded to the President.

Petitioner's entitlement to be promoted

20. The Petitioner had not satisfied the criteria for a promotion to the rank of Colonel in terms of Regulation 12 of '1R1'. Regulation 12(1) of the 'Army Officers Service Regulations (Regular Force) 1992' states that promotion to the rank of Colonel and above shall be by selection and that promotions to the rank of Colonel shall be awarded only to such **substantive** Lieutenant Colonel as is considered best qualified for such rank and appointment. Regulation 12(2) states that the Officer's past record of service and whether the promotion is clearly in the best interests of the Army shall be considered. As per Regulation 17(5) of '1R1' an officer of the substantive rank of Major may be promoted to the temporary rank of Lieutenant Colonel, if selected for an extra regimental employment carrying such rank. As brought to the notice of the court by the Learned Senior State Counsel on behalf of the Respondents, when an officer in the Army retires, the practice is to grant the promotion to the next rank, at the point of retirement. If the said practice of the Army, with regard to granting of promotions is to be considered, an officer who is in the rank of Lieutenant Colonel while in service is eligible to be promoted to the rank of Colonel at the point of retirement. As pointed out by the Respondents, the past disciplinary record affects the promotional prospects of even those officers who are deemed unfit for service on grounds of disability.

21. For the purposes of this judgment it would be useful to reproduce in full, Regulation 19(1) of '1R1'.

"19. (1) An officer who is overlooked for promotion may be superseded temporarily or permanently. If permanently superseded he shall be so informed.

(2) An officer shall be permanently superseded if he does not qualify for promotion before the expiry of the appropriate period referred to in Regulations 11 and 15: Provided that he shall not be permanently superseded where his failure to pass the appropriate examination is due to causes beyond his control, as determined by the Commander of the Army."

22. In the case of the present Petitioner he had been temporarily and then permanently superseded as he was overlooked for promotion. It is in accordance with Regulation 19(1), since it was due to the Petitioner's failure to obtain confirmation in the rank of Lieutenant Colonel in the normal course of promotions that he lost the opportunity of being promoted to the rank of Colonel prior to retirement.

23. Following the meeting with the 5th Respondent on 26th May 2015 the Petitioner had directed a ROG dated 04th June 2015 ('P8') to the 1st Respondent seeking redress against the decisions informed by the 5th Respondent. In 'P8' the Petitioner had maintained that he was not confirmed in the present rank with contemporary intakes due to being placed under observation for a period of one year ending on 7th May 2015 by the Colonel Commandant. Since the Petitioner as a battle casualty was in any event entitled to retire from service if found permissible by a Medical Board, the Petitioner had thereafter decided to retire from the Sri Lanka Army. By the ROG dated 27th January 2016 ('P9') forwarded to the 1st Respondent, the Petitioner had sought to retire from active service.

24. Thereafter, by message dated 14th March 2016 ('P10') the Petitioner had been summoned before a Board of Medical Officers who recommended that the Petitioner can be retired on medical grounds on the conclusion that he was unfit for active service. The Petitioner has brought to the notice of this court by

Seniority List of the Sri Lanka Army as at 12th February 2016 ('P11') that officers who belonged to Intake 33 have, on 10th April 2014, been confirmed in the rank of Lieutenant Colonel with effect from 9th January 2008 and that officers who belonged to Intake 33A have, on 27th January 2016, been confirmed in the rank of Lieutenant Colonel with effect from 1st July 2008. The Petitioner asserts that from the 4 officers who joined with Intake 33A, only the Petitioner and Lieutenant Colonel J. S. Weerakoon were in active service at that time.

25. Although officers in the contemporary intakes of 33 and 33A have been promoted to the rank of Lieutenant Colonel with effect from 2008 the Petitioner had not been confirmed in the rank of Lieutenant Colonel with his contemporary intake. The Petitioner therefore states that he is entitled to be confirmed in the rank with effect from 1st July 2008, the same date that the officer of the 33A intake Colonel J. S. Weerakoon was confirmed in the rank of Lieutenant Colonel. The Petitioner has pointed out that the said Officer Weerakoon had been temporarily superseded by the first Army Board No. 2 marked 'IR3' (at page 15) due to not being qualified at the Annual Physical Fitness Test. As the said Officer had again failed to qualify at the Physical Fitness Test the second Army Board No. 2 marked 'IR4' (at page 11) had temporarily superseded him and recommended that if the Officer fails to become medically fit before the end of his 1st service extension until 09th January 2016, he should be retired at the end of the said period. The Petitioner complains that although he too was on his 1st service extension running up to the same date i.e. 09th January 2016, he had been permanently superseded thereby unequally treating two equals. The Petitioner and the said Officer Weerakoon cannot be considered equals merely because they were both in their 1st service extension of the same duration. In the case of the Petitioner there were ongoing disciplinary proceedings against him at the time, whereas Officer Weerakoon had been overlooked due to his failure to pass the Annual Physical Fitness Test. Being subjected to disciplinary proceedings and failure to attain the required physical fitness cannot certainly be considered as identical or equal situations.

26. The Petitioner has further referred to the promotion of one Lieutenant Colonel Kithsiri Munasinghe. The said Officer had been confirmed in the rank of Lieutenant Colonel and retired by Extraordinary Gazette No. 1991 dated 28th October 2016 (marked 'X1' and submitted with the Written Submissions on behalf of the Petitioner) the same Gazette by which the Petitioner had been retired. Thereafter, by Extraordinary Gazette dated 13th January 2017 (marked 'X2' and submitted with the Written Submissions on behalf of the Petitioner) the said Officer's confirmation in the rank of Temporary Lieutenant Colonel and retirement had been revoked and he had been then promoted to the rank of Lieutenant Colonel and retired. In the absence of any information as to whether any one or more of the officers referred to above by the Petitioner were subjected to disciplinary proceedings, this court is not in a position to conclude that the Petitioner falls into the same class as them.

27. The Petitioner states that when an officer serving in a temporary rank is concluded to be unfit for active service, the normal practice followed by the Sri Lanka Army is to confirm the Officer in the rank with his contemporary intake and to grant the next promotion prior to the retirement. The Petitioner refers to the promotion of one Lieutenant Colonel Nilupul Wedaarachchi who had been serving in the rank of temporary Major and had opted to retire on medical grounds. He had been confirmed in the rank of Major with his contemporary intake and promoted to the rank of Lieutenant Colonel with effect from 06th July 2015 and retired from active service with effect from 07th July 2015.

28. The Petitioner's contention is that upon being considered unfit for active service by the medical board in March 2016 the Petitioner should be automatically placed in Category 3 set out in 'P4' and should have been promoted to the rank of Colonel after a 5-year period in the rank of Lieutenant Colonel. The Petitioner contends that since the Petitioner ought to have been confirmed in the rank of Lieutenant Colonel with effect from 01st July 2008 with his contemporary intake,

he should have been promoted to the rank of Colonel with effect from 01st July 2013 according to the provisions of 'P4'.

29. The Petitioner refers to one Colonel S. S. K. Jayawickrama, a Temporary Lieutenant Colonel who had been placed in Category 3 of 'P4' in 2008. He had been confirmed in the rank of Lieutenant Colonel along with his contemporary intake with effect from 16th June 2006 and then promoted to the rank of Colonel with effect from 2013 along with his contemporary intake. The Petitioner states that he had been reliably informed that Colonel S. S. K. Jayawickrama is to be promoted to the rank of Brigadier prior to his retirement, for which he had had forwarded the request at the time of filing the application.

30. By a ROG dated 04th April 2016 ('P12') the Petitioner had requested the 1st Respondent to confirm the Petitioner in the rank of the Lieutenant Colonel with his contemporary intake and further to promote him to the next rank of Colonel. By message dated 11th May 2016 ('P13B') the 4th Respondent had informed the Petitioner that the Ministry of Defence had approved his retirement on medical grounds with monthly salary and other benefits upto the age of 55. Although the Petitioner had been permitted to be retired on medical grounds by message dated 12th May 2016 ('P14') the Petitioner's requests for the promotions by 'P12' had not been granted. It was then that the Petitioner had, exercising the statutory right granted under Section 32 of the Army Act, appealed to the President of his predicament by 'P15' and requested that he be confirmed in the rank of Lieutenant Colonel with his contemporary intakes and that he be promoted to the next rank of Colonel.

31. Subsequently, by message dated 29th July 2016 ('P16') the Petitioner had been informed that the President had approved his confirmation in the rank of Lieutenant Colonel **with effect from 01st April 2016** (not with his contemporary intake which had been confirmed in 2008) **and to retire the Petitioner with effect from 02nd April 2016.**

32. Extraordinary Gazette No. 562/11 of 15th June 1989 ('P18') sets out the maximum permissible periods of time an officer can hold in each respective rank from the rank of Lieutenant. The Petitioner contends that according to 'P18' he is entitled to be promoted to the rank of Colonel on 1st July 2016 on which date he completed the maximum permissible period of 8 years in the rank of Lieutenant Colonel. Such a simplistic view cannot be adhered to as the Gazette does not state that promotions should be awarded mandatorily to every officer who completes the maximum permissible period in a particular rank. 3(1)(b) in 'P18' reads to the effect that;

3(1)(ආ) උපකරණ පාලක නිලධරයකු හෝ කෙටිකාලීන කාරක අධිකාරි ලත් නිලධරයකු හෝ නොවන්නාවූ නිලධරයකු ස්වකීය ස්ථිර නිලයෙහි රැඳී සිටින කාලසීමාව තුළ ඊළඟ ඉහල නිලයට උසස් කරනු නොලැබුවහොත් පහත නියම කර ඇති පරිදි උසුලන ස්ථිර නිලයේ කාලසීමාව අවසානයේදී විශ්‍රාම ගත යුතුය.

<u>ස්ථිර නිලය</u> -	<u>කාලය අවුරුදු</u>
ලුතිනන්-	06
කපිතන්-	11
මේජර්-	10
ලුතිනන් කර්නල්-	08
කර්නල්-	05
බ්‍රිගේඩියර්-	04

33. At the time, the Petitioner was in the rank of Temporary Lieutenant Colonel having been promoted to the temporary rank in 2009. According to 'P18', on the completion of the maximum permissible period in any of the specified ranks an Officer can be promoted only to the rank immediately above the **substantive**

rank held by such officer and **not** the rank immediately above the **temporary rank** held by an officer. Accordingly, the substantive rank of the Petitioner at the time being 'Major' the Petitioner can be promoted to the rank of Lieutenant Colonel and not to the rank of Colonel.

34. Until the service of 'P16' the Petitioner had been engaged in active service up to the 5th of August 2016. In addition to carrying out his ordinary responsibilities the Petitioner has served as an invigilator in the 'Captain to Major promotion (Regular) 2016 Examinations' held on 22nd June 2016 and 08th July 2016 respectively. The Petitioner argues that if the Petitioner is to be retired with effect from April 2016 his role in the Examinations could be brought into question. The allowances that were granted to the Petitioner during the 4 months from April too would be in question. The Petitioner states that even in the service report dated 28th July 2016 carrying the names of the officers in active service at the time includes his name.

35. The Respondents contend that although the Petitioner's retirement was to take effect from 02nd April 2016 he had been allowed to report to work until August even past the lapse of his last extension of service on 09th April 2016 purely due to routine administrative delays that take place in the processing of retirement papers of all officers of the Army and also because several appeals had been made to backdate his rank confirmation by the Petitioner. The Respondents further submit that the Petitioner has been paid all his employment dues covering the period that he reported to work beyond the effective date of retirement.

36. The Petitioner contends that the decision to retire the Petitioner with effect from 02nd April 2016 has been taken maliciously to deprive the Petitioner from being promoted to the rank of Colonel, as there is no other logical explanation to retire the Petitioner on 02nd January 2016 when he served in uniform until 2nd August 2016. Due to the decision to confirm the Petitioner in the rank of Lieutenant

Colonel with effect from 01st April 2016 the Petitioner had been prevented from obtaining the concessionary vehicle permit which is available to officers who have minimum service of six years (confirmed in the said rank) in the rank of Lieutenant Colonel or above.

37. The Petitioner challenges the decisions in 'P14' and 'P16' as actions and/or inactions of an administrative and executive nature in the circumstances referred to and alleges the infringement of his fundamental rights under Article 12(1) of the Constitution. The Petitioner prays for the Court to direct that the Petitioner be confirmed in the rank of Lieutenant Colonel with effect from 01st July 2008 and be promoted to the rank of Colonel with effect from 01st July 2016.

Conclusions

38. The Petitioner is not similarly situate as his peers because the Petitioner's promotion/rank confirmation was rejected on both occasions it came up for consideration. At the time of the decision to retire the Petitioner, he was holding the substantive rank of Major. Therefore, if he was granted promotion to the rank of Colonel, as well as promotion to/rank confirmation as Lieutenant Colonel it would have resulted in two promotions being awarded to an officer whose promotion had been rejected twice.

39. Promotion to rank of Colonel on the other hand, is not awarded merely due to serving in the Army for a set period of time, but upon meeting the criteria set out in Regulation 12, which the Petitioner has failed to meet due to issues in his past disciplinary conduct.

40. I wish to cite with approval the pronouncement made in the case of ***Wijesinghe v Attorney General*** 1978-1979-1980 1 SLR 102, where the court held;

"This Court is undoubtedly the guardian and protector of the fundamental rights secured for the people and our powers are given in very wide terms; but our authority is not absolute for these powers are subject to certain well defined principles and we have to concede that there are limits which we cannot transgress, however hard and unfortunate a case may be. We have to take cognizance of the distinction between ordinary rights and fundamental rights, and it is only a breach of a fundamental right that calls for our intervention." (at page 105)

"The judicial decision must of necessity depend on the facts and circumstances of each particular case and what may superficially appear to be an unequal application of the law may not necessarily amount to a denial of equal protection of law unless there is shown to be present in it an element of intentional and purposeful discrimination. (see per Stone, C.J. in Snowden v: Hughes, (supra))" (at page 106).

Even in the instant case the Petitioner has failed to establish that there had been purposeful discrimination against the Petitioner by the Respondents; and the Petitioner had not been granted the promotions that he had sought due to the shortcomings in the manner he had discharged his duties as a officer of the Armed Forces.

41. For the reasons set out above I am of the view that the Petitioner had failed to establish that his fundamental right enshrined in Article 12(1) had been violated by any of the Respondents and as such the Petitioner cannot succeed in this application. Accordingly, this Application is dismissed.

Application Dismissed

JUDGE OF THE SUPREME COURT

JUSTICE PRIYANTHA JAYAWARDENA PC

I agree.

JUDGE OF THE SUPREME COURT

JUSTICE L.T.B DEHIDENIYA

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an application under and in terms of Articles 11, 12, 13 (1) and 13 (2) of the Constitution read together with Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka

SC FR APPLICATION 296/2014

Kandawalage Don Samantha Perera,
Patapiligama,
Hettipola.

PETITIONER

Vs

1. Officer In Charge,
   Police Station,
   Hettipola.

2. OIC Crimes of Police,
   Police Station,
   Hettipola.

3. Inspector General of Police,
   IGP Office,
   Police Headquarters,
   Colombo 01.

4. Hon. Attorney General,
   Attorney General's Department,
   Hulftsdorp Street,
   Colombo 12.

RESPONDENTS

BEFORE : **PRIYANTHA JAYAWARDENA, PC, J.,**
L. T. B. DEHIDENIYA J. AND
S. THURAIRAJA, PC, J.

COUNSEL : Lakshan Dias with Shafuas Shandeen for the Petitioner
Upali Jayamanne with Ms. Menake Ariyapala for the 1st and 2nd Respondents instructed by. Indra Ratnamalala and Prasanna Saman
Kalana Kotalawala SC for the 3rd and 4th Respondents

ARGUED ON : 17th January 2020

DECIDED ON : 16th June 2020

S. Thurairaja PC. J,

The instant application has been filed by Kandawalage Don Samantha Perera (hereinafter referred to as the Petitioner) alleging that the one or more or all of the Respondents and the State have infringed the Fundamental Rights guaranteed to him under Articles 11, 12(1), 13(1), 13(2) and 13(3) of the Constitution. The Petitioner claims that he was unlawfully arrested, detained and subject to torture, cruel and inhuman treatment. On the 03rd of July 2015, leave to proceed was granted in respect of the alleged violations of Articles 11, 12(1), 13(1) and 13(2) of the Constitution.

Background of the Case

Petitioner's version

The Petitioner is a day labourer working at Fractures Ayurvedhic Dispensary in Hettipola and a former army soldier. The Respondents to this application are the Officer-in-Charge (OIC), Hettipola; OIC Crimes of Police, Hettipola; the Inspector General of Police and the Attorney General (described nomine officii). In his affidavit, the Petitioner has referred to Police Officer "Saman" and Sub-Inspector of Police (SI) Sumanaweera as the persons who violated his rights. Inspector of Police (IP) Samansiri, in his affidavit, has identified himself as the OIC of Hettipola and as the 1st Respondent. SI Sumanaweera has also filed an affidavit identifying himself as the OIC Crime of Hettipola and as the 2nd Respondent.

The Petitioner claims that he was arrested on the 13th of December 2013 at around 3.00 pm. The Petitioner further states that, at the time of his arrest, he had not been informed of the reason for his arrest. The Petitioner submits that he was repeatedly assaulted whilst in police custody by the 1st Respondent, IP Samansiri (hereinafter sometimes referred to as 1R) and the 2nd Respondent, SI Sumanaweera (hereinafter sometimes referred to as 2R) from the 13th to the 15th of December 2013.

The Petitioner states that he was produced before the District Medical Officer (DMO) of Hettipola on the 15th of December and to the Magistrate on the 16th of December 2013. The Police moved the Magistrate to handover the suspect to Kobeigane Army Camp. On the Magistrate's orders, the Petitioner had been remanded till the 24th of December 2013. On the 24th of December 2013, the Petitioner's mother produced the letter of discharge from service from the Sri Lankan army to the Magistrate. The Police had objected to bail being granted and the Learned Magistrate had ordered the prison officers to handover the Petitioner to the Boyagane military police. Although the Petitioner had been handed over to the military police on the 28th of December 2013, he had been permitted to leave as he no longer belonged to the Army.

The Petitioner states that he was admitted to Chilaw Hospital on the 31st of December 2013 as he was critically sick and that he was discharged from hospital on the 3rd of January 2014. He had complained about the assault to the DIG Kurunegala on the 7th of January 2014 and to the Human Rights Commission on the 16th of January 2014 (HRC 2012/2014). The Petitioner then sought the relief of the Supreme Court as no inquiry was held by the Human Rights Commission despite the lapse of 10 months since the complaint was made.

Respondent's Version

Both the 1st and 2nd Respondents claim that the Petitioner was arrested on the 15th of December 2013 at around 2.05 pm at the Galkanda Junction after having explained the charges against him. Respondents refute the claim that the arrest was unlawful and state that that the arrest was carried out based on the results of the preliminary investigation carried out by the Hettipola Police on a complaint made by Mohamed Rasiduge Mohamed Jaleel regarding theft of a mobile phone. Respondents also claim that the Petitioner is an army deserter attached to the 6th Vijayaba Regiment of the Sri Lankan Army.

Before proceeding to deal with the alleged infringement of Fundamental Rights guaranteed to the Petitioner under the Constitution of Sri Lanka, it is pertinent to reminisce the observations of Justice Prasanna Jayawardena in **Ajith Perera v. Daya Gamage et al.** [SC FR Application No. 273/2018 at page 23] (decided on 18th April 2019)

> "*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*."

I am in respectful agreement with his Lordship that '**Human Dignity**' is a constitutional value that underpins the Fundamental Rights jurisdiction of the Supreme Court. I am of the view that 'Human Dignity' as a normative value should buttress and inform our decisions on Fundamental Rights. Hence, it is with this value in mind, that the allegations against the Respondents and State are examined.

Article 13 of the Constitution guarantees to every person *inter alia* freedom from arbitrary arrest, detention and punishment. 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.*

Article 13(2) provides that;

> *Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to procedure established by law and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law.*

There seems to be a discrepancy in the Petitioner's and Respondent's as regards the time of the arrest. The Petitioner claims that he was arrested on the 13th of December 2013, kept in custody and assaulted till the 15th of December 2013. However, the Respondents claim that the Petitioner was arrested on the 15th of December 2013 at 2.05 pm. If the Respondent's account that the Petitioner was arrested on the 15th of December 2013 is true, then it seems to appear that the Respondents have obtained a Medico-Legal Examination Form (MLEF) by producing the Petitioner to a Medical Officer within half an hour of the time of the arrest (i.e. on the 15th of December 2013 at 2.32 pm). Although the Respondent's claim that the Petitioner was produced for an examination as he appeared to be under the influence of liquor, the MLEF relied on by the Respondents reveals that the reason for examination was to check whether the Petitioner has any injuries on his body. There

is no mention of whether the Petitioner resisted arrest or whether any violence or escape was involved. In brief, there is no material submitted to Court which reveals that the Petitioner had sustained injuries at the time of the arrest. If the Petitioner was arrested on the 15th of December 2013 as claimed by the Respondents, then the Respondents have not satisfactory explained as to why the Petitioner was produced before a Medical Officer *immediately* after the arrest to check for injuries. Under these circumstances, an inference can be drawn that the Petitioner was arrested not as claimed by the Respondent but as described by the Petitioner. Having found the Petitioner's claim that he was arrested on the 13th of December 2013 to be credible, I find that the detention of the Petitioner from the 13th to the 16th of December 2013 without producing him before a Magistrate to be unlawful and hence violation of Article 13(2) of the Constitution.

The reasons for arrest submitted by the Respondents are theft and desertion of the army. It is a proven fact that the Petitioner was serving in the Army and that he was duly discharged from the service. As per the material submitted to Court, a statement from the Petitioner and all necessary evidence relating to the charge of theft of a mobile phone (value is not mentioned) had been obtained by the Police by the 16th of December 2013. Hence, there appears to be no valid reason for the Police to object to bail being granted. The objections raised by the Police for bail being granted to the Petitioner for the bailable offence of theft of a mobile phone, leads me to the inference that the arrest was illegal. In view of the aforementioned circumstances, I find the arrest to be improper, unlawful and a violation of the Petitioner's rights enshrined under Article 13(1) and 13(2) of the Constitution.

The Petitioner submits that at the time of his arrest, he had not been informed of the reason for his arrest. The Respondents claim that he was arrested after having explained the charges against him. Given the paucity of evidence, no finding is made in this regard.

Article 11 of the Constitution guarantees that *no person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.* It is an unqualified, non-derogable right to which every person is entitled. The unqualified nature of the right together with the fact that it is an entrenched provision make it abundantly clear that the Constitution envisages 'zero tolerance' towards *cruel, inhuman or degrading treatment* which is the anti-thesis of 'Human Dignity'.

The Petitioner submits that on the 13th of December 2013, 1R and 2R assaulted him with a 2 feet long iron bar. He submits that his head was injured and that he was bleeding. When he requested for treatment, the police officer had merely thrown water at him and locked him up.

The Petitioner claims that he was assaulted again on the following day – i.e. on the 14th of December 2013. He had been asked to remove his clothes and 1R and 2R had proceeded to assault him with their hands and PVC pipes. The Petitioner's hands and thumbs had been tied backwards and he had been lifted up with the rope sent over a beam and hung from the rafter. 1R had pulled on the rope from time to time and the Petitioner claims that he was in terrible pain. The Petitioner submits that he was assaulted six times on the 14th of December 2013.

The Petitioner submits that he was assaulted once again on the 15th of December 2013 with the PVC pipes whilst he lay on the floor. The Petitioner claims that he was kept in a seating position and that 2R and 1R had given forceful blows to the soles of his feet with a wooden stick.

When investigating allegations of custodial violence inflicted by the Police, it is relevant to keep in mind the inherent difficulties in proving the allegations.

> *First, a victim or a witness able to corroborate his story might hesitate to describe or reveal all that has happened to him for fear of reprisals upon himself or his family. Secondly, acts of torture or ill-treatment by agents of the Police or Armed Services would be carried out as far as possible without witnesses and*

perhaps without the knowledge of higher authority. Thirdly, allegations of torture or ill-treatment are made the authorities whether the Police or Armed Services or the Ministers concerned must inevitably feel that they have a collective reputation to defend, a feeling which would be all the stronger in those authorities that had no knowledge of the activities of the agents against whom the allegations are made. In consequence there may be reluctance of higher authority to admit or allow inquiries to be made into facts which might show that the allegations are true. Lastly, traces of torture or ill-treatment may with lapse of time become unrecognizable, even by Medical Experts, particularly where the form of torture itself leaves … few external marks. [Jayampathy Wickramaratne, FUNDAMENTAL RIGHTS IN SRI LANKA (2nd edn, Stamford Lake Publication 2006) at p 219 citing 'Greek Case', Journal of Universal Human Rights, [1979] 1, No 4, 42)

The Respondents have denied the allegations of torture leveled against them. The Respondents claim that an internal investigation was carried out based on the complaint made by the Petitioner and that 2nd Respondent has been discharged of all allegations leveled against him. I am in agreement with Atukorale J's observations with Sharavanada CJ and LH de Alwis J agreeing in **Sudath Silva v. Kodithuwakku** [(1978) 2 Sri LR 119 at page 126 -127]

"*The police force, being an organ of the State, is enjoined by the Constitution to secure and advance this right and not to deny, abridge or restrict the same in any manner and under any circumstances… It is the duty of this court to protect and defend this right jealously to its fullest measure with a view to ensuring that this right which is declared and intended to be fundamental is always kept fundamental… **This court cannot, in the discharge of its constitutional duty, countenance any attempt by any police officer however high or low, to cancel or distort the truth induced, perhaps, by a false sense of police solidarity***."

(Emphasis mine)

The Petitioner claims that when he was produced before the Medical Officer on the 15th of December 2013, the Respondents had threatened him preventing him from disclosing any information about the assault. Thereafter, the Petitioner had been produced to the Magistrate on a Saturday and he had not been allowed to talk. Petitioner was enlarged on bail and freed from police and fiscal custody on the 28th of December 2013. On the 31st of December 2013, the Petitioner got himself admitted to the District General Hospital of Chilaw, where he had the freedom to speak to the Doctors and the Judicial Medical Officer (JMO). The Medical Legal Report (MLR) of the JMO of Chilaw states the following as the '*Short History given by the Patient*':

> "*While I was returning home in the evening from the working place I saw a sim card on a roadside culvert. I put it in my phone with the intention to find the owner and return. I called to a person named "Weeraman". After one week, Police came and arrested me. I was in their custody from 13/12/2013 to 16/12/2013. They physically harassed me. They hit me six times a day. They removed my clothes, tied my hands on my back and lifted up with a rope sent over the beam. They kept me in seated position and gave forceful blows to my soles with a wooden stick. They hit my face with a fisted hand. They also hit me with a rubber hose*."

The Report reveals that the Petitioner had two injuries caused by a blunt weapon, i.e. 1) parallel healed linear abrasions 5cm in length and 2 cm apart on the left side of the back, directed downwards and laterally, 8cm below the inferior angle of the scapula; 2) tenderness over buttocks, deltoid and anterior thigh area. After a thorough examination, the consultant JMO Chilaw had come to the conclusion that "***injuries that I could notice are compatible with the history given by the patient***" and commented that since the Petitioner was presented to the JMO two weeks after the date of the incident, some of the injuries could have disappeared by the time of the examination. Given the fact that the Petitioner was hospitalized from the 31st of

December 2013 to the 3rd of January 2014 and in light of the conclusion reached by the independent Government Judicial Medical Officer, I find the Petitioner's claims to be sufficiently corroborated.

In view of the above circumstances, I find that the Petitioner's fundamental right under Article 11 has been violated by the 1st and 2nd Respondents.

It should perhaps be mentioned in passing that gross humiliation or driving an individual to act against his will or conscience may be deemed to amount to 'degrading' treatment [Jayamapthi Wickramaratne in 'FUNDAMENTAL RIGHTS IN SRI LANKA' (2nd edition, Stamford Lake Publications 2006) at page 208 - 209 quoting from *Denmark, Norway, Sweden, and the Netherlands v. Greece* (1969) 12 YBECHR 1 and *Tyrer v. The United Kingdom* (1978) 17 YBECHR 356)]. The Petitioner claims that on the day of the arrest (i.e. the 13th of December 2013) although the Petitioner had been willing to come to the Police Station on his own motorbike, he had been handcuffed, dragged and forced to sit on the police motorbike and taken to the police station. It is pertinent to note here that if the Petitioner's claim is true, the *manner* in which the arrest was carried out can be said to be 'degrading' and hence a violation of Article 11. However, given the lack of evidence to support the Petitioner's claim, no finding is made as regards the *manner* of arrest.

In view of the violation of the Petitioner's rights under Articles 11 and 13, I find that the Respondents and the State have violated the Petitioner's right to equal protection of the law guaranteed under Article 12 (1) of the Constitution.

Responsibility of the State

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment (10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85,) has been ratified by Sri Lanka and incorporated into domestic law by

The Convention Against Torture Act No 22 of 1994. Section 12 of the Act defines Torture as,

> *"Torture" with its grammatical variations and cognate expressions means any act which causes severe pain, whether physical or mental, to any other person, being an act which is-*
>
> *(a) Done for any of the following purposes that is to say –*
>
> *(i) Obtaining from such other person or a third person any information or confession; or*
>
> *(ii) Punishing such other person for any act which he or a third person has committed, or is suspected of having committed; or*
>
> *(iii) Intimidating or co-ercing such other person or a third person; or*
>
> *(b) Done for any reason based on discrimination.*
>
> *And being in every case, an act which is done by, or at the very instigation of, or with the consent or acquiescence of, a public officer or other person acting in an official capacity.*

Given the circumstances, it is evident that the Petitioner has been subject to torture within the meaning of the aforementioned definition. The consistent pattern of police violence, custodial torture and death as evidenced by the considerable number of Fundamental Rights petitions filed before this Court, indicates that the State should consider addressing and mitigating the problem. Article 10 of the Convention which requires the State *to* ***ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment*** may provide a starting point. As a society that is committed to protecting the **Dignity and Well-being of the People** (See the Preamble/ Svasti of the Constitution), the violation of the right to liberty guaranteed by Articles 11 and

13 of the Constitution should be of serious concern and in my view, the State should take more proactive steps to address the gap between the law and practice.

Considering all material available before this Court, I am of the view that the Fundamental Rights enshrined in the Constitution, particularly **Articles 11, 12(1)**, **13(1)** and **13(2)** have been violated by the 1st, 2nd and 3rd Respondents. I specifically find the 1st and 2nd Respondents individually liable for the violation and I direct them to pay Rs. 50,000/- (Rupees Fifty Thousand) each as compensation from their personal resources to the Petitioner.

I find the State to be liable as the Respondents have acted as agents of the State. Hence, I order the State to pay Rs. 100,000/- (Rupees One Hundred Thousand) as compensation to the Petitioner from funds of the Police Department.

Application allowed.

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.

Galkandage Sahasra Sandeepa Perera,
No: 32, Chandra Place, Ja-Ela

SC (F/R) No. 335/2018

Petitioner

Vs.

1. Mr. Harsha Guruge,
   District Scout Commissioner,
   "Geeth", Station Road, Seeduwa.

2. Mr. Meril Gunathilake,
   Chief Commissioner-Scout
   Sri Lanka Scout Association,
   No: 65/9,
   Sir Chiththampalam A. Gardiner Mawatha,
   Colombo 02.

3. Secretary,
   Ministry of Education,
   "Isurupaya", Battaramulla.

4. Principal,
   Christ King College,
   Thudella, Ja-Eela.

5. Mr. S. A. Amarasinghe,
   Assistant Chief Commissioner,
   Chief of the Interview Board.

6. Mr. G.B. Orcus,

Leader Trainer, Secretary
National Training Team,
Member of the Interview Board.

5th and 6th above named
Both of
Sri Lanka Scout Association,
No: 65/9,
Sir Chiththampalam A. Gardiner Mawatha,
Colombo 02.

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

Respondents

8. The Ceylon Scout Council,
No: 65/9,
Sir Chiththampalam A. Gardiner Mawatha,
Colombo 02.

Added Respondent

Before: Buwaneka Aluwihare, PC. J.

Murdu N.B. Fernando, PC. J.

E.A.G.R. Amarasekara, J.

Counsel: Ms. Himalee Kularathna for the Petitioner.

Senaka De Saram for the 1st, 2nd, 5th and 6th Respondents.

Ms. Viveka Siriwardena, DSG for the 3rd and 7th Respondents.

Argued on: 05.02.2020

Decided on: 20.05.2020

Aluwihare PC. J.,

The Petitioner, Galkandage Sahasra Sandeepa Perera was a student of Christ King College, Ja-Ela at the time of filing this Petition, and has first joined Sri Lanka Scout Association as a Cub Scout in 2007 and continued his membership in the Association as a Scout from 2011 onwards. He alleges that the 1st Respondent, the Wattala-Ja-Ela District Scout Commissioner of the Sri Lanka Scout Association has violated the Petitioner's fundamental right to equality before the law and the equal protection of the law, enshrined in Article 12(1) of the Constitution, by maliciously refusing to authorize the Petitioner's application for the President's Scout Award. The Petitioner claims that the 2nd Respondent, the Chief Commissioner of the Sri Lanka Scout Association is complicit in the violation, owing to his refusal to confer the same on the Petitioner.

It must be observed at the outset, that for the conscience of the Court to be satisfied of the merit of any alleged violation of the fundamental rights of a Petitioner, it is an essential pre-requisite as per Articles 17 and 126 of the Constitution, that such infringement or imminent infringement of a fundamental right recognized by Chapter III of the Constitution be resulting from "*executive or administrative action".* Bearing this in mind, the key preliminary objection raised on behalf of the 1st, 2nd, 5th and 6th Respondents, that the Petitioner's application cannot be maintained against them, as their actions do not fall within the sphere of "*executive or administrative action"* as envisaged by Articles 17 and 126 of the Constitution, shall first and foremost be dealt with.

'Executive or Administrative Action' as per Articles 17 and 126

In so far as fundamental rights are concerned, it is only the infringement or imminent infringement of such rights by '*executive or administrative action'* that is considered to be justiciable before this Court in terms of Articles 17 and 126 of the Constitution.

In light of the absence of a definition in the Constitution for '*executive or administrative action'*, the existing body of case law points towards the understanding that if an action is to be amenable to the fundamental rights jurisdiction by qualifying as an infringement by '*executive or administrative action'*, one of the two following criteria must be met. *Firstly*, such action should either be an action of the State or Government itself, or *secondly*, it should be an action of an organ, agency or instrumentality of the government which is subject to governmental control, and done in the course executing a governmental function.

An examination of the case law points out that in **Wijetunga v. Insurance Corporation of Sri Lanka** (1982) 1 SLR 1, two of the key tests for adjudging which actions amount to '*executive or administrative action'* were discussed, which shall be dealt with in detail later. It was further pointed out that Article 4(d) of the Constitution mandated all organs of the Government to respect and advance the fundamental rights enshrined in Chapter III and that "*action by the organs of the Government alone constitutes the executive or administrative action that is a sine qua non or basic to proceedings under Article 126*" (at page 5 and 6, emphasis added).

As illustrated in Article 4(d) of the Constitution, all the organs of the government are charged with the responsibility of upholding and protecting fundamental rights. It reads as follows:

" 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).

In **Wijetunga** (supra) (at page 6) the Court examined the Insurance Corporation Act, No. 2 of 1961 to inquire whether the Sri Lanka Insurance Corporation (SLIC) which is a statutory corporation, was amenable to the fundamental rights jurisdiction. The Court observed; *"thus the relevant question is what is the relationship between the particular Cooperation whose acts are challenged and the State? Is it a Department of Government, or servant, or, instrumentality of the State? Whether the Corporation should be accorded the status of a Department of Government or not must depend on its Constitution, its*

powers, duties and activities. These are the basic factors to be considered. One must see whether the Corporation is under government control or exercises governmental functions" (emphasis added).

The nature of SLIC's powers and functions, the degree of Ministerial control over it and its financial resources were discussed and the Court drew the conclusion that, whether either one of the two tests; the functional test or the governmental control test is applied, the Corporation could not be identified with the Government or be regarded as its 'alter ego', or an organ of the State. Thus the court applied the two aforesaid tests and it was held that disciplinary action taken by Sri Lanka Insurance Corporation against its employees do not, therefore, qualify as '*executive or administrative action'*.

These two tests underlie the reasoning of the majority opinion of the Court in **Rajaratne v. Air Lanka** (1987) 2 SLR 128 (at page 148), delivered by Atukorale J. where it was held that Air Lanka was an agency or instrumentality of the government as it was "*a company formed by the government, owned by the government and controlled by the government*" (emphasis added). It was held that as Air Lanka was "*brought into existence by the government, financed almost wholly by the government and managed and controlled by the government through its own nominee Directors*", for the purpose of carrying out a function once carried out by the government, it is an "*agency or instrumentality of the government.*" It was further observed that the '*brooding presence'* of the government is manifest behind the '*veil of corporate personality'* of Air Lanka, and therefore as an organ or agency of the government, its actions are amenable to the fundamental rights jurisdiction and qualify as '*executive or administrative action'* (at page 149).

In **Rienzie Perera and Another v. University Grants Commission** (1978-80) 1 SLR 128, it was observed by Sharvananda J. (as he then was) that "*Only if it* (a wrongful act) *is sanctioned by the State or done under State authority does it constitute a matter for complaint under Article 126… In the context of fundamental rights, the 'State' includes every repository of State power*" (at page 138).

Therein it was held that the University Grants of Commission (UGC) established by the Universities Act, No. 16 of 1978 was an organ or delegate of the Government. The Court reasoned that as "*the Universities Act has assigned the execution of a very important*

governmental function to the Respondent…it is idle to contend that the Respondent is not an organ or delegate of the Government" (at page 139, emphasis added). The Court further observed that, "*the Minister shall be responsible for the general direction of University education and the administration of the Act and that he could issue directions to the Commission*" (at page 138, emphasis added). Following the rationale of the functional test and the control test it was consequently held that the impugned action of the UGC is amenable to the fundamental rights jurisdiction, as it is an organ or an instrumentality of the government.

In comparative jurisprudence, Indian case law merit study when inquiring into which entities can be categorized as the State, government or its organs. In India, as per Article 12 of the Indian Constitution, for the purposes of the Fundamental Rights Chapter, "the State" includes;

"…the Government and Parliament of India, the Government and Legislature of each of the States and all local and other authorities within the territory of India or under the control of the Government of India."

It must also be borne in mind, however, that the Indian definition of '*State'* is broader and embraces the entire gamut of State action and not restricted merely to '*executive or administrative action'*. Yet the jurisprudence is helpful in understanding the tests that have emerged to map out what qualifies as *'executive or administrative action'* of the State and its organs.

The Indian Supreme Court, in interpreting the term "*other authorities*" in Article 12 has opined, in the case of Rajasthan **State Electricity Board v. Mohan Lal** AIR 1967 SC 1857, [speaking through Bhargava J.], that if any corporation has authority to issue directions, the disobedience of which would be punishable as a criminal offence, that would be an indication that the corporation is "*State*". Shah J. concurring, stated that an authority, constitutional or statutory, would fall within the expression "*other authorities*" only if it is invested with the sovereign power of the State, namely the power to make rules and regulations which have the force of law. This test has come to be known as the sovereign power test.

The above test was further broadened by Mathew J. in his separate judgment in **Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi** AIR 1975 SC 1331 wherein the government instrumentality or agency test was first formulated. He opined that a corporation would be held to be an agency or instrumentality of the State when it is supported by public money for its operation, but it must be something surpassing mere financial aid to "*an unusual degree of control over the management and policies*". In addition, it was held that whether the operation of the corporation was for an important public function should also be factored in, before pronouncing a corporation as a State agency.

This broader test of instrumentality or agency propounded by Mathew J. in **Sukhdev Case** (supra) was adopted by Bhagwati J. (as he then was) in **Ramana Dayaram Shetty v. International Airport Authority of India** 1979 AIR 1628. There the test was further expanded by His Lordship and several factors were laid down, which although not in any manner exhaustive, are worthy of consideration in determining whether a statutory corporation is an agency or instrumentality of the Government;

"*whether there is any financial assistance given by the State, and if so, what is the magnitude of such assistance, whether there is any other form of assistance, given by the State, and if so, whether it is of the usual kind or it is extraordinary, whether there is any control of the management and policies of the corporation by the State and what is the nature and extent of such control, whether the corporation enjoys State conferred or State protected monopoly status and whether the functions carried out by the corporation are public functions closely related to governmental functions.*"

Bhagwati J. further stated that, "*Whatever be its genetical origin, it* (a corporation) *would be an "authority" within the meaning of Article 12* (of the Indian Constitution) *if it is an instrumentality or agency of the Government and that would have to be decided on a proper assessment of the facts in the light of the relevant factors.*" Thus the Court observed that the above factors should be considered cumulatively and in light of the particular facts and circumstances of each case.

Bhagwati J. (as he then was) in **Ajay Hasia v. Khalid Mujib Sehravardi and others** 1981 AIR 487, further consolidated the government instrumentality or agency test gathered from the decision in the **International Airport Authority Case** (supra), as follows:

(1) Whether the entire share capital of the corporation is held by the Government. If so it would go a long way to indicate that the corporation is an instrumentality or agency of the Government.

(2) Whether the financial assistance provided by the State is so much as to meet almost the entire expenditure of the corporation. If so, it would be indicative of the corporation being impregnated with governmental character.

(3) Whether the corporation enjoys monopoly status which is State conferred or State protected. If so, it would be a very relevant factor to be taken into consideration as being indicative that corporation is an instrumentality or agency of the Government;

(4) Whether there exists deep and pervasive State control of the corporation which would afford an indication that the corporation is a State agency or instrumentality.

(5) Whether the corporation performs functions of public importance and which are closely related to governmental functions and,

(6) Whether the corporation is one to which a department of Government has been transferred. If so, it would strongly support the inference that the corporation is an instrumentality or agency of the Government. (vide page 139 and 140 of **Rajaratne** (supra), emphasis added)

Before venturing on to an application of the above criteria to the case at hand, the following facts must be noted: The Sri Lanka Scout Association (SLSA) –a co-educational Association, is the national Scout organization of Sri Lanka which is recognized as a member by the World Organization of the Scout Movement (WOSM). Therefore, it must be appreciated that the Sri Lanka Scout Association- the local affiliate of its parent organization WOSM, can hardly be identified as an organ or instrumentality of the State of Sri Lanka. However, it must also be noted that the Sri Lanka Scout Association is operated by the Ceylon Scout Council which is a statutory corporation incorporated by Ceylon Scout Council (Incorporation) Act, No. 13 of 1957, and is the statutory body

which requires scrutiny under the tests elaborated above, as opposed to the Sri Lanka Scout Association.

On an application of the above criteria of the government instrumentality or agency test to the present case, it can be observed that as per the Ceylon Scout Council (Incorporation) Act, No. 13 of 1957, the Council's share capital is not held by the State nor is it financed exclusively by the State (its funds being raised almost completely through their membership); in fact there does not appear to be any financial commitment to the SLSA from the State apart from the routine annual government grant; it does not enjoy State conferred monopoly status; its management and policies are not pervasively controlled by the State (except a routine circular issued by the Ministry of Education pertaining to school children and teachers participating in Scouting activities); it does not carry out public functions closely related to any governmental function; and it certainly is not a corporation to which a Department of the Government has been transferred. Hypothetically, if the World Organization of the Scout Movement is disbanded/dissolved, the Sri Lanka Scout Association will also cease to exist, as SLSA is an affiliate body carrying out the objectives of WOSM, and not that of the State.

The Petitioner's contention that the President of the Republic being the Chief Scout is an indication of executive control, holds no merit as it is merely a ceremonial position which the President can decide not to accept, at his/her discretion. The President, if he/she so accepts the Title, becomes the Patron of the Scout Association and appoints the Chief Commissioner, Honorary Chief Commissioners and other higher officials merely upon the recommendation forwarded to him/her by the Association, while the other office bearers are elected by the members at the Annual General Meeting of the Council (vide section 2(1) of the Act).

The provisions of the Act confer the Council with powers to manage, raise and utilize property and funds of the Council, to establish and control Branches of the Association, to enter into arrangements with educational authorities and Departments of the government for promoting the interest of the Association, to determine and pay salaries, pensions and gratuities to its officers and to delegate the powers of the Council to the Committee of the Council (vide section 5 of the Act). Section 7 of the Act clearly indicates

that the Council is accountable to its members as opposed to the State, as yearly progress reports and statements of account are to be presented and approved at the AGM of members. The fact that it is not under government scrutiny is also evidenced by the Audit Report marked 'X' being prepared by an independent auditor and not the Auditor General. All these factors strongly indicate that the Scout Council is a self-regulating statutory corporation independent of the State/government, which is not subject to pervasive control by the government in its management or policies. These circumstances further indicate that neither the Association nor the Council are engaged in functions that are governmental in nature and that they do not possess the sovereign power of the State.

Further, as the 1st, 2nd, 5th and 6th Respondents have stated in paragraph 3 of their statement of objections that, the Application of the Petitioner cannot be maintained by virtue of Section 10 of the Scout Council Act. It states as follows: "*Nothing in this Act contained shall prejudice or affect the rights of the Republic, or of any body politic or corporate or of any other persons, except such as are mentioned in this Act and those claiming by, from or under them*" (emphasis added). These factors elaborated heretofore, disclaim and dissipate the argument that the Sri Lanka Scout Association's actions qualify as '*executive or administrative action'*.

It is seen that a cumulative application of the above criteria comprising the broader test of government instrumentality or agency, or the application of the narrower government control test, the functional test or the sovereign power test to the facts of the present case, clearly indicate that the Sri Lanka Scout Council, under which the Scout Association operates, is not an agency, organ or an instrumentality of the State. Consequently, by virtue of not being an organ of the State, it is incapable of performing any executive or administrative action challengeable under Articles 17 and 126 of the Constitution. Therefore, the refusal by the 1st and 2nd Respondents to grant the President's Scout Award to the Petitioner does not qualify, in whatever way it is interpreted, as an '*executive or administrative action'* for the purposes of Article 17 and 126 of the Constitution and any other interpretation would, in my view, be a naked violation of the Constitution.

Having established the above, I wish at this juncture to draw a distinction between two finer points. The first, as elaborated heretofore, is where a corporation, whatever may be its origins, does not satisfy the test of '*instrumentality or agency'* of the government and by virtue of which, its actions become not amenable to the fundamental rights jurisdiction. The second is where a '*specific impugned action'* by its nature itself, does not qualify as an '*executive or administrative action'* challengeable under Article 17 and 126, even where it is performed by a public servant or a corporation which indeed qualifies as an instrumentality of the government.

The above distinction can be observed in several cases. In **Rajaratne** (supra), the Court identified Air Lanka as an organ of the government, and the discriminatory deprivation of equal opportunity when recruiting two employees to Air Lanka was recognized as a violation of their fundamental rights guaranteed by Article 12 of the Constitution. However, in **Wijenaike v. Air Lanka** (1990) 1 SLR 293, the Court held that an issue arising out of a purported breach by Air Lanka of a contract of employment with one of its employees, was a matter to be redressed through private law remedies upholding contractual rights, and not Constitutional rights. It was held that the State would be governed by constitutional provisions at the threshold stage, but after the State has entered into a contract, the relations would be governed by the contract. It was held (at page 294) that, "*in the case of a public corporation which is an agency of the government, a breach of contract between an employee and the agency would not per se attract the provisions of Article 12(1)*".

However, even though in **Wijenaike** (supra) it was observed that the Court would not interfere into private contractual relations of a public corporation which is an agency/organ of the Government, this restriction was further narrowed down by this Court in **Captain Channa D.L. Abeygunewardena v. Sri Lanka Ports Authority** (2017) 1 ABH 214. In that case the Court introduced a further qualifying criterion to the effect that, the contractual relations of a public corporation which is a State's instrumentality will not be amenable to the Fundamental Rights jurisdiction when it acts in breach of a contract due to bona fide commercial or operational factors, inadvertence or unavoidable circumstances; but Court would interfere and uphold Fundamental Rights enshrined in Chapter III of the Constitution, if the impugned act is a deliberate misuse of a

term/breach of a contract arising from malice, perversity, arbitrariness or manifest unreasonableness.

Similarly, pertaining to acts committed by a public servant this distinction was made in **Vivienne Gunawardena v. Perera and Others** (1983) 1 SLR 305 (at page 322), where it was stated that, "*the State no doubt cannot be made liable for such infringements as may be committed in the course of personal pursuits of a public officer or to pay off his personal grudges. But infringements of Fundamental Rights committed under colour of office by public officers must result in liability being cast on the State*."

However, the present case falls under the first category, as the Sri Lanka Scout Association or the Council as elaborated above, are not amenable to the fundamental rights jurisdiction laid down by the Constitution, by virtue of the fact that they are not organs or instrumentalities of the State. Hence, an examination of the nature of the '*specific impugned actions*' of the 1st and 2nd Respondents as contractual or statutory need not be undertaken.

If indeed an injustice has been suffered by the Petitioner due to the unreasonable refusal of the President's Scout Award, the appropriate step would be to address such grievance pertaining to internal administrative matters by the redress mechanism provided by the Association itself. As per annexure "R6", it is observed that the Executive Committee of the Wattala/Ja-ela District Scout Association appointed an Inquiry Committee subsequent to the incident, which looked into the matter and submitted an Inquiry Report with findings to the effect that the President's Scout Badge was refused because the Petitioner was not sufficiently qualified. But, if the impartiality of such an inquiry is doubtful, the Petitioner could apply to the World Organization of the Scout Movement itself, by making a complaint through the its Ethics Committee, so that the World Scout Bureau may impose sanctions on the infringing persons after an inquiry, as necessary.

For the reasons set out above, I uphold the preliminary objection raised on behalf of the Respondents, that their actions are not amenable to the fundamental rights jurisdiction for the reason that they transcend the limits of 'executive or administrative action' for the purposes of Article 17 and 126 of the Constitution. Accordingly, the Petitioner's Application is dismissed *in limine.*

The learned counsel for the 1st, 2nd, 5th and 6th Respondents, in addition to the preliminary objection discussed in this order, also raised the issue that the Petition is misconceived in law as the Petitioner has failed to cite parties that are necessary to prosecute this Application. In view of the above findings I see no purpose in delving in to the said objection.

Application dismissed.

JUDGE OF THE SUPREME COURT

JUSTICE MURDU FERNANDO P.C.

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 under and in terms of Article 126 read with Article 17 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Aruna Laksiri Unawatuna,
No. 02,
Buddhist Cultural Centre,
Colombo 10.

Petitioner

SC (FR) Application No. 357/2018

Vs.

1. Hon. Maithripala Sirisena,
   H.E. the President of the Democratic Socialist Republic of Sri Lanka,
   Presidential Secretariat,
   Colombo 10.

In his place

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

2. Chairman and the members of the Election Commission,
   Election Secretariat,
   Rajagiriya.

3. Hon. Attorney-General,

Attorney-General's Department,
Colombo 12.

Respondents

Before: Priyantha Jayawardena, PC, J
Vijith K. Malalgoda, PC, J
Murdu N. B. Fernando, PC, J

Counsel: Aruna Laksiri Unawatuna for the Petitioner appears in person

Nerin Pulle DSG for the Attorney-General

Argued On: 10th January, 2019

Decided On: 14th October ,2020

Priyantha Jayawardena, PC, J

The petitioner filed the instant fundamental rights application alleging that the Proclamation issued by the former President, by Gazette No. 2096/70, dated 9th November, 2018 dissolving the Parliament and calling for election of the Members of Parliament, is contrary to Articles 10, 12(1), 12(2), 14(1)(a), 14(1)(c) and 14(1)(f) of the Constitution.

The petitioner stated in his petition that he is an Attorney-at-Law and that the instant application has been filed in the interest of the public.

The instant application was filed against the Attorney-General in terms of Article 35 of the Constitution on the basis that the aforementioned Gazette was issued by the former President. Both the former President and the Attorney-General were cited as the 1st respondent. The Chairman and the Members of the Election Commission have been cited as the 2nd respondent.

In his petition, the petitioner prayed *inter alia*;

(i) to suspend the operation of the Proclamation issued by the President dissolving the Parliament and calling for General Elections in the Gazette No. 2096/70 dated 9th November, 2018 until the conclusion of this application,

(ii) to stay the holding of Parliamentary Elections by the 2nd respondent until the conclusion of this application,

(iii) to declare that the 1st respondent has violated the petitioner's fundamental rights guaranteed under Articles 10, 12(1), 12(2), 14(1)(a), 14(1)(c) and 14(1)(f) of the Constitution, and

(iv) to quash the said Proclamation dissolving Parliament contained in the Gazette No. 2096/70 dated 9th November, 2018.

Before the instant application was supported for leave to proceed, the petitioner filed a motion stating that the fundamental rights application bearing No. SC/FR/351/2018 was similar to the instant application, and that the judgment of the said application had been delivered on 13th December, 2018.

Thereafter, the petitioner appeared in person and supported the said motion. The petitioner submitted that he had sent a letter by registered post to the former President, requesting a Sinhala translation of the judgment delivered in the said application No. SC/FR/351/2018 on 13th December, 2018. However, as the petitioner did not receive a response to the aforementioned letter, he filed the instant motion requesting the court to issue a Sinhala translation of the said judgment delivered in the said fundamental rights application.

Article 24(3) of the Constitution makes provision for a person to obtain translations of the records maintained in courts.

Article 24(3) of the English text of the Constitution states as follows:

> "Any judge, juror, party or applicant or any person legally entitled to represent such party or applicant, who is not conversant with the language used in court, shall be entitled to interpretation and to translation into Sinhala or Tamil provided by the State, to enable him to understand and participate in the proceedings before such court and shall also be entitled to obtain in such language any such part of the record or a translation thereof, as the case may be as he may be entitled to obtain according to law." [Emphasis added]

The word “record” in the aforesaid Article is defined in Article 24(5) of the English text of the Constitution as follows:

> “Record includes Pleadings, Judgments, Orders and Other judicial and Ministerial acts.”

Article 24(3) of the Sinhala text of the Constitution states:

> "අධිකරණයක භාවිත වන භාෂාව නොදන්නා යම් කිසි විනිශ්චයකාරවරයකුට, ජූරි සභිකයුකට, යම්කිසි පර්ශ්වයකුට හෝ අයදුම්කරුවකුට නැතහොත් ඒ පාර්ශ්වය හෝ අයදුම්කරු නියෝජනය කිරීමට නීතියෙන් බලය ලබා ඇති යම්කිසි තැනැත්තකුට එම අධිකරණයක සිදුවන කටයුතු වටහා ගැනීමටත් ඒ කටයුතුවලට සහභාගී වීමටත් හැකිවන සේ රජය විසින් සිංහල භාෂාවෙන් හෝ දෙමළ භාෂාවෙන් සපයනු ලබන භාෂණ පරිවර්තන සහ පරිවර්තන ලබා ගැනීමටත්, නඩු වාර්තාවකින් නීතිය අනුව ලබා ගැනීමට හිමිකම් ඇති කවර වූ හෝ කොටසක් නැතහොත් එහි පරිවර්තනයක් එම භාෂාවෙන් ලබා ගැනීමට හිමිකම ඇත්තේ ය." [Emphasis added]

The word "වාර්තාව" in Article 24(3) is defined in Article 24(5) of the Sinhala text of the Constitution as follows:

> ""වාර්තාව" යන්නට උත්තරවාද, නඩු තීන්දු, ආඥා සහ වෙනත් අධිකරණ හා විදායක කාර්යය ඇතුලත් වේ."

Accordingly, the legislator has restricted the application of the said Article 24(3) to a judge, juror, party or applicant or any person legally entitled to represent such party or applicant *in the proceedings of a case*, to obtain translations of the proceedings maintained in a court, *if he is not conversant with the language used in court*. Thus, the restrictions imposed in the said Article shall not be interpreted in such a way that it will result in the delay or abuse of process in the administration of justice.

The petition of the said fundamental rights application No. SC/FR/351/2018 in which the judgment was delivered, was filed by Rajavarothiam Sampanthan citing the Attorney-General, the Chairman and the members of the Election Commission as respondents.

Subsequently, Prof. Gamini Lakshman Peiris, Udaya Prabath Gammanpila, Wellawattage Jagath Sisira Sena de Silva, Mallika Arachchige Channa Sudath Jayasumana and Premnath Chaminda Dolawatte were permitted by the court to intervene in the said application.

Thus, the petitioner was neither a party nor an Attorney-at-Law who represented any of the parties in the said application No. SC/FR/351/2018. Thus, the petitioner is not entitled under Article 24(3) of the Constitution to obtain a translation of the judgment delivered in the said application.

Accordingly, the motion dated 31st December, 2018 is rejected.

Judge of the Supreme Court

Vijith K. Malalgoda, PC, J
I Agree

Judge of the Supreme Court

Murdu N.B. Fernando, PC, J
I Agree **Judge of the Supreme Court**

THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

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

S.C.F.R.APPLICATION NO: 399/2019

1. M.R.N Silva,
   No.107/B/55, Mattegoda Estate,
   Mattegoda.

2. M.D.K.P.M.Bamunuge,
   No.4/7, 1ST Lane, Ananda Maithree Road,
   Maharagama.

3. V.G.H.E.K Gunarathne
4. ,
   No.22, Chetiyagiri Vihara Lane,
   Kithulampitiya, Galle.

5. M.N.F.Nisadha,
   No.34, Galewatta Road, Katugastota
   Kandy

6. W.K.I Dharmasena,
   No.B31/1, Ewunugalla, Hettimulla,
   Kegalle.

7. M.S.M Dhanasekara
   No. 87, Kandy Road
   Danovita.

8. Selvathurai Gobika,
   Esway Vasam, South Puloli,
   Jaffna.

9. Emorian Fernando
   No.104, Elle House Road, Colombo-15

PETITIONERS

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,
   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: Jayantha Jayasuriya, PC, CJ.

L.T.B Dehideniya, J.

S. Thurairaja, PC, J

Counsels: Upul Jayasuriya PC for the Petitioners

Manohara de Silva PC instructed by Ms. Bhashini Hettiarachchi for the 1st Respondent.

Rajiv Goonatillake SSC for the A.G

Argued on: 17.02.2020

Decided on: 23.07.2020

L.T.B.Dehideniya, J

The application no: SC/FR 399/2019, 400/2019 & 459/2019 are on the same matter and the objections are also filed in the same manner. The parties agreed to argue these cases together and to abide by one judgement.

The Petitioners invoke the jurisdiction of this court alleging the infringement of their Fundamental Rights guaranteed under the Articles 12 (1) and the 14 (1) (g) of the Constitution by the Respondents.

The Petitioners state that, they have received medical education from the foreign universities and were awarded the relevant degrees of medicine after the completion of the specific periods of study. The Petitioners further state that, having obtained their degrees of medicine they returned to Sri Lanka and sought approval from the Sri Lanka Medical Council (hereinafter sometime called as 'SLMC') to sit for the Examination for Registration to Practise Medicine (hereinafter sometime called as 'ERPM') but the approval has not been granted. As per the contention of the Petitioners, the 1st Respondent has imposed a pre-entry qualification on the medical graduates from foreign universities which is bad in law and this application invoking the Fundamental Rights jurisdiction basically challenges the conduct of the 1st Respondent on the failure to grant permission to sit for the ERPM as grossly indefensible, unreasonable, arbitrary, capricious mala fide, unfair which involves in the violation of the principles of legitimate expectation, natural justice and reasonableness.

The 1st Respondent's contention is that the Petitioners do not possess the relevant qualifications. The 1st Respondent further states that, the Petitioners are not qualified to sit for the ERPM as they have not acquired the G.C.E Advanced Level qualification as adopted by the 1st Respondent in February 2010 as per the powers vested on the SLMC in terms of the section 29 (1) (b) (ii) (cc) of the Medical Ordinance.

Section 29(2) deals with provisional registration as a medical practitioner and provisions relating to such registration for a person who hold a degree of Bachelor of Medicine from a foreign university which is recognized by the SLMC are as follows.

The section 29 (2) of the Medical Ordinance states,

> *(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 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

The section 29 (2) (cc) of the Medical Ordinance reads as follows,

'.....has passed the special examination prescribed in that behalf by the Medical Council'.

As per the aforesaid section 29(2)(iii)(bb)(i) of the Medical Ordinance, it is clear that, in addition to the requirement of having a good character (as sets out in Section 29(2)(a)), the most imperative requirement which is essential to be entitled for the provisional registration as a medical professional is the possession of a degree of a Bachelor of Medicine or an equivalent qualification of any university or a medical school of any country other than Sri Lanka, which is recognized by the SLMC. Further, the section gives a deep emphasis on the standards of medical education of such university or medical school. It is clear to this court that, the section 29 (2) of the Medical Ordinance surfaces two important facts. The first among such facts insists that, Sri Lanka has emphasized the freedom of medical education within or outside the country. Thus, the law facilitates the medical education in local and foreign universities. The second foremost fact signified by the section is the recognition which is given by the SLMC on the universities imparting medical knowledge. The Medical Ordinance has expressly recognized the freedom of Sri Lankan students to receive the foreign medical education.

The section 29(2)(iii)(cc) further stresses on the passing of a special examination prescribed in that behalf by the SLMC.

It is evident to this court that, the Petitioners of this case have complied with the section 29 (2)(iii)(bb)(i) of the Medical Ordinance, where they have attended and obtained medical degrees and equivalent qualifications from the foreign universities recognized by the SLMC. Subsequent to their university education, they requested the SLMC to issue a degree approval certificate which is a pre-condition to sit for the ERPM exam but until the institution of this action the Petitioners have not received a response and were not been permitted up to date by the SLMC to sit the ERPM.

The details of the universities of the Petitioners are as follows:

SC.FR/400/2019

Name of the Petitioner	**University**	**Year**

A.L.M Rushdhaan	Tbilisi State Medical University – Georgia	2011
R. W.D.L.H. Rajasekara	Virgen Milagrosa University – Philippines	2008
M.L.M Nasly	Tbilisi State Medical University – Georgia	2010
D.N.de Silva	Tver State Medical University – Russia	2012
W.I. Madushani	Tver State Medical University – Russia	2012
Francis Vijitharan	Tbilisi State Medical University – Georgia	2010

SC.FR/ 399/2019

Name of the Petitioner	**University**	**Year**
M.R.N.Silva	Virgen Milagrosa University-Philippines	2012
M.D.K.P.M Bamunuge	Vitebsk State Medical University-Belarus	2011
V.G.H.E.K. Gunarathna	Tionjin Medical University- China	2012
M.N.F Nisadha	Tbilisi State Medical University – Georgia	2012
W.K.I. Dharmasena	Tver State Medical University – Russia	2011
M.S.M. Dhanasekara	Tbilisi State Medical University – Georgia	2012
Selvathurai Gobika	Vitebsk State Medical University-Belarus	2011
Emorian Fernando	Grodno State Medical University – Belarus	2012

SC.FR./459/2019

Name of the Petitioner	University	Year
Denushi Vindya Kasthuriarachchi	Tbilisi State Medical University – Georgia	2013

As per the provisions of the Medical Ordinance, SLMC is recognized as a corporate body which has a power to grant and issue provisional registration to the persons satisfying the requisite criteria under the Ordinance. The section 29(2)(iii)(cc) of the Medical Ordinance further empowered to prescribe special examinations which are to be followed by the relevant medical graduates. The authority of the SLMC is extended to carry out the ERPM under the said provisions.

The prominent attention of the Petitioners has been positioned on the pre-entry qualification imposed by the SLMC. The pre-entry qualification specifies as a mandatory educational entry qualification to follow courses in medicine/ dentistry which necessitates "Those who enter foreign medical schools from 01.June 2010 onwards should have obtained passes in Biology, Chemistry and Physics/Mathematics with credits in at least two of these subjects at the G.C.E. (Advanced Level) Sri Lanka or ....."(1R5 of case no SC/FR/399/2019)

The Petitioner holds that, the imposition of a pre-entry qualification is unreasonable, not justifiable and ultra-vires. The matter which is insisted by the Petitioners is that, even though they have complied with the black letter law of the country, imposition of the pre-entry qualification through an ultra vires decision has barred them illegally.

In S.F. Zamrath v. Sri Lanka Medical Council & Others (S.C.F.R.Application No: 119/2019 SC minutes of 23.07.2019), this court elaborated the purview which SLMC has been granted by law. There, the court has accepted that administrative authorities are bound to meet the challenging 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....'*

The imposition of the pre-entry requirement was further seen as an instance where the SLMC has overridden its powers.

'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'.

The obligation on the part of the SLMC to comply with the provisions of the Medical Ordinance was further emphasized by his Lordship Justice Padman Surasena, in S.M Halpe & Others v. Dr. Anil Jayasinghe (S.C.F.R.Application No: 54/2019). His Lordship stated,

'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.....Thus, the SLMC is denying 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.'

The speciality of his Lordship's statement lies on the fact that, he recognized the provisional registration guaranteed under the section 29 (2) of the Medical Ordinance as an entitlement. This signifies the very fact that, provisional registration does amount to a right which is sprung from the law of the country.

In the present application, SLMC fails to grant the approval to sit for the ERPM, thereby impeding the right of the Petitioners for provisional registration. It is very clear to this court that, SLMC's conduct resembles the usurpation of powers of the Parliament which stands as the supreme legislative authority of the country. Further, it is surprising to see the arbitrariness of the SLMC which alters the procedures and laws of the country. The very essence of the

view expressed by his Lordship Justice Padman Surasena in S.M Halpe & Others v. Dr. Anil Jayasinghe (Supra) emphasizes that, SLMC has no power to take out a right which has been granted by the law.

The same view was held in the FR applications 149/2019 and 145/2019 where this court held a similar notion on the supremacy of the Parliament and the regulatory authority of the SLMC. Thus, this court's view was that, ordinary law of the land is predominant and a law which was passed by the Parliament cannot be overridden by a regulation which has arbitrarily imposed by a subordinate authority.

The 1st Respondent's contention is that the court had held in the case of Zamrath (supra) that the pre-entry qualification of Advanced Level was held to be illegal only on the ground of violating the legitimate expectation and in the present case the requirement was imposed in 2010 and therefore the said judgment has no application. I cannot agree with this argument. In the said case the court had considered two aspects, that is, the violation of legitimate expectation and the ultra-vires nature of the SLMC decision. It has been held in the said case that,

> *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.*

Further, it was held that, depriving the right to sit for ERPM does amount to a severe violation of the future prospects of professional life of the medical graduates.

It is pertinent to note that, the Parliament being the Supreme legislative body of the country has approved a certain level of minimum qualification to enter in to the medical education. In

General Sir John Kotelawala Defence University (Special Provisions) Act No: 17 of 2018, by its section 2 (a) specifies that

> *'The General Sir John Kotelawala Defence University shall have the power to absorb those students who have obtained basic qualifications from among the students who have registered with the South Asian Institute of Technology and Medicine (hereinafter referred to as the 'SAITM') .....*

Further, the section 2(c) states,

> *'to award to those students having basic qualifications and have completed the study programme leading to the award of the MBBS Degree at the SAITM on or before the appointed date.'*

The section 4 of the act, interprets the term 'basic qualification' to mean,

> *'minimum of S grade (simple) pass in Chemistry, Physics and Biology at the G.C.E. (Advanced level) examination conducted by the Examinations Department of the Ministry of Education of Sri Lanka ..... or an equivalent foreign qualification...'*

The wordings of the act clearly show the intention of the Parliament. The intention of the Parliament reflects that, the minimum qualification to be eligible for the MBBS degree is 'minimum of S grade pass in Chemistry, Physics and Biology'. Thus, it is evident that, the Parliament has given the freedom to accept the minimum qualification as 3 'S' passes. Medical Ordinance being the main legal enactment is silent on the requirement as to the minimum qualification. This manifests that, the minimum qualification to study medicine is a matter to be decided by the specific university based on the relevant criteria. It is evident that, SLMC cannot influence the decisions of the relevant universities and to impose their own qualifications.

The first Respondent's argument is that he is entitled to prescribe a special examination for foreign medical graduates under S 29 (2) (ii) (cc) of the Medical Ordinance. The Medical Ordinance permits the SLMC to prescribe a special examination for the foreign medical graduates. It has to be a 'special examination'. At present the SLMC is holding an examination called "Examination to Register Practice Medicine" (ERPM). Unless the foreign graduate passes this examination he does not become entitled to 'Register Practise Medicine'. Under this Section the SLMC is not empowered to prescribe any pre-entry qualifications to enter into

a foreign university. It is a matter for the said university to decide what the pre-entry qualifications should be. The SLMC can evaluate the said university and grant or refuse recognition. Other than granting or refusing recognition to the said university or medical school, the SLMC cannot decide the pre-entry qualifications. Nor the SLMC is empowered to impose further restrictions to sit for the ERPM other that the requisites stipulated by the statue. Therefore, I do not agree with the argument of the first Respondent in that regard.

This court sees a grave misunderstanding on the part of the 1st Respondent over the powers which have been allocated by the law. The SLMC, by section 29 (2) (cc) is empowered to hold examinations to select the suitable medical practitioners from among the medical graduates in the country. The section allows no interference with the Advanced Level qualifications which determine the eligibility for the medical education.

It is clear that, the very decision made by the SLMC has deeply influenced the substantive rights and obligations of others, mainly the Petitioners. The decision of the SLMC gravely violates the future prospects of the professional life of the Petitioners. The right to equality of the Petitioners is prima facie in violation.

The 1st Respondent further argues that the application of the Petitioners is time barred. This argument is based on the one month rule in the Fundamental Rights Jurisdiction. The 1st Respondent ‘s position is that, the invoking of the Fundamental Rights jurisdiction should be taken place within one month from the alleged infringement and the Petitioners ought to have challenged the decision in the instance where they first came to know the decision. While justifying this contention in an unjust manner, the 1st Respondent states that, it was within the knowledge of the Petitioners that the decision of the SLMC influences their right to sit for the ERPM. It is apparent that, the decision of the SLMC is implemented in the year 2010. The Petitioners entered to the universities which have been recognized by the SLMC and thereby derived a legitimate expectation that, they will be given an opportunity to sit for the ERPM. The conduct of the Respondent SLMC based on their ultra vires decision- the decision to impose ‘pre entry qualification’ to medical studies overseas and or to sit for ERPM- had impacted upon such legitimate expectation of the petitioners, adversely. Further, the Petitioners resorted to this Court, at the failure to grant approval and it is clear that, they are entitled to redress their grievances as the said failure is clearly a continuing infringement of their right to equal protection of law.

It is clear to this court that, SLMC has arbitrarily imposed a pre-entry qualification for the provisional registration of the foreign medical graduates as the medical practitioners. It is apparent to this court that, the specific decision of the SLMC unjustly imposes a burden on the Petitioners over their professionalism and the purview of powers which has already been granted by the Medical Ordinance is overridden.

By concluding the judgement, this Court adopts the view that, the Fundamental Rights guaranteed to the Petitioners under the articles 12 (1) and 14 (1) (g) of the Constitution have been infringed by the act of Respondents which refused to grant permission to sit for the ERPM while imposing a pre-entry qualification against the law of the country. Thus, the Court reiterates on the fact that, the Respondents acted arbitrarily while making a decision which has influenced the substantive rights of the Petitioners in a great deal and orders the 1st Respondent to allow the Petitioners to sit for the ERPM.

Judge of the Supreme Court

Jayantha Jayasuriya, PC, CJ

I agree

Chief Justice

S. Thurairaja, PC, J

I agree

Judge of the Supreme Court

THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

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

S.C.F.R. APPLICATION
NO: 400/2019

1. A.L.M Rushdhaan,
   No.27-1/2, Alfred Place,
   Colombo-3

2. R.W.D.L.H.Rajasekara,
   No: 23, Saparamadu Place, Weragoda,
   Kelaniya.

3. M.L.M. Nasly,
   No.686,
   Rajamalwatte,
   Malwana.

4. Dulanjana Nishamali de Silva,
   No.207, Peradeniya Road,
   Kandy

5. W.I Madhushani,
   Dayani, Kondadeniya, Dickwella presently at No.173/A,
   Araliya Patumaga, Bellanwila,
   Boralesgamuwa

6. Francis Vijitharan,
   No.175, Moor Street,
   Mannar.

PETITIONERS

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,
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 Genreral's Department,
Colombo-12.

RESPONDENTS

Before: Jayantha Jayasuriya, PC, CJ.

L.T.B Dehideniya, J.

S. Thurairaja, PC, J

Counsels: Upul Jayasuriya PC for the Petitioners

Manohara de Silva PC instructed by Ms. Bhashini Hettiarachchi for the 1st Respondent.

Rajiv Goonatillake SSC for the A.G

Argued on: 17.02.2020

Decided on: 23.07.2020

L.T.B.Dehideniya, J

The application no: SC/FR 399/2019, 400/2019 & 459/2019 are on the same matter and the objections are also filed in the same manner. The parties agreed to argue these cases together and to abide by one judgement.

The Petitioners invoke the jurisdiction of this court alleging the infringement of their Fundamental Rights guaranteed under the Articles 12 (1) and the 14 (1) (g) of the Constitution by the Respondents.

The Petitioners state that, they have received medical education from the foreign universities and were awarded the relevant degrees of medicine after the completion of the specific periods of study. The Petitioners further state that, having obtained their degrees of medicine they returned to Sri Lanka and sought approval from the Sri Lanka Medical Council (hereinafter sometime called as 'SLMC') to sit for the Examination for Registration to Practise Medicine (hereinafter sometime called as 'ERPM') but the approval has not been granted. As per the contention of the Petitioners, the 1st Respondent has imposed a pre-entry qualification on the medical graduates from foreign universities which is bad in law and this application invoking the Fundamental Rights jurisdiction basically challenges the conduct of the 1st Respondent on the failure to grant permission to sit for the ERPM as grossly indefensible, unreasonable, arbitrary, capricious mala fide, unfair which involves in the violation of the principles of legitimate expectation, natural justice and reasonableness.

The 1st Respondent's contention is that the Petitioners do not possess the relevant qualifications. The 1st Respondent further states that, the Petitioners are not qualified to sit for the ERPM as they have not acquired the G.C.E Advanced Level qualification as adopted by the 1st Respondent in February 2010 as per the powers vested on the SLMC in terms of the section 29 (1) (b) (ii) (cc) of the Medical Ordinance.

Section 29(2) deals with provisional registration as a medical practitioner and provisions relating to such registration for a person who hold a degree of Bachelor of Medicine from a foreign university which is recognized by the SLMC are as follows.

The section 29 (2) of the Medical Ordinance states,

> *(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 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

The section 29 (2) (cc) of the Medical Ordinance reads as follows,

'.....has passed the special examination prescribed in that behalf by the Medical Council'.

As per the aforesaid section 29(2)(iii)(bb)(i) of the Medical Ordinance, it is clear that, in addition to the requirement of having a good character (as sets out in Section 29(2)(a)), the most imperative requirement which is essential to be entitled for the provisional registration as a medical professional is the possession of a degree of a Bachelor of Medicine or an equivalent qualification of any university or a medical school of any country other than Sri Lanka, which is recognized by the SLMC. Further, the section gives a deep emphasis on the standards of medical education of such university or medical school. It is clear to this court that, the section 29 (2) of the Medical Ordinance surfaces two important facts. The first among such facts insists that, Sri Lanka has emphasized the freedom of medical education within or outside the country. Thus, the law facilitates the medical education in local and foreign universities. The second foremost fact signified by the section is the recognition which is given by the SLMC on the universities imparting medical knowledge. The Medical Ordinance has expressly recognized the freedom of Sri Lankan students to receive the foreign medical education.

The section 29(2)(iii)(cc) further stresses on the passing of a special examination prescribed in that behalf by the SLMC.

It is evident to this court that, the Petitioners of this case have complied with the section 29 (2)(iii)(bb)(i) of the Medical Ordinance, where they have attended and obtained medical degrees and equivalent qualifications from the foreign universities recognized by the SLMC. Subsequent to their university education, they requested the SLMC to issue a degree approval certificate which is a pre-condition to sit for the ERPM exam but until the institution of this action the Petitioners have not received a response and were not been permitted up to date by the SLMC to sit the ERPM.

The details of the universities of the Petitioners are as follows:

SC.FR/400/2019

Name of the Petitioner	**University**	**Year**

A.L.M Rushdhaan	Tbilisi State Medical University – Georgia	2011
R. W.D.L.H. Rajasekara	Virgen Milagrosa University – Philippines	2008
M.L.M Nasly	Tbilisi State Medical University – Georgia	2010
D.N.de Silva	Tver State Medical University – Russia	2012
W.I. Madushani	Tver State Medical University – Russia	2012
Francis Vijitharan	Tbilisi State Medical University – Georgia	2010

SC.FR/ 399/2019

Name of the Petitioner	**University**	**Year**
M.R.N.Silva	Virgen Milagrosa University-Philippines	2012
M.D.K.P.M Bamunuge	Vitebsk State Medical University-Belarus	2011
V.G.H.E.K. Gunarathna	Tionjin Medical University- China	2012
M.N.F Nisadha	Tbilisi State Medical University – Georgia	2012
W.K.I. Dharmasena	Tver State Medical University – Russia	2011
M.S.M. Dhanasekara	Tbilisi State Medical University – Georgia	2012
Selvathurai Gobika	Vitebsk State Medical University-Belarus	2011
Emorian Fernando	Grodno State Medical University – Belarus	2012

SC.FR./459/2019

Name of the Petitioner	University	Year
Denushi Vindya Kasthuriarachchi	Tbilisi State Medical University – Georgia	2013

As per the provisions of the Medical Ordinance, SLMC is recognized as a corporate body which has a power to grant and issue provisional registration to the persons satisfying the requisite criteria under the Ordinance. The section 29(2)(iii)(cc) of the Medical Ordinance further empowered to prescribe special examinations which are to be followed by the relevant medical graduates. The authority of the SLMC is extended to carry out the ERPM under the said provisions.

The prominent attention of the Petitioners has been positioned on the pre-entry qualification imposed by the SLMC. The pre-entry qualification specifies as a mandatory educational entry qualification to follow courses in medicine/ dentistry which necessitates "Those who enter foreign medical schools from 01.June 2010 onwards should have obtained passes in Biology, Chemistry and Physics/Mathematics with credits in at least two of these subjects at the G.C.E. (Advanced Level) Sri Lanka or ....."(1R5 of case no SC/FR/399/2019)

The Petitioner holds that, the imposition of a pre-entry qualification is unreasonable, not justifiable and ultra-vires. The matter which is insisted by the Petitioners is that, even though they have complied with the black letter law of the country, imposition of the pre-entry qualification through an ultra vires decision has barred them illegally.

In S.F. Zamrath v. Sri Lanka Medical Council & Others (S.C.F.R.Application No: 119/2019 SC minutes of 23.07.2019), this court elaborated the purview which SLMC has been granted by law. There, the court has accepted that administrative authorities are bound to meet the challenging 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....'*

The imposition of the pre-entry requirement was further seen as an instance where the SLMC has overridden its powers.

'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'.

The obligation on the part of the SLMC to comply with the provisions of the Medical Ordinance was further emphasized by his Lordship Justice Padman Surasena, in S.M Halpe & Others v. Dr. Anil Jayasinghe (S.C.F.R.Application No: 54/2019). His Lordship stated,

'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.....Thus, the SLMC is denying 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.'

The speciality of his Lordship's statement lies on the fact that, he recognized the provisional registration guaranteed under the section 29 (2) of the Medical Ordinance as an entitlement. This signifies the very fact that, provisional registration does amount to a right which is sprung from the law of the country.

In the present application, SLMC fails to grant the approval to sit for the ERPM, thereby impeding the right of the Petitioners for provisional registration. It is very clear to this court that, SLMC's conduct resembles the usurpation of powers of the Parliament which stands as the supreme legislative authority of the country. Further, it is surprising to see the arbitrariness of the SLMC which alters the procedures and laws of the country. The very essence of the

view expressed by his Lordship Justice Padman Surasena in S.M Halpe & Others v. Dr. Anil Jayasinghe (Supra) emphasizes that, SLMC has no power to take out a right which has been granted by the law.

The same view was held in the FR applications 149/2019 and 145/2019 where this court held a similar notion on the supremacy of the Parliament and the regulatory authority of the SLMC. Thus, this court's view was that, ordinary law of the land is predominant and a law which was passed by the Parliament cannot be overridden by a regulation which has arbitrarily imposed by a subordinate authority.

The 1st Respondent's contention is that the court had held in the case of Zamrath (supra) that the pre-entry qualification of Advanced Level was held to be illegal only on the ground of violating the legitimate expectation and in the present case the requirement was imposed in 2010 and therefore the said judgment has no application. I cannot agree with this argument. In the said case the court had considered two aspects, that is, the violation of legitimate expectation and the ultra-vires nature of the SLMC decision. It has been held in the said case that,

> *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.*

Further, it was held that, depriving the right to sit for ERPM does amount to a severe violation of the future prospects of professional life of the medical graduates.

It is pertinent to note that, the Parliament being the Supreme legislative body of the country has approved a certain level of minimum qualification to enter in to the medical education. In

General Sir John Kotelawala Defence University (Special Provisions) Act No: 17 of 2018, by its section 2 (a) specifies that

> *'The General Sir John Kotelawala Defence University shall have the power to absorb those students who have obtained basic qualifications from among the students who have registered with the South Asian Institute of Technology and Medicine (hereinafter referred to as the 'SAITM') .....*

Further, the section 2(c) states,

> *'to award to those students having basic qualifications and have completed the study programme leading to the award of the MBBS Degree at the SAITM on or before the appointed date.'*

The section 4 of the act, interprets the term 'basic qualification' to mean,

> *'minimum of S grade (simple) pass in Chemistry, Physics and Biology at the G.C.E. (Advanced level) examination conducted by the Examinations Department of the Ministry of Education of Sri Lanka ..... or an equivalent foreign qualification...'*

The wordings of the act clearly show the intention of the Parliament. The intention of the Parliament reflects that, the minimum qualification to be eligible for the MBBS degree is 'minimum of S grade pass in Chemistry, Physics and Biology'. Thus, it is evident that, the Parliament has given the freedom to accept the minimum qualification as 3 'S' passes. Medical Ordinance being the main legal enactment is silent on the requirement as to the minimum qualification. This manifests that, the minimum qualification to study medicine is a matter to be decided by the specific university based on the relevant criteria. It is evident that, SLMC cannot influence the decisions of the relevant universities and to impose their own qualifications.

The first Respondent's argument is that he is entitled to prescribe a special examination for foreign medical graduates under S 29 (2) (ii) (cc) of the Medical Ordinance. The Medical Ordinance permits the SLMC to prescribe a special examination for the foreign medical graduates. It has to be a 'special examination'. At present the SLMC is holding an examination called "Examination to Register Practice Medicine" (ERPM). Unless the foreign graduate passes this examination he does not become entitled to 'Register Practise Medicine'. Under this Section the SLMC is not empowered to prescribe any pre-entry qualifications to enter into

a foreign university. It is a matter for the said university to decide what the pre-entry qualifications should be. The SLMC can evaluate the said university and grant or refuse recognition. Other than granting or refusing recognition to the said university or medical school, the SLMC cannot decide the pre-entry qualifications. Nor the SLMC is empowered to impose further restrictions to sit for the ERPM other that the requisites stipulated by the statue. Therefore, I do not agree with the argument of the first Respondent in that regard.

This court sees a grave misunderstanding on the part of the 1st Respondent over the powers which have been allocated by the law. The SLMC, by section 29 (2) (cc) is empowered to hold examinations to select the suitable medical practitioners from among the medical graduates in the country. The section allows no interference with the Advanced Level qualifications which determine the eligibility for the medical education.

It is clear that, the very decision made by the SLMC has deeply influenced the substantive rights and obligations of others, mainly the Petitioners. The decision of the SLMC gravely violates the future prospects of the professional life of the Petitioners. The right to equality of the Petitioners is prima facie in violation.

The 1st Respondent further argues that the application of the Petitioners is time barred. This argument is based on the one month rule in the Fundamental Rights Jurisdiction. The 1st Respondent ‘s position is that, the invoking of the Fundamental Rights jurisdiction should be taken place within one month from the alleged infringement and the Petitioners ought to have challenged the decision in the instance where they first came to know the decision. While justifying this contention in an unjust manner, the 1st Respondent states that, it was within the knowledge of the Petitioners that the decision of the SLMC influences their right to sit for the ERPM. It is apparent that, the decision of the SLMC is implemented in the year 2010. The Petitioners entered to the universities which have been recognized by the SLMC and thereby derived a legitimate expectation that, they will be given an opportunity to sit for the ERPM. The conduct of the Respondent SLMC based on their ultra vires decision- the decision to impose ‘pre entry qualification’ to medical studies overseas and or to sit for ERPM- had impacted upon such legitimate expectation of the petitioners, adversely. Further, the Petitioners resorted to this Court, at the failure to grant approval and it is clear that, they are entitled to redress their grievances as the said failure is clearly a continuing infringement of their right to equal protection of law.

It is clear to this court that, SLMC has arbitrarily imposed a pre-entry qualification for the provisional registration of the foreign medical graduates as the medical practitioners. It is apparent to this court that, the specific decision of the SLMC unjustly imposes a burden on the Petitioners over their professionalism and the purview of powers which has already been granted by the Medical Ordinance is overridden.

By concluding the judgement, this Court adopts the view that, the Fundamental Rights guaranteed to the Petitioners under the articles 12 (1) and 14 (1) (g) of the Constitution have been infringed by the act of Respondents which refused to grant permission to sit for the ERPM while imposing a pre-entry qualification against the law of the country. Thus, the Court reiterates on the fact that, the Respondents acted arbitrarily while making a decision which has influenced the substantive rights of the Petitioners in a great deal and orders the 1st Respondent to allow the Petitioners to sit for the ERPM.

Judge of the Supreme Court

Jayantha Jayasuriya, PC, CJ

I agree

Chief Justice

S. Thurairaja, PC, J

I agree

Judge of the Supreme Court

IN THE SUPREME COURT OF DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

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

Case No: SCFR 442/2019

Shamini Jayathilaka Dissanayake,

Pathakada,

Pelmadulla.

Petitioner

Vs

1. Sri Lanka Medical Council,
   31, Norris Canal Road,
   Colombo 10.

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

Respondents

Before: L.T.B.Dehideniya J,

P.Padman Surasena, J,

S. Thurairaja, PC, J,

Counsels: Romesh de Silva PC with Sugath Caldera and Niran Ankarel for Petitioner.

Manohara de Silva PC with Imalka Abeysinghe and H. Kumarage for the 1st Respondent

Mahendra Kumarasinghe with Isansi Dantanarayana for Petitioner seeking to intervene instructed by Jayarani Kumarasinghe

Suren Gnanaraj, SSC for the Attorney General

Argued on: 02.03.2020

Decided on: 23.07.2020

L.T.B.Dehideniya, J

The parties in FR 443/2019 AND 444/2019 agreed to abide by this judgement. Therefore this judgement has the binding effect in all the said cases.

The Petitioner invokes the jurisdiction of this court alleging the infringement of her Fundamental Rights guaranteed under the Articles 12 (1) and the 14 (1) (g) of the Constitution by the Respondents.

The Petitioner states that, she has received medical education from the foreign universities and was awarded the relevant degrees of medicine after the completion of the specific periods of study. The Petitioner further states that, having obtained their degrees of medicine she returned to Sri Lanka and sought approval from the Sri Lanka Medical Council (hereinafter sometime called as 'SLMC') to sit for the Examination for Registration to Practise Medicine (hereinafter sometime called as 'ERPM') but the approval has not been granted. As per the contention of the Petitioner, the 1st Respondent has imposed a pre-entry qualification on the medical graduates from foreign universities which is bad in law and this application invoking the Fundamental Rights jurisdiction basically challenges the conduct of the 1st Respondent on the failure to grant permission to sit for the ERPM as grossly indefensible, unreasonable, arbitrary, capricious mala fide, unfair which involves in the violation of the principles of legitimate expectation, natural justice and reasonableness.

The 1st Respondent's contention is that the Petitioner does not possess the relevant qualifications. The 1st Respondent further states that, the Petitioner is not qualified to sit for the ERPM as she has not acquired the G.C.E Advanced Level qualification as adopted by the 1st Respondent in February 2010 as per the powers vested on the SLMC in terms of the section 29 (1) (b) (ii) (cc) of the Medical Ordinance.

Section 29(2) deals with provisional registration as a medical practitioner and provisions relating to such registration for a person who hold a degree of Bachelor of Medicine from a foreign university which is recognized by the SLMC are as follows.

The section 29 (2) of the Medical Ordinance states,

(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 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

The section 29 (2) (cc) of the Medical Ordinance reads as follows,

'.....has passed the special examination prescribed in that behalf by the Medical Council'.

As per the aforesaid section 29(2)(iii)(bb)(i) of the Medical Ordinance, it is clear that, in addition to the requirement of having a good character (as sets out in Section 29(2)(a)), the most imperative requirement which is essential to be entitled for the provisional registration as a medical professional is the possession of a degree of a Bachelor of Medicine or an equivalent qualification of any university or a medical school of any country other than Sri Lanka, which is recognized by the SLMC. Further, the section gives a deep emphasis on the standards of medical education of such university or medical school. It is clear to this court that, the section 29 (2) of the Medical Ordinance surfaces two important facts. The first among such facts insists that, Sri Lanka has emphasized the freedom of medical education within or outside the country. Thus, the law facilitates the medical education in local and foreign universities. The second foremost fact signified by the section is the recognition which is given by the SLMC on the universities imparting medical knowledge. The Medical Ordinance has expressly recognized the freedom of Sri Lankan students to receive the foreign medical education.

The section 29(2)(iii)(cc) further stresses on the passing of a special examination prescribed in that behalf by the SLMC.

It is evident to this court that, the Petitioner of this case has complied with the section 29 (2)(iii)(bb)(i) of the Medical Ordinance, where she has attended and obtained medical degrees and equivalent qualifications from the foreign universities recognized by the SLMC. Subsequent to her university education, she requested the SLMC to issue a degree approval certificate which is a pre-condition to sit for the ERPM exam but until the institution of this

action the Petitioner has not received a response and not been permitted up to date by the SLMC to sit the ERPM.

The details of the university of the Petitioner are as follows:

SC.FR/442/2019

Name of the Petitioner	**University**	**Year**
Shamini Jayathilaka Disanayake	Vitebsk State Medical University	2013

As per the provisions of the Medical Ordinance, SLMC is recognized as a corporate body which has a power to grant and issue provisional registration to the persons satisfying the requisite criteria under the Ordinance. The section 29(2)(iii)(cc) of the Medical Ordinance further empowered to prescribe special examinations which are to be followed by the relevant medical graduates. The authority of the SLMC is extended to carry out the ERPM under the said provisions.

The prominent attention of the Petitioner has been positioned on the pre-entry qualification imposed by the SLMC. The pre-entry qualification specifies as a mandatory educational entry qualification to follow courses in medicine/ dentistry which necessitates "Those who enter foreign medical schools from 01.June 2010 onwards should have obtained passes in Biology, Chemistry and Physics/Mathematics with credits in at least two of these subjects at the G.C.E. (Advanced Level) Sri Lanka or ....."(1R5 of case no SC/FR/399/2019)

The Petitioner holds that, the imposition of a pre-entry qualification is unreasonable, not justifiable and ultra-vires. The matter which is insisted by the Petitioner is that, even though she has complied with the black letter law of the country, imposition of the pre-entry qualification through an ultra vires decision has barred her illegally.

In S.F. Zamrath v. Sri Lanka Medical Council & Others (S.C.F.R.Application No: 119/2019 SC minutes of 23.07.2019), this court elaborated the purview which SLMC has been granted by law. There, the court has accepted that administrative authorities are bound to meet the challenging 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....'

The imposition of the pre-entry requirement was further seen as an instance where the SLMC has overridden its powers.

> *'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'.*

The obligation on the part of the SLMC to comply with the provisions of the Medical Ordinance was further emphasized by his Lordship Justice Padman Surasena, in S.M Halpe & Others v. Dr. Anil Jayasinghe (S.C.F.R.Application No: 54/2019). His Lordship stated,

> *'The entitlement of the Petitioner 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.....Thus, the SLMC is denying 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.'*

The speciality of his Lordship's statement lies on the fact that, he recognized the provisional registration guaranteed under the section 29 (2) of the Medical Ordinance as an entitlement. This signifies the very fact that, provisional registration does amount to a right which is sprung from the law of the country.

In the present application, SLMC fails to grant the approval to sit for the ERPM, thereby impeding the right of the Petitioner for provisional registration. It is very clear to this court that, SLMC's conduct resembles the usurpation of powers of the Parliament which stands as the supreme legislative authority of the country. Further, it is surprising to see the arbitrariness of the SLMC which alters the procedures and laws of the country. The very essence of the view expressed by his Lordship Justice Padman Surasena in S.M Halpe & Others v. Dr. Anil Jayasinghe (Supra) emphasizes that, SLMC has no power to take out a right which has been granted by the law.

The same view was held in the FR applications 149/2019 and 145/2019 where this court held a similar notion on the supremacy of the Parliament and the regulatory authority of the SLMC. Thus, this court's view was that, ordinary law of the land is predominant and a law which was passed by the Parliament cannot be overridden by a regulation which has arbitrarily imposed by a subordinate authority.

The 1st Respondent's contention is that the court had held in the case of Zamrath (supra) that the pre-entry qualification of Advanced Level was held to be illegal only on the ground of violating the legitimate expectation and in the present case the requirement was imposed in 2010 and therefore the said judgment has no application. I cannot agree with this argument. In the said case the court had considered two aspects, that is, the violation of legitimate expectation and the ultra-vires nature of the SLMC decision. It has been held in the said case that,

> *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.

Further, it was held that, depriving the right to sit for ERPM does amount to a severe violation of the future prospects of professional life of the medical graduates.

It is pertinent to note that, the Parliament being the Supreme legislative body of the country has approved a certain level of minimum qualification to enter in to the medical education. In General Sir John Kotelawala Defence University (Special Provisions) Act No: 17 of 2018, by its section 2 (a) specifies that

'The General Sir John Kotelawala Defence University shall have the power to absorb those students who have obtained basic qualifications from among the students who have registered with the South Asian Institute of Technology and Medicine (hereinafter referred to as the 'SAITM') .....

Further, the section 2(c) states,

'to award to those students having basic qualifications and have completed the study programme leading to the award of the MBBS Degree at the SAITM on or before the appointed date.'

The section 4 of the act, interprets the term 'basic qualification' to mean,

'minimum of S grade (simple) pass in Chemistry, Physics and Biology at the G.C.E. (Advanced level) examination conducted by the Examinations Department of the Ministry of Education of Sri Lanka ..... or an equivalent foreign qualification...'

The wordings of the act clearly show the intention of the Parliament. The intention of the Parliament reflects that, the minimum qualification to be eligible for the MBBS degree is 'minimum of S grade pass in Chemistry, Physics and Biology'. Thus, it is evident that, the Parliament has given the freedom to accept the minimum qualification as 3 'S' passes. Medical Ordinance being the main legal enactment is silent on the requirement as to the minimum qualification. This manifests that, the minimum qualification to study medicine is a matter to be decided by the specific university based on the relevant criteria. It is evident that, SLMC cannot influence the decisions of the relevant universities and to impose their own qualifications.

The first Respondent's argument is that he is entitled to prescribe a special examination for foreign medical graduates under S 29 (2) (ii) (cc) of the Medical Ordinance. The Medical Ordinance permits the SLMC to prescribe a special examination for the foreign medical graduates. It has to be a 'special examination'. At present the SLMC is holding an examination called "Examination to Register Practice Medicine" (ERPM). Unless the foreign graduate passes this examination he does not become entitled to 'Register Practise Medicine'. Under this Section the SLMC is not empowered to prescribe any pre-entry qualifications to enter into a foreign university. It is a matter for the said university to decide what the pre-entry qualifications should be. The SLMC can evaluate the said university and grant or refuse recognition. Other than granting or refusing recognition to the said university or medical school, the SLMC cannot decide the pre-entry qualifications. Nor the SLMC is empowered to impose further restrictions to sit for the ERPM other that the requisites stipulated by the statue. Therefore, I do not agree with the argument of the first Respondent in that regard.

This court sees a grave misunderstanding on the part of the 1st Respondent over the powers which have been allocated by the law. The SLMC, by section 29 (2) (cc) is empowered to hold examinations to select the suitable medical practitioners from among the medical graduates in the country. The section allows no interference with the Advanced Level qualifications which determine the eligibility for the medical education.

It is clear that, the very decision made by the SLMC has deeply influenced the substantive rights and obligations of others, mainly the Petitioner. The decision of the SLMC gravely violates the future prospects of the professional life of the Petitioner. The right to equality of the Petitioner is prima facie in violation.

The 1st Respondent further argues that the application of the Petitioner is time barred. This argument is based on the one month rule in the Fundamental Rights Jurisdiction. The 1st Respondent 's position is that, the invoking of the Fundamental Rights jurisdiction should be taken place within one month from the alleged infringement and the Petitioner ought to have challenged the decision in the instance where she first came to know the decision. While justifying this contention in an unjust manner, the 1st Respondent states that, it was within the knowledge of the Petitioner that the decision of the SLMC influences their right to sit for the ERPM. It is apparent that, the decision of the SLMC is implemented in the year 2010. The Petitioner entered to the university which has been recognized by the SLMC and thereby derived a legitimate expectation that, they will be given an opportunity to sit for the ERPM.

The conduct of the Respondent SLMC based on their ultra vires decision- the decision to impose 'pre entry qualification' to medical studies overseas and or to sit for ERPM- had impacted upon such legitimate expectation of the petitioner, adversely. Further, the Petitioner resorted to this Court, at the failure to grant approval and it is clear that, she is entitled to redress her grievance as the said failure is clearly a continuing infringement of her right to equal protection of law.

It is clear to this court that, SLMC has arbitrarily imposed a pre-entry qualification for the provisional registration of the foreign medical graduates as the medical practitioners. It is apparent to this court that, the specific decision of the SLMC unjustly imposes a burden on the Petitioner over her professionalism and the purview of powers which has already been granted by the Medical Ordinance is overridden.

By concluding the judgement, this Court adopts the view that, the Fundamental Rights guaranteed to the Petitioner under the articles 12 (1) and 14 (1) (g) of the Constitution have been infringed by the act of Respondents which refused to grant permission to sit for the ERPM while imposing a pre-entry qualification against the law of the country. Thus, the Court reiterates on the fact that, the Respondents acted arbitrarily while making a decision which has influenced the substantive rights of the Petitioner in a great deal and orders the 1st Respondent to allow the Petitioner to sit for the ERPM.

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 application under and in terms of 126(2) of the Constitution of the Republic of Sri Lanka

Batuwana Dewage Lionel Hemakumara,
No. 681 2/2, Hospital Place,
New Town,
Embilipitiya.

SC FR Application No. 451/2016

Petitioners

-Vs-

1) Ruwan Gunasekara,
   Superintendent of Police,
   Director,
   Discipline and Conduct Division,
   Police Headquarters,
   Colombo 01.

2) Ajith Rohana,
   Deputy Inspector General,
   Discipline and Conduct Division,
   Police Headquarters,
   Colombo 01.

3) Pujitha Jayasundara,
   Inspector General of Police,
   Police Headquarters,
   Colombo 01.

4) P.H. Manatunga,
   Chairman

5) S.T. Hettige,
   Member,

6) Savithree D. Wijesekara,
Member,

7) Y.L.M. Zawahir,
Member,

8) B.A. Jeyanadan,
Member,

9) Tilak Collure,
Member,

10) Frank De Silva,
Member,

The 4th to 10th Respondents, all of National Police Commission,
Block No.09, BMICH Premises,
Bauddaloka Mawatha,
Colombo 07.

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

Respondents

Before: Sisira J de Abrew, J
Vijith K. Malalgoda, PC J. and
Murdu N.B.Fernando, PC J.

Counsel: Sanjeewa Ranaweera for the Petitioner
Dr. Avanthi Perera SSC for the Respondent.

Argued on: 01.10.2018

Decided on: 29.07.2020

Murdu N.B. Fernando, PC J.

The Petitioner filed this application in December 2016, seeking inter-alia a declaration that the Respondents have violated the Petitioners' fundamental rights guaranteed under Article 12(1) of the Constitution. Leave to proceed was granted to the Petitioner by this Court 28-02-2018.

The relevant facts as stated by the Petitioner before this Court are as follows: -

The Petitioner joined the Sri Lanka Police Reserve as a Reserve Sub-Inspector in January 1990. In the year 1999, whilst he was serving at the Embilipitiya Police Station he was arrested in connection with an alleged murder and two days thereafter his services were suspended with immediate effect.

In the year 2007, he was indicted before the High Court by the Attorney General and in December 2011 he was acquitted from the said charge.

Subsequent to the said acquittal, he made a request that he be re-instated in service, and the Police conducted a preliminary investigation in respect of the said incident. On 09-04-2013 he was charge sheeted and a formal disciplinary inquiry was held. The Petitioner was not informed of the outcome of the said inquiry.

Thereafter, in April 2015 he was again requested to present himself at a disciplinary inquiry which he did. At the inquiry it was revealed that the said inquiry pertained to the same charge sheet served on the Petitioner earlier and the inquiry was indefinitely postponed.

In January 2016, the Petitioner moved this Court by way of a Fundamental Rights Application (SC/FR 01/2016) challenging the holding of the 2nd inquiry. Whilst this Court granted the Petitioner Leave to Proceed and fixed the matter for hearing, the 2nd inquiry proceeded and by a letter dated 22-08-2016 (P12) the Petitioner was informed that by 3rd Respondents' Disciplinary Order dated 19-08-2016, the Petitioner was re-instated in service with immediate effect subject to certain conditions. In response to same, the Petitioner reported for duty.

Thereafter, by a letter dated 30-08-2016, the Petitioner appealed to the 2nd Respondent to pay him back wages for the period that the Petitioner was suspended from service. By letter dated 27-09-2016 (P14) the said appeal was turned down. Being aggrieved by the said decision which the Petitioner pleads is arbitrary, unreasonable, irrational, unlawful, contrary to principles of natural justice and doctrine of legitimate expectation and thus a continuing

violation of his fundamental rights guaranteed under Article 12(1) of the Constitution, the Petitioner came before this Court by way of the instant application.

The 3rd Respondent by an affidavit filed before this Court, raised a preliminary objection that the Petitioners' application is time barred. The said Respondent also pleaded that in any event the Petitioner being a reservist is only entitled to daily wages based on his active service. The Petitioners' re-instatement was not back dated; the Petitioner cannot claim back wages for the period of suspension from service i.e. 04.10.1999 to 19.08.2016 since he was not in active service. Thus, the Respondent pleaded that the Petitioner has failed to establish a violation of his fundamental rights guaranteed under Article 12(1) of the Constitution.

It is observed that the Petitioner did not challenge or respond to the said Respondents' affidavit.

Having referred to the factual matrix of this application let me now move onto examine the legal implications pertaining to this application.

The Counsel for the Petitioners' main submission before us, was that the Petitioner was deprived of back wages for the period of suspension of service and that the Respondents did not give reasons for such decision. The Respondents on the other hand contended that the Petitioner being a reservist is not entitled for wages as he was not in active service and in any event the application was time barred.

Thus, the first matter this Court has to examine is whether the Petitioner has complied with the provision of Article 126(2) of the Constitution.

Article 126(2) reads as follows: -

> "Where any person alleges that any such fundamental 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…."

The scope of the above section has been extensively analyzed by this Court in many an instance and the mandatory nature of the one-month rule stipulated therein has been consistently and unreservedly accepted. Similarly, in a long line of judicial authorities the

limited circumstances under which the said mandatory rule of one month may be relaxed or exempted has also been precisely laid down.

I wish to refer to a few judicial decisions, where Article 126(2) and the principles governing same were examined by this Court.

In **Muthuweeran Vs The State 5 Srikantha's Law Reports 123 at page 130** Sharvananda, CJ., observed:

> *"Because the remedy under Article 126(2) is thus guaranteed by the Constitution, a duty is imposed upon the Supreme Court to protect fundamental rights and ensure their vindication. Hence Article 126(2) should be given a generous and purposive construction."*

In **Namasivayam Vs Gunawardene [1989] 1 SLR 394** the said position was re-affirmed by Sharvananda, CJ.

In **Edirisuriya Vs Navaratnam and others [1985]1 SLR 100** where an arrest and detention under Emergency Regulation was challenged, Ranasinghe J (as he then was) having referred to many unreported judgements, at page 105 stated as follows: -

> *"This Court has consistently proceeded on the basis that the time of one month set out in Article 126(2) of the Constitution in mandatory."*

However, his Lordship at page 106 went onto state;

> *"A solemn and sacred duty has been imposed by the Constitution upon this Court, as the highest Court of the Republic, to safeguard the fundamental rights which have been assured by the Constitution to the citizens of the Republic as part of their intangible heritage. It, therefore behoves this Court to see that the full and free exercise of such rights is not impeded by any flimsy and unrealistic considerations."*

Thus, this Court has jealously maintained its guardianship to give relief to and protect a person whose fundamental rights have been infringed by executive and administrative

actions and entertain an application made outside the said time limit of one month, where the Petitioner in the Petition itself provides an adequate excuse in the delay in presenting a petition.

The above stated position was re-iterated by Mark Fernando, J. in **Gamaethige Vs Siriwardene and others [1988]1 SLR 384** and a generous and purposive construction was given to the said rule in the following terms:

> *"While the time limit is mandatory, in exceptional cases, on an application of the principle lex non cogil 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" (vide p. 402)*

In this case, the Petitioner was a clerk in the General Clerical Service and applied for quarters and was placed in a waiting list. At a particular point of time his name was removed. Years later he made a request to restore his name in the waiting list and when it was refused he appealed to multiple authorities. His Lordship after considering and evaluating many judicial authorities considered the aspect that has emerged from the decisions of this Court with regard to time spent on appeals or other relief and went on to hold as follows: -

> *"If a person is entitled to institute proceedings under Article 126(2) in respect of an infringement at a certain point in time, the filling of an appeal or application for relief, whether administrative or judicial, does not in any way prevent or interrupt the operation of the time limit." (vide page 396)*

Hence, our Courts have categorically held that pursuing other avenues of relief will not intercept the period of one month.

In the recent past, the long line of decided cases on Article 126(2) was extensively discussed and analyzed by Prasanna Jayawardena, J. in an illuminating judgement **Demuni de Zoysa Vs Dissanayake SC/FR 206/2008 decided on 09.12.2016.**

The principles governing Article 126(2) were applied by his Lordship to the facts of the said case pertaining to rights of public servants by sequentially posing three questions, the first being when did the infringement occur or when did the Petitioner become aware of the infringement?

If I may raise or pose the same question in the instant application, when did the Petitioner become aware of the violation of his fundamental rights? Is it one month before

filling this action or is it prior to that? The answer to the said query in my view would determine whether this application is time barred or not.

The instant application was filed before this Court on 19-12-2016. It is not disputed that the 3rd Respondents' Disciplinary Order was served on the Petitioner (P12) and he reported for duty on 22-08-2016. On 30-08-2016 (P13) he appealed for back wages and by letter dated 27-09-2016 (P14) the appeal was turned down. Thus, it is apparent on the said documents filed before this Court by the Petitioner that jurisdiction of this Court has not been invoked within one month of the alleged violation.

The contention of the Respondents was that the petition was time barred by four months. The Petitioners' response was twofold. *Firstly,* the Petitioner submitted he came before Court no sooner he was in receipt of P14 dated 27.09.2016 which the Petitioner alleged to be on 22.11.2016, approximately two months after the issuance of the letter.

It is observed by this Court that the date of receipt of P14 as alleged by the Petitioner is disputed by the Respondents. There is no evidence before Court to establish that the Petitioner in fact received P14 on 22.11.2016 except the bare averment of the Petitioner in the affidavit. Hence, the said circumstances in my view gives credence to the submission of the Respondents that this application is time barred. In any event as the ratio laid down in **Gamaethiges'** case referred to earlier, filling an appeal or application for relief (P13) will not in any way prevent or interrupt the operation of the time limit of one month. Thus, in my view this cause of action will not give a new lease of life to an application which is already time barred.

Secondly, the Petitioner contended with regard to P12, the document by which the Petitioner was re-instated in service, did not spell out reasons for depriving the Petitioner of back wages nor the basis upon which the period of suspension from service was considered, a period in which the Petitioner was not in active service. Hence, the Petitioner argued, the material document to be considered is not P12 but P14.

To substantiate the said proposition, the Petitioner relied on the Court of Appeal decision in **Kegalle Plantations Ltd. Vs Silva and others [1996] 2 SLR 180**, and submitted that unless a party can discover the reasoning behind the decision, he is unable to say whether it is reviewable or not and will be deprived of the protection of the law. Hence, the Petitioner argued that since P12, the letter of re-instatement did not disclose the reasons for the decision therein, that the time stipulated to come before the Supreme Court will not begin to run from the receipt of P12. The Petitioner also relied on the legal maxim *Lex non cogit ad impossibilia*, that law does not require a man to do what is impossible to further substantiate his position.

It is observed that the aforesaid **Kegalle Plantations case** relied upon by the Petitioner pertains to a writ application and where an inquiry conducted by the Commissioner of Labour under Termination of Employment of Workmen (Special Provisions) Act was challenged. The learned Judge in the said case referred to the present trend or the rubric running throughout public law that those who give administrative decisions should give reasons for its decision which is implicit in the requirement of a fair hearing and should be considered from the said perspective. While appreciating the learned Judges' views on reasons to be a *sine qua non* for a fair hearing and be within the ambit of natural justice, the fundamental question that relates to determine whether a matter is time barred or not is when did the Petitioner become aware of the violation of the fundamental right or in simple terms non-payment of back wages. From the letter of re-instatement P12, it is clearly seen that the Petitioners' re-instatement effective from 19-08-2016 is conditional i.e. for the period the Petitioner was not in-service no payments will be made. Thus, the Petitioner was aware upon receipt of P12 that he will not be paid for the period of non-employment.

It is a matter of interest that upon receipt of P12 and being aggrieved by the conditions therein, the Petitioner as stated earlier by letter dated 30-08-2016 (P13) made an appeal to the 3rd Respondent for payment of back wages, and by P14 the decision of non-payment of back wages was confirmed by the said Respondent and was further justified with reasons. Thus, upon the said perspective too, I see no merit to excuse the delay of the Petitioner to invoke the jurisdiction of this Court.

Hence, having considered the said submissions presented by the Petitioner, I am of the view that in the instant application time starts to run upon the Petitioner first becoming aware of the occurrence of the infringement of his fundamental rights and not on the alleged date of receipt of P14 as contended by the Petitioner.

In the said circumstances, for the reasons stated above, I uphold the objection of the Respondents that the application of the Petitioner is time barred.

Thus, this application could have been dismissed *in limine*. Nevertheless, since both parties were heard on the merits of the application, in the interest of justice, I would now move on to consider whether the Petitioner has established before this Court that he has been discriminated and if so, whether it is against a similarly circumstanced person and/or the Petitioner has been differently treated by the Respondents or whether in effect there was a violation of the Petitioners' fundamental rights guaranteed under Article 12(1) of the Constitution.

In order to substantiate his case, the main submission of the Petitioner before this Court was twofold. *Firstly,* that he was deprived of back wages for 17 years and no reasons were

given for such decision and therefore non-granting of reasons itself amounts to a violation of his fundamental rights. *Secondly,* that he being a police reservist should be considered in the same vein as a member of the regular police force and all rights and entitlement of a member of the regular police force pertaining to wages should be granted to the Petitioner as well.

It is undisputed as stated earlier, that the Petitioner, a police reservist, was suspended from service with effect from 04-10-1997. In 2007, the Petitioner was indicted on a charge of murder and in 2011 acquitted from the said charge. Thereafter, whilst still under suspension from service the Petitioner was charge sheeted for violation of police departmental orders. Thus, the Petitioner continued to be a reservist under suspension of his services until he was re-instated (by P12) and assumed office on 22-08-2016 although the Police Reservists Service was abolished in the year 2006.

The letter of re-instatement (P12) specifically referred that the period of suspension would deem to be considered a period not in active service and not entitled to any payment or allowances and if requisite qualifications are fulfilled that the Petitioner may be absorbed into the regular force. Consequent to his appeal for back wages (P13) as observed earlier, by letter dated 27-09-2016 (P14), the Petitioner was categorically informed that he cannot be paid back wages and allowances for the period of suspension in terms of IGP's Circular bearing no 1044/92 since the allowances of police reservists are based upon their period of service. In the said letter (P14), reference was also made to Public Service Commission Circular No 02/2014, wherein a period of active service is defined as a period upon which a person was drawing a salary and was actually performing a service, and the Petitioner was informed that the period in which the Petitioner was not performing a service and was not on duty cannot be considered as a period of active service.

Hence, the question I wish to examine now is whether the Petitioner being a reservist can stake a claim or is entitled to wages during the period of suspension from service.

Petitioners' entire case is based upon the fact that the Petitioner although is a reservist, is drawing a monthly salary as a member of the regular police force and that the Petitioner is entitled to his monthly wages and being a reservist has no bearing to such entitlement. To substantiate the said argument, the Petitioner relies on IGP'S Circulars bearing Nos. 1044/92 and 1044/92 (1) (P15a and P16a) issued in December 1992. By the said Circulars the terms and conditions of the Sri Lanka Reserve Police Service was amended in order to pay the reservists a monthly salary instead of the daily wages that was been paid up to that time.

However, as contended by the Respondents, for reservists unlike for members of the regular police force, the entitlement for leave was based proportionate to the number of days worked during a month and (though the reservists were paid once a month) it was based upon work actually performed as opposed to the regular force.

Further, it is observed that IGP's Circulars bearing No 1590/2001 and 1801/2004 (P16b and P16c) refers to the disciplinary control of a reservist and P16c specifically states that the Establishment Code provisions will not apply to reservists. According to the provisions laid down in the said Circulars, suspension and re-instatement of a reservist should be by the Commanding Officer of the Police Reservist Service following the procedure laid down therein.

The Police Reservist Service was abolished in 2006 although no material pertaining to same was tendered to Court and the Petitioner has not established the steps taken by him to safeguard his status when the Police Reservist Service was abolished. Thus, it can be construed that the Petitioner remained a reservist on suspension of service. The Petitioner did not challenge the manner and mode of the disciplinary inquiry and especially the procedure pertaining to his re-instatement and the date of re-instatement. Whilst admitting that he was re-instated only with effect from 22-08-2016 the Petitioner accepts and admits that he was not serving or was not on duty during the period October 1999 to August 2016, but staking a claim for back wages for the said 16 years.

Vide P12, the Petitioner was re-instated by the 3rd Respondent subject to certain conditions and the Petitioner has not challenged nor moved to quash the said decision of re-instatement before any Court. Vide P14, the Petitioner has been emphatically informed that active service is a period a person actually serves or works, drawing a salary. This decision of the Respondents is substantiated by P15b, the interpretation given by the Public Service Commission (4th to 10th Respondents) in respect of the said term, active service. The Petitioner has also failed to substantiate before this Court that he was actually working or performing a duty during the said period. In fact, his only ground of challenge is that no reasons have been given to him for the said decision reflected in P12 and P14 and thus it is null and void and upon the said basis is moving this Court alleging violation of a fundamental rights guaranteed under Article 12(1) of the Constitution.

In order to substantiate the above contention, the learned Counsel for the Petitioner relied on three cases, *firstly*, with regard to the submission that failure to give reasons is a denial of justice and an error of law the Petitioner relied on **Hapuarachchi and Others Vs Commissioner of Elections and another [2009] 1 SLR 1**.

In the said case, the Petitioners who formed a political party complained to this Court that the application for the registration of the party was refused by the Commissioner of Elections and that in the said communique no reasons were given. The Court after discussing a number of cases pertaining to Administrative Law principles and rules of procedural propriety held that although the Commissioner of Elections tendered to Court the reasons for his decision, the Commissioner of Elections has violated the Petitioners' fundamental rights

and directed the Commissioner of Elections to reconsider the application tendered by the Petitioners for registration of the party and give reasons and make a determination.

In my view, the aforesaid case where the Commissioner of Elections was directed by Court to give reasons and make a determination can be distinguished from the instant case. In the instant case, the Petitioner was in re-instated in service by the Respondent consequent to a disciplinary inquiry, subject to the condition that the Petitioner is deemed not entitled to any payment for the period of suspension as he was not on active service.

In **Hapuarachchis' case**, no reasons were given for the non-registration of the party. With regard to the instant case, reasons were given to the Petitioner for non-payment of back wages, not engaged in active duty or non-performance any official duty during the material period. Hence, I do not see any merit on the said ground propounded by the Petitioner before this Court that failure to give reasons is a denial of justice in order to establish that his fundamental rights had been violated by the Respondents.

Secondly, with regard to non-payment of back wages which the Petitioner termed as deprivation of back wages, the case relied upon by the Petitioner was **Coats Thread Lanka (Pvt) Ltd Vs Samarasundara [2010]2 SLR 1.** This case was an appeal from a LT application filed under the Industrial Disputes Act by an employee in respect of termination of service and restraint of trade. The employee therein independent to his normal duties was elected as a treasurer of a welfare association of the employer company. He was subsequently investigated by the company on allegations of corruption and was suspended from service without pay in order to conduct a full inquiry. Whilst the inquiry was pending, being informed he was employed elsewhere, the company considered the employee as having repudiated his contract of employment, terminated his employment. This Court in the afore said appeal, upheld that the termination of the services of the employee was justified.

However, with regard to placing the employee on suspension of service prior to termination of employment, JAN de Silva, CJ., in the afore said **Coats Thread case** after analyzing and discussing many authorities pertaining to labour law and employment and especially restraint of trade and observations of Lush, J in the landmark English case ***Hanley Vs Pease and Partners 1915(1) KB 698*** with regard to continuing contracts, held though the termination was justified, that the Petitioner was entitled to all wages deprived during the period of suspension pending inquiry. His Lordship further observed as follows: -

> *"The word "suspension" has at least two distinct meanings. It is sometimes used in a punitive sense i.e. punitive suspension. This is where a workman is prohibited from work and deprived of pay as punishment for some misconduct committed by the workman. Workers are also*

suspended in a secondly sense. That is where the worker is prohibited from entering the work place as an interim measure pending inquiry to facilitate such inquiry... [ ]... This is for the purpose of ascertaining whether the worker is guilty of any misconduct in order to decide whether the contract of employment should be terminated. The worker cannot be deprived of his wages during this period." (vide pages 12 and 13)

The Counsel for the Petitioner therefore relies on the said observations to establish that being deprived of wages the Petitioners' fundamental rights have been violated by the Respondents. In my view, there is a vast distinction between the **Coats Thread case** and the case under discussion.

In the instant application as referred to earlier, the Petitioner a reservist Police Officer was suspended from service in connection with a criminal offence, for which the Petitioner was indicted before the High Court. The circumstances under which the Petitioner was suspended from service cannot be compared with the grounds referred to in the **Coats Thread case** and the observations of His Lordship in the said case should not be blindly referred to by the Petitioner to stake a claim for back wages for a period of 16 years. Thus, the said case pertaining to a Labour Tribunal Appeal, in my view, has no relevance whatsoever to the matter in issue and can be distinguished from the instant application.

The Petitioner should substantiate his case, on the terms and conditions of his contract of service which he has failed to produce before this Court. The provisions of the IGP's Circulars referred to earlier, clearly indicates that terms and conditions of the Police Reservists Service is independent and different to the Regular Police Force of the Sri Lanka Police Force and that the provisions of the Establishment Code have no applicability to the Police Reservists. This also implies, the temporary nature of the Police Reservist Service.

The Respondents' contention was that police reservists drew a salary based upon the number of days actually served, as opposed to the regular force. The Petitioner has failed to meet the said submission. The Police Reservists Service has now been abolished. The letter of re-instatement of the Petitioner (P12) clearly indicates that the Petitioner will be absorbed into the Regular Police Force only if qualifications are fulfilled.

The Respondents have also taken up the position that active service has been interpreted by the Public Service Commission to mean, actually engaged in official functions whilst drawing a salary pertaining to an office and clearly the Petitioner does not fall within the said definition. The Petitioner has failed to meet the said contention too, except to say that his

services were never made inactive after a disciplinary procedure and thus he remained in active service during the period of suspension.

It appears that the Petitioner has equated not in 'active service' to being made 'inactive' after a disciplinary procedure. Neither the Petitioner nor the Respondents to this application have cited any authority or judgements to establish their contention before us, in respect of the above terminology. Nevertheless, in my view the plain reading of the terminology is sufficient to come to a correct finding in respect of this application.

However, the Counsel for the Petitioner is heavily relying on a recent judgement of this Court, **Seneviratne Vs Inspector General of Police and Others SC/FR 396/2010 decided on 30-11-2016,** to substantiate his case. The said case filed by a member of the Police Regular Force was with regard to non-payment of back wages during the period of interdiction. In the said case, the petitioner was indicted by the Commission to Investigate Allegations of Bribery and Corruption and was subsequently acquitted and re-instated. Thereafter, the police charge sheeted him and held a disciplinary inquiry where he was exonerated. In the said case, this Court after analyzing and examining the provisions of the Establishment Code held that depriving of back wages is a severe punishment. As stated earlier in **Seneviratnes' cas**e the petitioner was a member of the Regular Police Force. In the instant case, the Petitioner strenuously submitted before this Court that being a reservist and not a regular police officer has no bearing in respect of the monthly wage entitlement and that the Petitioner is entitled to his wages, whether in active service or otherwise just like any other member of the Regular Police Force.

I am unable to accept the said contention of the Petitioner. According to IGP's Circulars pertaining to police reservists (P15a, P16a, P16b and P16c) there is a clear distinction and a vast difference between police reservists and members of the regular force.

Regular Police Force is governed under the provisions of the Establishment Code, whereas the reservists are not and P16b IGP's Circular specifically refers to the said fact. Thus, a reservist cannot be considered and equated to a regular police officer. Regular Police Force comes under the purview of the National Police Commission whereas the Police Reservists Service is presently abolished.

In the aforesaid **Seneviratnes' case** the petitioner therein was charge sheeted and disciplinary inquiry held after being re-instated in service whereas the Petitioner in the instant application was charge sheeted and disciplinary inquiry held prior to being re-instated. Hence, in my view the said **Seneviratnes'case** can be distinguished from the case before us. The two cases cannot be compared for the reasons stated above.

Each case has to be considered on its own merits to determine whether the fundamental rights of an individual has been violated by the actions or the inactions of the relevant Respondents. In the case before this Court, the Petitioner in my view has failed to establish that his fundamental rights have been violated by the actions or the inactions of the Respondents.

For the reasons extensively discussed in the judgement, I hold that the Petitioner has failed to prove that he was discriminated by the Respondents or that the Petitioners' fundamental rights guaranteed under Article 12(1) of the Constitution were violated by the Respondents. Hence, for the aforesaid reasons, the Petition is dismissed.

The application is 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

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.

S.C.F.R APPLICATION 459/2019

1. Denushi Vindya Kasthuriarachchi
   No.109, Kingswood Park,
   Maya Terrace, Kiribathgoda.

PETITIONER

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

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

RESPONDENTS

Before: Jayantha Jayasuriya PC, CJ

L.T.B Dehideniya, J.

S. Thurairaja, PC, J.

Counsel: Chandana Liyanapatabendi P.C with Saduni Madhubashini and Hansini Bandaranayake instructed by Sanjay Fonseka for the Petitioner.

Manohara de Silva P.C instructed by Ms. Bashini Hettiarachchi for the 1st Respondent.

Suren Gnanaraj SSC for the A.G.

Argued on: 17.02. 2020
Decided on: 23.07.2020

L.T.B.Dehideniya, J

The application no: SC/FR 399/2019, 400/2019 & 459/2019 are on the same matter and the objections are also filed in the same manner. The parties agreed to argue these cases together and to abide by one judgement.

The Petitioner invokes the jurisdiction of this court alleging the infringement of her Fundamental Rights guaranteed under the Articles 12 (1) and the 14 (1) (g) of the Constitution by the Respondents.

The Petitioner states that, she has received medical education from the foreign universities and was awarded the relevant degrees of medicine after the completion of the specific periods of study. The Petitioner further states that, having obtained their degrees of medicine she returned to Sri Lanka and sought approval from the Sri Lanka Medical Council (hereinafter sometime called as 'SLMC') to sit for the Examination for Registration to Practise Medicine (hereinafter sometime called as 'ERPM') but the approval has not been granted. As per the contention of the Petitioner, the 1st Respondent has imposed a pre-entry qualification on the medical graduates from foreign universities which is bad in law and this application invoking the Fundamental Rights jurisdiction basically challenges the conduct of the 1st Respondent on the failure to grant permission to sit for the ERPM as grossly indefensible, unreasonable, arbitrary, capricious mala fide, unfair which involves in the violation of the principles of legitimate expectation, natural justice and reasonableness.

The 1st Respondent's contention is that the Petitioner does not possess the relevant qualifications. The 1st Respondent further states that, the Petitioner is not qualified to sit for the ERPM as she has not acquired the G.C.E Advanced Level qualification as adopted by the 1st Respondent in February 2010 as per the powers vested on the SLMC in terms of the section 29 (1) (b) (ii) (cc) of the Medical Ordinance.

Section 29(2) deals with provisional registration as a medical practitioner and provisions relating to such registration for a person who hold a degree of Bachelor of Medicine from a foreign university which is recognized by the SLMC are as follows.

The section 29 (2) of the Medical Ordinance states,

> *(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 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

The section 29 (2) (cc) of the Medical Ordinance reads as follows,

'.....has passed the special examination prescribed in that behalf by the Medical Council'.

As per the aforesaid section 29(2)(iii)(bb)(i) of the Medical Ordinance, it is clear that, in addition to the requirement of having a good character (as sets out in Section 29(2)(a)), the most imperative requirement which is essential to be entitled for the provisional registration as a medical professional is the possession of a degree of a Bachelor of Medicine or an equivalent qualification of any university or a medical school of any country other than Sri Lanka, which is recognized by the SLMC. Further, the section gives a deep emphasis on the standards of medical education of such university or medical school. It is clear to this court that, the section 29 (2) of the Medical Ordinance surfaces two important facts. The first among such facts insists that, Sri Lanka has emphasized the freedom of medical education within or outside the country. Thus, the law facilitates the medical education in local and foreign universities. The second foremost fact signified by the section is the recognition which is given by the SLMC on the universities imparting medical knowledge. The Medical Ordinance has expressly recognized the freedom of Sri Lankan students to receive the foreign medical education.

The section 29(2)(iii)(cc) further stresses on the passing of a special examination prescribed in that behalf by the SLMC.

It is evident to this court that, the Petitioner of this case has complied with the section 29 (2)(iii)(bb)(i) of the Medical Ordinance, where she has attended and obtained medical degrees and equivalent qualifications from the foreign universities recognized by the SLMC. Subsequent to her university education, she requested the SLMC to issue a degree approval certificate which is a pre-condition to sit for the ERPM exam but until the institution of this action the Petitioner has not received a response and not been permitted up to date by the SLMC to sit the ERPM.

The details of the university of the Petitioner are as follows:

SC.FR/400/2019

Name of the Petitioner	University	Year
A.L.M Rushdhaan	Tbilisi State Medical University – Georgia	2011
R. W.D.L.H. Rajasekara	Virgen Milagrosa University – Philippines	2008
M.L.M Nasly	Tbilisi State Medical University – Georgia	2010
D.N.de Silva	Tver State Medical University – Russia	2012
W.I. Madushani	Tver State Medical University – Russia	2012
Francis Vijitharan	Tbilisi State Medical University – Georgia	2010

SC.FR/ 399/2019

Name of the Petitioner	University	Year
M.R.N.Silva	Virgen Milagrosa University-Philippines	2012
M.D.K.P.M Bamunuge	Vitebsk State Medical University-Belarus	2011
V.G.H.E.K. Gunarathna	Tionjin Medical University- China	2012
M.N.F Nisadha	Tbilisi State Medical University – Georgia	2012
W.K.I. Dharmasena	Tver State Medical University – Russia	2011
M.S.M. Dhanasekara	Tbilisi State Medical University – Georgia	2012
Selvathurai Gobika	Vitebsk State Medical University-Belarus	2011
Emorian Fernando	Grodno State Medical University – Belarus	2012

SC.FR./459/2019

Name of the Petitioner	University	Year
Denushi Vindya Kasthuriarachchi	Tbilisi State Medical University – Georgia	2013

As per the provisions of the Medical Ordinance, SLMC is recognized as a corporate body which has a power to grant and issue provisional registration to the persons satisfying the requisite criteria under the Ordinance. The section 29(2)(iii)(cc) of the Medical Ordinance further empowered to prescribe special examinations which are to be followed by the relevant medical graduates. The authority of the SLMC is extended to carry out the ERPM under the said provisions.

The prominent attention of the Petitioner has been positioned on the pre-entry qualification imposed by the SLMC. The pre-entry qualification specifies as a mandatory educational entry qualification to follow courses in medicine/ dentistry which necessitates "Those who enter foreign medical schools from 01.June 2010 onwards should have obtained passes in Biology, Chemistry and Physics/Mathematics with credits in at least two of these subjects at the G.C.E. (Advanced Level) Sri Lanka or ....."(1R5 of case no SC/FR/399/2019)

The Petitioner holds that, the imposition of a pre-entry qualification is unreasonable, not justifiable and ultra-vires. The matter which is insisted by the Petitioner is that, even though she has complied with the black letter law of the country, imposition of the pre-entry qualification through an ultra vires decision has barred her illegally.

In S.F. Zamrath v. Sri Lanka Medical Council & Others (S.C.F.R.Application No: 119/2019 SC minutes of 23.07.2019), this court elaborated the purview which SLMC has been granted by law. There, the court has accepted that administrative authorities are bound to meet the challenging 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...'*

The imposition of the pre-entry requirement was further seen as an instance where the SLMC has overridden its powers.

> *'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'.*

The obligation on the part of the SLMC to comply with the provisions of the Medical Ordinance was further emphasized by his Lordship Justice Padman Surasena, in S.M Halpe & Others v. Dr. Anil Jayasinghe (S.C.F.R.Application No: 54/2019). His Lordship stated,

> *'The entitlement of the Petitioner 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.....Thus, the SLMC is denying 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.'*

The speciality of his Lordship's statement lies on the fact that, he recognized the provisional registration guaranteed under the section 29 (2) of the Medical Ordinance as an entitlement. This signifies the very fact that, provisional registration does amount to a right which is sprung from the law of the country.

In the present application, SLMC fails to grant the approval to sit for the ERPM, thereby impeding the right of the Petitioner for provisional registration. It is very clear to this court that, SLMC's conduct resembles the usurpation of powers of the Parliament which stands as

the supreme legislative authority of the country. Further, it is surprising to see the arbitrariness of the SLMC which alters the procedures and laws of the country. The very essence of the view expressed by his Lordship Justice Padman Surasena in S.M Halpe & Others v. Dr. Anil Jayasinghe (Supra) emphasizes that, SLMC has no power to take out a right which has been granted by the law.

The same view was held in the FR applications 149/2019 and 145/2019 where this court held a similar notion on the supremacy of the Parliament and the regulatory authority of the SLMC. Thus, this court's view was that, ordinary law of the land is predominant and a law which was passed by the Parliament cannot be overridden by a regulation which has arbitrarily imposed by a subordinate authority.

The 1st Respondent's contention is that the court had held in the case of Zamrath (supra) that the pre-entry qualification of Advanced Level was held to be illegal only on the ground of violating the legitimate expectation and in the present case the requirement was imposed in 2010 and therefore the said judgment has no application. I cannot agree with this argument. In the said case the court had considered two aspects, that is, the violation of legitimate expectation and the ultra-vires nature of the SLMC decision. It has been held in the said case that,

> *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.*

Further, it was held that, depriving the right to sit for ERPM does amount to a severe violation of the future prospects of professional life of the medical graduates.

It is pertinent to note that, the Parliament being the Supreme legislative body of the country has approved a certain level of minimum qualification to enter in to the medical education. In General Sir John Kotelawala Defence University (Special Provisions) Act No: 17 of 2018, by its section 2 (a) specifies that

> *'The General Sir John Kotelawala Defence University shall have the power to absorb those students who have obtained basic qualifications from among the students who have registered with the South Asian Institute of Technology and Medicine (hereinafter referred to as the 'SAITM') .....*

Further, the section 2(c) states,

> *'to award to those students having basic qualifications and have completed the study programme leading to the award of the MBBS Degree at the SAITM on or before the appointed date.'*

The section 4 of the act, interprets the term 'basic qualification' to mean,

> *'minimum of S grade (simple) pass in Chemistry, Physics and Biology at the G.C.E. (Advanced level) examination conducted by the Examinations Department of the Ministry of Education of Sri Lanka ..... or an equivalent foreign qualification...'*

The wordings of the act clearly show the intention of the Parliament. The intention of the Parliament reflects that, the minimum qualification to be eligible for the MBBS degree is 'minimum of S grade pass in Chemistry, Physics and Biology'. Thus, it is evident that, the Parliament has given the freedom to accept the minimum qualification as 3 'S' passes. Medical Ordinance being the main legal enactment is silent on the requirement as to the minimum qualification. This manifests that, the minimum qualification to study medicine is a matter to be decided by the specific university based on the relevant criteria. It is evident that, SLMC cannot influence the decisions of the relevant universities and to impose their own qualifications.

The first Respondent's argument is that he is entitled to prescribe a special examination for foreign medical graduates under S 29 (2) (ii) (cc) of the Medical Ordinance. The Medical Ordinance permits the SLMC to prescribe a special examination for the foreign medical graduates. It has to be a 'special examination'. At present the SLMC is holding an examination called "Examination to Register Practice Medicine" (ERPM). Unless the foreign graduate

passes this examination he does not become entitled to 'Register Practise Medicine'. Under this Section the SLMC is not empowered to prescribe any pre-entry qualifications to enter into a foreign university. It is a matter for the said university to decide what the pre-entry qualifications should be. The SLMC can evaluate the said university and grant or refuse recognition. Other than granting or refusing recognition to the said university or medical school, the SLMC cannot decide the pre-entry qualifications. Nor the SLMC is empowered to impose further restrictions to sit for the ERPM other that the requisites stipulated by the statue. Therefore, I do not agree with the argument of the first Respondent in that regard.

This court sees a grave misunderstanding on the part of the 1st Respondent over the powers which have been allocated by the law. The SLMC, by section 29 (2) (cc) is empowered to hold examinations to select the suitable medical practitioners from among the medical graduates in the country. The section allows no interference with the Advanced Level qualifications which determine the eligibility for the medical education.

It is clear that, the very decision made by the SLMC has deeply influenced the substantive rights and obligations of others, mainly the Petitioner. The decision of the SLMC gravely violates the future prospects of the professional life of the Petitioner. The right to equality of the Petitioner is prima facie in violation.

The 1st Respondent further argues that the application of the Petitioner is time barred. This argument is based on the one month rule in the Fundamental Rights Jurisdiction. The 1st Respondent 's position is that, the invoking of the Fundamental Rights jurisdiction should be taken place within one month from the alleged infringement and the Petitioner ought to have challenged the decision in the instance where she first came to know the decision. While justifying this contention in an unjust manner, the 1st Respondent states that, it was within the knowledge of the Petitioner that the decision of the SLMC influences their right to sit for the ERPM. It is apparent that, the decision of the SLMC is implemented in the year 2010. The Petitioner entered to the university which has been recognized by the SLMC and thereby derived a legitimate expectation that, they will be given an opportunity to sit for the ERPM. The conduct of the Respondent SLMC based on their ultra vires decision- the decision to impose 'pre entry qualification' to medical studies overseas and or to sit for ERPM- had impacted upon such legitimate expectation of the petitioner, adversely. Further, the Petitioner resorted to this Court, at the failure to grant approval and it is clear that, she is entitled to redress

her grievance as the said failure is clearly a continuing infringement of her right to equal protection of law.

It is clear to this court that, SLMC has arbitrarily imposed a pre-entry qualification for the provisional registration of the foreign medical graduates as the medical practitioners. It is apparent to this court that, the specific decision of the SLMC unjustly imposes a burden on the Petitioner over her professionalism and the purview of powers which has already been granted by the Medical Ordinance is overridden.

By concluding the judgement, this Court adopts the view that, the Fundamental Rights guaranteed to the Petitioner under the articles 12 (1) and 14 (1) (g) of the Constitution have been infringed by the act of Respondents which refused to grant permission to sit for the ERPM while imposing a pre-entry qualification against the law of the country. Thus, the Court reiterates on the fact that, the Respondents acted arbitrarily while making a decision which has influenced the substantive rights of the Petitioner in a great deal and orders the 1st Respondent to allow the Petitioner to sit for the ERPM.

Judge of the Supreme Court

Jayantha Jayasuriya, PC, CJ

I agree

Chief Justice

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 Articles 17 read along with Article 126 of the Constitution.

SC/FR APPLICATION 551/2012

P.U.P.K. De Silva,
No. 65, Railway Station Road,
Balapitiya.

PETITIONER

Vs

1. Public Service Commission,
   No.177, Nawala Road,
   Narahenpita,
   Colombo 05.

2. Dayasiri Fernando,
   Chairman,

2A. Dharmasena Dissanayaka,

3. Palitha M. Kumarasinghe, P.C.

3A. Prof. Hussain Ismail,

4. Sirimavo A. Wijeratne,

4A. Dr. Prathap Ramanujam,

5. S.C. Mannapperuma,

5A. V. Jegarasasingham,

6. Ananda Seneviratne,

6A. S. Ranugge,

7. N.H. Pathirana,

7A. D. Laksiri Mendis,

8. S. Thillanandarajah,

8A. Sarath Jayathilaka,

9. M.D.W. Ariyawansa,

9A. Sudharma Karunarathna,

10. A. Mohamed Nahiya,

10A. A.G.S.A. De Silva PC,

(All of them of Public Service Commission, No.177, Nawala Road, Narahenpita, Colombo 5.)

11. L.C. Senaratne

11A. M.A.B. Daya Senerath,
Secretary,
Public Service Commission,
No. 177, Nawala Road,
Narahenpita, Colombo 05.

12. Southern Province Provincial Public Service Commission,
    6th Floor, District Secretariat Office,
    Galle.

13. H.W. Wijerathne,
13A. H.W. Wijerathna
    Chairman.

14. K.K.G.J.K. Siriwardena,
14A. K.K.G.J.K. Siriwardena

15. D.W. Vitharana,
15A. Daya Vitharana

16. Munidasa Halpandeniya,
16A. D.K.S. Amarasiri,

17. Srimal Wijesekara,
17(a) A.L.K Ariyarathna,
    All of them are Members of the Southern Province Provincial Public Service Commission,
    6th Floor, District Secretariat Office,
    Galle.

18. S.D. Pandikorala,

18A. K.L Dayananda,
Secretary,
Southern Province Provincial Public Service Commission,
6th Floor, District Secretariat Office,
Galle.

19. R.M.D.B. Meegasmulla,

19A. R.C. De Soyza,
Chief Secretary,
Southern Province Provincial Public Service Commission,
S.S. Dahanayake Wm,
Galle

20. H.K.R.J. Edirisinghe,

20A. A. Ranasinghe,
Deputy Chief Secretary (Engineering Service),
Southern Provincial Engineering Service Office, Fort, Galle.

21. Director – Engineering Services,
Office of the Engineering Services Board,
Independence Square,
Colombo 7.

22. P.B. Abeykoon,

Ceased to hold office.

22.A. Mr. S. Hettiarachchi,
Secretary,
Ministry of Public Administration and Home Affairs,
Colombo 7.

23. Hon. Attorney – General,
Attorney – General's Department,
Hultsdorp Street,
Colombo 12.

RESPONDENTS

BEFORE : **JAYANTHA JAYASURIYA, PC, CJ.**
L.T.B. DEHIDENIYA, J. and
S. THURAIRAJA, PC, J.

COUNSEL : S.N. Vijithsingh for the Petitioner.
Suren Gnanaraj SSC for the AG.

ARGUED ON : 17th February 2020.

WRITTEN SUBMISSIONS : 1st and 23rd Respondents on 24th February 2020
Petitioner on 20th February 2020.

DECIDED ON : 31st July 2020.

S. THURAIRAJA, PC, J.

P.U.P. Kumara De Silva (hereinafter sometimes referred to as the Petitioner) filed this Fundamental Rights application on the 19/09/2012 stating that his fundamental rights enshrined under Articles 12(1), 12(2), 14(1) (g) and 17 were violated by non – promotion and/or non – absorption and failure to give permanent appointment in the Sri Lanka Engineering Service Class II Grade II from the Sri Lanka Technical Services. Leave to proceed was granted by this Court for the alleged infringement of Article 12(1) of the Constitution.

According to the Petitioner's petition he joined as a Technical Officer (Electrical) Grade III of Middle Level Technical Service (MLTS) in the Local Government Service on the 01/10/1985. On the 07/03/1991 he was absorbed into the Provincial Public Service and posted to the Balapitiya Pradeshiya Sabha. During this period the Ceylon Electricity Board was privatized and the services of the Petitioner were terminated. Being aggrieved by this decision the Petitioner filed Fundamental Rights Application No. SC FR 144/92. A settlement was reached and Court directed that the Petitioner be reinstated with due seniority and back wages. He was then posted to the Municipal Council of Galle. In 1994 the Petitioner was absorbed into the Sri Lanka Technical Services (SLTS) from the Middle Level Technical Service in the Local Government. On the 24/08/1995 his services were made permanent with effect from 03/10/1985. On 12/03/1997 he was promoted as a Technical Officer (Electrical) Grade II. Thereafter in 1999 he was promoted to Grade II A. in December 1999 he was absorbed into SLTS Grade I and in 2002 he was promoted to the special grade.

The Sri Lanka Engineering Service (SLES) was governed by the Gazette Extraordinary dated 07/06/1988 and is a service distinct from the SLTS. Appointments to the SLES are vested in the 1st Respondent Public Service Commission. The cadre structure in the SLES is Class I, Class II Grade I and Class II Grade II (Recruitment

grade). An avenue of progress to the SLES for Class I and/or Special Class officers under the SLTS was created by the Engineering Service Circular No. 31 dated 5/8/1997 by the Ministry of Public Administration, Home Affairs and plantation industries at the time (P7). Thus it is evident that the only way for an Officer of the SLTS to be appointed to the SLES is through the aforementioned avenue of progress as set out in the Circular marked P7.

On the 9th of February 2006, while the Petitioner was performing his duties in the Southern Provincial Council, he was appointed as an acting engineer to cover up the position of electrical engineer. Since then he was writing to the authorities to make him permanent in the said position. The Petitioner claims that, as per Circular No. 31 dated 5/8/1997, he is entitled to be appointed as an Engineer Class II Grade II from 4/10/2000. Further he moves that the letter sent by the 20th Respondent dated 20/08/2012 (letter written by the Deputy Chief Secretary [Engineering] [Southern Province] to the accountant terminating allowances paid for cover up duties to the Petitioner from 06/08/2012) be quashed.

The 11th and 20th Respondents' filed objections and took up the following preliminary objections;

a) The application is time barred.
b) Necessary parties are not before the court.
c) Prayer c of the petition is inaccurate and is contrary to the Supreme Court rules 44(1) (d)

When this matter was pending before this court both parties informed Court that they were willing to settle the matter. Finally on the 16th of May 2019 the Petitioner informed Court that if he is given the benefits attached to the cover – up duties, he is willing to withdraw the application.

When taking this matter into consideration I find it pertinent to first discuss the Petitioner's aforementioned acting appointment (***වැඩි බලන***) in February of

2006 from which the alleged Fundamental Rights infringement stems from. The Petitioner's main grievance is that he was not made permanent in the acting appointment. As evident from the above mentioned facts the Petitioner came to this Court in 2012, after a period of six years had lapsed since the acting appointment was made. I am of the view that the Petitioner accepted the acting appointment without any objection in 2006, as he himself was aware that he was not qualified to be appointed to the said post on a permanent basis. Even though the Petitioner may not have been qualified for the post, had he wanted to be made permanent in that position he could have taken the necessary steps to become qualified for that post as per Circular No. 31 dated 5/8/1997 (P7). The procedure set out in P7 is reproduced below for ease of reference.

(3) The minimum qualifications and the conditions for promotion to Class II/II of the Sri Lanka Engineering Service for Officers of the Sri Lanka Technological Service (former MLTS) who are attached to Departments and Provincial Councils are as follows;

(i) An officer who has passed the 3rd examination conducted by the commissioner of examinations, with 15 years of total service, out of which a minimum of 5 years should be in CL 1 of the SLTS and/or CL II "A" of the former MLTS or

(ii) An officer who has passed the Senior Technical Examination conducted by the commissioner of Examinations, with a total of 15 years of service out of which a minimum period of 5years should be in CL I of the SLTS and/or CL II "A" of the former MLTS Or

(iii) An officer in the special grade of the SLTS or CL 1 of the former MLTS with a total of 21 years of service and passed the 2nd examination for Technical officers conducted by the Commissioner of Examinations.

(iv) An officer in the special grade of the SLTS or CL1 of the former MLTS with a total of 21 years of service who has been recruited directly to the territorial Civil Engineering Organization or absorbed to the TCEO from other Government Departments as per the TCEO Minute ad successfully completed the2nd

common examination for Technical officers conducted by the Commissioner of examinations before the specified date (i.e. 31sr December 1980)

(v) *An officer in the SLTS/MLTS seeking Engineering grade promotion to civil group 3 of the Sri Lanka Engineering Service should have passed in Hydraulics and Irrigation subjects in any of the qualifying examination mentioned above, which he has successfully completed to become eligible for promotion to the Engineering grade in the SLES.*

The procedure in which an Officer in the Special Class of the SLTS can be promoted to the SLES is set out above. On perusing the material available before us it is evident that the Petitioner had not provided this court with any evidence pertaining to the fact that he had among the other requirements sat for and passed the 2nd examination for Technical officers conducted by the Commissioner of examinations. Hence the Petitioner had no right to ask for his acting appointment to be made permanent as he had not fulfilled the mandatory requirements that are provided in the Circular marked P7. Furthermore the allowance, facilities and benefits provided to the Petitioner in the course of his acting appointment are not a right they are merely a privilege. And as such the Petitioner cannot make an application to this court under Fundamental Rights jurisdiction to obtain said benefits by claiming them to be a right.

I find it pertinent to discuss the time bar per Article 126 (2) of the Constitution as it relates to this application. Article 126(2) of the Constitution stipulates that an applicant should invoke the jurisdiction of this court within 30 days from the violation. Prior Judgments of this court have touched upon this principle.

In the case of ***Demuni Sriyani De Soyza and others v Dharmasena Dissanayake, Public Service Commission and others - SC/FR 206/2008*** (S.C.M – 9th December 2016) Hon. Justice Prasanna Jayawardena, PC stated as follows;

"Article 126(2) of the constitution stipulates that, a person who alleges that any of his fundamental rights have been infringed or are about to be infringed by executive or administrative action may…within one month thereof…apply to this court by way of a petition praying for relief or redress in respect of such infringement. The consequence of this stipulation in Article 126(2) is that, a Petition which is filed after the expiry of a period of one month from the time the alleged infringement occurred, will be time barred and unmaintainable. This rule is so well known that it hardly needs to be stated here.

The rule that, an application under Article 126 which has not been filed within one month of the occurrence of the alleged infringement will make that application unmaintainable, has been enunciated time and again from the time this Court exercised the Fundamental Rights jurisdiction conferred upon it by the 1978 Constitution. Thus, in ***Edirisuriya v Navaratnam (1985 1 SLR 100 at p.105 – 106)****, Ranasinghe J, as he then was, stated "this court has consistently proceeded on the basis that the time limit of one month set out in Article 126(2) of the Constitution is mandatory"*

In the case of ***Lewla Thiththapajjalage Illangaratne v Kandy Municipal Council and Others (1995 BALJ Vol. VI Part 1)*** Kulatunga J held as follows;

*"The result of the express stipulation of a one month time limit in Article 126(2) is that, this court has no jurisdiction to entertain an application which is filed out of time – ie: after the expiry of one month from the occurrence of the alleged infringement or imminent infringement which is complained of…****if it is clear that an application is out of time, the Court has no jurisdiction to entertain such application****¨*

(Emphasis added)

I carefully considered the Petitioner's application, giving special consideration to paragraph 5 and the prayers in the petition. Prayer C states as follows;

" (c) – Quash the letter dated 20/08/2012 (P11) issued by the 20th Respondent."

When I perused the document marked P11 it is the Gazette No.1726 dated 30/09/2011. Whereas P12 is the letter dated 20/08/2012 and written by the 20th Respondent. I presume that the Petitioner in actuality want to quash P12.

Prayers d, e and f in the petition are virtually praying to appoint the Petitioner to the SLES Class II Grade II from 04/10/2000 with back wages.

Taking into consideration the 1st preliminary objection raised by the Respondents namely, the time bar, I find that the Petitioner is relying on a Circular issued by the Secretary of Public Administration and Home Affairs dated 02/01/2009 calling for applications from officers who are in the SLTS to apply for the post of Sri Lanka Engineering Service Class II Grade II (Marked P9). The Petitioner after having failed to fulfill the requirements stipulated in "P9" made communications with some of the Respondents, from the date that he was appointed to cover up duties. There is no material submitted that he had fulfilled the requirements stipulated in the said circular marked P9 and the Petitioner had come to Court with unexplained undue delay seeking relief in 2012 based on the circular (P9) issued in 2009.

Prayer 'C' of the petition focuses on the letter dated 20/08/2020. It was by this letter that the decision to stop the payment of the acting allowance had been communicated to the Petitioner and the accountant. The Petitioner came to this Court on the 19/09/2012. Hence, prima facie it satisfies Article 126(2). The Petitioner claims that discontinuing his allowance paid during the acting appointment (cover up duties) is a violation of his Fundamental Rights.

According to P12 the date of the letter is 20/08/2012. However in order to obtain a proper perspective P12 should not be read in isolation, it should be read in conjunction with letters marked P5D, P5C, P5A and P5E. P12 references P5D (letter dated 04/04/2006). By P12, the payments authorized by letter P5D had been stopped. The payments approved of by P5D had been approved of in the year 2006,

consequent to a decision in P5C. By P5C the Petitioner had been specifically informed that the acting appointment would be effective until the vacancy is filled by a permanent appointee. Furthermore, when the Petitioner accepted the acting appointment in 2006 by P5E he was aware that the acting appointment was to be made until the post of Sri Lanka Engineering Service Class II Grade II (Electrical) in the Southern Provincial Council was filled. Hence I find that the grievance arising from P12 is linked to the appointment made to fill the vacancy of the said post. Therefore the date of the alleged infringement of the Petitioner's rights arising from the letter dated 20/08/2012 is the date of appointment of the new appointee and the one month period in relation to Article 126(2) of the Constitution should begin from that date.

When I perused P13 which is an appointment letter for P.U.P.K De Silva to be granted an acting appointment in SLES Class II Grade II (Electrical) dated 10/08/2012, I found that in paragraph No.2, it was revealed that an engineer who belonged to SLES Class II Grade II (Electrical) had transferred and reported for work on 08/08/2012. Hence the one month period began from the 8th of August 2012. Further the Petitioner did not reveal this fact to Court in his petition and affidavit and hence this amounts to a misrepresentation. This application was filed on 19/09/2012 which was after one month from the date of the alleged violation of his fundamental rights.

If the Petitioner sought the benefit of the principle that the time period in relation to Article 126(2) should start counting from the date he became aware of the act resulting in the alleged infringement as recognized by this Court in ***Demuni Sriyani De Soyza and others v Dharmasena Dissanayake, Public Service Commission and others (Supra)*** it is pertinent to note the following observations of this court;

> *"where the time period of one month is to be computed not from the date of the occurrence of the alleged infringement but from the day the Petitioner becomes aware of the alleged infringement - in the decision cited*

by De Alwis J, namely, SIRIWARDENE vs. RODRIGO, Ranasinghe J, as he then was, held [at p.387] "Where however, a petitioner establishes that he became aware of such infringement, or the imminent infringement, not on the very day the act complained of was so committed, but only subsequently on a later date, then, in such a case, the said period of one month will be computed only from the date on which such petitioner did in fact become aware of such infringement and was in a position to take effective steps to come before this Court.". This principle has been reiterated time and again.

It should be added here that, if the facts and circumstances of an application make it clear that, a Petitioner, by the standards of a reasonable man, should have become aware of the alleged infringement by a particular date, the time limit of one month will commence from that date on which he should have become aware of the alleged infringement."

The case of ***Sri Lanka Nidahas Rubber Inspectors Union v R. B. Premadasa-SC/FR 109/2005*** (S.C.M – 25th September 2019) further reiterates the aforementioned principle. the burden is on the Petitioner to establish the date on which he became aware of the relevant act.

In ***Lewla Thiththapajjalage Illangaratne v Kandy Municipal Council and Others (Supra)*** Kulatunga J stated as follows;

"Hence it would not suffice for the ***petitioner to merely assert that he personally had no knowledge of the discriminatory act****, if on an objective assessment of the evidence, If the law were otherwise, and the Court is constrained to entertain applications which are out of time upon subjective considerations, the mandatory time limit would be rendered nugatory. It would also lead to the mischief that the petitioner will be given*

a measure of discretion to select the time of coming before this Court, according to his convenience."

(Emphasis added)

Thus it is apparent that a heavy burden lies on the Petitioner to establish this fact and a mere assertion does not suffice.

The Petitioner's silence on this fact fails to establish that he did not become aware of the new appointment on the 08/08/2012 even though the letter dated 10/08/2012 (P13) clearly establishes the fact that the new appointee had reported for duty on 08/08/2012. Thus it is reasonable to assume that a person would become aware of an appointment of a person who takes over the duties he had been performing at least on the day the new appointee reports for duty. Therefore I find that the Petitioner has failed to satisfy Article 126(2) even in relation to prayer C of the petition.

As discussed above, it is apparent that the Petitioner is seeking remedy under the circular dated 02/01/2009 (marked P9) in relation to prayers (d), (e), (f) but he filed this application on the 19th of September 2012. Hence, I find this claim to be time barred.

For the purpose of completeness, as it was discussed above in the Circular marked P7, the Petitioner was not automatically qualified to be appointed to the SLES Class II Grade II. There is no evidence before this Court that the Petitioner had fulfilled the requirements stipulated in P7

Further it is revealed that the newly appointed Electrical Engineer from the SLES had assumed duty which was covered up by the Petitioner on the 08/08/2012 but the Petitioner had come to courts on 19/09/2012. Consequently, I find this claim to also be time barred. Accordingly I find the Petitioner's application to be unmaintainable before this court under Article 126 of the Constitution. This results in the dismissal of this application.

Since the preliminary objection on time bar is upheld this court has no jurisdiction to hear the other issues raised by the Petitioner. Application Dismissed. We order no costs.

Application dismissed.

JUDGE OF THE SUPREME COURT

JAYANTHA JAYASURIYA PC, CJ.

I agree.

CHIEF JUSTICE

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 in terms of Section 31DD of the Industrial Disputes Act No. 43 of 1950(as amended) read with section 3 and 10 of the High Courts of Provinces (Special Provisions) Act No. 19 of 1990 from the judgement of the High Court of Negombo dated 29th March, 2018.

SC Appeal No. SC HC LA/54/18
HC Appeal No. HCA LT/86/2016
LT Case No. 21/95/2012

Nestle Lanka PLC
440, T.B. Jayah Mawatha,
Colombo 10.

Respondent-Appellant-Petitioner

Vs.

Gamini Rajapakshe
Bodiyawatte
Ambalan Watte,
Ratnapura.

Applicant-Respondent-Respondent

Before	:	Hon. Jayantha Jayasuriya, PC, CJ Hon. L.T.B. Dehideniya, J Hon. S. Thurairaja, PC, J.
Counsel	:	Manohara de Silva, PC with Hirosha Munasinghe for the Respondent-Appellant- Petitioner instructed by D.L. & F. de Saram. Dilip Obeysekera with Sanjeewa Dissanayake for the Applicant-Respondent-Respondent.
Argued on	:	31.10.2019, 28.02.2020 and 15.05.2020
Decided on	:	30.09.2020

Jayantha Jayasuriya, PC, CJ

The Respondent-Appellant-Petitioner (hereinafter referred to as the "Petitioner") filed a Petition, and an Affidavit with four annexures marked P5-P8 on 10th May 2018, at the Supreme Court Registry. The Petition and the affidavit are captioned;

> "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 Section 3 and 10 of the High Courts of the Provinces (Special Provisions) Act No 19 of 1990 from the Judgment of the High Court of Negombo dated 29th March 2018".

It is only on 24 July 2018, the Petitioner filed a "certified copy of the appeal brief of case bearing No. Negombo HCALT 86/2016 marked 'X'. The said brief contained documents marked as P1, P2, P3, P4, P6 & P7. On 10th August 2018, an appointment of an Attorney-at-Law and a Caveat was filed on behalf of the Applicant-Respondent-Respondent (hereinafter referred to as the "Respondent").

The Respondent on 27th August 2018 filed an affidavit and *inter alia* moved that the application be dismissed *in limine* due to non-compliance with Rule 6 of the Supreme Court Rules of 1990.

When this matter came up before Court on 27 June 2019, the Learned Counsel for the Respondent raised a preliminary objection on the basis that the Petitioner failed to comply with Rules 2, 6 and 8 of the Supreme Court Rules. This matter was thereafter, rescheduled for support on 31 October 2019 on an application by the Learned President's Counsel for the Petitioner. On 31 October 2019, the learned President's Counsel for the Petitioner in response to the preliminary objection submitted, that Rules pertaining to Special Leave to Appeal Applications are not applicable to the instant application. Furthermore, moved for time to tender an affidavit clarifying the factual positions raised by the Respondent. Accordingly, a partner of the legal firm representing the Petitioner filed an affidavit dated 22 November 2019 with an annexure marked 'Z' and thereafter the Respondent filed the counter affidavit dated 25 November 2019. Further to oral submissions, both parties filed written submissions (Petitioner on 30 June 2020 and the Respondent on 01 July 2020) in support of their respective contentions.

Petitioner's response to the preliminary objection is twofold. Firstly, it is submitted that the Supreme Court Rules are not applicable to the instant application. Therefore, he moves that the preliminary objection be over ruled and the application be determined on merits. Secondly, without prejudice to the first contention, the Petitioner moved that the explanation submitted on behalf of the Petitioner by his Registered Attorney through the affidavit dated 22 November 2019 be accepted and the preliminary objection be overruled.

Of these contentions of the parties I will consider the question whether the Supreme Court Rules are applicable to the instant application, first.

On behalf of the Petitioner it is contended that Rules 2,6 and 8 of the Supreme Court Rules (1990) which are in Part IA of the said Rules, which is titled "Special Leave to Appeal" are applicable to Special Leave to Appeal Applications filed in the Supreme Court in relation to orders, judgments decrees and sentences of the Court of

Appeal only, and has no application to the instant application as this is a "Leave to Appeal Application" against the judgment of a High Court established under Article 154P of the Constitution. Furthermore, it is contended that none of the Rules in Part IB ("Leave to Appeal") and Part IC ("Other Appeals") apply to the instant application. It is his contention that Part IB applies to instances where Court of Appeal had grated Leave to Appeal and Part IC is applicable to 'Appeals' and not to a 'Leave to Appeal Application'.

It is pertinent to note that the Supreme Court Rules (1990) were made under Article 136 of the Constitution by the Chief Justice with three other Judges of the Supreme Court nominated by him. The Constitution empowers to make such Rules regulating the practice and procedure including matters pertaining to appeals such as the terms under which appeals to the Supreme Court to be entertained and for provision for the dismissal of such appeals for non-compliance with such Rules. The Constitution that establishes the Supreme Court and makes provision relating to its jurisdiction have not made provisions relating to the practice and procedure of the Court and had left it to the Supreme Court to make provision on such matters by way of Rules under Article 136 subject to the provisions of the Constitution and any law. Prior to the Supreme Court Rules 1990 came into force, practice and procedure relating to Special Leave to Appeal and Leave to Appeal were governed by the Supreme Court Rules 1978, which were repealed later.

Part I of the Supreme Court Rules 1990 regulates the practice and procedure relating to three types of matters where jurisdiction of the Supreme Court is invoked. They are Special Leave to Appeal (Part I A), Leave to Appeal (Part I B) and Other Appeals (Part I C). Whilst Practice and Procedure relating to Applications under Articles 126 are dealt with under Part IV, General Provisions relating to Appeals and Applications are dealt with in Part II of the said Rules. Prior to the Part I A and Part I B of the 1990 Rules came in to force, practice and procedure relating to Special Leave to Appeal applications and Leave to Appeal applications in the Supreme Court were governed by Part I (a) and Part I (b) of the Supreme Court Rules 1978. Parts I (a) and (b) of 1978 Rules (along with several other parts of 1978 Rules) were repealed and Part I of

1990 Rules (along with several other parts of 1990 Rules) were brought in to operation.

Petitioner's contention, that the Supreme Court Rules 1990 has no application to the instant matter is based on the proposition (as set out in paragraph (4) of his written submissions) that "on the face of this application this is not an application from the Court of Appeal therefore, Part IA has no application".

There is no doubt that the instant application before the Supreme Court is not relating to an Order or a Judgment of the Court of Appeal. However, it is pertinent to observe that Part IA of the 1990 Rules does not contain a specific provision restricting the applicability of the provisions in the aforesaid Part to orders and judgments of the Court of Appeal. In fact the first four Rules (Rules2, 3, 4 and 5) of Part I A, that set out the mode of initiating the process, the nature of the material required and the content and the form of the pleadings do not restrict the applications to the orders or judgments of the Court of Appeal. However, there is reference to the Court of Appeal in Rule 6 and Rule 7. In Rule 6 it is said that "Where any such application contains allegations of fact which cannot be verified reference to the judgment or order of the Court of Appeal in respect of which Special Leave to Appeal is sought…..". Rule 7 deals with the time period within which a Petitioner should invoke the jurisdiction of the Supreme Court. It provides that "Every such application shall be made within six weeks of the order, judgment, decree or sentence of the Court of Appeal, in respect of which Special Leave to Appeal is sought". It is also pertinent to note that Part IA has no specific provision that excludes the applicability of Rules to the orders and judgments from the High Court or from any other court. Therefore, it is relevant to consider the legislative framework within which the instant application is made in the Supreme Court.

On 26 June 2012, the Respondent in this mater invoked the jurisdiction of the Labour Tribunal under the provisions of the Industrial Disputes Act and challenged the dismissal of service by the Petitioner. The learned President of the Labour Tribunal by his order of 09 March 2016 allowed the said application. The Petitioner being aggrieved with the said Order appealed to the Provincial High Court and tendered the Petition of Appeal dated 01 April 2016 and the learned Judge of the High Court

dismissed the said appeal on 29 March 2018. It is against the said judgment of the Provincial High Court, the Petitioner thereafter invoked the jurisdiction of the Supreme Court by way of a Petition and Affidavit filed on 10 May 2018. The caption of the said Petition and Affidavit describe the nature of the matter as an application for 'Leave to Appeal'. It is furthermore pleaded in the caption that the said application is made in terms of the provisions of the Industrial Disputes Act No 43 of 1950 (as amended) and the High Court of the Provinces (Special Provisions) Act No 19 of 1990. Section 31DD of the Industrial Disputes Act No 43 of 1950 as amended by Act No 32 of 1990 and sections 3 and 10 of the High Court of the Provinces (Special Provisions) Act No 19 of 1990 are set out as the relevant provisions of the two Acts.

It is pertinent to note that the legislative scheme in relating to the instant application emanates, mainly, from two pieces of legislation. They are the Industrial Disputes Act as amended by Industrial Disputes (Amendment) Act No 32 of 1990 and High Court of the Provinces (Special Provisions) Act No 19 of 1990.

His Lordship Justice Priyasath Dep PC J (as he then was) in **Rambanda v People's Bank** SC Spl. LA No 229/11, (Supreme Court minutes of 17.07.2014 – 'Latest Judgments of the Supreme Court and Court of Appeal', 2014 Vol II page 17) examined the legislative history relating to these two enactments in determining upon a preliminary objection in a 'Special Leave to Application' filed in the Supreme Court challenging the Order of the High Court on an appeal against the order of a Labour Tribunal. The Supreme Court in relation to the nature of the applications that are filed challenging the High Court judgments on Labour Tribunal Orders initially observed that,

> "it is clear that the High Court of the Provinces (Special Provisions) Act No 19 of 1990 and Industrial Disputes (Amendment) Act No 32 of 1990 has similar provisions if not identical provisions". (at p 27)

Having examined the two pieces of legislation more closely, it was further observed that

> "In view of this ambiguity or confusion created by the legislation or the draftsmen, different forms of applications are filed in the Supreme Court. The litigants should not be penalized or non suited due to this ambiguity.
>
> There are Special Leave to Appeal applications filed under the High Court of the Provinces (Special Provisions) Act No 19 of 1990. In some instances, Leave to Appeal applications are filed under section 31DD of the Industrial Disputes (Amendment) Act No 32 of 1990. In Some applications due to an abundance of caution reference is made to both High Court of the Provinces (Special Provisions) Act No 19 of 1990 and Industrial Disputes (Amendment) Act No 32 of 1990. There has been no consistent practice in this regard" (at p 27).

His Lordship Justice Dep, having made these observations, proceeded to examine the distinction between 'Leave to Appeal Applications' and 'Special Leave to Appeal Applications' and concluded that the Supreme Court could entertain both Special Leave to Appeal Applications filed under section 9 of the High Court of the Provinces (Special Provisions) Act No 19 of 1990 as well as 'Leave to Appeal Applications' filed under section 31DD of the Industrial Disputes (Amendment) Act No 32 of 1990, in relation to a judgment of the High Court arising from an appeal from an Order of a Labour Tribunal.

It is also pertinent at this juncture to note that the jurisdiction to hear appeals from the Orders of the Labour Tribunal was vested with the Court of Appeal, prior to the coming into operation of the provisions of the High Court of the Provinces (Special Provisions) Act No 19 of 1990 and Industrial Disputes (Amendment) Act No 32 of 1990. Provisions of Chapter XXVIII of the Code of Criminal Procedure Act relating to appeals from magistrate's court were applicable to such appeals. Any party who was aggrieved with the judgment of the Court of Appeal thereafter invoked the appellate jurisdiction of the Supreme Court either by way of a Leave to Appeal application filed in the Court of Appeal or by way of a Special Leave to Appeal application filed in the Supreme Court and the Supreme Court Rules were applicable to such applications.

In the year 2017, His Lordship Justice Dep, in **Aaron Senarath v The Manager Moray Estate and another** SC SPL/LA 231/2015 (SC minutes of 19.01.2017), considered a Leave to Appeal application filed in the Supreme Court challenging the judgment of the High Court on an order of the Labour Tribunal. In the aforesaid order the Labour Tribunal held the applicant was guilty of misconduct and the termination of his services was both lawful and just. The applicant's appeal to the High Court was dismissed and the applicant invoked the appellate jurisdiction of the Supreme Court by way of a Leave to Appeal application. In the said matter, the Respondent raised a preliminary objection in the Supreme Court on the basis that the Petitioner had failed to comply with the Supreme Court Rules 1990 as he had failed to file material documents. However, the Petitioner contended that the Supreme Court Rules are not applicable as the application under consideration was not relating to a judgment of the Court of Appeal. In determining this matter His Lordship Justice Dep examined the provisions of the Industrial Disputes (Amendment) Act No 32 of 1990 and High Court (Special Provisions) Act No 19 of 1990 and observed, that those statutes

> "conferred on the High Court of Provinces concurrent jurisdiction with the Court of Appeal to hear and determine appeals and revision applications in relation to orders from the Labour Tribunal. ***There was a shift of the forum jurisdiction and the High Court of the Provinces exercise the appellate and revisionary jurisdiction hitherto exercised by the Court of Appeal*****"**(emphasis added).

The Supreme Court, thereafter considered the applicability of the Supreme Court Rules 1990 in relation to the application that was under consideration and concluded that the said Rules are applicable[1].

Taking into account the scope of Industrial Disputes (Amendment) Act no 32 of 1990 and High Court (Special Provisions) Act No 19 of 1990 together with the jurisprudence of this Court discussed hereinbefore, it is clear that there had been no legislative intent to bring in any change to the final appellate jurisdiction exercised by

[1] The Supreme Court in this case upheld the preliminary objection raised by the respondent. The said leave to appeal application was dismissed as the Petitioner failed to comply with Rules 2 and 6 of the Supreme Court Rules 1990.

the Supreme Court, in relation to an Order of a Labour Tribunal[2]. From the year 1978, the Supreme Court Rules of 1978 governed the practice and procedure in relation to such applications before the Supreme Court. Thereafter for the last three decades, as recognised by the jurisprudence of this Court, such procedure is being governed by Supreme Court Rules of 1990.

I am also is of the view that the absence of any specific reference to appeals from a High Court to the Supreme Court in relation to a Labour Tribunal Orders in the Supreme Court Rules of 1990 (either initiated by way of a 'Leave to Appeal application' or a 'Special Leave to Appeal application'), does not render the applicability of the said Rules to govern the practice and procedure in relation to such applications filed before the Supreme Court nugatory. The change that took place in the year 1990 through legislation was only a ***'forum change of the first appeal, shifting the jurisdiction from the Court of Appeal to the High Court'*** (emphasis added). I find no reason to deviate from the jurisprudence of this Court, as discussed hereinbefore, in this regard.

It is my view, Part I A of the Supreme Court Rules 1990 are applicable to applications that are directly filed in the Supreme Court invoking the appellate jurisdiction against an judgment of the High Court in relation to an Order of the Labour Tribunal, either by way of Leave to Appeal or Special Leave to Appeal.

In view of these findings I am unable to hold with the contention of the Petitioner that the Supreme Court Rules 1990 are not applicable to the instant application.

The significance and the importance of the procedural laws in a legal system as well as the Supreme Court Rules is succinctly described by Her Ladyship Dr Shirani Bandaranayake, Chief Justice in **Sudath Rohana and another v Mohamed Zeena and another** [2011] 2 SLR 134 at 144-145. Her Ladyship observes that,

> "When it is stated that the substantive law and procedural law are complementary, it signifies the importance of procedural law in a legal

[2] The only change that had been made effective is the 'change of forum jurisdiction from the Court of Appeal to the High Court in the context of the first appeal' in relation to such Order.

system. Whilst the substantive law lays down the rights, duties, powers and liberties; the procedural law refers to the enforcement of such rights and duties. In other words the procedural law breaths life into substantive law, sets it in motion, and functions side by side with the substantive law.

Rules of the Supreme Court are made in terms of Article 136 of the Constitution, to regulate the practice and procedure of this Court. Similar to the Civil Procedure Code, which is the principal source of procedure which guides the courts of civil jurisdiction, the Supreme Court Rules thus regulates the practice and procedure of the Supreme Court".

Now I will proceed to examine whether the Petitioner has failed to comply with the Supreme Court Rules 1990, as contended by the Respondent.

The Petitioner tendered to the Supreme Court on 10th May 2018, the Petition, Affidavit and annexures marked P5-P8 along with the motion dated 10th May 2018. The Petition and the Affidavit are dated 09th May 2018. In paragraph 7 of the said Petition the Petitioner claims that "A certified copy of the entire Appeal Brief in the High Court of Negombo bearing No HCALT 86/2016 is annexed hereto marked as X and plead as part and parcel of this Petition. The Application of the Applicant, the Answer of the Petitioner, the evidence led and the Order of the learned President are marked as P1 to P4 and annexed and pleaded as part and parcel thereof".

However, in paragraph 20 of his petition the Petitioner has sought permission of Court to "allow the Petitioner to file the petition subject to furnishing certified copies of the appeal brief". Furthermore, in the motion dated 10th May 2018, the Attorneys-at-Law for the Petitioner submits that "The Respondent-Appellant-Petitioner has applied for a certified copy of the appeal brief of case bearing No. Negombo HCALT 86/2016 marked as "X" comprising of the annexures marked as "P1-P8" and undertakes to file same as upon receiving the same and / or as otherwise directed by Your Lordship's Court".

The Petitioner by the motion dated 24 July 2018, tendered the aforementioned certified copy of the appeal brief marked 'X' comprising of the annexures marked as P1, P2, P3, P4, P6 & P7.

It is the Respondent's contention that the Petitioner failed to comply with Rules 2, 6 and 8 of the Supreme Court Rules. Furthermore, it is contended that the Petitioner by failing to disclose the true position to court deprived the Court exercising its discretion judiciously.

According to Rule 2 of the Supreme Court Rules 1990, it is mandatory that an application for Special Leave to Appeal to the Supreme Court be made by a petition together with affidavits and documents as prescribed by Rule 6 and a copy of the judgment or order in respect of which Leave to Appeal is sought. However, this Rule itself makes provision for a Petitioner to seek permission of the Court to tender such material at a later stage. The procedure for making such an application is set out (in Rule 2) as follows: "if the Petitioner is unable to obtain any such affidavit, document, judgment or order, as is required by this Rule to be tendered with his petition, ***he shall set out the circumstances in his petition,*** (emphasis added) and shall pray for permission to tender the same, together with the requisite number of copies, as soon as he obtains the same". When a Petitioner prays for permission in the manner prescribed by the Rule, to tender necessary material at a later stage he is deemed to have complied with the Rule if the "court is satisfied that the Petitioner has exercised due diligence in attempting to obtain such affidavit, document, judgment or order, and that the failure to tender the same was due to circumstances beyond his control".

The Petitioner in paragraph 20 of his petition and in the motion dated 10th May 2018, failed to disclose the reason as to why he could not tender the certified copy of the appeal brief together with the petition; nor has he tendered any material to satisfy Court that he exercised due diligence and the failure is due to circumstances beyond his control. Therefore, prima facie, the Petitioner has failed to satisfy requirements of Rule 2. However, subsequently on 22nd November 2019 an affidavit of the attorney-at-law of the Petitioner was tendered to Court with permission of Court and a copy of the motion tendered to the High Court to obtain a certified copy of the brief was produced marked "Z" along with the said affidavit. According to the said affidavit,

the attorney-at-law for the Petitioner claims that at the time of filing the application on 10 May 2018 they 'verily believed that the motion for the Appeal Brief marked "Z" was actually filed of record prior to filing this application".

However, it is pertinent to note that the said motion marked "Z" is undated and therefore does not corroborate an assertion that the motion was filed prior to 10th May 2018 nor provide any reasonable basis to form 'a belief' that the said motion had in fact been filed prior to 10th May 2018. Furthermore, the date stamp of the High Court imprinted on the copy of the motion is unclear and the only date appearing there on is 06/07. Such entry is in the minute relating to the issuance of the receipt F/24 465237 confirming the payment of Rs 4350/- being the charges for issuing the copy of the brief.

The affidavit dated 22nd November 2019 further claims that there had been a considerable delay in locating the appeal brief and it was only around 7th June 2018 the said brief had been located. In this regard I observe that the impugned judgment of the High Court was delivered on 29 March 2018 and a certified copy of the same had in fact been issued on 06 April 2018. Thereafter photocopies with the date stamp of the High Court depicting 25 May 2018, has been issued and tendered by the Petitioner (the document marked 'X'). Therefore none of these facts reflect that the brief was not located until 7th June 2018. I further observe that none of the material tendered to court such as the motion dated 10 May 2018, petition dated 09 May 2018, affidavit dated 22nd November 2019 and the copy of the motion produced marked "Z" along with the said affidavit, fail to specify the date on which the application for a certified copy of the appeal brief was made to the High court. It is also observed that even if the appeal brief was located on or around 07th June 2018 the Petitioner had taken further six weeks to tender copies to this Court.

Furthermore, the Respondent in his affidavit dated 27th August 2018 claimed that it was only the Motion, Affidavit, Petition and annexures marked P5 to P8 were served on him on 6th August 2018. It is only on 28th January 2019, the Petitioner filed a motion with the proof of delivery of the copy of the brief marked 'X' on the Respondent. Therefore it is after a delay of eight months the copy of the case record (material necessary to support the application) was served on the Respondent.

In this context it is also important to examine the requirements stipulated in Rule 8 of the Supreme Court Rules 1990. Rule 8(1) of such Rules requires the Registrar to give notice of such application to the Respondents *forthwith* (emphasis added), upon an application being lodged in the Registry. It is also important to note that along with such notice a copy of the petition, a copy of the judgment and copies of all affidavits and annexures filed along with the application should be attached to such notice. As per Rule 8(3) it is the responsibility of the Petitioner to tender required number of notices and other material to the Registry to be served on the Respondent/s. The object of this Rule is to ensure that the Respondents are given sufficient time and opportunity to prepare himself to contest the matter without undue delay, if he desires so. However, the object of this Rule can be frustrated if the Petitioner fails to provide all necessary material without undue delay. The Respondent would thereby be denied the opportunity to effectively enjoy the relief granted through the impugned judgment when delay is caused. It is pertinent to note that the Learned President of the Labour Tribunal on 09 March 2016 decided that the Respondent's services had been unfairly and unjustly terminated by the Petitioner with effect from 05 March 2012 and had awarded rupees three hundred twenty thousand one hundred and fifty as compensation and the Learned High Court Judge on 29 March 2018 had dismissed the Petitioner's appeal. Therefore, if delay in the judicial proceedings are caused due to the recklessness of the Petitioner or his failure to exercise due diligence, the Respondent is denied his lawful right to enjoy the benefit of the order of the Labour Tribunal, effectively.

It is pertinent to note that the Supreme Court in **Udaya Shantha v Jeevan Kumarathunga and others** (SC/Spl/LA 49/2010- SC minute of 29.03.2012) 2012 (B.L.R) 129 at 133 observed, that

> "Supreme Court Rules, in its totality, has made provision to ensure that all parties are properly notified without any undue delay in order to give a hearing for all parties".

In **Udaya Shantha** (*Supra*.), the Court was mindful of the series of cases where it was held that the non-compliance with Rule 8(3) would result in the dismissal of an

application as well as the cases in which the proposition that mere technicalities should not be thrown in the way of the administration of justice was recognized,[3] when the Court upheld the preliminary objection and dismissed the application.

However, Learned President's Counsel for the Petitioner in his submissions emphasized that the Supreme Court has "moved towards to hearing the cases on merits rather than sticking on technicalities to reach justice". This submission was based on the judgment of this Court in **A.D Bandara and another v H.M.L.Menike and another**, SC Appeal 172/2011, SC minutes of 22-01-2014, a judgment in which a preliminary objection due to the failure to tender written submissions within the time frame stipulated as required by the Rule 30, was overruled. In **Bandara and another** (*Supra.*) Her Ladyship Justice Eva Wanasundera PC, while overruling the preliminary objection of the Respondent, observed that, "any case should be heard on merits and not stifled by technicalities to reach justice which is very much needed by the parties". This judgment in my view cannot be interpreted to the effect that all cases should be considered on merits irrespective of the nature of the non-compliance with the procedural laws, rules and practices. The non-compliance considered in this case was the failure to tender written submissions within the stipulated time period prior to the argument. Examination of the facts of this case reveal that the written submissions of the Appellant had been filed about two months prior to the date of hearing (the first date of hearing) and written submissions of both parties had been filed in or around the same time. The explanation of the appellant on the failure to tender written submissions within the stipulated time period was the lapse due to inadvertence on the part of the lawyers. Furthermore, the Court distinguished facts of the case under consideration with several other cases where matters were dismissed on the basis that the party at fault failed to prosecute the matter with due diligence as required under Rule 34.

It is pertinent to note that while Rule 34 is requiring parties to ***show due diligence*** in prosecuting an appeal in cases where leave had been granted, Rule 2 requires a party

[3] **K.Reaindran v K.Velusomasunderan** SC Spl LA 298/99, SC minutes of 07-02-2000; **N.A.Premadasa v The People's Bank**, SC Spl LA 212/99, SC minutes of 24-02-2000; **Hameed v Majibdeen and Others**, SC Spl LA 38/2001, SC minutes of 23-07-2001; **K.M.Samarasinghe v R.M.D.Ratnayake and others**, SC Spl LA 51/2001, SC minutes of 27-07-2001; **Soong Che Foo v Harosha K. De Silva**, SC Spl LA 184/2003, SC minutes of 25-11-2003; **C.A. Haroon v S.K.Muzoor and others**, SC Spl LA 158/2006, SC minutes of 24-11-2006; **Woodman Exports (Pvt) Ltd v Commissioner General of Labour**, SC Spl LA 335/2008, SC minutes of 13-12-2010; **Tissa Attanayake v Commissioner General of Election**, SC Spl LA 55/2011, SC minutes of 21-07-2011;**Samantha Niroshana v Senarath Abeyruwan**, SC Spl LA 145/2006, SC minutes of 02-08-2007, **A.H.M.Fowzie v Vehicles Lanka (Pvt) Ltd**, SC Spl LA 286/2007, SC minutes of 27-02-2008, **Wickramatillake v Marikkar**, 2 NLR 9

who is seeking Special Leave to ***exercise due diligence*** in attempting to obtain all necessary material to submit to Court along with the Petition and the Affidavit.

Therefore, I am of the view that the judgment in **Bandara and another** (*Supra*.) cannot be considered in favour of the Petitioner in the instant matter as the Respondent claims that the Petitioner failed to comply with both Rule 2 and Rule 8.

In the absence of any evidence on the exact date on which the Petitioner in this matter made the application to obtain the certified copy of the appeal brief coupled with his conduct that caused further delay in tendering certified copies to this Court and to the Respondent, the Petitioner fails to satisfy this Court, that he exercised due diligence in obtaining a certified copy within the time period he has to file the petition and ensure service on the Respondent along with the notices, forthwith as required under Rule 8(1) and Rule 8(3). Furthermore, there is no material to conclude that the failure to tender all necessary documents along with the petition, is due to circumstances beyond his control.

In **Attanayake v Commissioner General of Elections** [2011] 1 SLR 220, this Court upheld the preliminary objection of the Respondents on the basis that the Petitioner's failure to comply with Rule 8(3) should result in the dismissal of the application and accordingly dismissed the application. In this case the Petitioner took steps to dispatch notices on the Respondents by registered post without tendering them to the Registrar of the Supreme Court along with the petition, affidavit and other annexures. The Court observed that,

> "The Supreme Court Procedure laid down by way of Supreme Court Rules made under and in terms of the Constitution cannot be easily disregarded as they have been made for the purpose of ensuring the smooth functioning of the legal machinery of this Court. When there are mandatory Rules that should be followed and when there are preliminary objections raised on non-compliance of such Rules, those objections cannot be taken as mere technical objections" (at p 234).

Further it was observed that

> "If a party so decides to act recklessly it is needless to say that such a party would have to face the consequences which would follow in terms of the relevant provisions" (at p 234).

The Supreme Court in **Peiris and another v Peiris** SC/HC CA/LA137/12, SC minutes of 25 September 2014 (Vol XXI BALJ (2015) 101) upheld the preliminary objection of the respondent and dismissed the application due to non compliance with Rule 8(3) of the Supreme Court Rules, when the petitioner failed to tender notices along with the petition and affidavit but tendered after 24 days of filing them.

In view of the foregoing reasons and jurisprudence of this Court, as discussed hereinbefore, I am of the view that the Petitioner is unable to satisfy Court that he exercised due diligence and the failure to submit all the material necessary to support his application along with the petition and the affidavit and the delay of eight months to serve all the necessary material on the Respondent was due to circumstances beyond his control. Therefore, I uphold the preliminary objection of the learned counsel for the Respondent and dismiss the Petition for Leave to Appeal, for non-compliance with Rules 2 and 8 of the Supreme Court Rules, 1990.

Chief Justice

L.T.B. Dehideniya, 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 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.

Pattiyage Leelawathie Gomes,
No. 60/10 J, Templers Road,
Mt. Lavinia

Plaintiff

Vs.

1. Preethi Reeta Bastian,
2. Wajirapani Bastian,
3. Luwis Vidanalage Manel Bridget Bastian

All of No. 53/3, Sri Gunaratne Mawatha, Mt. Lavinia.

Defendants

AND

1. Preethi Reeta Bastian,
2. Wajirapani Bastian,
3. Luwis Vidanalage Manel Bridget Bastian

All of No. 53/3, Sri Gunaratne Mawatha, Mt. Lavinia.

Defendants-Appellants

Vs.

Pattiyage Leelawathie Gomes,
No. 60/10 J, Templers Road,
Mt. Lavinia (deceased)

Plaintiff-Respondent

SC/HCCA/LA/404/2013

WP/HCCA/MT/90/09/F

DC (Mt. Lavinia): 1638/02/L

AND NOW BETWEEN

1. Preethi Reeta Bastian,
2. Wajirapani Bastian,

All of No. 53/3, Sri Gunaratne Mawatha, Mt. Lavinia.

Defendants-Appellants-Petitioners

Vs.

1. Sriya Sepalika Suludagoda,
2. Lal Kumara Suludagoda,
3. Neetha Kamini Suludagoda,
4. Geetha Chandani Suludagoda,

All of No. 60/10 J, Templers Road, Mt. Lavania

SUBSTITUTED Plaintiffs-Respondents-Respondents

Before: Priyantha Jayawardena, PC, J.
Murdu N.B. Fernando, PC, J.
Yasantha Kodagoda, PC, J.

Counsel: Venura Cooray for the Defendants-Appellants-Petitioners
J.A.J Udawatta for the 1st, 3rd and 4th substituted Plaintiffs-Respondents-Respondents

Argued on: 20th July, 2020

Decided on: 24th September, 2020

Priyantha Jayawardena, PC, J

This is an application filed to have the judgment of the Provincial High Court of the Western Province exercising civil appellate jurisdiction (hereinafter referred to as the "Civil Appellate High Court") affirming the judgment of the District Court of Mount Lavinia (hereinafter referred to as the "District Court") set aside.

Facts of the case

The substituted Plaintiffs-Respondents-Respondents (hereinafter referred to as "the Plaintiffs") had instituted action in the District Court praying *inter alia* for a declaration of title and the ejectment of the Defendants-Appellants-Petitioners (hereinafter referred to as "the Defendants") from the land and premises referred to in the schedule to the plaint. At the conclusion of the trial, the learned judge of the District Court had delivered a judgment in favour of the Plaintiffs and granted the reliefs as prayed for in the plaint.

Being aggrieved by the aforesaid judgment, the Defendants had preferred an appeal to the Civil Appellate High Court. Upon hearing both parties, the Civil Appellate High Court had delivered its judgment on 28th August, 2013 dismissing the said appeal and affirmed the judgment of the District Court.

Being aggrieved by the aforesaid judgment of the Civil Appellate High Court, the Defendants had preferred an application for leave to appeal to this Court on 10th October, 2013.

Preliminary Objection of the Plaintiffs

When this application was taken up for support, a preliminary objection was raised by the learned Counsel for the Plaintiffs on the maintainability of the instant application on the basis that it had been filed outside the "six weeks" stipulated in Rule 7 of the Supreme Court Rules of 1990 (hereinafter referred to as "the Supreme Court Rules").

The time limit for applications seeking leave to appeal from the Civil Appellate High Court

It is common ground that the judgment of the Civil Appellate High Court had been delivered on 28th August, 2013 and the instant application was filed on 10th October, 2013. Thus, the issue in this application is to consider whether the appeal has been filed out of time.

Part I of the Supreme Court Rules refers to three types of appeals: 'Part 1A' stipulates the procedure applicable to applications seeking 'special leave to appeal' from the Court of Appeal, 'Part 1B' stipulates the procedure applicable to applications seeking 'leave to appeal', and 'Part 1C' stipulates the procedure applicable to all other types of appeals to the Supreme Court.

Rule 7 in 'Part 1A' of the Supreme Court Rules states:

> *"Every such application shall be made within six weeks of the order, judgment, decree or sentence of the Court of Appeal in respect of which special leave to appeal is sought."* [Emphasis Added]

Thus, an application seeking 'special leave to appeal' should be made within six weeks of the impugned order, judgment, decree or sentence of the Court of Appeal.

However, the instant application is an application seeking 'leave to appeal' from a judgment of the Civil Appellate High Court. Thus, it comes under 'Part 1C' of the Supreme Court Rules which stipulates the procedure for 'Other Appeals.'

The aforementioned position was held in *L. A. Sudath Rohana and another v. Mohamed Cassim Mohemmed Zeena,* SC/HCCA/LA/111/2010, SC Minutes dated 14.07.2010, wherein the court held:

> *"Part I of the Supreme Court Rules, 1990 refers to three types of appeals which are dealt with by the Supreme Court, viz., special leave to appeal, leave to appeal and other appeals. Whilst applications for special leave to appeal are from the judgments of the Court of Appeal, the leave to appeal applications referred to in the Supreme Court Rules are instances, where the Court of Appeal had granted leave to appeal to the Supreme Court from any final order, judgment, decree or sentence of the Court of Appeal, where the Court had decided that it involves a substantial question of law. The other appeals referred to in Section C of Part I of the Supreme Court Rules are described in Rule 28(1).*

The High Court of the Provinces (Special Provisions) Act No.19 of 1990 and High Court of the Provinces (Special Provisions) Amendment Act No.54 of 2006 do not contain any provisions contrary to Rule 28(1) of the Supreme Court Rules, 1990 thus enabling the fact that Section C of Part I of the Supreme Court Rules, which deals with other appeals to the Supreme Court, should apply to the appeals from the High Courts of the Provinces." [Emphasis added]

Rule 28(1) in Part 1C of the Supreme Court Rules states:

"Save as otherwise specifically provided by or under any law passed by Parliament, the provisions of this rule shall apply to all other appeals to the Supreme Court from an order, judgment, decree or sentence of the Court of Appeal or any other court or tribunal."

In view of the fact that Rule 28(1) does not stipulate a time limit, it is necessary to consider whether the six-week time limit stipulated in Rule 7 is applicable to the instant application falling under the category of 'Other Appeals.'

In this regard, in *George Stuart and Co. Ltd. v. Lankem Tea and Rubber Plantations (Pvt.) Ltd*. (2004) 1 SLR 246 at page 252, this court held:

"Where no provision is made in the relevant Act specifying the time frame in which an application for leave to appeal be made to the Supreme Court, and simultaneously when there are Rules providing for such situations, the appropriate procedure would be to follow the current Rules which govern the leave to appeal application to the Supreme Court. Consequently, such an application would have to be filed within 42 days from the date of the Award."

In *Priyanthi Chandrika Jinadasa v. Pathma Hemamali and 4 Others* (2011) 1 SLR 337 at page 344 cited the said case of *George Stuart and Co. Ltd. v. Lankem Tea and Rubber Plantations (Pvt.) Ltd*. (*supra*) with approval and held:

"Accordingly, it is evident that an application for leave to appeal from the High Court (Civil Appeal) of the Provinces to the Supreme Court should be filed within 42 days from the date of the judgment."

Further, in *Mahaweli Authority of Sri Lanka v. United Agency Construction (Pvt) Ltd* (2002) 1 SLR 8 at page 12, it was held:

> *"In my view, the clear inference is that the Supreme Court in making the rules did not consider it necessary to go beyond a maximum of forty-two days for making an application for special leave to the Supreme Court. In deciding on these periods within which such applications for leave to appeal should be made we must necessarily conclude that the Supreme Court fixed such periods as it was of the view that such periods were reasonable having regard to all relevant circumstances, and also that the Supreme Court acted reasonably in doing so."*

Accordingly, the time limit of six weeks stipulated in Rule 7 of the Supreme Court Rules is applicable not only to applications seeking 'special leave to appeal' from the Court of Appeal but also to applications seeking leave to appeal from the Civil Appellate High Court falling within Part 1C of the Supreme Court Rules.

Thus, an application for leave to appeal from the Civil Appellate High Court to the Supreme Court should be filed within six weeks from the date of the judgment.

Computation of the six-week time limit

A week is defined in Maxwell on '*The interpretation of Statutes'*, 12th Ed., at page 309, as follows:

> "A "week" may according to context, be a calendar week beginning on Sunday and ending on Saturday or <u>any period of seven days</u>." [Emphasis added]

Further, Stroud's *Judicial Dictionary* Vol. III, 6th Ed. at page 2890, states:

> "Though a "week" usually means <u>any consecutive seven days</u>, it will sometimes be interpreted to mean the ordinary notion of a week reckoning from Sunday to Sunday (*Bazalgette v. Lowe* 24 L.J. Ch. 368, 416). And, probably, <u>a "week" usually means seven clear days</u>…." [Emphasis Added]

As stated earlier, the language of Rule 7 stipulates that the application must be filed *"within six weeks of the order, judgment, decree or sentence*". The said phrase in Rule 7 has been examined in detail in the case of *Board of Investment v. Million Garments (Pvt) Ltd*, SC/HC/ LA/58/2012, SC Minutes 24.10.2014 which held:

> "*the term "**of**" as used in the Rule 7 is synonymous with "**from**", and "six weeks of the order, judgement" etc., means the same as "six weeks from the order, judgment" etc.*" [Emphasis Added]

In interpreting the aforesaid word "*from",* Maxwell (*supra)* at page 309 states:

> "Where a statutory period runs from a named date to another, or the statute prescribes some period of days or weeks or months or years within which some act has to be done, although the computation of the period must in every case depend on the intention of Parliament as gathered from the statute, generally the first day of the period will be excluded from the reckoning, and consequently the last day will be included" [Emphasis Added]

A similar view was expressed in *Sinna Lebbe Saliya Umma v. Shahul Hameed Mohammed Yaseen*, SC/Appeal/99/2014, SC Minutes 04.04.2018.

In view of the above, in computing the six-week time limit in Rule 7, the first date on which the judgment of the Civil Appellate High Court was delivered must be excluded from the calculation.

Has the instant application been filed within the six-week time limit stipulated in Rule 7?

As stated above, since the date on which the impugned judgment was delivered must be excluded in the computation of the six weeks, Wednesday, 28th August, 2013 shall be excluded.

Accordingly, the time has commenced to run from Thursday, 29th August, 2013. Thus, the sixth week has ended on Wednesday, 9th October, 2013.

In the circumstances, it is evident that the Defendants have failed to comply with the six-week time limit stipulated in Rule 7 as the application has been filed on Thursday, 10th October, 2013.

Is the non-compliance with the time limit fatal to the maintainability of the application?

The learned Counsel for the Defendants contended, citing the case of *Nirmala de Mel v Seneviratne* (1982) 2 SLR 569, that even though the Supreme Court Rules may specify a time

limit in filing an application seeking leave to appeal, the court may exercise its discretion and waive off such time limit.

However, the said case of *Nirmala de Mel v. Seneviratne* (supra) which was decided well before the present Supreme Court Rules of 1990 were promulgated has no application to the instant application.

Further, the procedural rules in respect of time limits ensure uniformity and efficiency in the legal system. Further, it goes to the root of the jurisdiction of the court.

A similar view was expressed by Mark Fernando, J. in *The Ceylon Brewery Ltd. v. Jax Fernando, Proprietor, Maradana Wine Stores*, (2001) 1 SLR 270 at page 271 where it was held:

> *"We are of the view that section 86(2) of the Civil Procedure Code is the provision which confers jurisdiction on the District Court to set aside a default decree. That jurisdiction depends on two conditions being satisfied. One condition is that the application should be made within 14 days of the service of the default decree on the defendant.*
>
> *It is settled law that provisions which go to the jurisdiction must be strictly complied with."* [Emphasis Added]

Similarly, in *L.A. Sudath Rohana v. Mohamed Zeena and others* (*supra*) it was held:

> *"Be that as it may, it is also of importance to bear in mind that the procedure laid down by way of Rules, made under and in terms of the provisions of the Constitution, cannot be easily disregarded. Such Rules have been made with purpose and that purpose is to ensure the smooth functioning of the legal machinery through the accepted procedural guidelines. In such circumstances, when there are mandatory Rules that should be followed and objections raised on non–compliance with such Rules such objections, cannot be taken as mere technical objections."* [Emphasis added]

Further, in *Edward v. De Silva* (1945) 46 NLR 342 at page 344, it was held:

> *"The legislature continued the jurisdiction, that is to say, the competency of the court as the court appointed to try and determine the case, beyond its ordinary limits, but it*

took care to see, as it almost invariably does, that its jurisdiction, in the sense of its power to act, and of its correct action are made dependent on the observance of rules and procedures. Some of those rules are so vital, being of the spirit of the law, of the very essence of judicial action, that a failure to comply with them would result in a failure of jurisdiction or power to act, and that would render anything done or any order made thereafter devoid of legal consequences. The failure to observe other rules, less fundamental, as pertaining to the letter of the law and to matters of form that would not prevent the acquisition of jurisdiction or power to act, but would involve the exercise of it in irregularity. Or it may happen that the court having acquired jurisdiction, thereafter acts irregularly or erroneously and thereby prejudice is caused to some party." [Emphasis added]

Thus, the time limits that have been stipulated by the Supreme Court Rules cannot be considered mere technicalities.

Further, the compliance with Rule 7 is mandatory and cannot be waived off. A similar position was held in *Priyanthi Chandrika Jinadasa v. Pathma Hemamali and 4 Others (supra)* at page 346:

"The language used in Rule 7, clearly shows that the provisions laid down in the said Rule are mandatory and that an application for leave for this Court should be made within six weeks of the order, judgment, decree or sentence of the Court below of which leave is sought from the Supreme Court. In such circumstances it is apparent that it is imperative that the application should be filed within the specified period of six (6) weeks".

In view of the above, it is imperative that an application seeking leave to appeal should be filed within a period of six weeks as specified in Rule 7 of the Supreme Court Rules.

Conclusion

For the aforementioned reasons, I hold that the Defendants had not complied with the mandatory Rule 7 of the Supreme Court Rules of 1990 and the instant application for leave to appeal has been filed out of time.

In the circumstances, I uphold the preliminary objection raised by the learned Counsel for the Plaintiffs and dismiss the Defendants application for leave to appeal.

I order no costs.

Judge of the Supreme Court

Murdu N. B. Fernando, PC, J

I agree **Judge of the Supreme Court**

Yasantha Kodagoda, PC, J

I agree **Judge of the Supreme Court**

IN THE SUPREME COURT OF THE

DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of a Rule issued against Mr. Wasantha Wijewardena Attorney-at-Law in terms of section 42(3) read with section 42(2) of the Judicature Act No. 2 of 1978.

S C Rule No. 08/ 2014

R M Karunaratne Banda,

No. 95/1,

Kahawatta,

Ambatenna.

COMPLAINANT

-Vs-

Wasantha Wijewardena, (Attorney-at-Law)

No. 03,

Colombo Street,

Kandy.

RESPONDENT

Before: **VIJITH K MALALGODA PC J**

P PADMAN SURASENA J

S THURAIRAJA PC J

Counsel: Dr. Avanthi Perera SSC with Sureka Ahamad SC for Attorney General.

Rohan Sahabandu PC for the Bar Association of Sri Lanka.

Respondent Wasantha Wijewardena Attorney-at-Law appeared in person.

Inquiry conducted on : 03-09-2019, 02-12-2019, 10-02-2020, and 10-03-2020.

Decided on : 25-09-2020

P PADMAN SURASENA J

Upon a Complaint against the Respondent Attorney-at-Law made to this Court by the Complainant, this Court served a copy of the said complaint on the Respondent Attorney-at-Law and called for his observations thereon. Thereafter, this Court referred the said complaint to a disciplinary committee of the Bar Association of Sri Lanka in accordance with section 43 of the Judicature Act with a direction to conduct a preliminary inquiry into the alleged misconduct of the Respondent Attorney-at-Law. This was to enable this Court to determine whether further proceedings should be taken against the Respondent Attorney-at-Law to deal with him under section 42 of the Judicature Act.

The said disciplinary committee (of the Bar Association of Sri Lanka) having inquired into the said complaint, has forwarded to this Court its order dated 07-12-2013. This has been produced before this Court marked **P 11**. The said disciplinary committee had concluded that the Respondent Attorney-at-Law, who has filed an application on behalf of the Complainant after receiving fees from him, has not given an acceptable explanation for his absence in the Supreme Court on 17-06-2009 and 20-07-2009, which were the dates the Court had fixed the said application for support. Further, the said disciplinary committee also had concluded that it was long after the Court had dismissed the said application that the Respondent Attorney-at-Law had made the re-listing application. The

said disciplinary committee had also stated in its order that it is a bounden duty on the part of the Respondent Attorney-at-Law to have examined the record to check the next date for support and that he should have taken steps to file a re-listing application immediately after the order of dismissal.

It was on the above basis that the disciplinary committee of the Bar Association of Sri Lanka had finally concluded that the Respondent Attorney-at-Law has not shown due diligence in carrying out his professional obligations towards his client and decided to refer the record of its proceedings to this Court for further action.

This Court on the receipt of the said record of proceedings by the said disciplinary committee noticed the Respondent Attorney-at-Law as well as the Hon. Attorney General to appear before this Court.

Thereafter, this Court on 09-05-2014 having considered the conclusions of the disciplinary committee of the Bar Association of Sri Lanka has directed the Registrar of this Court to forward certified copies of the relevant documents to the Hon. Attorney General for the purpose of drafting a Rule against the Respondent Attorney-at-Law in terms of the relevant provisions in the Judicature Act.

It was pursuant to the above order that Hon. Attorney General had prepared a draft Rule and submitted to this Court. It was the said Rule,[1] which was issued against the Respondent Attorney-at-Law under the hand of the Registrar of this Court.

The said Rule has averred the facts and circumstances relevant to the questionable acts and conduct of the Respondent Attorney-at-Law. The several averments of facts in the said Rule point to three main alleged questionable acts/conduct on the part of the Respondent Attorney-at-Law. They are as follows.

(i) The Respondent Attorney-at-Law never informed the Complainant that the Fundamental Rights Application, which was to be filed, would be time barred and that the Complainant would never have instructed the Respondent Attorney-at-

[1] Rule dated 17th September 2014.

Law to file such an application and paid his fees if he had been appraised of the said position.

(ii) The Respondent Attorney-at-Law failed to appear for the petitioner in the relevant Fundamental Rights Application (No. SC FR 445 / 2009) when it was listed for support initially on 17-06-2009 and subsequently on 20-07-2009 and that the Supreme court dismissed the said application on the latter date as the Petitioner had been absent and unrepresented in Court.

(iii) The Respondent Attorney-at-Law failed to file or support an application to have the said dismissed application re-listed and restored until he filed a motion on 19-10-2009, which was rejected by the Supreme Court due to the delay.

It was on the premise of the above-alleged questionable acts/conduct by the Respondent Attorney-at-Law that the Rule has alleged that;

a) by reason of the said acts and conduct, the Respondent Attorney-at-Law has conducted in a manner that would reasonably be regarded as disgraceful or dishonourable by Attorneys-at-Law of good repute and competence and have thus committed a breach of Rule 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;

b) by reason of the aforesaid acts and conduct, the Respondent Attorney-at-Law has conducted in a manner that would render him unfit to remain as an Attorney-at-Law and has thus committed a breach of Rule 60 of the said Rules;

c) by reason of the aforesaid acts and conduct, the Respondent Attorney-at-Law has conducted in a manner which is inexcusable and such as to be regarded as deplorable by his colleagues in the profession and has thus committed a breach of Rule 60 of the said Rules;

d) by reason of the aforesaid acts and conduct, the Respondent Attorney-at-Law has conducted in a manner unworthy of an Attorney-at-Law and has thus committed a breach of Rule 60 of the said Rules;

e) by reason of the aforesaid conduct, the Respondent Attorney-at-Law has committed acts of;

i. deceit and/or;

ii. malpractice.

Having alleged as above, the Rule has directed the Respondent Attorney-at-Law, to appear before this Court and show cause as to why he should not be suspended from practice or be removed from the office of the Attorney-at-Law of the Supreme Court of the Democratic Socialist Republic of Sri Lanka, in terms of section 42(2) of the Judicature Act.

The Respondent Attorney-at-Law appeared in person to defend himself. This Court then read out the said Rule and handed over a copy of the said Rule to him in open court. As the Respondent Attorney-at-Law moved for time to show cause the Court then had granted him time and fixed the inquiry for another date.[2] Thereafter, the Court commenced the inquiry on 03-09-2019 and concluded it on 10-03-2020.

The main witness called in support of the Rule is Randilisi Mudiyanselage Karunaratne Banda who is the Complainant in this case. In addition, the evidence of the Registrar of the Supreme Court was also led before this Court in support of the Rule. After the learned Senior State Counsel closed the case in support of the Rule, the Respondent Attorney-at-Law also gave evidence under oath.

The Respondent Attorney-at-Law did not challenge the following factual positions in the course of the inquiry before this Court. Therefore, the said factual positions became common grounds. They are as follows.

(i) The Complainant having paid the full fees quoted, had duly retained the Respondent Attorney-at-Law, and instructed him to file a Fundamental Rights Application in the Supreme Court in order to obtain relief for the complained infringement of his Fundamental Rights.

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[2] Vide proceedings dated 17-09-2014.

(ii) Accordingly, the Respondent Attorney-at-Law has filed the Fundamental Rights Application bearing No. SC FR 445 / 2009, which was then fixed for support for 17-06-2009. The record of the Fundamental Rights Application bearing No. SC FR 445 / 2009 was produced marked **P 8**.

(iii) The Respondent Attorney-at-Law did not appear for the Petitioner in Court to support the said application on 17-06-2009. However, he has arranged another Attorney-at-Law to appear for the Petitioner in Court and make an application on his behalf for a postponement. Upon the said application, the Court re fixed the application for support for 20-07-2009.

(iv) The Respondent Attorney-at-Law failed to appear to support this application on 20-07-2009. Therefore, on that date, the Supreme Court has dismissed the application on the basis that the Petitioner was absent and unrepresented. The journal entry containing the order made by Court on 20-07-2009 has been produced marked **P 8(a)**.

(v) The Respondent Attorney-at-Law failed to file or support an application to have the said dismissed application re-listed and restored until he filed a motion on 19-10-2009, which requested to list it for 10th or 11th or 12th November 2009.

(vi) The then Hon. Chief Justice who presided on the bench, which dismissed the Complainant's application on 20-07-2009, had made order on the motion dated 19-10-2009 filed by the Respondent Attorney-at-Law. The said order dated 27-10-2009 stated, "Do not list this". The relevant journal entry in the record of the Fundamental Rights application bearing No. SC FR 445 / 2009 has been produced marked **P 2(a)**.

I have already stated above that the Rule point to three main alleged questionable acts/conduct on the part of the Respondent Attorney-at-Law. As the second of the said three main alleged questionable acts/conduct of the Respondent Attorney-at-Law is a quite straightforward complaint it would be opportune to consider it first.

The said second questionable act/conduct alleged that the Respondent Attorney-at-Law failed to appear (for the Complainant) in Court in the Fundamental Rights Application No. SC FR 445 / 2009 when it came up for support initially on 17-06-2009 and subsequently on 20-07-2009 and the said failure resulted in the Supreme court dismissing the said application on the basis that the Petitioner had been absent and unrepresented in Court on the latter date.

Rule 16 of Supreme Court (Conduct of and Etiquette for Attorneys-at-Law) Rules 1988 is as follows,

"Where the services of an Attorney-at-Law have been retained in any proceedings in any Court, tribunal or other institution established for the administration of justice, it shall be the duty of such Attorney-at-Law to appear at such proceedings, unless prevented by circumstances beyond his control."

The Respondent Attorney-at-Law gave evidence on his behalf in the course of the instant inquiry. He categorically admitted in his evidence that it was his responsibility to have made arrangements for an appearance of counsel on the date the Court had fixed the case for support.

I would at this stage, digress to examine how this Court has previously viewed such absence of such Attorneys-at-Law, which had resulted in failures on their part to perform their duties on behalf of their clients. It would suffice to refer to the following two cases.

In the case of Daniel vs Chandradewa,[3] the facts are as follows.

In an action filed in the District Court of Colombo, the registered Attorney on record between 22-03-1988 and 06-08-1992 was Chandradewa who was the respondent Attorney-at-Law in that case. One of the allegations against the said Attorney-at-Law was her failure to appear in Court and or not having performed her duties on behalf of her client in the said pending action before the District Court.

[3] 1994 2 Sri LR 1

The said District Court case was an action filed under Chapter 53 of the Civil Procedure Code to recover a liquid claim through summary procedure. The defendant D E Daniel[4] made an application seeking the permission of Court to file answer.

The court ordered the Defendant to file written submissions on 04-05-1988 to enable Court to decide whether it should grant leave for the Defendant to defend the said action conditionally or unconditionally.

The Defendant's written submissions was not filed on 04-05-1988 as directed by Court. His registered Attorney on record (the respondent Attorney-at-Law Chandradewa) was absent on 04-05-1988. The Court reserved its order for 06-06-1988 on which date also the registered Attorney was absent. The Court issued notice for 27-06-1988. The registered Attorney was not present on 27-06-1988 but another Attorney –at-Law Mr. Welcome appeared on that day and moved for a postponement. The Court fixed 11-07-1998 as the final date for the filing of written submissions. Mr. Welcome appeared for the Defendant on 11-07-1988 but the registered Attorney was absent. As no written submissions was filed on 11-07-1988, Court directed to call the case on 19-08-1988 for an order.

The respondent Attorney-at-Law took up the position that she was not present in Court on 19-08-1988 because on the previous date namely 11-07-1988 Mr. Welcome Attorney-at-Law had appeared on her instructions and obtained the date. She therefore took up the position that she did not know that the date given was 19-08-1988 as she was not present herself in Court at the time the said date was fixed. She further took up a position that when a counsel appears and obtains a date it is a date convenient to that counsel and therefore the responsibility shifts to that counsel to keep a track of the case and appear on the next date or prepare answer or written submissions or whatever document he had undertaken to prepare before the next date.

This Court rejecting that argument stated as follows.

[4] He is the complainant in the subsequently issued Rule against his Attorney-at-Law.

"…. While an Attorney who has been retained and instructed by a Registered Attorney to appear as counsel for the purpose of conducting the case, and who in so acting, obtains a date to suit his convenience, could be reasonably expected to appear on that date to conduct the case, Mr. Welcome had not been so retained and instructed. According to the evidence of the respondent, she retained Mr. Welcome on each of the two occasions on which he appeared for the specific and limited purpose of obtaining postponements because the respondent was engaged in the business of another Court. There was nothing to show that the date was suggested by Mr. Welcome to suit his convenience. There was no reason for him to have asked for a particular date since he was not the counsel in the case. The respondent knew the circumstances in which Mr. Welcome was retained and she could not have reasonably assumed that Mr. Welcome would appear once again. There is certainly no duty as suggested by learned counsel for the respondent that an Attorney who is merely instructed to appear for the purpose of requesting a postponement, should, without being instructed to do so, appear again. Having asked Mr. Welcome to obtain a postponement, it was her duty to ascertain what the decision of the Court was in response to his application. This, she should have ascertained form Mr. Welcome, who, she claims, she retained, or by examining the journal entries from time to time, as a Registered Attorney should do, especially if he or she has not been in Court on account of his or her presence having being dispensed with by counsel. Having ascertained the next date, the respondent should have either instructed counsel to appear on that date or personally appeared for the client on that date. Ranaweera vs Jinadasa and Gunapala[5] does not assist the respondent. If a Registered Attorney has not appointed another Attorney to act as counsel, or having appointed counsel, he has not agreed with counsel that the attendance in Court of such Registered Attorney may be dispensed with, then such Registered Attorney must personally keep a track of the dates of hearing, having regard to the usual way in which dates of hearing are fixed and notice is given in the Court or tribunal, and appear when the case comes on for hearing or other purpose decided or ordered by the Court or tribunal. In the circumstances, the absence

[5] SC Appeal 41/1991 SC minutes of 27-03-1992.

of the respondent on the 19th of August 1998 was an inexcusable contravention of her obligation to appear for the Complainant. …"

The second case I would refer to is the case of Piyadasa Vs Kurukulasuriya Attorney-at-Law.[6] It is also a case where this Court had to deal with an Attorney-at-Law who was in default of his basic obligation to exercise due diligence in an application for leave to appeal pending before the Court of Appeal.

In that case Piyadasa who was the Defendant in the District Court case No. 860/RE retained the respondent Attorney-at-Law in an application for leave to appeal against an order made in favour of said Piyadasa pending before the Court of Appeal. The said respondent Attorney-at-Law failed to enter his appearance, give his free dates and failed to keep a track of the said application. Subsequently the Court of Appeal decided the appeal against said Piyadasa who was unrepresented in Court.

Having examined the material and the arguments of the respective parties this Court stated as follows.

"…. However had the Respondent entered his appearance and given his free dates, in all probability the case would have been listed on a date suitable to him; and if it was not, that would have been a sufficient ground for re-listing. There would have been no defaults on 13-11-90 04-09-91, 27-11-91, 18-09-92, 30-10-92 and 24-11-92. Despite avoidable lapses by the registry officials, it was thus the Respondent who was principally responsible for those defaults which resulted in adverse orders being made on 13-11-90 and 24-11-92. His evidence indicated that he was waiting some intimation form the Court of Appeal, but the practice of the Court clearly did not entitle a party or his Attorney-at-Law to any such notice. Nor can this Court treat his responsibility as any less simply because he retained Attorney-at-Law Hirimuthugoda, for it is the respondent's position that Attorney-at-Law Hirimuthugoda was only asked to appear on 11-10-90 and 03-12-90 and, thereafter, "to have an eye on the appeal list" not that he was retained to argue the case.

[6] 1997 2 Sri LR 410

As the registered Attorney, it remained the respondent's responsibility to deal with the case.(See Daniel Vs Chandradewa) … "

On the above basis this Court held that the said Respondent Attorney-at-Law was in default of his basic obligation to exercise due diligence, now expressly recognized in rules 10 and 15 of the Supreme Court (Conduct of and Etiquette for Attorneys-at-Law) Rules 1988.

Let me now come back to the instant case. As has already been mentioned above, the Respondent Attorney-at-Law has categorically admitted that it was his responsibility to have made arrangements for an appearance of counsel on the date the Court had fixed the case for support. He has neither appeared nor made any such arrangement for an appearance by any other counsel. The Respondent Attorney-at-Law has admitted that the complainant has fully paid his fees.

The Fundamental Rights application of the complainant has been dismissed for non-prosecution with due diligence since no Attorney-at-Law had appeared on that date. When that was brought to his notice by his client and on repeated requests and reminders, the Respondent Attorney-at-Law has undertaken to file necessary papers to move Court to have the dismissed application re-listed.

The position taken up by the Respondent Attorney-at-Law in this regard is that he heard the next date of the case as 20-07-2009 when the Attorney-at-Law who appeared on his behalf in Court on 17-06-2009 telephoned him and conveyed the next date in the night of 17-06-2009 itself. However, under cross-examination the Respondent Attorney-at-Law had admitted;

(i) that the free dates he provided to the said Attorney-at-Law who appeared on 17-06-2009 were 20th, 21st and 22nd of July 2009;

(ii) that it was his responsibility to correctly ascertain the next date of the case and that the application got dismissed on 20-07-2009 because of his fault;

(iii) that one of his friends conveyed the fact that this case was dismissed by Court in the night of that date itself i.e. 20-07-2009.

In addition, the evidence of the Complainant who was also in Court on 17-06-2009 is also relevant in this regard. The Complainant, having noted the next date the Court re-fixed the case for support as 20-07-2009, has subsequently informed the Respondent Attorney-at-Law over the telephone that the case has been re-fixed for support for 20-07-2009. The Respondent Attorney-at-Law has not challenged the said evidence of the Complainant.

Thus, it is clearly established that the Respondent Attorney-at-Law was in default of his basic professional obligation towards his client. The said obligations are expressly recognized in rules 10 and 15 of the Supreme Court (Conduct of and Etiquette for Attorneys-at-Law) Rules 1988.

Therefore, I hold that the above-mentioned second main alleged questionable acts/conduct on the part of the Respondent Attorney-at-Law has been clearly established before this Court.

I would now proceed to consider the above-mentioned third main alleged questionable acts/conduct of the Respondent Attorney-at-Law. It is the fact that the Respondent Attorney-at-Law failed to file or support an application to have the said dismissed application re-listed and restored until he filed a motion on 19-10-2009, which was rejected by the Supreme Court due to the delay.

It is to be noted that the Supreme Court has first dismissed the said Fundamental Rights Application of the Complainant on 20-07-2009. The Respondent Attorney-at-Law had thereafter filed a motion dated 19-10-2009 with a petition and an affidavit requesting Court to re-list the dismissed application. However, the then Hon. Chief Justice who presided on the bench, which dismissed the Complainant's application on 20-07-2009, had made order on the above motion (dated 19-10-2009) stating "Do not list this". The relevant journal entry in the record of the Fundamental Rights application bearing No. SC FR 445 / 2009 has been produced marked **P 2(a)**.

The Respondent Attorney-at-Law had thereafter filed another motion dated 13-01-2010 to move Court to list the case on 25th or 27th or 28th January 2010 to enable him to

support a re-listing application. However, the then Hon. Chief Justice as per **P 9(a)** had made the following order.

"Counsel for the Petitioner has stated that he got relief after filing this application. Therefore no need to list this again. Furthermore this application was dismissed on the 20th of July and he was informed of this on the 21st but he took two months time to file a motion to get it re-listed and that is the reason why re-listing was not permitted by me on 27/10. That order stands."

The Respondent Attorney-at-Law giving evidence on his behalf in the course of the instant inquiry categorically admitted that it was his responsibility to have made arrangements for an appearance of counsel on the date the Court had fixed the case for support. He also has admitted that it was his responsibility to have moved Court in the proper manner to get the dismissed case re-listed within a reasonable time. The Respondent Attorney-at-Law at a later stage of his evidence reluctantly admitted that he had failed in the above obligations towards his client.

Rule 15 of Supreme Court (Conduct of and Etiquette for Attorneys-at-Law) Rules 1988 is as follows,

"On accepting any professional matter from a client or on behalf of any client, it shall be the duty of the Attorney-at-Law to exercise his skill with due diligence to the best of his ability and care in the best interests of his client in such matter as he may decide and he should do so without regard to any unpleasant consequences either to himself or to any other person. Furthermore he should at all times so act with due regard to his duty to Court, tribunal or any institution established for the Administration of Justice before which he appears and to his fellow Attorneys-at-Law opposed to him."

The excuse offered by the Respondent Attorney-at-Law with regard to his failure to take immediate steps to tender and support a re-listing application is the receipt of letter dated 29-06-2009 produced marked **R 5** and sending of a letter of demand. Although the Respondent Attorney-at-Law has attempted to justify the said failure, giving that explanation in the face of further questioning, he was compelled to admit that such a

move is not a substitute for the restoration of the dismissed case. Further, it must be noted that the letter **R 5** is dated 29-06-2-2009 while the date of dismissal is 20-07-2009. Therefore, the letter **R 5** had been received before the Court dismissed the Fundamental Rights Application.

In addition, it is the evidence of the Complainant that he continuously reminded and requested the Respondent Attorney-at-Law to take steps to file a re-listing application immediately. The Respondent Attorney-at-Law has not challenged the above evidence. Moreover, the Respondent Attorney-at-Law was silent when he was questioned as to whether he suggested the above position (excuse offered by him in his evidence) to the Complainant when he was cross-examining the Complainant.

Another excuse the Respondent Attorney-at-Law had attempted to offer in that regard is the fact that the Complainant did not approve the motion produced marked **P 1**, which he had drafted to file in order to move Court to re-list the dismissed case. At this instance, also he had attempted to state that it was necessary for him to file an affidavit from the Complainant along with a re-listing application. Again, in the face of further questioning the Respondent Attorney-at-Law has finally admitted that such an affidavit (from the Complainant) is not required in the said re-listing application. Moreover, the Respondent Attorney-at-Law in the face of further questioning admitted with reluctance that it is not necessary for an Attorney-at-Law to obtain the approval of the draft motion from the client before filing such motion in Court.

In any case, the motion marked **P 1**, is dated 01-09 2009. The Respondent Attorney-at-Law has admitted that it is a motion, which was never filed in Court. The original record of SC FR 445/2009 was produced in this inquiry marked **P 8**. The journal entries therein clearly show that the said motion **P 1** has never been filed in Court. The Complainant in his evidence has stated that the Respondent Attorney-at-Law instructed him to send to the respondents of the Fundamental Rights Application, copies of the said motion, giving him the impression that it was a motion filed in Court. The Complainant had complied with the said instruction. However, later, he had found out that, the said motion had never been filed in Court and that the Respondent Attorney-at-Law had misled him to

believe the contrary. The explanation given by the Respondent Attorney-at-Law in this regard in his evidence is that the Complainant took the said motion for his perusal and approval. However, it could clearly be observed that the motion **P 1** is not merely a draft but a completed motion signed by the Respondent Attorney-at-Law with his seal being stamped on it. Thus, I am of the view that the above explanation by the Respondent Attorney-at-Law must be rejected and the evidence of the Complainant on this point must be accepted. This leads me to conclude that the Respondent Attorney-at-Law has deliberately deceived the Complainant to believe that he had filed the motion **P 1** when he knew very well that it was not so.

On his own admission, the Respondent Attorney-at-Law has had nearly thirty years of practice. Admittedly, he is also familiar with the method of filing re-listing applications. In the light of the above, the Respondent Attorney-at-Law had finally admitted that it was solely his responsibility to ensure taking steps to file a re-listing application without delay.

The Respondent Attorney-at-Law in his evidence reluctantly admitted at the last moment, that he had failed in the above obligations to his client. Indeed, he has not offered any acceptable explanation in that regard. This is a yet another blatant defiance of his professional obligation towards his client.

Thus, I hold that the above-mentioned third main alleged questionable acts/conduct on the part of the Respondent Attorney-at-Law has also been clearly established.

Let me now turn to the first of the above-mentioned main alleged questionable acts/conduct of the Respondent Attorney-at-Law. It is the fact that the Respondent Attorney-at-Law never informed the Complainant that the Fundamental Rights application, which was to be filed, would be time barred and that the Complainant would never have instructed the Respondent Attorney-at-Law to file such an application and paid his fees if he had been appraised of the said time bar.

Following enumerated facts are revealed from the Complainant's (Randilisi Mudiyanselage Karunaratne Banda) evidence.

I. He was working as a Management Assistant at the Department of Health Services of the Central Province.

II. Although he was promoted to the Supra Grade in the Management Assistant Service, the relevant authority had not assigned him any duty comparable with the said new post.

III. Being aggrieved by the above situation he had tendered retirement papers and refrained from reporting to work.

IV. As the relevant authority also failed to process his retirement papers, he had lodged a compliant in the Human Rights Commission.

V. He has not agreed to the proposed settlement at the Human Rights Commission.

VI. It was thereafter that he consulted, retained and gave instructions to the Respondent Attorney-at-Law to file a Fundamental Rights Application in the Supreme Court.

VII. He had paid Rs. 50,000/= as an advance payment of the full fee of Rs. 100,000/= requested by the Respondent Attorney-at-Law.

VIII. The Respondent Attorney-at-Law had delayed filing the said application in the Supreme Court stating that it would be better to first obtain from the Human Rights Commission, an affirmative declaration that the Complainant's fundamental rights had been infringed.

IX. The Human Rights Commission in the meantime had considered the complaint of the Complainant on 20-01-2009 and 23-02-2009.

X. In the meantime the officials of the Department of Health had requested the Complainant to report to work and later transferred him to a position in a higher Grade but had failed to attend to his other matters.

XI. It was in the above circumstances that the Complainant had met the Respondent Attorney-at-Law, paid him the balance Rs. 50,000/= and requested him to file the promised Fundamental Rights Application in the Supreme Court.

With regard to the above-mentioned complaint relating to the failure to inform the complainant of the time bar, the Respondent Attorney-at-Law appears to be taking up the position that the alleged infringement in the relevant Fundamental Rights application is a continuing infringement. When considering the evidence of the Respondent Attorney-at-Law relating to the above position in the light of the fact that the Court has dismissed the application on the basis that the Petitioner was absent and unrepresented, I am inclined, in fairness to the Respondent Attorney-at-Law, to refrain from making any adjudication on the said first main alleged questionable acts/conduct by the Respondent Attorney-at-Law. Moreover, the fact that there had been some proceedings before the Human Rights Commission too supports taking this course of action. Thus, I would not proceed to determine and make a pronouncement on the first of the above-mentioned main alleged questionable acts/conduct of the Respondent Attorney-at-Law leaving the Respondent Attorney-at-Law to enjoy the benefit of any doubt in this regard.

In the aforesaid circumstances, and for the foregoing reasons, I hold that the above-mentioned acts namely second and third acts/misconduct by the Respondent Attorney-at-Law have been proved to the satisfaction of Court and that the said acts amount to acts of deceit and/or malpractice in terms of section 42(2) of the Judicature Act. Therefore, I find the Respondent Attorney-at-Law guilty of deceit and malpractices referred to above in paragraphs (a) to (e).

The Respondent Attorney-at-Law has not been sincerely and truly repentant over the above breaches for which he is clearly liable. Instead, he was determined to the last stages of the inquiry to contest the said allegations. He admitted his responsibility when he could no longer face the questioning. That necessarily indicates the absence of any remorse on his part in relation to the said acts of defiance.

Further, the Respondent Attorney-at-Law has not thought it important to ensure attendance at the preliminary inquiry into this incident, which was conducted by a disciplinary committee of the Bar Association of Sri Lanka. When asked about the said default, he gave a reason, which he had offered for the first time in this Court. He has had no interest to have the said reason communicated to the said disciplinary committee

within a reasonable time. This is despite the notice sent to him by the Registrar of Supreme Court. In my view, this is not the kind of conduct expected from the practitioners in this noble profession.

Rule 60 of the Supreme Court (Conduct of and Etiquette for Attorneys-at-Law) Rules 1988 published in the Gazette Extraordinary of the Democratic Socialist Republic of Sri Lanka No. 535/7 dated 07-12-1988 states as follows.

"an Attorney-at-Law must not conduct himself in any manner which would be reasonably regarded as disgraceful or dishonourable by Attorneys-at-Law of good repute and competency or which would render him unfit to remain an Attorney-at-Law or which is inexcusable and such as to be regarded as deplorable by his fellows in profession."

It is also relevant to note that while rule 61 states that an Attorney-at-Law shall not conduct himself in any manner unworthy of an Attorney-at-Law, rule 62 states that these rules are not exhaustive.

In terms of section 42 of the Judicature Act, the Supreme Court has been vested with the power to suspend from practice or remove from office, any Attorney-at-Law who is found to be guilty of any deceit or malpractice.

It must be borne in mind that this Court admits and enrolls as Attorneys-at-Law in terms of section 40 of the Judicature Act, only persons of good repute and of competent knowledge and ability. Such Attorneys-at-Law are entitled by law to assist and advise clients and to appear, plead or act in every Court or other institution established by law for the administration of justice. Thus, it is a reasonable expectation of public that the Attorneys-at-Law they retain would fulfil their professional obligations towards them to the best of their ability. They would not expect the retained Attorneys to deceive them.

Section 42 has entrusted this Court with the responsibility of maintaining the aforesaid standards. Thus, this Court has a duty to take into consideration, the interests and aspirations of the general public, in particular litigants, the need to maintain the quality of administration of justice, and the need to maintain the standards expected from the

members of the legal fraternity when deciding the course of action it should take in a case of this nature.

Having considered all those circumstances, I order that the Respondent Attorney-at-Law Mr. Wasantha Wijewardena be suspended from practice for 07 years with effect from the date of this decision.

The Complainant had fully paid the fees of the Respondent Attorney-at-Law. He had also incurred other expenses due to the acts of deceit and malpractices by the Respondent Attorney-at-Law. In view of the above, I also order the Respondent Attorney-at-Law Mr. Wasantha Wijewardena to deposit within one month from the date of this order, Rs. 300,000/= to be paid to Randilisi Mudiyanselage Karunaratne Banda who is the Complainant in this case.

I order the Registrar of this Court to take necessary incidental steps to enforce this order.

JUDGE OF THE SUPREME COURT

VIJITH K MALALGODA 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 from the judgment of the Court of Appeal under and in terms of Article 128(2) of the Constitution.

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

Complainant

Supreme Court Case No:
SC(SPL) LA 184/2017

Court of Appeal Case No:
CA/323/07

HC Colombo Case No:
1044/2002

Vs.

Punchiweddikarage Aruna Felix Perera
No. 21/7, Dharmarathna Mawatha,
Rawathawatte, Moratuwa.

Accused

AND BETWEEN

Punchiweddikarage Aruna Felix Perera
No. 21/7, Dharmarathna Mawatha,
Rawathawatte, Moratuwa.

Accused-Appellant

Vs.

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

Complainant-Respondent

AND NOW BETWEEN

Punchiweddikarage Aruna Felix Perera
No. 21/7, Dharmarathna Mawatha,
Rawathawatte, Moratuwa.

Accused-Appellant-Petitioner

Vs.

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

Complainant-Respondent-Respondent

Before: Buwaneka Aluwihare, PC. J.
L. T. B. Dehideniya, J.
P. Padman Surasena, J.

Counsel: Faisz Musthapha PC with Ms. Thushani Machado for the Accused-Appellant-Petitioner.

Dilan Ratnayake, DSG for Complainant-Respondent-Respondent.

Argued on: 11.06.2020

Judgement on: 26.06.2020

Aluwihare PC. J.,

In supporting this Special Leave to Appeal application, the learned President's Counsel on behalf of the Accused-Appellant-Petitioner (hereinafter the Petitioner) submitted to the court that among other matters, he is relying mainly on two issues;

(1) Has the manner in which this matter was dealt with by the Court of Appeal created a reasonable doubt as to whether the Petitioner had had the benefit of the consideration of his appeal by one of the two judges who had heard the appeal, in as much as the judgement had been delivered without jurisdiction? (Cumulatively, questions of law raised in sub-paragraphs a. and b. of Paragraph 20 of the Petition.)

(2) Did the Court of Appeal misdirect itself by not considering or by having overlooked, the version of the Petitioner placed before the court in arriving at its conclusions? (Cumulatively, questions of law raised in sub-paragraphs, c. d. and e. of paragraph 20 of the Petition of the petitioner.)

This court having considered the submissions made on behalf of the Petitioner, is of the view that there is merit in the matters urged before us. Accordingly, Special leave to appeal is granted on the questions of law (1) and (2) referred to above.

As the learned Counsel representing the parties have consented for the court to act under the proviso to Rule 16(1) of the Supreme Court Rules 1990, this court would proceed to determine the above two issues forthwith, dispensing with compliance with the provisions of the said Rules in regard to the steps preparatory to hearing of this appeal.

With regard to the first question of law referred to above, it was the contention of the learned President's Counsel that this matter was argued in the Court of Appeal before **Hon. Justices, K. K. Wickramasinghe and M. M. A. Gafoor** and the judgement was delivered on 07th June 2017. The judgement, however, had been delivered by **Hon. Justices P. R. Walgama and K. K. Wickramasinghe**. It was pointed out that this matter was **not argued before her ladyship Justice Walgama**. On the perusal of the Court of Appeal minutes, commencing from 23rd April 2012 up to 08th June 2016, it is quite evident that Hon. Justice Walgama had not presided over this matter. On 08th June 2016 the matter had been taken up for argument before Hon. Justices Wickramasinghe and Gafoor. The arguments had been re-fixed, to be resumed on 04th August 2016, on which date the arguments were concluded before the same bench referred to above, and the judgement was reserved by Hon. Justice Wickramasinghe. The court had ordered the parties to file written submissions. The day on which the written

submissions were tendered to the court, Hon. Justices Walgama and Wickramasinghe had presided.

Hon. Justice Wickramasinghe had delivered the judgement on the **07th June 2017.** Hon. Justice Walgama, concurring with Justice Wickramasinghe, had signed the said judgement (A6). Subsequently, however, this case had got listed again on the **17th July 2017** and had come up before Hon. Justice Wickramasinghe. On the said date, the court observing, that ***'there is a typographical error and a genuine mistake in the judgement'***, a fresh judgement of even date **signed by both Hon. Justices Wickramasinghe and Gafoor** had been pronounced, and in the same breath the **judgement delivered on the 07th June 2017 had been set aside** [Court of Appeal minutes of 17/07/2017].

The learned President's Counsel pointed out that according to the Court of Appeal minutes aforementioned, it appears that the subsequent judgement had been referred to Hon. Justice Gafoor for his consideration only **after** the second judgement was signed by him and the same was delivered.

The last line of that minute (of 17th July 2017) reads as follows; *"After realizing that it should have been signed by H/L M. M. A Gafoor J,* ***I send the judgement to for <u>his consideration</u>"***. [sic] (emphasis added)

What reflects from the above minute is that the judgement has been referred to Hon. Justice Gafoor **for his consideration,** <u>only after</u> it was delivered for the second time. The learned President's Counsel submitted that if that be the case, the judgement cannot stand, as it had not been considered by one of the two judges who heard the case.

The Court of Appeal record does not disclose when the error was detected and whether any steps were taken consequent to the detection of the error. This court sought the assistance of both the learned President's Counsel for the Petitioner and the learned Deputy Solicitor General in this regard. But neither Counsel could elucidate as to what transpired between the 07th June and the 17th July 2017.

Perusal of both judgements clearly shows that it is more than a typographical error. The caption of the judgement delivered on 07th June 2017 states that the matter was argued ***"Before; P. R. Walgama, J & K. K. Wickramasinghe, J"*** whereas the judgment delivered on 17th July states ***"Before; M. M. A. Gafoor, J & K. K. Wickramasinghe, J."***

It was also pointed out by the learned President's Counsel that the Judgment delivered by Hon. Justices Walgama and Wickramasinghe is identical to the judgement purported to have been delivered by Hon. Justices, Gafoor and Wickramasinghe. It was contended on behalf of the Petitioner that substantial prejudice had been caused to him as there is a serious doubt as

to whether Hon. Justice Gafoor had had the opportunity to consider the judgement in draft, prepared by Hon. Justice Wickramasinghe and to offer his opinion, before it was pronounced.

Lord Chief Justice Hewart's remarks in the case **R v. Sussex Justices *ex parte* McCarthy** ([1924] 1 KB 256, [1923] All ER Rep 233) made almost 100 years ago, ***"Justice should not only be done, but should manifestly and undoubtedly be seen to be done"*** are now heard throughout the common law legal regimes. They sustain, in my view, not only an ethical requirement that judges cannot hear a case if, from the perspective of a reasonable and informed observer, their impartiality might reasonably appear to be compromised, but transcends to the requirement that judges must also observe procedures that are widely regarded as fair and transparent, especially in criminal cases.

Considering the aforesaid, I am of the view that, in the interest of justice, it would not be safe to sustain the impugned judgment.

The second matter raised before this court by the learned President's counsel was that the Hon. Judges of the Court of Appeal had not given any consideration whatsoever to the matters raised on behalf of the Accused-Appellant-Petitioner before the Court of Appeal. The learned President's Counsel submitted that the matters raised on behalf of the Petitioner, in the course of the oral arguments before the Court of Appeal, with regard to the three distinct counts on which the Petitioner was indicted, are referred to in pages 5, 6, 7 and 8 of the Petition of the Petitioner filed before this court. It was also submitted that a comprehensive written submission dated 11th November 2016, was also filed on behalf of the Petitioner. The learned President's Counsel contended that, from the judgement it appears that the Court of Appeal had not considered or given its mind to any of those matters. He also pointed out that, of the 7-page judgement where the court had dealt with the issues, 3 ½ pages are a verbatim reproduction of the written submissions filed on behalf of the Attorney General. Perusal of the documents shows that the submission of the learned President's Counsel is not without merit.

As referred to earlier in this judgement, on the first question of law raised on behalf of the Petitioner, this court is of the view that it would not be safe to sustain the judgements (dated 07th June 2017 and 17th July 2017) delivered by the Court of Appeal. As such we are of the view that it would not be necessary to consider and make a pronouncement on the second question of law on which Special Leave to Appeal was granted.

Accordingly, both judgments pronounced by the Court of Appeal (07th June 2017 and 17th July 2017) in this matter are hereby set aside. This court further directs the Court of Appeal to hear the arguments in this matter afresh before a bench which had not considered this case earlier.

Appeal partially allowed, Rehearing of the appeal by the Court of Appeal ordered.

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 Special Leave to Appeal from the Judgment of the Court of Appeal under Article 128 (2) of the Constitution.

The Attorney General
Attorney General's Department
Colombo 12.

Plaintiff

SC (SPL) LA 145/2014
CA LA 06/2009
HC-Colombo 1649/2004

Vs,

1. Herath Mudiyanselage Sarath Wijewardene,
   No. 35, Migunagama, Mahiyangana.

2. Algama Koralage Sumedha Perera,
   No. 270C, 14B, Dickland Estate,
   Hokandara Road, Talawatugoda.

Accused

And between

Stanley Christoffel Asoka Obeysekere,
No.11/5, Rajakeeya Mawatha,
Colombo 07

Aggrieved Party -Appellant

Vs.

1. Herath Mudiyanselage Sarath Wijewardene,
   No. 35, Migunagama, Mahiyangana.

2. Algama Koralage Sumedha Perera,
   No. 270C, 14B, Dickland Estate,
   Hokandara Road, Talawatugoda.

Accused-Respondents

The Attorney General
Attorney General's Department
Colombo 12.

Respondent

And Now Between

1. Herath Mudiyanselage Sarath Wijewardene,
   No. 35, Migunagama, Mahiyangana.

2. Algama Koralage Sumedha Perera,
   No. 270C, 14B, Dickland Estate,
   Hokandara Road, Talawatugoda.

Accused-Respondents-Petitioners

Vs,

Stanley Christoffel Asoka Obeysekere,
No.11/5, Rajakeeya Mawatha,
Colombo 07

Aggrieved Party -Appellant-Respondent

The Attorney General
Attorney General's Department
Colombo 12.

Respondent- Respondent

Before: **Justice Vijith K. Malalgoda, PC**

Justice Murdu N. B. Fernando, PC

Justice P. Padman Surasena

Counsel: **Faisz Musthapha, PC, for the Accused-Respondent-Petitioners**

Romesh de. Silva, PC, for the Aggrieved Party-Appellant-Respondent

Thusith Mudalige, DSG, for the Hon. Attorney General

Argued on 27.01.2020

Order on 26.06.2020

Vijith K. Malalgoda PC J

Heard the learned President's Counsel for the Accused-Respondent-Petitioners in support of the instant Special Leave to Appeal Application. The main argument of the learned President's Counsel was based on section 16 (2) of the Judicator Act, whether the Aggrieved Party-Appellant-Respondent before this Court is in fact an Aggrieved Party within the meaning of the Judicator Act.

During his reply the learned President's Counsel for the Aggrieved Party-Appellant-Respondent, relied on the following passage from Weeramanthri on property at page 873;

> "In Ceylon the property of a deceased person whether testate or intestate vests immediately on the death in his heirs, subject to payment of just debts, to the extent of which the personal representative as such has a claim upon the property."

In support of his contention he further relied on the decisions in ***Silva Vs. Silva 10 NLR 242*** and SC Appeal 28/2013 decided on 14th January 2016

As observed by this court, the Court of Appeal when refusing the preliminary objection raised on behalf of the Accused-Respondent-Petitioners had not considered the above position, which in our opinion, is very relevant to the maintainability of the main appeal before the Court of Appeal.

Considering all the matters raised by both parties we are not inclined to grant Special Leave in this matter.

Application for Special Leave is refused.

As agreed by parties the order of the Court of Appeal shall stand altered to read as only as overruling the Preliminary Objection raised against the maintainability of the Leave to Appeal application on the ground that the Petitioners in the application before the Court of Appeal has no locus standi. Further Court of Appeal Order must not be taken to have granted Leave to Appeal to the said Petitioners despite the refences to that effect.

Thus, the Court of Appeal is directed to hear the parties and decide the question whether it should grant Leave to Appeal for the Aggrieved Party-Appellant-Respondent to proceed with the appeal.

This application is accordingly dismissed. No Costs

Judge of the Supreme Court

Justice Murdu N. B. Fernando, 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 for Special Leave to Appeal in terms of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka read with Section 9(a) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 and Section 31DD(1) of the Industrial Disputes Act from the judgment of the Provincial High Court of the Western Province

Hiranya Surantha Wijesinghe
Thuduwa Road, Madapatha, Piliyandala

Applicant

SC/Spl/LA/159/2017
HC (ALT) No. 53/2014
LT Maharagama 33/1000/2011

Vs.

Tenderlea Farms (Pvt) Limited
No. 5A, Thuduwa Road, Madapatha,

Piliyandala

(office Now at)

No. 31, First Lane, Ratmalana

Respondent

AND BETWEEN

Tenderlea Farms (Pvt) Limited

No. 5A, Thuduwa Road, Madapatha,

Piliyandala

(Office now at)

No. 31, First Lane, Ratmalana

Respondent-Appellant

Vs.

Hiranya Surantha Wijesighe

Thudawa Road, Madapatha, Piliyandala.

Applicant-Respondent

AND NOW BETWEEN

Hiranya Surantha Wijesinghe

Thuduwa Road, Madapatha, Piliyandala

Applicant-Respondent-Petitioner

Vs.

Tenderlea Farms (Pvt) Limited

No. 5A, Thuduwa Road, Madapatha,

Piliyandala

(Office now at)

No. 31, First Lane, Ratmalana

Respondent-Appellant-Respondent

Before: Priyantha Jayawardena, PC, J
Murdu N.B. Fernando, PC, J
S. Thurairaja, PC, J

Counsel: Kaushali Rubasinghe with Kushani Harischandra for Applicant-Respondent-Petitioner

Viran Corea with Sarita de Fonseka instructed by DN Associates for Respondent-Appellant-Respondent

Argued On: 12th February, 2019

Decided On: 17th September, 2020

Priyantha Jayawardena, PC, J

Facts of the case

This is an application seeking for special leave to appeal (hereinafter referred to as "the instant application") against the judgment of the High Court holden in Colombo (hereinafter referred to as "the High Court") setting aside a Labour Tribunal Order which held that the termination of employment of the workman was illegal and unjustified.

The applicant-respondent-petitioner (hereinafter referred to as "the workman") was employed as the Farm Manager of the respondent-appellant-respondent Company (hereinafter referred to as "the employer"). He filed an application in the Labour Tribunal claiming compensation for the alleged unlawful termination of services and gratuity from the employer.

In his answer, the employer stated that the termination was due to 'frustration' of the contract of employment as the farm in which the employer worked was closed down as it was not feasible to continue with its operations.

After the conclusion of the inquiry, the Labour Tribunal delivered its Order granting a sum of Rs. 276,980/- as compensation for the wrongful termination of employment. Further a sum of

Rs.138,490/- was granted as gratuity since the employer had less than fifteen employees at the time of the alleged termination of the services of the workman.

Being aggrieved by the Order of the Labour Tribunal, the employer appealed to the High Court to have the Order of the Labour Tribunal set aside.

Having heard the parties, the High Court allowed the appeal and set aside the Order of the Labour Tribunal.

Being aggrieved by the judgment of the High Court, the workman preferred an application for special leave to appeal to this court on the following questions of law;

i. Is the said Judgment of the Learned High Court contrary to law and against the submissions made?

ii. Is the said Judgment of the Learned High Court Judge contrary to the decisions in the cases relating to depositing securities, specifically the case of *Wimalasiri Perera and others v Lakmali Enterprises Diesel and Petrol Motor Engineers and others (2003) 1 SLR 62?*

iii. Is the said Judgment of the Learned High Court Judge contrary to the decisions in the cases related to compensation for loss for employment within the context of closure of business?

iv. Is the said Judgment of the Learned High Court Judge contrary to decision in the cases related to granting gratuity at the termination of employment?

v. Is the said Judgment of the Learned High Court Judge not considered the material questions involved and ignored the facts on ground of justice and equity?

vi. Has the said Judgment of the Learned High Court Judge failed to justify the termination on balance of probability?

vii. Has the said Judgment of the Learned High Court Judge made a finding which is inconsistent with the evidence and contradictory of it?

viii. Are the findings in the said Judgment of the Learned High Court Judge rationally possible and perverse with regard to the evidence on record?

When the application was first taken up for support, the learned Counsel for the employer had moved to re-fix the application for support to obtain instructions. Accordingly, the application was re-fixed for support.

However, when this application was taken up for support for the second time, the learned Counsel for the employer raised a Preliminary Objection stating that the workman had not complied with Rule 2 read with Rule 6 of the Supreme Court Rules of 1990 (hereinafter referred to as the "Supreme Court Rules") and moved for a dismissal of the application *in limine*.

Preliminary Objection raised by the Employer

The Counsel for the employer submitted that, although the workman, in his petition of appeal, had specifically pleaded that the entire Appeal Brief of the case No. HC/ALT/53/2014 had been annexed, none of the documents produced before the High Court, except for the judgment, were produced in court and no reason was given for such omission. Further, the workman had not sought the permission of the court to produce the said documents at a subsequent date.

Moreover, it was submitted that almost a month after the said Preliminary Objection was raised, the workman had filed, by way of motion several documents without assigning any reason for the delay and/or inability to have tendered the said documents along with the petition. The documents that were tendered by the workman along with the said motion are as follows:

(a) the statement of objections dated 24th April, 2015 filed by the workman in the High Court,
(b) the affidavit filed along with the statement of objections of the workman dated 24th April, 2015 filed in the High Court,
(c) the written submissions of the workman dated 28th August, 2015 filed in the High Court,
(d) the written submissions of employer dated 14th July, 2015 filed in the High Court, and
(e) the written submissions of employer dated 5th October, 2015 filed in the High Court.

Submissions of the Employer

The Counsel for the employer submitted that the workman has not given any reasons for failing to file the aforesaid documents with the petition. In the circumstances, this court would not be

able to consider the questions of law set out in the application for special leave to appeal without considering the said material and the arguments placed before the High Court.

In support of his submission, the Counsel for the employer cited the case of *Ceylon Electricity Board v Ranjith Fonseka* (2008) 1 SLR 337.

It was further submitted that where the failure to comply with the Rules of the Supreme Court has not been explained, non-compliance should not be excused.

It was contended that such non-compliance could be excused only where the workman has proved due diligence on his part to obtain the documents and that the default was due to circumstances beyond his control, but not otherwise.

The Counsel for the employer cited the case of *Aaron Senerath v The Manager, Moray Estate and another* (SC/SPL/LA/231/2015) SC Minutes 19th January, 2017 which held:

> *"I am of the view that the Petitioner has failed to comply with the Rules of the Supreme Court when he failed to annex the material documents required by Rule 2 and Rule 6. The Petitioner in his Petition did not seek permission of the Court to file the documents subsequently. He had failed to give reasons for noncompliance.*
>
> *In terms of Rule 2 of the Supreme Court Rules 1990 the Petitioner could be excused only if it is proved that he had exercised due diligence to obtain the documents and the default was due to circumstances beyond his control, but not otherwise, that he shall be deemed to have compiled with the provisions of this rule.*

In the foregoing circumstances, it was submitted that the workman has failed to comply with Rule 2 read with Rule 6 of the Supreme Court Rules 1990, by failing to submit material documents considered by the High Court. Thus, the instant application for special leave to appeal ought to be dismissed *in limine* with costs.

Submissions of the Workman

In response to the said objection, the learned Counsel for the workman submitted that in terms of Rule 2 read with Rule 6 of the Supreme Court Rules, documents have to be annexed where the

application contains allegations of fact which cannot be verified by reference to the judgment or Order in respect of which special leave to appeal is sought.

He further submitted that the impugned judgment of the High Court and the appeal brief of the High Court that were tendered with the petition are sufficient to consider all the questions of law contained in the petition and therefore, it is not necessary to file the documents referred to above, to support the application for special leave to appeal. Moreover, it was submitted that no prejudice has been caused to the rights of the employer or the administration of justice due to the non-availability of those documents.

Furthermore, the Counsel for the workman submitted that the aforementioned documents referred to by the Counsel for the employer in his Preliminary Objection, were tendered by way of motion on 18th December, 2017 after the Preliminary Objection was raised, but prior to the inquiry in respect of the said Preliminary Objection.

Moreover, it was submitted that the employer filed a motion along with the Proxy and Caveat without raising any objections to the maintainability of the special leave to appeal application. Further, when the application was taken up for support for the first time, no objection was raised on the maintainability of the application. However, the objection regarding non-compliance was raised only when the matter was taken up for support for the second time.

Furthermore, it was submitted that the employer has not followed the proper procedure in raising the Preliminary Objection. In support of his submission, the Counsel for the workman cited the judgment decided in *S. J. Sirisena and Others v A. A. Gunawardane and 5 others* (SC/SPL/LA No. 133/2015) SC Minutes 2nd August, 2017.

Is there a material breach of Rule 2 read with Rule 6 of the Supreme Court Rules 1990?

Rule 2 of the Supreme Court Rules states as follows:

> "Every application for special leave to appeal to the Supreme Court shall be made by a petition in that behalf lodged at the, Registry, <u>together with affidavits and documents in support thereof as prescribed by rule 6,</u> and a certified copy, or uncertified photocopy, of the judgment or order in respect of which leave to appeal is sought. Three additional copies of such petition, affidavits documents, and judgment or order shall also be filed;

> Provided that if the petitioner is unable to obtain any such affidavit, document, judgment or order, as is required by this rule to be tendered with his petition, he shall set out the circumstances in his petition, and shall pray for permission to tender the same, together with the requisite number of copies, as soon as he obtains the same. If the Court is satisfied that the petitioner had exercised due diligence in attempting to obtain such affidavit, document, judgment or order, and that the failure to tender the same was due to circumstances beyond his control, but not otherwise, he shall be deemed to have complied with the provisions of this rule." [Emphasis added]

Further, Rule 6 of the Supreme Court Rules reads as follows:

> "Where any such application contains allegations of fact which cannot be verified by reference to the judgment or order of the Court of Appeal in respect of which special leave to appeal is sought, the petitioner shall annex in support of such allegations an affidavit or other relevant document (including any relevant portion of the record of the Court of Appeal or of the original court of tribunal). Such affidavit may be sworn to or affirmed by the petitioner, his instructing attorney-at-law, or his recognized agent, or by any other person having personal knowledge of such facts. Every affidavit by a petitioner, his instructing attorney-at-law, or his recognized agent, shall be confined to the statement of such facts as the declarant is able of his own knowledge and observation to testify to: provided that statements of such declarant's belief may also be admitted, if reasonable grounds for such belief be set forth in such affidavit."
> [Emphasis added]

The above shows that, Rule 2 read with Rule 6 specifies the documents that are required to be annexed to an application for special leave to appeal, if allegations of facts referred to in such an application cannot be verified by reference to the judgment in respect of which special leave to appeal is sought.

The application is filed along with a certified copy of the High Court brief which contained the following documents: the petition of appeal filed in the High Court, application to the Labour Tribunal, answer, replication, amended application, amended answer and the amended

replication, written submissions of the workman and the employer filed in the Labour Tribunal, proceedings in the Labour Tribunal, Order of the Labour Tribunal (hereinafter referred to as the "appeal brief"). Further, the impugned judgment of the High Court was filed along with the said application.

In terms of Rule 3 of the Supreme Court Rules, every application for special leave to appeal shall contain a plain and concise statement of all facts and matters that are necessary to enable the court to determine whether special leave to appeal should be granted, including the questions of law in respect of which special leave to appeal is sought, and the circumstances rendering the case or matter fit for review by the Supreme Court.

In the instant application, the workman had reserved the right to tender further documents. However, even though the workman filed the appeal brief of the High Court and the impugned judgment of the High Court along with the application for special leave to appeal, the documents referred to in the Preliminary Objection stated above were filed after the said objection was raised.

Non-compliance with the Supreme Court Rules does not necessarily result in depriving a party seeking redress from this court. It is the discretion of court to consider whether such documents are necessary to consider the application for granting special leave to appeal.

Further, the court would have to consider whether the non-compliance is fatal to the maintainability of an application or whether it is just a failure or omission which should not affect the administration of justice or whether the defect can be cured in the interests of justice without adversely affecting the rights of the other parties.

This position was held in *Kiriwanthe and Another v Navaratne and Another* [1990] 2 SLR 393, Fernando, J held:

> *"The weight of authority thus favours the view that while all these Rules must be complied with the law does not require or permit an automatic dismissal of the application or appeal of the party in default. The consequence of non-compliance (by reason of impossibility or for any other reason) is a matter falling within the discretion of the Court, to be exercised after considering the nature of the default, as well as the excuse or explanation therefor, in the context of the object of the particular Rule."* [Emphasis added]

In the circumstances, it is necessary to consider whether the documents that have not been filed along with the application for special leave to appeal are fatal to the maintainability of the instant application.

The Counsel for the employer submitted *inter alia* that the objections and affidavit that were filed in the High Court by the workman have not been produced in this court along with the instant application.

There is no provision requiring the filing of objections in an appeal. Hence, the statement of objections and the verifying affidavit filed by the workman before the High Court are not necessary to consider the instant application.

The other documents that have not been filed, are the written submissions filed by the workman and the employer before the High Court.

Upon perusal of the questions of law raised, it is evident that there are no allegations of fact which cannot be verified by reference to the impugned judgment and the appeal brief. Hence, I am of the opinion that the said documents are not material documents to consider granting of special leave to appeal in the instant application.

Thus, the case of *Aaron Senerath v The Manager, Moray Estate and another* (SC/SPL/LA/231/2015) SC Minutes 19th January, 2017 cited by the Counsel for the employer has no relevance to the instant application as the material documents are provided along with the petition in the instant application.

A close examination of the instant application shows that the impugned judgment of the High Court and the appeal brief filed in the High Court annexed to the said application are sufficient to consider the questions of law that are set out in the application for special leave to appeal.

Further, the Counsel for the employer cited the case of *Ceylon Electricity Board v Ranjith Fonseka* (2008) 1 SLR 337 in support of his Preliminary Objection. However, it has no relevance to the application, as the said appeal had been decided mainly on the defects in the caption of the petition and affidavit filed in court, and not on the failure to file written submissions that were filed in the lower court by the parties.

In the circumstances, the instant application can be considered by referring to the impugned judgment of the High Court and the appeal brief of the High Court produced along with the said application.

Thus, I am of the opinion that there is no material breach of Rule 2 read with Rule 6 of the Supreme Court Rules on the part of the workman and substantial compliance with the Supreme Court Rules has been observed in filing the instant application. In any event, no prejudice has been caused to the employer.

Has the employer followed the proper procedure for raising the aforementioned Preliminary Objection?

The employer filed a motion along with its Proxy and Caveat without raising any objections for the alleged breach of the Supreme Court Rules.

Further, when the instant application came up for support, the employer had made an application to re-fix the application for support without raising any objection as to the maintainability of the instant application. The Preliminary Objection was raised for the first time when the instant application was taken up for support for the second time.

If an application for special leave to appeal does not comply with the Supreme Court Rules, a party who wishes to raise an objection for the non-compliance of the Rules, shall do so in terms of Rule 10 by filing a motion and moving court for the rejection or dismissal of the said application.

Rule 10 reads as follows:

> "(1) A single Judge of the Supreme Court, sitting in Chambers, may refuse to entertain any application for special leave to appeal on the ground that it discloses no reasonable cause of appeal, or is frivolous or vexatious, or contains scandalous matter, or is preferred merely for the purpose of causing delay, or that such application does not comply with these rules.
>
> (2) Where a Judge refuses to entertain an application for special leave to appeal under the provisions of the preceding sub-rule, the petitioner may appeal, by

way of motion, to the Supreme Court against such refusal." [Emphasis added]

The correct procedure for raising an objection for non-compliance of Supreme Court Rules was discussed in detail in *S. J. Sirisena and Others v A. A. Gunawardane and 5 others* (SC/SPL/LA No. 133/2015) SC Minutes 2nd August, 2017 where it was held:

> *"Rule 10(1) stipulates the consequences of non-compliance with the Supreme Court Rules. I am of the view that the correct procedure for raising an objection of non-compliance of the Supreme Court Rules is to move the Court by filing a motion seeking for the rejection of the application. However, in this instance, the Respondents had failed to invoke the Rule 10(1) prior to raising the preliminary objection. Thus, the Respondents are not entitled to raise the said preliminary objection at a later stage."*

However, in the instant application, the employer has failed to comply with the procedure set out in Rule 10 of the Supreme Court Rules in respect of raising a Preliminary Objection. Hence, the employer is not entitled to raise the Preliminary Objection stated above.

Thus, I am of the opinion that the employer has not followed the proper procedure in raising the Preliminary Objection by not complying with Rule 10 of the Supreme Court Rules of 1990.

Conclusion

In the circumstances, due to the reasons stated above, the Preliminary Objection raised by the employer is overruled.

I order Rs. 25,000/- as costs. The costs should be paid to the workman on or before 30th September, 2020.

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**

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.

Arangallage Samantha
No 275/26, Arachchiwatta,
Nedagamauwa,
Kotugoda, Minuwangoda.

Petitioner

S.C. (F/R) Application No. 458/2012

1. The Officer-in-charge of the Police Station
   Police Station
   Biyagama

2. A.S.P. Nishantha Soyza
   A.S.P.'s Office, Police Station
   Mirihana, Nugegoda.

3. The Headquarter Inspector of Police
   Police Station, Mirihana,
   Nugegoda.

4. Police Constable 40841
   Kumudesh
   Police Station, Mirihana,
   Nugegoda.

5. Police Constable 40937
   Samaraweera
   Police Station, Mirihana,
   Nugegoda.

6. The Inspector-General of Police
   Police Headquarters
   Colombo 01.

7. Hon. Attorney-General
Attorney-General's Department
Colombo 12.

Respondents

Before: Buwaneka Aluwihare, PC, J.
Murdu N. B. Fernando, PC, J. &
E. A. G. R. Amarasekera, J.

Counsel: R. Navodayan for the Petitioner.
Amaranath Fernando for the 4th and 5th Respondents.
Chrisanga Fernando SC for the Attorney-General.

Argued On: 13. 12. 2019

Decided On: 28. 01. 2020

Aluwihare PC, J,

The Petitioner, a three-wheeler driver by profession, complained of the violation of his fundamental rights guaranteed under Articles 11, 12(1) and 13(1) by the Respondents and leave to proceed was granted for the alleged infringement of the said Articles against the 4th and 5th Respondents.

The version of the Petitioner

According to the Petitioner, on the 28th of June 2012, while the Petitioner was driving his three-wheeler from Rajagiriya to Malwana, at around 8.30 am two persons who were unknown to him, had blocked his path with their motorcycle and had brought his three-wheeler to a halt. These two persons who were dressed in civilian clothing had then forcibly taken the Petitioner to the Biyagama Police Station. After being presented

before the Officer-in-charge of the Biyagama Police Station, on his instructions, the Petitioner had been kept in the police cell for about half an hour without any reasons being given for his arrest.

Thereafter, the 4th and 5th Respondents who had come over to the Biyagama Police Station from the Mirihana Police Station, had taken over the custody of the Petitioner. He had been ordered to drive his three-wheeler to the Mirihana Police Station and while he was driving, the 5th Respondent who was seated at the back of the three-wheeler had beaten the Petitioner on the head. When they reached Rajagiriya the Petitioner had stopped his three-wheeler. The Petitioner alleges that at this point the 5th Respondent again assaulted the Petitioner on his head and on one ear and due to the intensity of the attack, the Petitioner fainted. According to the Petitioner, after the assault, the Respondents had taken the Petitioner to the Mirihana Police Station in his three-wheeler.

At the Mirihana Police Station the Petitioner had been produced before the Assistant Superintendent of Police, Nishantha Soyza, the 2nd Respondent, and on his instructions the Petitioner had been detained in the police cell. In the early hours of the following day, (29th June 2012) the Petitioner had been released from police custody after having his statement recorded.

The Petitioner states that as he experienced severe pain he sought treatment at a private hospital. As his condition, however, did not abate the Petitioner had sought treatment at the District General Hospital, Gampaha on 5th July 2012, roughly a week after the alleged assault, where he had been admitted and received treatment for 6 days. The Petitioner had not produced any of the medical records relating to the treatment he is said to have obtained from the private hospital.

When one considers the material adduced by the Petitioner before court, several contradictions can be identified. The Petitioner has averred in the Petition that he was assaulted by **two** police officers. On the contrary, the history given by the Petitioner as recorded in the Medico-Legal Report (MLR) of 10th July 2012 ('P7') is that, "Assaulted by **four** police officers of the Mirihana Police on 28th June 2012 at 9.30 am with hands".

Furthermore, the version of the events narrated in the Petition varies from the version that emerges from the letter marked 'P5'. 'P5' is a copy of the message sent by the Deputy Inspector General of Police, Western Province (South), dated 13th July 2012, directing HQI Mirihana to produce the two police officers against whom a complaint had been made by the Petitioner to the said Deputy Inspector of Police. The complaint referred to in 'P5' had been made regarding two police officers attached to the Mirihana Police Station for having boarded the Petitioner's three-wheeler, and travelling in the three-wheeler the entire day up to around 12 midnight and leaving without paying any fare after having got themselves dropped near the police sports grounds at Mirihana. In addition, according to 'P5', the Petitioner is alleged to have complained that he was assaulted and threatened by the said two police officers as well. This is contradictory to the averments of the Petition where the Petitioner has asserted that he was held in custody at the Mirihana Police Station and that he was released at 1.00 am on 29th June 2012 after having a statement recorded from him.

As referred to earlier, although the Petitioner claims that following the assault he obtained treatment from a private hospital, no records of such treatment have been submitted. The submitted medical records from the District General Hospital Gampaha are from 5th July 2012 onwards. The only 'medical report' is the MLR of Dr. Wijewickrama ('P7') who had recorded that the Petitioner had no external injuries. He has noted in the MLR; "Patient was complaining of hearing loss on right side and he was referred to a Neurologist for a special test (Auditory brain stem response). Patient was advised to come back after the test to complete his medical report, but the patient did not turn up".

The other records produced are the Admission Form-District General Hospital, Gampaha dated 5th July 2012, and Audiological Evaluation Sheet- Pure Tone Audiometry ('P6'). In the counter affidavit of the Petitioner at paragraph 7, reference is made to an endorsement made on top of 'P6' (Audiological Evaluation Sheet) in Sinhala "කන් ඇසීම අඩුයි" ("hard of hearing") and it has been claimed that to be an endorsement made by the physician. The body of the entire Evaluation Sheet is

perfected in English and this endorsement is found outside the area dedicated to record findings in that sheet. Thus, to me it appears to be an endorsement made, merely to enlighten the doctor of the patient's history rather than a clinical finding by the doctor.

Consultant ENT and Head and Neck Surgeon, Dr. W. M. C. Narampanawa has referred the Petitioner to a Consultant Neurologist to assess his hearing threshold as his PTA indicated "R/S mixed hearing loss". The Brain Stem Auditory Evoked Potential Report dated 26th July 2012 obtained from the National Hospital (marked 'P2') states that *"The findings are suggestive of R/S peripheral lesion (cochlear or immediate retro cochlear) (exclusion of conductive cause is assumed)"*. The Audiological Evaluation Sheet obtained two years later from the District General Hospital, Gampaha, on 08th October 2014 (marked 'P8') records a finding of "Profound sensory neural hearing loss in right ear". While these records point to hearing loss suffered by the Petitioner, neither the MLR or the other medical records produced link the physical infirmity of the Petitioner with the alleged assault by the 4th and 5th Respondents. The non-production of the immediate medical records in order to exclude the possibility of the damage being inflicted at any time during the margin between 29th June 2012 and 5th July 2012 is another deficiency of the Petitioner's case.

The violations alleged

Violation of Article 13(1):

Article 13(1) of the Constitution stipulates that "any person arrested shall be informed of the reason for his arrest". The Petitioner alleges that no reasons were given for his arrest. According to the Petitioner he had been arrested by two officers from the Biyagama Police station and produced before the OIC of the Biyagama Police station. The Petitioner had not cited the two police officers who arrested him as Respondents. According to his own admission the 4th and 5th Respondent had come to the Biyagama police station and then taken him to the Mirihana police station. By that time the Petitioner had been placed under arrest. As such the 4th and 5th Respondents who had

nothing to do with the arrest of the Petitioner cannot be held liable for unlawful arrest of the Petitioner.

I am mindful of the fact that the failure to make a person who is alleged to have violated a fundamental right, a Respondent in a petition for relief under Article 126 of the Constitution is not a fatal defect, which now is settled law under the realm of the fundamental rights jurisdiction (see ***Samanthilaka v Ernest Perera and Others*** [1990] 1 Sri LR 318). All what a Petitioner is required to satisfy is that a violation of a fundamental right had been occasioned by executive or administrative action.

In the instant case the only material this court has to determine the violation of Article 13(1) is the assertion of the Petitioner that he was arrested without assigning any reason. Although the Petitioner alleges that he was 'forcibly taken', he has not elaborated on the nature of force used. According to the Petitioner it was the officers of the Biyagama police station who had arrested the Petitioner. When this application was supported the court had thought it fit not to grant leave to proceed against the 1st Respondent who was the Officer-in-Charge of the Biyagama police station. As such I do not see a reason to consider violation of Article 13(1) in the present application. On the other hand, when one considers the infirmities of the Petitioner's version of the events that unfolded, the bare assertion by the Petitioner that "no reason was assigned to his arrest" is not sufficient in this backdrop to hold that the Petitioner's arrest was illegal.

The excerpt from the Information Book of the Mirihana Special Crimes Investigation Unit (marked '4R1') states that the Petitioner was stopped at the Dompe junction and later asked to drive the three-wheeler to a house in Rajagiriya which was supposed to be frequented by one Dinesh Darshika whom the Police officers were seeking to arrest and had travelled in the Petitioner's three-wheeler that day. There is no mention of the Petitioner being held in the police cell at the Mirihana Police Station. According to the excerpt, from the Rajagiriya house, the Petitioner had been taken to the Mirihana Police Station where he had been produced before the Officer-In-Charge of the Mirihana Police Station and the Nugegoda Senior Superintendent of Police, and directed to report

to the Police Station if he was called again. The Petitioner's complaint of detention without reasons for arrest therefore, does not tally with the version of the Police. Given the contradictions in the Petitioner's version of the events, the Information Book excerpts appear to be more believable.

Violation of Article 11:

The Petitioner has complained of torture at the hands of the 4th and the 5th Respondents. The Admission Form dated 05th July 2012 as well as the MLR of 10th July 2012 (marked 'P7') however, record that there were no external injuries to be seen on the Petitioner. While external injuries are not an essential indicator of torture, given the circumstances of the present case the only instance where the Petitioner alleges that he was assaulted is when he was travelling in the three-wheeler in the company of the 4th and the 5th Respondents. In addition, the Petitioner's allegation that he was assaulted on the head **while he was driving** the three-wheeler does not appear to be plausible as such reckless behavior could have led to the Petitioner losing control of the vehicle he was driving and caused an accident endangering the lives of the assailants themselves. The Petitioner has also averred that he lost consciousness at Rajagiriya due to the assault and he had further asserted that the three-wheeler was driven to Mirihana after he re-gained consciousness. Here, the Petitioner is not clear as to whether he had driven the three-wheeler or it was one of the Respondents who did so.

It does not appear to be a rational course of conduct on the part of the 4th and 5th Respondents to have permitted the Petitioner to drive the vehicle for the distance from Rajagiriya to Mirihana. It is doubtful as to whether any right-minded person would allow a person to drive a vehicle immediately after such person had fainted and regained consciousness.

In proceedings of this nature, the court has very limited avenues to test the veracity of these assertions and necessarily have to depend on the affidavits and other documents filed. In the circumstances, in arriving at a just and equitable decision in the realm of

the fundamental rights jurisdiction, the court necessarily has to apply the test of probability to the factual matters placed before us.

In this regard I wish to cite with approval the opinion expressed by Wanasundera J. in the case of ***Velmurugu v The Attorney General and Others*** 1981 1 SLR 406, where his Lordship stated that the test applicable is a "preponderance of probability" adopted in civil cases. It was stated that although the standard is not as high as that required in criminal cases there can be different standards of probability within that standard and the degree applicable would depend on the subject-matter. Further, Soza J. in ***Vivienne Goonewardene v Hector Perera*** 1983 SLR 1 V 305 stated;

> *"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."*

As alleged, the Petitioner may have been assaulted by the 4th and 5th Respondents, the issue, however, is whether the Petitioner has placed sufficient material before this court to the degree required for the court to come to a conclusion that the said Respondents have infringed the Petitioners fundamental right guaranteed under Article 11 of the Constitution.

It was well within the means of the Petitioner to have the records relating to the treatment he obtained from the private medical facility produced. According to the MLR the Petitioner had no external injuries and was requested to consult the Assistant JMO after undergoing the recommended medical test, which the Petitioner had not done. There is an endorsement in 'P2' (Brain Stem Auditory Evoked Potential Report) that "the findings are suggestive of R/S peripheral lesion (cochlear or retro cochlear)". However, there is paucity of material for the court to come to a conclusion as to the cause of the medical condition referred to or whether it is compatible with the history given by the Petitioner. For the reasons given above, I hold that the Petitioner has failed

to satisfy the high degree of probability required to prove the infringement of the absolute right of freedom from torture.

Considering the matters referred to, I am unable to say that the Petitioner has proved the alleged violation to my satisfaction. The conduct and behavior of the Petitioner leaves a serious doubt in my mind as to whether or not the incidents spoken of by him happened in the manner narrated by him. In the circumstances aforesaid, I am of the view that the alleged acts of torture by the 4th and 5th Respondents has not been made out or cannot be imputed as a liability of the state as a matter of law.

For the reasons given above, I hold that the Petitioner has failed to satisfy the high degree of probability required to prove the infringement of the absolute right of freedom from torture.

As such, in the absence of proof to indicate that the Petitioner was not accorded the equal protection of the law, I am of the opinion that the Petitioner's right to equality under Article 12(1) was not violated by the 4th and 5th Respondents.

In the course of the submissions the court was informed that the 4th and the 5th Respondents were subjected to disciplinary action based on the complaint made by the Petitioner. The findings by this court on the alleged infringement of fundamental rights of the Petitioner should not have any bearing with regard to the disciplinary proceedings against the said Respondents; for the reason that this court is of the view that the disciplinary authority would be better equipped to inquire in to the allegation fully and test the veracity of the Petitioner's allegations and to come to an independent finding of its own.

It must, however, be emphasized that the members of the Police force entrusted with the task of ensuring a peaceful environment for the citizenry to live without fear of crime or violence, should not themselves consider it their right to resort to violence at the cost of the well-being of their detainees, in the achievement of those ends.

Application dismissed and in the circumstances of this case I order no costs.

Application dismissed.

JUDGE OF THE SUPREME COURT

JUSTICE MURDU N. B. FERNANDO PC
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

Application under Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC (F/R) No. 29/2018

1. Locomotive Assistants Union,
   Department of Railways,
   Maligawatte, Colombo 10.

2. Pitigala Arachchige Danushka Perera
   President,
   Locomotive Assistants Union
   No. C 22 Railway House,
   Dematagoda, Colombo 09.

3. Rupasinghe Arachchilage Sanka Namal
   Secretary,
   Locomotive Assistants Union
   No. 28, Railway Quarters,
   Danister de Silva Mawatha
   Dematagoda, Colombo 09.

4. Dikmahadu Godage Gunapala,
   Treasurer,
   Locomotive Assistants Union,
   Liyanagedara, Nedurugoda,
   Elpitiya, Thelijjawila.

5. Hewa Heenipallage Ranaweera
   No. 208, Kirikurakkan Hena,
   Komangoda, Tihiyagoda.

6. Weerasinghe Arachchilage Ranga Prasad
   No. 1A/F1/014
   Mihindusevanapura,
   Dematagoda, Colombo 09.

7. Hettiarachchilage Ananda Sarath
   No 22, Tissa Weerasinghe Square,
   Seema Road, Batticaloa.

8. Hittatiya Edirisooriyage Janaka Ranjan
   No. 706/1, Elhena Road,
   Madinnagoda, Rajagiriya.

9. Thuwan Nijam Tuwannoor
   No. 105/P/2,
   D.R. Wijewardana Mawatha,
   Colombo 10.

10. Mahabandarage Dishan
    No. B/4/3, Maligawatta,
    Railway Quarters, Colombo 10.

11. Maththumagoda Kankanamalage Samantha
    No. 765/314, National Housing,
    Maligawatta, Colombo 10.

12. Chathura Lakpriya Rambukpota
    No. 13/9, Martis Lane,
    Colombo 12.

13. Rajamunige Prasath Dhanuka
    No. 1A/F2/022,
    Mihindusenpura,
    Dematagoda, Colombo 09.

14. E.D.U.P. Vijithananda
    64/30, Railway Quarters, Maligawatta.

Petitioners

Vs.

1. S.M. Abeywickrema
   Former General Manager,
   Sri Lanka Railways Department.

1A. M.J.D. Fernando,
General Manager,
General Manager's Office
Sri Lanka Railways Department,
P.O. Box 355, Olcott Mawatha,
Colombo 10.

2. Nimal Siripala De Silva
Former Minister of Civil Aviation and Transport,
Ministry of Civil Aviation and Transport,
7th Floor, Sethsiripaya, Stage II,
Battaramulla.

2A. Mahinda Amaraweera,
Minister of Transport Services Management,
7th Floor, Sethsiripaya, Stage II
Battaramulla.

3. G.S. Vithanage
Former Secretary,
Ministry of Civil Aviation and Transport.

3A. H.M. Gamini Seneviratne,
Secretary,
Ministry of Transport Services Management,
7th Floor, Sethsiripaya, Stage II
Battaramulla.

4. Dr. Sarath Amunugama,
Minister of Special Assignments,
6th Floor, Sethsiripaya, Stage II,
Battaramulla.

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

Respondents

6. Railway Locomotive Operating Engineers' Union
No. 7, T.B. Jayah Mawatha, Colombo 10.

7. D.L.P. Paranavitharana
President
Railway Locomotive Operating Engineers' Union
No. 35/3, Bandaranaike Mawatha, Katubedda, Moratuwa.

8. D.H. Indika
Secretary
Railway Locomotive Operating Engineers' Union
No.29, Mount Mary, Colombo 10.

Added-Respondents

Before: Buwaneka Aluwihare, PC. J.

L.T.B. Dehideniya, J.

E.A.G.R. Amarasekara, J.

Counsel: Chamantha Weerakoon Unamboowe with Lumbini Kohilawatte for the Petitioners.

Faisz Mustapha, PC with Ranga Dayananda instructed by Lilanthi de Silva for the 6th to 8th Added-Respondents.

Dr. Avanti Perera, SSC for 1st to 5th Respondents.

Argued on:	16.10.2019 and 04.11.2019
Written Submissions:	Petitioners on 16. 12. 2019
	1st to 5th Respondents on 17. 12. 2019
Decided on:	16. 07. 2020

Aluwihare PC. J.,

The subject matter of this Application concerns whether the non-implementation, by the 1st to 3rd Respondents, of the Scheme of Recruitment (SOR) issued in 2016 for the purpose of effecting new recruitments for the post of 'Railway Driver Assistants' in the Sri Lanka Railways Department, amounts to a violation of the Petitioners' right to equality before the law and equal protection of the law, guaranteed by Article 12(1) of the Constitution.

Factual Background

The Petitioners are office bearers and members of the Trade Union, 'Locomotive Assistants Union' (hereinafter sometimes referred to as the 1st Petitioner Union), and are employed in the Sri Lanka Railways Department as 'Railway Driver Assistants'. The Added-Respondents are also employees of the said Department, as well as office bearers and members of the Trade Union, 'Railway Locomotive Operating Engineers' Union' (hereinafter sometimes referred to as the 6th Added-Respondent Union). The Added-Respondents have intervened in this Petition representing the interests of the 'Railway Engine Drivers' of the Department of Railways.

This Application challenges the alleged non-implementation by the 1st to 3rd Respondents of the Scheme of Recruitment (hereinafter sometimes referred to as the SOR of 2016) issued in 2016 marked '**P9**', and claims that their failure to make necessary new recruitments to the post of 'Railway Engine Driver Assistants' in terms of the SOR, is a violation of the Petitioners' right to equality before the law and equal protection of the law as enshrined in Article 12(1) of the Constitution. The Petitioners pray for a

Declaration to that effect, and a direction to the Respondents to take appropriate steps to immediately fill the existing vacancies in the post of 'Railway Driver Assistant', as per the SOR of 2016.

In the sequence of events leading up to the status quo, it is the Petitioners' contention (as per the amended Petition dated 05th March 2018) that in 1993, four existing 'Labour grades' in the Department of Railways [Third Enginemen, Second Enginemen, Shed Enginemen, and Shunting Engine Driver] were amalgamated to form the two grades designated as 'Railway Engine Drivers (shunting)' and 'Driver Assistants'. In 1996, these two grades have been taken out of the 'Labour grades' and placed under the 'Major Staff grade' (as evidenced by the letter marked '**P1**' and the General Manager's Circular marked '**P21**'). With the subsequent establishment of the Sri Lanka Technological Service, these two grades have been assigned the salary scales pertaining to Sri Lanka Technological Services Grades II A and II B, respectively.

Thereafter, effecting a general re-structuring of salaries in the public service, the Public Administration Circular No: 06/2006 (marked '**P2**'), brought about a re-categorisation and re-classification of public sector employees with effect from 1st January 2006. Under the said Circular, the 'Engine Drivers (Shunting)' and 'Railway Driver Assistants' were once again categorized under 'Labour grades', and in the new classification, they were assigned the salary code PL 2-2006 A (Primary Level- Semi Skilled). This decision appears to have been taken as there was no category, after the restructuring of salaries in the public service by the said Public Administration Circular, to accommodate the 'Major Staff grade'- the grade in which the 'Engine Drivers (Shunting)' and the 'Railway Driver Assistants' were hitherto placed.

Following the protests against the above course of action by the 1st Petitioner Union and the 6th Added-Respondent Union, the Circular No: 06/2006 was amended in 2007 by, *inter alia*, the Public Administration Circular No: 06/2006 (IV) (marked '**P3**'). This amendment had been consequent to a recommendation made by a Committee appointed by the then Secretary to the Ministry of Transport to resolve the issue.

The Cabinet of Ministers had approved a Scheme of Recruitment (SOR) on 03rd February 2010 in terms of the above Circular ('**P3**') for the new Grade of 'Railway Driver Assistants

and Engine Drivers (Shunting)' to take effect from 01st January 2010. By virtue of this SOR both the 'Railway Driver Assistants' and the 'Engine Drivers (Shunting)' were placed in the category of 'Management Assistant Technical-Segment 3' and were assigned the salary scale code MT 1-2006(A) (Rs. 14,425-10x145-11x170-6x240-14x320-23,665). The 'Engine Driver (Shunting)' was placed higher in the same salary scale (as per '**P5**').

This SOR submitted by the Petitioners marked as '**P5**', stipulates the approved cadre for 'Engine Drivers (Shunting)' as 103 and the approved cadre for 'Railway Driver Assistants' as 390, out of which 50% is to be recruited through an open competitive examination, with 10% through a limited examination for internal applicants and 40% through merit. It also lays down the academic and technical qualifications for new recruitments to grade III of 'Railway Driver Assistants' and for the post of 'Engine Driver (Shunting)'.

Meanwhile, the Department of Management Services (DMS), expressing a contrary view by their letter dated 09th April 2013 (marked '**IP4-A**') had stipulated that the approved cadre of the Sri Lanka Railways is as set out in Annex1 thereto, in terms of which the new recruitments to the post of 'Railway Driver Assistants' should be made under the salary scale PL 3- 2006(A) as opposed to MT 1-2006(A). It conveyed that those Assistants who were already drawing a salary as per the salary scale of MT 1-2006(A) should continue to receive that salary.

The Petitioners submit that around August 2013, the 1st Petitioner Trade Union became aware of an **attempt** by the General Manager- Railways (1st Respondent) to place the 'Railway Driver Assistants' in a lower salary scale (under salary code PL 3 -2006 A) applicable to the Grade of Primary Level-Skilled Workers which is a 'Labour grade', while the 'Engine Driver (Shunting)' were to remain in the previous higher salary scale stipulated by the SOR of 2010 (namely, salary code MT 1-2006 (A) for Management Assistant Technical- Segment 3). Challenging, *inter alia*, this attempt to thwart the operation of the approved SOR and place them in a lower salary scale, the Petitioner Union of Railway Driver Assistants had filed the Fundamental Rights Application SC FR No. 341/13 on 01st October 2013 (Petition marked '**P6**') claiming the infringement of their right to equality before the law and equal protection of the law as per Article 12(1).

It is stated by the Petitioners that while the above case (SC FR No. 341/13) was pending, a new Scheme of Recruitment in respect of recruitment of Railway Driver Assistants was approved by the Public Service Commission on 9th June 2016 and 29th September 2016 (marked '**P9**'). This new SOR preserved the *status quo* by placing the 'Railway Driver Assistants' under the same category of 'Management Assistant Technical- Segment 3' and assigning them the salary code MT 1-2006 (A) (Rs. 14,425-10x145-11x170-6x240-14x320- 23,665).

As for the changes brought about by the new SOR of 2016, it increased the cadre of 'Railway Driver Assistants' from 390 to 540; 30% of them was to be recruited through an open competitive examination while the rest 70% was to be selected through a limited examination for internal applicants. The earlier method of recruitment based on merit was done away with. Another substantial change brought about was that it amended the recruitment qualifications for external recruits to the post of 'Railway Driver Assistants' stipulated in the earlier SOR. It removed the academic qualification requirement of securing four passes at the G.C.E. Advanced Level Examination in the Science Stream, and replaced the previous technical qualification of completing a NVQ Level-5 course of not less than 18-month duration (related to diesel engine operation), with the requirement to complete a 2 ½ year technical course recognized by the Tertiary and Vocational Education Commission.

The Petitioners state that they accepted the new SOR of 2016 as a settlement of their grievances. With the Railway Department subsequently commencing calling for external and internal applications for vacancies in the post of 'Railway Driver Assistants' under the new SOR, and publishing a notice in the Government Gazette to that effect dated 23rd December 2016, the Petitioners had moved the Court on 13th February 2017 to terminate the proceedings of the above case filed by them- SC FR No. 341/13.

Meanwhile, the 6th Added-Respondent Union had forwarded proposals to be incorporated in to this new SOR of 2016 to the then Secretary to the Ministry of Transport, the relevant Minister, the Department of Management services and the Ministry of Public Administration and Management ('**8R6**') on several occasions. In opposition to the Examination for recruitment under the SOR 0f 2016 being gazetted,

they had resorted to Trade Union action on 08th April 2016, and had threatened such action again on 06th October 2016 and 18th January 2018 (**'8R8'**).

In view of the fact that the new SOR of 2016 did not include any of their suggested amendments, the Railway Locomotive Operating Engineers' Union had filed a separate Fundamental Rights Application - SC FR No. 76/2017 on 16th February 2017 (evidenced by **'P8'**) challenging the legitimacy of the SOR, and seeking to amend the new SOR of 2016- purportedly to bring it into conformity with the aforementioned Public Administration Circular No: 06/2006 and the Safety Rules of the Department of Railways- which appear to be Rules governing the operation of trains, coming into effect in the year 1983 and are currently applicable.

The Engine Drivers' Union had also sought to intervene in the earlier Fundamental Rights Application filed by the Petitioners (SC FR No. 341/13) on 22nd February 2017 (after almost 4 years had passed since the Petitioners had filed the case and after the Petitioners moved to terminate it, as evidenced by **'P7'**) but the intervention Application was not supported by them.

However, when the Petitioners who had moved to terminate the proceedings of SC FR No. 341/13 were informed that the recruitment process of 'Railway Driver Assistants' which was then underway, had been suspended on the directive of the Senior Assistant Secretary to the Ministry of Transport and Civil Aviation by a letter dated 17th January 2017, they opted not to support the motion for termination. But with the Additional General Manager of the Railway Department subsequently informing the Petitioners that the suspension had been cancelled on 10th March 2017, the Petitioners were satisfied, and filed a motion to support the application for termination of proceedings. Consequently, the proceedings of SC FR No. 341/13 were terminated on 30th March 2017.

Soon after, however, another complication had developed to stifle the recruitment process. The Petitioners had received a letter from the 1st Respondent [GM-Railways] dated 23rd May 2017 (marked **'P12'**), communicating that on the instructions of the Minister of Transport and Civil Aviation (2nd Respondent) pursuant to a meeting held by the then Secretary to the Ministry, the recruitments to the post of 'Railway Driver Assistant' have been temporarily suspended for two weeks. The reason had been given as

the need to allow time for 'Railway Engine Drivers' to seek legal relief under the case filed by them, but have stated that this decision does not suspend the written examination. The Petitioners state that the 'Railway Engine Drivers', however, did not take any further steps in the abovementioned Fundamental Rights Application -SC FR No. 76/2017 filed by them (which suffered the fate of being postponed several times until finally being withdrawn a few months later on 25th October 2017), nor did they seek any other legal remedy during the two weeks' grace period.

After the two-week period had lapsed with no objections, the Open Competitive Examination for Recruitment to the Post of Railway Engine Driver Assistant- Grade III was fixed for 26th August 2017. But after the strike action on 21st June 2017 by the 6th Added-Respondent Union opposing, *inter alia*, the recruitment of Driver Assistants as per the SOR of 2016 ('**P16**') the examination was yet again postponed on the instructions of the then Secretary to the Ministry of Transport and Civil Aviation (as per his letter dated 02nd August 2017 -marked '**P14(a)**').

Two months later, the letter postponing the exam was cancelled by the 3rd Respondent (Secretary to the Ministry of Transport) by his letter dated 28th September 2017 (marked '**P14(b)**') by which he directed the 1st Respondent (GM-Railways) to take all necessary steps to hold the said examination without delay. Consequently, the 1st Respondent had abided by the instructions and written to the Commissioner General of Examinations to take all necessary steps to conduct the examination. The examination was finally fixed for 23rd December 2017.

At this juncture, the 6th Added-Respondent Union of Engine Drivers, being aggrieved by the fact that the proposals presented by them to be incorporated in the new SOR of 2016 to purportedly bring it into conformity with Safety Rules and PA Circular No: 06/2006 were rejected, resorted to Trade Union action on 12th October 2017 (paragraph 22 XVIII of the affidavit of the 8th Added-Respondent). As a consequence of such Trade Union action, an Eight Member Committee was appointed by the Secretary to the President on 12th October 2017 to look into the concerns raised by the 'Railway Engine Drivers' regarding the SOR of 2016 and to make recommendations to resolve the outstanding issues ('**IP13A**'). Subsequent to meeting with the said Committee, the 6th Added-

Respondent Union withdrew the FR Application No. 76/2017 filed by them on 25th October 2017 (**'P13'**), as they were given an undertaking by the then Secretary to the Ministry of Transport to suspend the examination until the SOR of 2016 was amended.

Thereafter, the 6th Added-Respondent Union had yet again struck work along with the 'Trade Union Alliance of the Department of Railways' on 06th December 2017 (paragraph 11 of the Petitioners' written submissions) over salary anomalies, even with the G.C.E. Ordinary Levels Examination looming close. At that point, the President had appointed a Cabinet Sub-Committee chaired by the 4th Respondent to resolve the issues of the strikers. While the negotiations continued, the examination was yet again postponed indefinitely on the instructions of the 4th Respondent on 20th December 2017 (**'P15'**) for the time being. This was, in the sequence of events, ***effectively the fourth time that the recruitment process of 'Railway Engine Driver Assistants' had been halted.***

The abovementioned Cabinet Sub-Committee on 16th February 2018 issued a Joint Cabinet Memorandum with their observations on outstanding issues (**'IP16-A'**). By issue number 02 of the Memorandum, the Committee has identified that, increasing the basic qualifications for Primary Technical Service MN1 level salaried officers to recruit them to MT1 and MT2 level salary scales had created an anomaly, in that MN1 level officers were imposed with a basic qualification of NVQ level proficiency, resulting in no qualified candidates being available for their vacancies, as it exceeded the level of education required by these employees in discharging their duties. However, the Petitioners submit in their written submissions (paragraph 21) that issue number 02 does not concern Driver Assistants who were previously in PL 2 salary scale but only refers to Primary Technical Service (MN 1 level) officers who were subsequently given MT 1 and MT 2 level salary scales. They further state that a number of qualified candidates applied for the competitive examination when it was gazetted to be held in 23rd December 2017.

Observation number 3 in the Memorandum, notes the need to "revise salary scales and recruitment schemes of all officers" of the Railway Department. The Cabinet of Ministers made a policy decision dated 9th May 2018 (**'IP16-B'**) and granted approval to implement the observations, including observation 3 (as a long-term measure) to resolve the issue, thus allowing for the formulation of a new SOR. The approval however, was "subject to

the Ministry of Transport and Civil Aviation taking action to convert the Department of Sri Lanka Railways to a closed Department in future."

The Petitioners on the other hand contend that continuous disruptions to the process of recruitment are a result of the Respondent Authorities acquiescing to the strike actions or threats of striking work by the 6th Added-Respondent Trade Union of the Engine Drivers, merely for the purpose of gaining leverage to achieve their demands contained in the letter marked "**P16**", which includes *inter alia,* the Union's objections to the SOR of 2016 and the implementation of it.

The Petitioners state that even though the above SOR increased the cadre of 'Railway Driver Assistants' to 540, at the moment only 220 'Railway Driver Assistants' are in service, creating more than 300 vacancies, **with the last intake being in 2011, nearly 09 years ago**. They claim that the Railway Department functions were hindered by Railway Driver Assistants being severely understaffed. Due to this, they state, around 140 workers from lower labour grades had had to function as 'Acting Driver Assistants', covering the duties since 2010. The 6th Added-Respondent Union has concurred that due to the shortage of 'Railway Driver Assistants', they are currently engaging in work with labour grade workers, to cover the duties of 'Driver Assistants', in their letter to the 2nd Respondent on 04th April 2016 ('**IP6**').

These difficulties are also evidenced by the letter of the Chief Engineer (Motive Power) addressed to the 1st Respondent dated 22nd May 2017 (marked '**P18**'), where he communicates the hardships in maintaining services with 300 existing vacancies for Railway Driver Assistants, and requests him to expedite the recruitments.

With such an impasse continuing without a resolution in sight, the 1st Respondent had written to the Coordinating Secretary to the President on 04th December 2017 ('**P19**'), reiterating that currently bare minimum service is maintained by employing Technical Assistants to cover the duties of 'Railway Driver Assistants' and re-employing retired Engine Driver Assistants on contract basis. He has thus requested the Secretary to issue instructions to the officials of the Ministry of Transport and Civil Aviation to expedite recruitments, in view of these facts.

Additionally, the Petitioners also state that due to no new recruitments being done, **they have been denied** their usual nine-hour rest after an outstation turn, and **their legitimate expectation of promotion to the post of 'Engine Driver (Shunting)' of which 30% of the vacancies are open to the 'Driver Assistants' who have completed 5 years of satisfactory service.** They submit that this has resulted in both the posts of 'Railway Driver Assistants' and 'Engine Drivers (Shunting)' being understaffed.

In light of these circumstances, the Petitioners submit that the failure or the refusal of the 1st to 3rd Respondents to act in accordance with SOR of 2016 and to make the recruitments to the post of 'Railway Driver Assistants', is an arbitrary and an unreasonable act. They claim that it is a violation of the Fundamental Right to equality before the law and equal protection of the law, of the 1st Petitioner Union and of the other Railway Assistants represented by them, as guaranteed to them by Article 12(1) of the Constitution.

Competing Interests of the Petitioners and the 6th to 8th Added-Respondents

The main issue in this Application is whether the non-implementation of the Scheme of Recruitment of 2016 which is currently in force regulating the recruitments to the post of 'Railway Driver Assistants' by the 1st to 3rd Respondents, is indeed a violation of the Petitioners' right to equality before the law and their entitlement to the equal protection of the law.

However, when cumulatively considering the above illustration of the sequence of events that had come to pass, with the affidavit of the 8th Added-Respondent and its annexures, as well as the affidavit of the 3rd Respondent, it is apparent that the practical implementation of the SOR had been continuously disrupted due to the 6th Added-Respondent Union resorting to Trade Union action whenever the Railways Department was poised to conduct the Open Competitive Examination for admitting new recruits for the post of 'Railway Driver Assistant', as per the SOR of 2016.

The persistent objections of the 6th Added-Respondent Trade Union, against the implementation of the SOR of 2016 are based on the following grounds;

1. The requirement of a 2 ½ years' vocational training course as an entry qualification is unnecessary for Driver Assistants, considering the primary level duties carried out by them;
2. The Driver Assistants who perform 'primary duties' according to Rule 169(c) of the Appendix to Rules and Regulations – Part I (Operating), being classified under the 'Management Assistant' Grade and being placed on Salary Scale MT1-2006(A) is contrary to PA Circular 6/2006;
3. Authorizing the Executive to assign technical and operating tasks to Railway Driver Assistants, by virtue of the General Definition of Assigned Tasks (clause 3.3) and their duties (clause 6) of the SOR-2016, undermines the hitherto exclusive supervision of the Driver Assistants exercised by the Engine Drivers, and is contrary to Rule 157(c) of the Railway Safety Rules, 1983.

These objections hold little legal merit and require mere cursory attention as it is not the subject matter of this application.

It must be noted, that by any stretch of the imagination, over-qualification cannot present an issue for the safety of railway operations. A training of a longer duration can only lead to recruits being better qualified and adept at performing the technical and safety procedures listed in clause 6 of the SOR and the Safety Rules 155, 157, 161-163 and 178, which is only in agreement with the vehement concern expressed by the 6th to 8th Added-Respondents on public safety. The concern over Driver Assistants who perform 'primary duties' being placed in the same salary scale as the Engine Drivers [MT 1-2006(A)] being prejudicial to them too is unsubstantiated as it can be observed that the Engine Drivers were placed higher in the same salary scale since the approval of the SOR of 2010 (as per '**P5**'), commensurate with their duties. A perusal of '**P21**'- the General Manager's Circular No. 4 for the month of April in 1996- indicates that both these grades come from an amalgamation of four existing grades at the time, and were taken out of the 'labour schedule' together as far back as 1996. The said Circular also notes that future action should be taken in accordance with this change, when effecting appointments, promotions etc. Further, a study of Clause 3 and 6 of the SOR does not indicate that the Driver Assistants being assigned duties by the executive, necessarily deprives the Engine

Drivers of their habitual supervision and control over the Railway Driver Assistants for the operation of the railway services.

Furthermore, as stated before, the 6th Added-Respondent Union had forwarded proposals on several occasions to address the concerns itemized in numbers 1, 2 and 3 above, with a view to incorporating them in to the SOR of 2016, to a host of Authorities-the then Secretary to the Ministry of Transport, the Minister of Transport, the Department of Management services and also the Ministry of Public Administration and Management (as evidenced by '**8R6**'). It is therefore clear that the stakeholders involved in the making of the new SOR of 2016 were well aware of these suggestions, and have opted not to incorporate them into the said SOR, which is justifiable.

In this context, it must be noted, as the 8th Added-Respondent contended [in his affidavit], **Section 37** of the **Railways Ordinance, No. 1 of 1903** places the safety of the public as the overriding concern:

> "In the construction to be placed upon this Ordinance, every railway official shall be deemed to be legally bound to do everything necessary for, or conducive to, the **safety of the public** which he shall be required to do by this Ordinance, or by any rule which shall be made by the Minister, and of which rule such official shall have had notice; and every such official shall be deemed to be legally prohibited from doing every act which shall be likely to cause danger." (emphasis added)

The 1st Respondent [GM Railways] writing to the Coordinating Secretary of the President on 04th December 2017 (**'P19'**) has referred to the hardships faced by the Railway Department owing to the recruitments being halted and has reiterated that currently even the bare minimum service is maintained by employing Technical Assistants who are of the untrained labour grade to cover the duties of 'Railway Driver Assistants', and also re-employing retired Engine Driver Assistants on contract basis. The 6th Added-Respondent Union in '**8R-6**' concurs with this fact.

It is therefore illogical, how the Added-Respondents who are railway employees legally bound to give utmost importance to the safety of the commuters and who express

vehement concern over public safety, are agreeable to compromising on safety as well as efficiency by working with untrained labour grade employees and senescent retired employees as replacements for technically-trained Driver Assistants. This is also evident from their protests against the Driver Assistants acquiring any awareness of Safety Rules (as per page 191 of the 6th Added-Respondent's letter marked **'8R-15'**). They are also objecting to the Driver Assistants being authorised to apply the brakes to stop the train, should the driver become incapacitated during the journey (which is in line with Rule 158 of the **Sri Lanka Railway -Safety Rules 1983** and Clause 6 of the SOR of 2016), and they also oppose the Driver Assistants being given the training required for them to pass the competitive test for that purpose (as per page 203 of the meeting minutes marked **'8R-15'**).

It is evident, therefore, that the opposition to the SOR of 2016 harboured by the 6th Added-Respondent Union of Engine Drivers aim more towards **maliciously stripping the Driver Assistants of their powers and demoting them to the labour grade by holding the public at ransom through trade union action**, all the while paying lip service to ensuring the safety of the public, which indeed they are legally obligated to ensure.

Nevertheless, it must be emphasized that the object of the present Application is not inquiring into the validity of the SOR of 2016 from the stand point of the rights of the 6th Added-Respondent Union, but is delving into the **legality or otherwise of its non-implementation** in the context of the Petitioner's Fundamental Rights. Whether the SOR itself was violative of the 6th to 8th Added-Respondents' Fundamental Rights was the subject matter of a separate Fundamental Rights Application- SC FR No. 76/2017 filed by the 6th to 8th Added-Respondents; but it had been withdrawn by them before the matter could proceed to argument. The present application, therefore, cannot act as a vehicle for the 6th Added-Respondent Union to challenge the SOR, which came into force over 03 years ago. Hence, the SOR of 2016 stands unchallenged, until such time it is replaced by a new SOR.

As the learned Senior State Counsel appearing for the1st to 5th Respondents submitted, the determination of the present application hinges on the presence or absence of a legal

impediment for the 1st to 3rd Respondents to implement the SOR of 2016 and whether the protection of the law will be achieved through its implementation.

For this purpose, attention should be paid to two main considerations. Firstly, whether there are any legal impediments which hinder the 1st to 3rd Respondents from implementing the SOR of 2016, Secondly, if no such impediments are present, whether by such non-implementation of the SOR, they [the 1st to 3rd Respondents] have denied the Petitioners' right to equality before the law and equal protection of the law, enshrined in Article 12(1) of the Constitution.

Legal Impediments to the Implementation of the SOR

As per **Article 55(1) of the Constitution,** the Cabinet shall provide for and determine all matters of policy relating to public officers, relating to schemes of recruitment, codes of conduct for public officers, and the principles to be followed in making promotions and transfers etc. However, **Article 55(3)** vests the authority in the Public Service Commission (PSC) to effect appointments, promotions, transfers and disciplinary control/dismissal of public officers. It states as follows:

> *Article 55(3) – "Subject to the provisions of the Constitution, the appointment, promotion, transfer, disciplinary control and dismissal of public officers shall be vested in the Public Service Commission."*

The Public Service Commission Procedural Rules- Volume I on 'Appointment, Promotion and Transfer of Public Officers' (published in Gazette Extraordinary No. 1589/30 dated 20.02.2009) issued in terms of Article 61B and 58(1) of the Constitution which came into effect from 02nd April 2009, in its Chapter IV- titled 'Service Minutes & Schemes of Recruitment' stipulates the following:

> *38. The Commission shall have the discretion to approve or approve with revisions or reject or revoke a Scheme of Recruitment or Service Minute or the proposed amendments submitted by a Secretary…* (Emphasis added)

The Public Service Commission, 'Guideline for Preparing Schemes of Recruitment' for streamlining SORs as per P.A Circular No. 06/2006- Section 4 titled 'Submission for Approval' provides as follows:

> *I. The Head of Department shall invariably be responsible for the content and the accuracy of a draft scheme of recruitment when it is submitted to the Public Service Commission for approval.*
>
> *II. Since the schemes of recruitment are prepared for a category of service, it is necessary to obtain from the Director General of Management Services, a formal approval pertaining to all posts belonging to such category of service.*
>
> *III. It is necessary to obtain the relevant recommendations of the Director General of Establishments and the National Salaries and Cadres Commission for the draft scheme of recruitment concerned.*
>
> *IV. Thereafter the Head of Department should forward the prepared draft scheme of recruitment embodying the aforesaid recommendations together with the recommendations of the respective Secretary of the line Ministry to the Public Service Commission for approval. (emphasis added)*

In view of the above provisions, the Head of the Department- the General Manger-Railways (1st Respondent) bears responsibility for the contents of the draft SOR which is to be forwarded to the PSC after due formal approval by Director General of Management Services together with the recommendations of the National Salaries and Cadres Commission, Director General of Establishments and the Secretary of the line Ministry. The final approval is given by the PSC.

It must be noted that the Scheme of Recruitment in **'P9'** bears the signature of the General Manger of Railways-the Department Head, dated 16.11.2016, the signature of the Secretary to the line Ministry, dated 05.12.2016 as well as the signature of the Secretary of the Public Service Commission, dated 17.01.2017 along with a minute stating the following:

"ශ්‍රී ලංකා දුම්රිය දෙපාර්තමේන්තුවෙහි දුම්රිය එන්ජින් රියැදුරු සහායක තනතුර සඳහා වන මෙම සංශෝධිත බඳවා ගැනීමේ පටිපාටිය 2016.09.29 වන දින රාජ්‍ය සේවා කොමිෂන් සභාව විසින් අනුමත කරන ලදී."

Hence, the fact that the SOR of 2016 is founded in law is clear. After coming into force, despite the proposals made by the 6th Added-Respondent Union for its amendment, no amended SOR had been submitted to the PSC for approval. The Fundamental Rights Application SC FR No. 76/2017 filed by the 6th to 8th Added-Respondents challenging the SOR and seeking to amend it was also withdrawn by them on 25th October 2017. The implementation of the SOR of 2016 was last halted for the time being by the 1st Respondent on the instructions of the 4th Respondent on 20th December 2017 (**'P15'**) as the Cabinet sub-Committee discussion was then ongoing. The policy decision made by the Cabinet Sub-Committee on 9th May 2018 (**'IP16-B'**) in terms of the observations in their Joint Cabinet Memorandum to prepare a new SOR has not yet materialized.

As such, with no amendment or replacement of the SOR of 2016, it continues in force.

This is substantiated by **Section 2:1:1 of Chapter II of the Establishments Code**:

> *"The Scheme of Recruitment in respect of a post in the Public Service which has already received approval, will continue to be in force subject to any changes as may be made hereafter."*

As no subsequent changes in the form of an amendment, as envisaged in the Establishments Code, had been brought to the SOR of 2016, the above provision clarifies that the SOR marked **'P9'** continues to be the SOR applicable in respect of the post of Railway Driver Assistant, until such time an amendment or a replacement is made. As per ***Abeywickrama v. Pathirana and Others*** (1986) 1 SLR 120, it is trite law that the Establishments Code by virtue of its constitutional origin acquires statutory force, provided that it's not inconsistent with any provision of the Constitution. Therefore, it is apparent that the SOR of 2016 remains in force unchallenged since its approval on 29th September 2016.

As held by Sharvananda C.J. in **C.W. Mackie and Co. Ltd v. Hugh Molagoda, Commissioner General of Inland Revenue and Others** (1986)1 SLR 300 at page 310,

noting that in respect of a violation of Article 12(1), "*To succeed in the plea the petitioner has to establish discrimination in the performance of a lawful act. The doctrine of equality is intended to advance justice according to law, by avoiding hostile discrimination*" (emphasis added). Hence, the SOR of 2016 which springs from a legal source and is currently in force, ought to encounter no legal impediment for its implementation. It must now be inquired into whether such non-implementation of a legally valid SOR is violative of the Petitioners' rights under Article 12(1) of the Constitution.

Violation of Article 12(1)

In the absence of legal impediments to the implementation of the SOR of 2016, it is observed that what hindered its implementation is the practical obstacle faced by the 1st to 3rd Respondents due to the trade union action resorted to by the 6th Added-Respondent Union as a strategic weapon, whenever the open competitive examination for recruiting Railway Driver Assistants as per SOR 2016 was scheduled to be held. This fact is admitted by the 3rd Respondent in his affidavit.

The Petitioners claim that their fundamental right guaranteed by **Article 12(1)** of the Constitution which postulates that "*All persons are equal before the law and are entitled to the equal protection of the law*," has been violated by the 1st to 3rd Respondents' arbitrary and unreasonable decisions to acquiesce to the demands of the 6th to 8th Added-Respondents time and again and to repeatedly postpone the implementation of the SOR of 2016, which has resulted in the following grievances (vide paragraphs 26-29 of the Amended Petition):

I. due to no new recruitments being done and Driver Assistants being understaffed, they have been overburdened by requiring to be on duty continuously for over a week and denied their entitled off-days and nine-hour rest after an outstation turn,
II. their legitimate expectation of promotion to the post of 'Engine Driver (Shunting)', of which 30% of the vacancies are open to the Driver Assistants with 5 years of satisfactory service, has been denied to them.

When inquiring as to whether the above grievances were caused by the decisions of the 1st to 3rd Respondents to postpone indefinitely and suspend recruitments under the SOR of 2016, the following criteria should be borne in mind;

"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." **(C.W. Mackie and Co. Ltd v. Hugh Molagoda** (supra) at page 308)

It can be observed by the 1st Respondent's letter to the Coordinating Secretary of the President on 04th December 2017 (**'P19'**) and the letter by 6th Added-Respondent Union to the 1st to 3rd Respondents (**'8R-6'**) that for maintaining the bare minimum railway services during this period, Technical Assistants had to be employed to cover the duties of 'Railway Driver Assistants' and retired Engine Driver Assistants had to be re-employed on contract basis. Thus, the suspension of recruitments and non-implementation of the SOR was prejudicing only the Petitioner 'Railway Driver Assistants' who were currently in service.

Not only have the Petitioners been denied promotion and been overburdened in their duties in contradistinction to the other railway employees, but the vacancies in their posts have been filled by *de facto* upgrading untrained labour grade employees to that post and rehiring retired employees through new contractual agreements due to the hesitation and indecisiveness shown by the 1st to 3rd Respondents to go ahead with the implementation of the SOR, without indulging the 6th Added-Respondent Union or succumbing to the pressure exerted by them. This satisfies the first limb of the criteria in **C.W. Mackie and Co. Ltd** (supra) that the Petitioners were treated differently from others.

Examining whether the Petitioners have been treated differently from similarly circumstanced persons without a reasonable basis as per the second limb, it must be noted that the 1st to 3rd Respondents have not sought a *proactive and lasting solution* to this impasse created by the competing interests of two grades of its employees who are in the same salary scale. They have instead merely favoured the claims of the 6th Added-Respondent Union and yielded to the pressure wielded by the Engine Drivers' Union,

while compromising the interests of the 'Railway Driver Assistants' in an ad-hoc and arbitrary manner. **They have effectively postponed/suspended the examinations four times**, once after scheduling it to be held on 26th August 2017 and again on 23rd December 2017, even after the candidates had arrived at the examination centre, wasting both time and resources at the tax-payers' expense (paragraph 26 of the Petitioners' counter affidavit).

As a result, the recruitment of new Railway Driver Assistants according to the SOR has been arbitrarily and repeatedly suspended since the SOR's approval on 29th September 2016 until the filing of this application on 22nd January 2018, and even up to the present day, without a definite and immediate solution in sight. The failure of the 1st to 3rd Respondents to address the concerns of the 6th Added-Respondent Union with a considered solution when the disagreement first cropped up, and instead suspending recruitments to the Petitioners' post in an ad-hoc manner, has resulted in the current impasse.

In their defence, the 3rd Respondent affirms in paragraph 8 of his affidavit that the 1st to 3rd Respondents have been compelled to take cognizance whenever the 6th Added-Respondent Union struck work (which had assumed the ruse of salary anomalies to interfere where they had no sufficient interest to interfere) "*in order to minimize disruption to railway services and the hardships faced by railway commuters thereby*". Quite paradoxically, the repeated suspension of the recruitment process of Driver Assistants, due to some of its terms being contested by the 6th Added-Respondent Union, has only incurred additional costs and hardship to the Department of Railways and compromised the efficiency of work and safety of the public, merely to sustain the bare minimum service to the public. This course of action is further violative of **Section 37** of the **Railways Ordinance, No. 1 of 1903** which binds all railway officials to do everything necessary for ensuring the safety of the public. Thus, the second limb of the criteria in **C.W. Mackie and Co. Ltd** (supra) is thereby substantiated.

It should also be noted that, although the Cabinet of Ministers' policy decision dated 27th April 2018 (**'IP16-B'**) granted approval to implement all the observations included in the 'Joint Cabinet Memorandum' drafted pursuant to the Cabinet sub-committee inquiring

into this issue, allowing for the formulation of fresh SORs, its approval was "*subject to the Ministry of Transport and Civil Aviation taking action to convert the Department of Sri Lanka Railways to a closed Department in future.*" Furthermore, the Petitioners affirm that these observations were based on misrepresented and one-sided facts, as the Petitioners were only consulted in one meeting, while the sub-committee meetings had continued only with the strikers (Paragraph 28 of counter-affidavit).

At this point it is apt to refer to the case of **The Public Services United Nurses Union v. Montague Jayewickrema, Minister of Public Administration and Others** (1988) 1 SLR 229. This case, akin to the instant one, concerned two rival trade unions. The Petitioner Union struck work demanding increase in salaries, but subsequently the strike was settled and the strikers went back to work without loss of back pay and was taken back unconditionally. However, after the strike, following the urging of the Respondent rival nurses trade Union, the members of whom did not participate in the strike, were granted a special ad-hoc benefit of two salary increments by a Cabinet decision, as a reward for their non-participation and continued service during the strike.

Wanasundera J. stated in the above case that the ad-hoc benefit was especially crafted to benefit members of one trade union to the detriment of those of another, giving one a decided advantage over the other, even though up to now they have been equals. Quoting from **Roshan Lal v. Union of India** AIR 1967 SC 1894, where it was stated that "*The emoluments of the Government servant and his terms of service are governed by statute or statutory rules which may be unilaterally altered by the Government without the consent of the employee*", Wanasundera J. opined that while there is no doubt of such unilateral authority, "*there still remains a question of <u>form and procedure</u> as to how it should be done*" (emphasis added).

Thereby, following this argument the Court held in **The Public Services United Nurses Union** (supra) that,

> "*…there is no valid basis for granting these far-reaching <u>benefits to a very limited and narrow segment of public officers of the public service of this country, or for imposing a disability or disadvantage on the rest</u>. The matter becomes all the more suspect when we find that the benefits of this proposal*

accrue primarily to officers of a particular union… The wage structure of the public service is of utmost interest both to the officers concerned and the general public and its importance is seen by the fact that revisions and alterations are made only after the most careful consideration and after a thorough hearing of the views of all categories of public officers." (at pages 238, 239, emphasis added)

In the instant case, the Petitioners- 'Railway Driver Assistants' and the 6th to 8th Added-Respondents- 'Engine Drivers (Shunting)' were both placed in the same category of 'Management Assistant Technical-Segment 3' and both were assigned the salary scale code MT 1-2006(A) by the SOR of 2010. The 'Engine Drivers (Shunting)' were, however, placed higher, albeit in the same salary scale, in recognition of and commensurate with the additional level of responsibility on the Engine Drivers. This wage structure pertaining to 'Railway Driver Assistants' was unchanged by the SOR approved by the PSC in 2016. Therefore, it is evident that, in terms of grade and salary scale, the two are equals.

In such a backdrop, the suspension and non-implementation of the legally valid Scheme of Recruitment approved in 2016, by the 1st to 3rd Respondents places the Petitioners in a disadvantaged position against their equal as well as other railway employees, and frustrate their legitimate expectations of promotion as per the terms of the SOR. As such, the non-implementation of the SOR of 2016 by the 1st to 3rd Respondents is violative of the Petitioners' Fundamental Right to equality before the law and equal protection of the law.

Until such time as the proposed changes are brought about and fresh SORs are prepared, the prevailing situation, naturally, cannot be sustained without causing serious harm to the safety of the railway commuters, as well as the functioning of the railway service.

I need not state in express terms that the railway service is supported by public funds and at a significant cost to the public. Every railway employee has to bear in mind that they are compensated by the public with the expectation of providing an essential service to them. It is no enigma that it is the masses who mainly rely on the railway system to commute and there is an ethical and a moral duty cast on all the railway employees to

make every endeavour to offer the service to the discerning general public without a disruption, to the best of their ability. It is in that spirit that they are expected to discharge their responsibilities. In the instant case, the 6th Added-Respondent Union have left out the paramount duty they owe to the very society that maintain them, which to my mind is unfortunate, to say the least.

In this regard, I wholeheartedly concur with the opinion expressed by Justice F.N.D. Jayasuriya in **Best Footwear (Pvt) Ltd. and Two Others v. Aboosally, Former Minister of Labour & Vocational Training and Others** (1997) 2 SLR 137 at page 151:

"*It is a trite proposition that since the commencement and the continuance of a strike has an adverse effect upon production and upon the industry and because it may ultimately lead to a closure of manufacturing establishments, this weapon of a strike ought to be used as a last resort when all other avenues for settlement of industrial disputes have proved to be futile and fruitless. In the circumstances, Courts of law by their orders ought to discourage the misuse of strikes and to control and minimise the deleterious and harmful consequences of its misuse in respect of industries as far as possible so that the economy of the country would not be adversely affected. I hold that the strike in this case has not been utilised as a last resort and this hasty and ill-considered decision to strike has caused cessation of production, considerable financial loss and detriment to the employer and an adverse effect on the economy of the country for which all blame must be imputed to the trade union in question*" (emphasis added).

Considering the above I hold that the non- implementation of the SOR of 2016 (**'P9'**) has resulted in a violation of the Fundamental Rights of the Petitioners and accordingly declare that the Petitioner's Fundamental Right enshrined in Article 12(1) has been violated in the instant situation by the State. Although 1st to 3rd Respondents were responsible for implementing the SOR, it appears they were hamstrung in doing so due to various factors beyond their control and as such court does not hold them responsible individually.

I also observe that the implementation of the SOR of 2016 applicable to the 'Railway Driver Assistants' does not in any way impinge on the rights of the 6th to 8th Added-Respondents or the members of the 'Railway Locomotive Operating Engineers' Union'

represented by them, as such they should not take any action to hinder the implementation of the SOR of 2016 (**'P9'**).

Earlier in this judgement I have referred to the numerous difficulties the Railway Department is facing as a result of not being able to fill the vacancies of Railway Driver Assistants. Bearing in mind such complications and the disruption caused by this impasse to the public railway transport system- over which the Sri Lanka Railway Department holds a monopoly- the 1st to 3rd Respondents or their successors are directed to take all necessary steps to implement the SOR of 2016 (**'P9'**) forthwith, and to report the progress of the action taken in that regard to this court on the 30th November 2020. This directive, however, is to be carried out subject to any budgetary constraints the State might be facing.

In the circumstances of this case, this court does not award compensation or order costs.

Application allowed.

JUDGE OF THE SUPREME COURT

JUSTICE L.T.B. DEHIDENIYA.

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

1. Juan Badathuruge Anugi Sageethma,
   No. 78/23D, Samagi Mawatha,
   Bandaranayake Place,
   Galle.

2. Juan Badathuruge Janaka Prasad,
   No. 78/23D, Samagi Mawatha,
   Bandaranayake Place,
   Galle.

SC FR Application No. 214/2017

Petitioners

-Vs-

1. Sandhya Iranie Pathiranawasam,
   The Principal and member of the Interview Board to admit students to Grade 1,
   Southlands College.
   Galle.

2. S.K.S.D. Silva,
   The Vice Principal and member of the Interview Board to admit students to Grade 1,
   Southlands College,
   Galle.

3. Member of the Interview Board to admit students to Grade 1,
   Southlands College,
   Galle.

4. Member of the Interview Board to admit students to Grade 1,
   Southlands College,
   Galle.

5. Member of the Interview Board to admit students to Grade 1,
   Southlands College,
   Galle.

6. Ranjith Thilakasiri,
   Chairman of the Appeals and Objections Board to admit student to Grade 1,
   Southlands College,
   Galle.

7. S.K.S.D. Silva,
   Member of the Appeals and Objections Board to admit student to Grade 1,
   Southlands College,
   Galle.

8. D.L.Chithra,
   Member of the Appeals and Objections Board to admit student to Grade 1,
   Southlands College,
   Galle.

9. Upali Amaratunga,
   Member of the Appeals and Objections Board to admit student to Grade 1,
   Southlands College,
   Galle.

10. Devika Dodampegama,
    Member of the Appeals and Objections Board to admit student to Grade 1,
    Southlands College,
    Galle.

11. Ranga Mohotti,
    Member of the Appeals and Objections
    Board to admit student to Grade 1,
    Southlands College,
    Galle.

12. Director of National Schools,
    Ministry of Education,
    Isurupaya,
    Battaramulla.

13. Secretary,
    Ministry of Education,
    Isurupaya,
    Battaramulla.

14. Padmi Dilrushika,
    317, Udugama Road,
    Galle.

15. Dimantha Kumara,
    Gangarama Cross Street,
    Magalle.

16. M.D.S. Roshan,
    Gangarama Cross Street,
    Magalle.

17. W.G.M. Sharaf,
    Magalle,
    Galle.

18. W.M.S. Senevirathne,
    Gangarama Road,
    Magalle,
    Galle.

19. Rasika Priyadharshana,
    Magalle,
    Galle.

20. Honorable Attorney General,
Department of Attorney General,
Colombo 12.

Respondents

Before: Priyantha Jayawardene, PC, J.
Murdu N.B. Fernando, PC, J. and
S. Thurairaja, PC, J.

Counsel: Saliya Pieris, PC. with Lisitha Sachindra for the Petitioners.
Rajiv Gunathilake SSC for 1st-13th and 20th Respondents.

Argues on: 28.05.2019

Decided on: 17.07.2020

Murdu N.B. Fernando, PC, J.

The 1st and 2nd Petitioners ("The Petitioners") have filed this application seeking a Declaration that the Petitioners' fundamental rights guaranteed under Article 12(1) of the Constitution have been violated by one or more or all of the Respondents and/or the State and direct the Respondents to admit the 1st Petitioner to the relevant grade at Southlands College, Galle.

This Court granted Leave to Proceed on 04-08-2017 for the alleged violation of Article 12(1) of the Constitution against all the Respondents.

The facts of this application as submitted by the Petitioners are as follows: -

The 2nd Petitioner, the father of the 1st Petitioner submitted an application to Southlands College, Galle for the admission of the 1st Petitioner to Grade One for the year 2017 under the core category 'Children of residents living in close proximity to the school' (proximate category) based upon clause 6:1 of the Admission Circular (P2) dated 16-5-2016.

The Petitioners were called for an interview and at the interview the documents submitted by the Petitioners were examined and marks were given accordingly. The total marks awarded to the Petitioner at the interview was 80, vide mark sheet (P5) and the breakdown of the marks was as follows: -

-	proof of place of residence – electoral registration	-	35 marks
-	proof documents of residence	-	10 marks
-	additional documents to conform place of residence	-	05 marks
-	proximity to the School from the place of residence	-	30 marks
			80 marks

On or about 17-12-2016 'the interim list' of those who were eligible was released and the 1st Petitioners' name appeared as the 68th in a list of 87 names under the 'proximate category'.

Thereafter, by a letter dated 14-12-2016, the 1st Respondent informed the 2nd Petitioner to be present for an inquiry on 28-12-2016 before the Appeals and Objections Board ("Appeals Board") as an objection had been raised in respect of the 1st Petitioners' application for admission to Southlands College, Galle.

The 2nd Petitioner further averred that at the said inquiry the nature and/or the details of the objection pertaining to the 1st Petitioners' admission to Southlands College, Galle was not revealed, and the 2nd Petitioner was only informed that marks awarded to the 1st Petitioner will not be altered or reduced and the mark sheet (P5) was returned to the 2nd Petitioner without any endorsement.

On 14-01-2017 'the final list' was displayed but the name of the 1st Petitioner was not in the list of admissions to Southlands College, Galle. The 1st Petitioner had been moved to the 'waiting list' at the 7th place. Thereafter, the 2nd Petitioner had met the 1st Respondent, the Principal and Chairman of the interview board who informed him that the admission process was not yet complete. On 26-01-2017, the new admissions to Grade One of Southlands College were made. But the 1st Petitioner was not among the selectees.

Thereafter, the 2nd Petitioner went before the Human Rights Commission('HRC'). In March 2017, the 2nd Petitioner was informed that based upon the observations of the 1st Respondent that the Petitioners' rights had not been violated by the Respondents.

The HRC forwarded the 1st Respondents' above said response to the Petitioners which revealed that the Appeals Board had reduced five additional marks from the 1st Petitioner under the sub-category 'proximity to the school from the place of residence'; that initially marks had been reduced under this sub-category only for four schools by the interview board; that the Appeals Board had thereafter reduced marks for five schools upon the premise that there were seven schools between the Southlands College, Galle and the Petitioners' residence; a considered decision was made to reduce marks for five out of the said seven schools; and that this brought down the 1st Petitioners' aggregate to 75, which

was lower than the cut off mark of 76, under the 'proximity category' for admission of students to Southlands College for the year 2017. Being dissatisfied for the said reasons above, the 2nd Petitioner re-agitated the issue before the HRC and the HRC re-iterated its decision.

Thereafter, the Petitioners invoked the jurisdiction of this Court on 22-06-2017 with regard to violation of the Petitioners' fundamental rights guaranteed under Article 12(1) of the Constitution by non admission of the 1st Petitioner to Southlands College, Galle and specifically with regard to the variation of 1st Petitioners' marks by the Appeals Board after the conclusion of the inquiry.

In the Petition filed before this Court, the Petitioners also averred that the Respondents have violated many provisions of the Admission Circular. Namely, clause 10.9 – the Appeals Board not making an endorsement in the mark sheet; clause 10.7- the Appeals Board considering other documentation not presented at the 1st inquiry; clause 11.4- not displaying the final list for two weeks; clause 11.8 - overriding the decision of the Appeals Board; and clause 11.6- not communicating the final decision to the Petitioners.

The Petitioners also averred that the children of 14th,15th,16th,17th,18th and 19th Respondents have been admitted under 'proximate category' though their residences were further away than the residence of the Petitioners and moved that the 1st Petitioner be admitted to Grade One of Southlands College.

In response to the said Petition, the 1st to 13th Respondents ("Respondents") response was that at the interview, the 2nd Petitioner pointed out the place of residence of the Petitioner in a map of the city of Galle and based upon same, marks were awarded under the sub-category 'proximity to school' from the place of residence after deducting 5 marks each for other eligible schools which the applicant could have applied for admission and in this instance marks were reduced for four schools, under the relevant sub clause of Admission Circular P2.

The Respondents further averred that an objection was raised, with regard to the 1st Petitioner and the Appeals Board been satisfied that there were seven eligible schools between the Petitioners' residence and Southlands College, Galle, reduced marks for an additional school. Thus for 5 schools 5x5=25 marks were reduced which brought down the total marks of the 1st Petitioner to 75 which was below the cut-off mark of 76 for admission under the 'proximity category'. A map of the city of Galle (R2) substantiated the placement of the Petitioners residence viz-a-viz Southlands College.

Whilst categorically denying the Petitioners' allegation of failure to adhere to the provisions stipulated in the Admission Circular P2, the Respondents averred that out of the

14th to 19th Respondents whose childrens' admission was challenged by the Petitioners in this application, that there were no objections raised on behalf of 15th and 16th Respondents, the objection raised pertaing to the 14th, 17th and 19th Respondents were duly considered by the Appeals Board and dismissed; and the 18th Respondent as the name stipulates therein was not an applicant parent. In any event, the Respondents averred that they are not in a position to tender further documentation pertaining to the 1st Petitioner and the children of the said 14th to 19th Respondents, as the relevant files maintained for admissions to Grade One in the year 2017, were taken into custody by the Bribery Commission.

In response to the above, the 2nd Petitioner filed a counter affidavit annexing a map of the Galle city (P12) upon which the Petitioners had marked the residences of the 14th,15th and 17th Respondents and the relevant proximity circles and averred that the Respondents have failed to consider the schools which fell within the proximity circle of the 14th,15th and 17th Respondents when computing the marks for the aforesaid Respondents application for admission to Southlands College and thereby granted the said Respondents and advantage over the Petitioners.

When this application was heard before this Court the Petitioners main submission was that the Petitioners who were similarly circumstanced as the 14th,15th and 17th Respondents, had been treated unequally, arbitrary and discriminatory by the Respondents and thereby the right to equality of the Petitioners had been violated by the Respondents.

The Petitioners also contended that the initial decision of the Appeals Board not to alter the marks awarded to the 1st Petitioner at the appeal inquiry created a legitimate expectation with regard to admission of the 1st Petitioner and therefore the subsequent decision of the Appeals Board to reduce marks without informing the Petitioners was a breach of the legitimate expectation of the Petitioners and thus the said decision is arbitrary, capricious and an infringement of the rights of the Petitioners guaranteed under Article 12(1) of the Constitution.

In response to the said contention of the Petitioners, the Respondents main submission was that Article 12 guarantees equal protection in the performance of a lawful act and that via Article 12 one cannot seek the execution of any illegal or invalid act and further contended that based upon the alleged wrongful admission of 14th,15th and 17th Respondents, a case cannot be made out to admit the 1st Petitioner to Southlands College.

Prior to analyzing the afore mentioned legal arguments presented, I wish to refer to two other matters relevant to this application.

Firstly, the contention of the Petitioners that there is no explanation tendered by the Appeals Board consisting of the 6th to 11th Respondents before this Court in relation to the

reduction of five marks. The record bears out that an affidavit had been filed by the 6th Respondent, the Chairman of the Appeals Board and the said affidavit indicates the decision of the Appeals Board to deduct marks for five schools reducing the 1st Petitioners' aggregate marks to 75 from 80 and informing the said fact to the 2nd Petitioner at the hearing of the Appeal Board. The Petitioners have failed to respond to this affidavit. Thus, in respect of the said material fact the Court will come to a finding based on the preponderance of evidence.

Secondly, the reference and reliance on the judgement of **K.J.A. Chathumi Sehasa and another Vs Pathiranawasam and others SC/FR 201/2017 - S.C. minutes dated 30.05.2018** wherein the admissions to Grade One of Southlands College, Galle in the year 2017 was challenged by way of a fundamental rights application. The said case was based upon the same Admission Circular relied on in this application for admissions in 2017 (P2) and the same core category 'Children of residents living in close proximity to the school' where the Court opined that it cannot compel a Respondent to act illegally and dismissed the application.

In the present application too, this Court is called upon to determine the actions and conduct of the Respondents, similar in nature to the said case and whether such actions and conduct would amount to a violation of fundamental rights of the Petitioners before this Court guaranteed under Article 12(1) of the Constitution.

Upon the aforesaid background, I now wish to examine the instant application in order to determine whether the due process of the law has been followed in the perspective of the merits of this application and the procedure adhered to by the Petitioners and the Respondents in this matter.

The due process of the law for admission of children to Grade One begins from the submission of a duly filled application form. The application should be in accordance with the format at schedule one to the Admission Circular (P2).

Hence, the 1st question to examine is whether the 2nd Petitioner tendered a duly filled application. It's observed by this Court that in the application tendered (P3), to the query 'the total number of schools in closer proximity to the Petitioners' residence viz-a-viz Southlands College [the school applied for] two different responses have been given by the Petitioner. In one instance (at cage 5) it is 'one school' by name Anuladevi Vidyalaya. In another instance (at cage 7.1 d) it is two schools by number. Thus, the Petitioner by stating one and then two schools contradicts its own position in the application. Further, the Petitioner implies that marks should be reduced only for the said one/two schools.

The Survey General's map of the city of Galle (R2) produced before this Court shows the Petitioners' residence marked therein as pinpointed by the 2nd Petitioner at the 1st interview. A visual examination of the said map clearly indicates seven schools located in closer proximity to the Petitioners' residence viz-a-viz Southlands College, Galle. Thus, the information provided by the Petitioners in the application (P3) is inaccurate and false with regard to proximity.

When tendering an application for admission of a child, the applicant parent at cage 8 of the application form declares and acknowledges that submitting false information would render the application to be rejected in limine. Thus, the application of the Petitioners should have been rejected in limine for giving false and inaccurate information as discussed above. This action of the Petitioners' in my view, amounts to a misrepresentation and an intentional violation of the due procedure at the point of submitting an application itself and disqualifies the Petitioners from seeking relief from this Court.

However, it appears that even with the said discrepancy in the application form, the application has been accepted by the Respondents and the Petitioners were called for the 1st interview. At the 1st interview the Petitioners had been given 30 marks under the sub-category 'proximity to the school from the place of residence' considering four schools being in closer proximity and after deducting 5 marks per school for the said four schools. Thus, a total of 20 marks from a possible 50 marks had been deducted and the 1st Petitioner had been granted 30 marks.

The Appeals Board on the other hand had deducted marks for five schools, 5 marks each for the 5 schools which add up to 25 marks under the relevant category (category III in clause 6.1) considering an additional school located in closer proximity to Petitioners' residence. The Appeals Board had not deducted marks for the balance two schools (out of the seven schools) in the vicinity namely, Sacred Heart Convent and Sangamitta Balika Vidyalaya for reasons best known to the Appeals Board. The Respondents in its submissions contended may be one of the said schools is a denominational school and the other lies in equidistance to Southlands College, Galle viz-a-viz Petitioners' residence.

This variation of the five marks for the additional school is the crux of this application. It brought down the aggregate of the 1st Petitioner from 80 to 75, which went below the cut-off mark of 76 and deprived the 1st Petitioner from gaining admission to Southlands College.

Was the decision of the Appeals Board correct when it deducted an additional five marks is the question that this Court has to examine next. The Petitioners have not produced

any evidence to establish that the said five Schools are not situated between Southlands College and the Petitioners' residence. In fact, the Petitioners do not challenge the existence of the said five schools. In the aforesaid circumstances, this Court cannot faulter the Appeals Board for reducing marks for the said five schools under the relevant sub-category as the said five schools lie in closer proximity to the Petitioners' residence when compared with Southlands College. Thus, on the merits of this application the Respondents have acted correctly and legally and in accordance with the relevant regulations and guide lines stipulated in the Admission Circular.

The Petitioners on the contrary contended before this Court, that the aforesaid decision of the Appeals Board was arbitrary, capricious and violated Article 12(1) of the Constitution as the Respondents when awarding marks to the 14th, 15th and 17th Respondents have failed to deduct marks under sub-category 'proximity to the school from the place of residence' for a given number of named schools located in between the residences of the said Respondents and Southlands College though for the Petitioner 25 marks were deducted for five schools as discussed earlier. It appears, the Petitioners have limited their objections to only these three Respondents and had accepted the reasons given by the Respondents in their objections with regard to admission of children of 16th, 18th and 19th Respondents to Southlands College. However, with regard to the veracity of the Petitioners accusation in respect of the 14th,15th and 17th Respondents, the Court will not come to a finding as the applications and admission records of the said Respondents were not produced before this Court for examination due to it being in the custody of the Bribery Commission.

Even if this Court accepts the Petitioners' contention that the 1st to 13th Respondents have wrongfully granted marks to the 14th,15th and 17th Respondents, is that fact alone sufficient for the 1st Petitioner to gain admission to Southlands College is the next question and the most pertinent question that this Court is called upon to answer. In simpler terms, can this Court issue a direction under Article 126(4) to the Respondents to admit the 1st Petitioner to Grade One of Southlands College, Galle, when the 1st Petitioner has obtained less marks than the cut-off marks for the year 2017 or can this Court compel a Respondent to act illegally or contrary to the law and to the due process of the law, merely because the Respondents have acted illegally or contrary to law in a respect of another applicant.

The position in respect of illegal and unlawful orders has been considered by this Court on numerous occasions as reflected in the reported judgements. I wish to refer to the observations of the Lordships of this Court in the following cases referable to the exercise of a valid right founded in law in contradiction to an illegal right which is invalid in law with which I respectfully agree.

Sharvananda, CJ in **CW Mackie and Co.Ltd Vs Hugh Molagoda Commissioner General of Inland Revence and others 1986(1) SLR 300** succinctly held;

> *"The inequality complained by this petitioner in this case is only an inequality in the matter of illegal treatment. The Constitution only guarantees equal protection of the law and not equal violation of the law. One illegality does not justify another illegality.*
>
> *In the exercise of it's power under Article 126(4) of the Constitution this Court can issue a direction to a public authority or official commanding him to do his duty in accordance with the law. It cannot issue a direction to act contrary to the provisions of the law or to do something which in law, would be in excess of this powers"- vide pages 309*
>
> *"[ ] The rule of equality before the law or equal protection of the law under Article 12(1) cannot be invoked under such circumstances. In the exercise of its jurisdiction to grant relief or give such directions as this Court may deem just and equitable this Court cannot lend its sanction or authority to any illegal act. Illegality and equity are not on speaking terms". -vide page 310 and 311*

The aforesaid dicta postulated by Sharvananda, CJ has been quoted, referred and followed in many an instance by this Court.

Mark Fernando, J in **Gamaethige Vs Siriwardena and others [1988]1 SLR 384 at page 404** referring to the above stated legal position went on to hold that,

> *"Two wrongs do not make a right, and on proof of the commissioning of one wrong the equal protection of the law cannot be invoked to obtain relief in the form of an Order compelling commission of a second wrong."*

In **Jayasekera Vs. Wipulasena and others [1988]2 SLR 237** GPS de Silva J (as he then was) and in **Seelawansa Thero and two others Vs Tennakoon Additional Secretary, Public Service Commission [2004]2 SLR 241**, Shirani Bandaranayake J (as she then was) followed the above stated principles and held that Article 12 of the Constitution cannot be understood as requiring the authorities to act illegally in one instance because they acted illegally in another instance.

In **Chathumi Sehasas' case** (the school admission case referred to earlier) Aluwihare, J. respectfully agreeing with the above stated ratio descendi of this Court observed,

"that the conduct of the Respondents in admitting other applicants who have presumably received lower marks than the Petitioner cannot give rise to a 'legitimate expectation'. The Petitioner cannot request this Court to compel the Respondents to act illegally in this case for the mere reason that they have acted illegally in previous cases. The relief which the Petitioner claims is a relief which this Court as a Court of Law and Equity cannot provide since 'Illegality and Equity are not an speaking terms."

Thus, our Courts have consistently held that two wrongs do not make a right and an illegal order cannot be the foundation or the basis for another illegal order.

Hence, it is my considered view that the Petitioners cannot establish its grievance or non-admission of the 1st Petitioner to Southlands College merely because the 14th,15th and 17th Respondents children were admitted on an allegedly a wrong premise. One illegality will not justify another. Thus on such ground too, the Petitioners cannot obtain from this Court a declaration that their rights have been violated by the Respondents.

Independent to the above, the Petitioners should establish their rights and entitlement on an accepted, valid and a legally sound premise which in this application the Petitioners have failed to do. Moreover, the Petitioners have failed to establish that the decision of the Appeals Board in deducting marks for five schools under the relevant sub-category as discussed earlier, is contrary to the law and thus violated the Petitioners fundamental rights.

Therefore, it is re-iterated that this Court will not and cannot make an Order to compel the Respondents to act contrary to the law and admit the 1st Petitioner to Southlands College based only upon the ground that the 14th,15th and 17th Respondents have been admitted to Southlands College. The Constitution guarantees only equal protection of the law and not equal violation of the law. This Court will not issue directions to a Respondent to act illegally merely because in an earlier occasion the Respondents have acted illegally. Thus, I hold that the relief sought by the Petitioners cannot be granted.

In the above referred **Chathumi Sehasas' Case** this Court came to a similar finding in respect of admissions to Southlands College in the year 2017. In the instant case the learned Counsel for the Petitioners appearing before us distinguished the said judgement and strenuously submitted that even if this Court, based on the aforesaid premise were to hold that the acts complained of does not amount to a violation of the Petitioners' fundamental rights, the relief claimed by the Petitioners should be granted on the ground that the Respondents have acted contrary to many provisions of the Admission Circular which according to the Petitioners amounts to an abuse of the procedure and the very abuse

of the said process is equally a violation of Article 12(1) of the Constitution. The said aspect the Petitioners' alleged, had not been considered by when delivering the judgement referred to earlier and thus submitted that the said **Chathumi Sehasas' Case** is not on 'all fours' similar to the instant case.

The learned Presidents' Counsel for the Petitioners, placed his argument on the ground that the Respondents have violated a number of clauses in the Admission Circular and specifically clause 10.9 of the circular and altered the marks not in the manner provided for in the circular i.e not in the presence of the Petitioners (the applicant) and thus the failure to adhere to the specific provision of the circular is an abuse of the due procedure which amounts to a violation of the equal protection clause under Article 12(1) of the Constitution. The Counsel for the Petitioners strenuously argued that when the Appeals Board held out to the Petitioners that no change of the marks would take place, a 'legitimate expectation' was created and relied heavily on the judgement in **Samaraweera Vs People's Bank [2007]2 SLR 362** to substantiate the said contention.

Contrary to the assertion of the Petitioners' with regard clause 10.9, I observe that, in fact in **Chathumi Sehasas' Case,** the Court has considered the said clause of the Admission Circular and stated since there are no markings in the marking sheet 'it lends credence to the position taken by the Petitioners of the said case'. Nevertheless, the Court in the said case observed in terms of clause 10.10 and 8.2 (a) of the circular the Respondents are not precluded from subsequently altering their position and went onto hold 'that while in the ordinary course it is prudent that the amended marks be duly noted and communicated to an applicant at the desired point, one must also be mindful that late discovery that vitiates the eligibility of the applicant, makes an exception to this practice'.

In the said background, I would now examine **Samaraweeras' case** relied upon by the Counsel for the Petitioners to substantiate the above stated contention, with regard to abuse of process, legitimate expectation and violation of a fundamental right.

Samaraweeras' case pertains to a bank employee and extension of his services beyond 55 years. He was initially granted one years' extension of service upon reaching 55 years but was granted only two months extension when requested for a further extension of one year. The Petitioner Samaraweera relied on the relevant circulars to present a case firstly, that he had a legitimate expectation to go on without requesting extensions until 57 years; and secondly, that in any event others who failed to qualify for extensions had been granted extensions and the bank discriminated him as against the other employees.

The court (vide judgement of Raja Fernando, J. at page 365) having observed that the petitioner will have to stand or fall on the record of his own service went on to hold

that the petitioner has failed to establish that he had a legitimate expectation for an extension of service in terms of the circular.

However, with regard to the application of circulars and guidelines, the court held that 'it must be applied fairly and equally to all persons concerned with' and went onto hold that 'the failure to apply the said circular in a uniform manner and in selectively granting treatment to certain employees by misapplying the circular amounted to an infringement of the petitioners' fundamental right. Nevertheless, the court in the said case did not grant the relief prayed for by the petitioner by way of an extension of service, but only granted compensation.

In the said **Samaraweeras' case** Shirani Bandaranayake, J (as she then was) in a separate judgement, while concurring with the judgement of Raja Fernando, J. went onto discuss the circulars pertaining to selection of persons eligible for retirement; principles relating to 'giving of reasons' to court when extension of service of Samaraweera was refused; and 'legitimate expectation' of continuing in service based on a circular and at page 388 stated that legitimate expectation ought to be given a broad interpretation utilizing the concept of procedural fairness, which the Counsel for the Petitioners vigorously propounded before us, strenuously argued and heavily relied upon to substantiate its contention before this Court that the Appeals Board created a legitimate expectation on the Petitioners with regard to admission of 1st Petitioner, the breach of which amounted to a violation of his fundamental right.

While accepting that circulars and guidelines must be applied fairly and equally to all persons and in a uniform manner and not selectively, it is my considered view that in respect of the instant application it is not necessary to go on an academic exercise and analyse 'procedural abuse' in the way the Petitioners term it. It is also not necessary to go on a voyage to define legitimate expectation, procedural fairness and other principles referred to in the afore mentioned case, simply because the Petitioners' case before us stands or falls on the facts and conduct of the Petitioners themselves.

Firstly, in the Application Form the Petitioners tendered to Southlands College it is abundantly clear that the Petitioners have given inaccurate information and has come before Court with soiled fingers and *Secondly,* the Petitioners have failed to establish that the subsequent decision for reduction of marks by the Appeals Board for five schools being more proximate is wrong and inaccurate. Hence, in view of the said facts, in my view the dicta of the Hon. Judges in the **Samaraweeras' case** referred to above have no bearing to the case before us. Thus the said case can be easily differentiated and distinguished. In the said circumstances, I am of the view that the contention of the Petitioners with regard to

procedural fairness and legitimate expectation has no merit and the judgement of **Chathumi Sehasas' case** is on 'all fours' similar to the instant application.

I also wish to comment on certain provisions of the Admission Circular which I consider relevant and important in respect of the appeal procedure and specifically in relation to the Appeals Board hearing. According to clause 9.2 (a) an objection could be tendered even anonymously; clause 10.6 makes provision for holding of an inquiry in order to re-examine the documents already tendered pertaining to an objection; and clause 10.7 speaks of an inquiry pertaining to an appeal. It is observed, that although clause 10.9 makes provision for the Appeals Board to enter marks in the relevant sheets maintained by the school as well as in the summary sheet given to the applicant respectively, it does not indicate that it has to be done in the presence of the parties. Clause 10.10 makes provision for the Appeals Board to verify any fact where necessary by any means (including a site visit) and take relevant follow up action. This Clause is silent as to how and when variation of marks, if any, can be done and the manner of doing same whether it is in the presence of the applicant or not. This Clause gives rise to the proposition that the Respondents could vary or alter the marks even at a subsequent stage, after being satisfied with regard to the matters in dispute, although I am of the view that it would be prudent to do so after informing the parties and necessary amendments made in the presence of an applicant.

I also observe that clause 11.1(a) and (b) provides for an 'Amended interim list' to be prepared and to give a hearing to the parents of the children who will be eliminated from the list, prior to finalizing the 'Final List', which I consider to be a very salutary provision. Thus, this clause once again gives credence to the fact that even at this stage, changes may be made to the marks awarded. Clause 11.8 which refers to the decision of the Appeals Board been final and conclusive is found in the Admission Circular only at this point. i.e. even after a hearing is given to parents consequent to preparation of the 'Amended Interview List'. It is observed in the instance case that an 'Amended interview List' was not prepared and the third and final opportunity given to an unsuccessful parent to be heard was not afforded to the Petitioners selectively but to other unsuccessful parents as well. Hence, even on the said grounds the non-adherence of the procedure in my view cannot be considered an abuse of the process which amounts to a violation of Petitioners fundamental rights.

In summarizing, the alleged violation complained by the Petitioners was in respect of the substantive aspect of the Admission Circular with regard to proximity rule. Nevertheless, greater emphasis was placed by the Petitioners to challenge the procedural aspect of the Circular, reduction of marks by the Appeals Board to establish the violation of its fundamental rights.

For reasons discussed in detail earlier, I am of the view that the proper procedure laid down has been followed and the merits of the Petitioners' application for admission has been properly evaluated and a correct finding has been made. Even with regard to the alternative contention of the Petitioners in respect of procedural impropriety, I see no merit or compelling reason to interfere with the said decision and make order to direct the Respondents to act illegally and in violation of the law and admit the 1st Petitioner to the school applied for.

Hence, I hold that the Petitioners have failed to establish that the Petitioners' fundamental rights guaranteed under Article 12(1) of the Constitution have been violated by the Respondents.

For the aforesaid reasons, the application of the 1st and 2nd Petitioners is dismissed. In view of the circumstances of this case, I make no order with regard to costs.

The application is dismissed.

Judge of the Supreme Court

Priyantha Jayawardene, 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 Chapter III of the Constitution of the Democratic Socialist Republic of Sri Lanka in terms of Article 17 read together with Article 126

Alankarage Dona Chathurika Silva,
No. 52, Pepiliyana Mawatha,
Pepiliyana.

Petitioner

Case No: SC/FR/222/2018

Vs.

1. Sunil Hettiarachchi,
   Secretary – Ministry of Education,
   'Isurupaya', Pelawatta,
   Battaramulla.

1A. Pathmasiri Jayamanne
   Secretary – Ministry of Education,
   'Isurupaya', Pelawatta,
   Battaramulla.

1B. N H M Chitrananda
   Secretary – Ministry of Education,
   'Isurupaya', Pelawatta,
   Battaramulla.

Added 1B Respondent

2. Hon. Akila Viraj Kariyawasm,
Minister of Education,
Ministry of Education,
'Isurupaya', Pelawatta,
Battaramulla.

2A. Hon. Dallas Alahapperuma,
Minister of Education,
Ministry of Education,
'Isurupaya', Pelawatta,
Battaramulla.

Added 2A Respondent

3. W.M. Jayantha Wickramanayake,
Director – National Schools,
Department of Education,
Ministry of Education,
'Isurupaya', Pelawatta,
Battaramulla.

4. Judicial Service Association,
Chief Magistrate's Court Premises,
Colombo 12.

5. R.S.A. Dissanayake,
President – Judicial Service Association,
Chief Magistrate's Court,
Colombo 12.

5A. Hasitha Ponnamperuma
President – Judicial Service Association
District Court,
Matale.

Added 5A Respondent

6. M. M. M. Mihal
Secretary – Judicial Service Association
Magistrate's Court,
Mount Lavinia.

6A. Prasanna Alwis
Secretary – Judicial Service Association
Magistrate's Court,
Kaduwela.

Added 6A Respondent

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

Respondents

AND

Case No: SC/FR/223/2018

Wellawalage Dakshika Chanima Wijebandara,
No. 52, Pepiliyana Mawatha,
Pepiliyana.

Petitioner

Vs.

1. Sunil Hettiarachchi,
Secretary – Ministry of Education,
'Isurupaya', Pelawatta,
Battaramulla.

1A. Pathmasiri Jayamanne,
Secretary – Ministry of Education,

‘Isurupaya’, Pelawatta,
Battaramulla.

1B. N H M Chitrananda
Secretary – Ministry of Education,
‘Isurupaya’, Pelawatta,
Battaramulla.

Added 1B Respondent

2. Hon. Akila Viraj Kariyawasm,
Minister of Education,
Ministry of Education,
‘Isurupaya’, Pelawatta,
Battaramulla.

2A. Hon. Dallas Alahapperuma
Minister of Education,
Ministry of Education,
‘Isurupaya’, Pelawatta,
Battaramulla.

Added 2A Respondent

3. W.M. Jayantha Wickramanayake
Director – National Schools,
Department of Education,
Ministry of Education,
‘Isurupaya’, Pelawatta,
Battaramulla.

4. Judicial Service Association,
Chief Magistrate’s Court Premises,
Colombo 12.

5. R.S.A. Dissanayake
President – Judicial Service Association,
Chief Magistrate's Court,
Colombo 12.

5A. Hasitha Ponnamperuma,
President - Judicial Service Association,
District Court,
Matale.

Added 5A Respondent

6. M. M. M. Mihal
Secretary – Judicial Service Association
Magistrate's Court,
Mount Lavinia.

6A. Prasanna Alwis,
Secretary – Judicial Service Association,
Magistrate's Court,
Kaduwela.

Added 6A Respondent

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

Respondents

Before: Priyantha Jayawardena PC, J
Vijith K. Malalgoda PC, J
E.A.G.R. Amarasekara, J

Counsel: Romesh de Silva, PC with Sugath Caldera and Harith de Mel for the Petitioners

Sanjeewa Jayawardena, PC for the 4th – 6th Respondents.

Viraj Dayaratne PC, ASG with Ms. Sureka Ahmad, SC for the 1st, 2nd, 3rd and 7th respondents.

Argued on: 17th June, 2019

Decided on: 18th June, 2020

Priyantha Jayawardena, PC, J

Facts of the Application

SC/FR Application No. 222/2018

The petitioner stated that at the time of filing the instant application, she was serving as the Additional District Judge of Mathugama. Subsequent to her appointment as a Judicial Officer in 2010, the petitioner had been transferred to various parts of the island in the years 2013, 2014, 2015 and 2017 to function as a Judge.

The petitioner had filed the instant application in her personal capacity as well as on behalf of her child, as the petitioner's child had been denied admission to Grade 1 of Visakha Vidyalaya for the year 2017 and for the benefit of all Judicial Officers. Thus, this application will fall within the scope of private and public interest litigation regimes.

The petitioner alleged that the acts referred to in the petition constitute executive and administrative action which resulted in the violation of the Fundamental Rights of the petitioner and her child.

The 1st respondent is the Secretary to the Ministry of Education and the 2nd respondent is the Hon. Minister of Education. The 3rd respondent is the Director of National schools and the 4th respondent is the Judicial Service Association. The 5th and 6th respondents are the President and the Secretary of the Judicial Service Association, respectively.

The petitioner stated that as per the Circular No. 17/2016 issued by the Ministry of Education applicable for the year 2017 school admissions, the children belonging to 'various categories' were entitled to apply for Grade 1 of State Schools.

Moreover, the petitioner stated that the aforesaid scheme for admissions to Grade 1 of State Schools requires a stipulated criterion to be fulfilled. However, Judicial Officers are unable to

fulfill the said criterion due to the nature of the work that they have to perform and the office held by them.

Further, the children of persons in the staff of institutions directly involved in school education, the children of persons arriving after living abroad with the children and the children of officers in the Public Sector, State Corporations and State Banks who have received transfers on exigency of service have been included in the said Circular for admission to Grade 1 of State Schools.

Furthermore, the petitioner stated that the Department of Education had recognized that the members of the Three Armed Forces and the Police were unable to comply with the said stipulated criterion in the Circular and thus, a special criterion had been formulated for the admission of the children of the members of the Three Armed forces, to a State School.

However, there is no such special criterion stipulated in the said Circular applicable for admission of the children of Judicial Officers to Grade 1 of State Schools.

Therefore, from the years 2011 to 2016, the following practice had been followed when admitting the children of Judicial Officers to a State School:

Judicial Officers seeking to admit their children to State Schools would forward their applications indicating the school of first preference to the Judicial Service Commission through the Judicial Service Association. If the admission of the children was warranted, the Judicial Service Commission would forward the applications to the Ministry of Education. Thereafter, the Ministry of Education would admit those children to the preferred school of the Judicial Officers.

However, the said practice had not been followed in the year 2017.

The petitioner stated that in the circumstances, the Ministry of Education had accepted and acknowledged that Judicial Officers are a separate category for the purpose of admitting their children to State Schools and accordingly, admitted the children of Judicial Officers to a school of their preference, including to Grade 1.

Further, over the years Judicial Officers had applied to admit their children to various schools in different parts of the island such as Visakha Vidyalaya in Colombo, Royal College in Colombo, Darmashoka Vidyalaya in Ambalantota, D.S. Senanayake College in Ampara, Maliyadeva Girls' College in Kurunegala, Swarnapali Girls' School in Anuradhapura, Bandarawela Central College in Bandarawela, Viharamaha Devi Balika Vidyalaya in Kiribathgoda and Ferguson High School

in Ratnapura, etc. and their requests had been entertained by the Ministry of Education by following the said practice.

The petitioner stated that in the year 2017, there were 27 applications for admission of the children of Judicial Officers to various grades of different schools. However, out of the 27 applicants, only 6 applicants had been admitted to the school of their preference.

Moreover, out of the 5 applicants who had applied to Visakha Vidyalaya for Grade 1, only one applicant had been granted admission to the said school.

The petitioner further stated that there were 7 applications from Judicial Officers for the school admission of the year 2018. All these applicants had received admission to their school of preference, except one child. Later, he too had been admitted to the school of his preference consequent to litigation.

The petitioner stated that in view of the said practice that was in existence for several years, she had a legitimate expectation that it would be followed by the Ministry of Education and the Department of Education with respect to the admission of children to Grade 1 for the year 2017 which would have enabled her to admit her child to Visakha Vidyalaya, Colombo.

Hence, complying with the said practice, the petitioner had made an application to admit her daughter to Grade 1 of Visakha Vidyalaya for the year 2017, through the Judicial Service Association for admission.

The petitioner further stated that the Judicial Service Association had submitted her application to the Judicial Service Commission, which had thereafter forwarded the same to the Ministry of Education with a recommendation to admit the child to Grade 1 of Visakha Vidyalaya.

The petitioner stated that the failure on the part of the Ministry of Education and the Department of Education to follow the aforementioned practice in the year 2017, violated her legitimate expectation.

Moreover, the petitioner stated that the Ministry of Education and the Department of Education had reverted to the said practice applicable to Judicial Officers once again in the years 2018 and 2019.

The petitioner further stated that, the Director of National Schools had sent a letter dated 12th April, 2017 to the Secretary of the Judicial Service Commission, requesting the petitioner and the other

Judicial Officers referred to in the said letter to participate in a meeting presided over by the Minister of Education on 18th April, 2017 in order to admit their children to State Schools.

However, the petitioner had refused to participate at the said meeting as she was of the view that it was inappropriate for a member of the judiciary to meet with officials of the Ministry of Education to admit their children to schools.

The petitioner further submitted that on 18th April, 2017 the petitioner's child was granted admission to St. Paul's Milagiriya which however, is not the school preferred by the petitioner.

The petitioner stated that subsequently she became aware that certain judges who had met the Minister of Education were able to admit their children to schools of their preference.

In the circumstances, the petitioner stated that she could not get her child admitted to a school of her choice as she declined to meet the Minister of Education and due to the failure of the Ministry of Education and the Department of Education to follow the longstanding practice of admitting the children of Judicial Officers to a school of their preference.

The petitioner stated that in the circumstances, the respondents have violated the Fundamental Rights of the petitioner and her child, guaranteed by Article 12(1) of the Constitution.

SC/FR Application No. 223/2018

In addition to the above stated facts, the petitioner in SC/FR Application No. 223/2018 stated that she is also a Judicial Officer and at the time of filing the application, she was serving as the Magistrate of Nugegoda.

Subsequent to her appointment as a Judicial Officer in 2007, the petitioner had been transferred to courts in various parts of the island in the years 2008, 2010, 2013, 2016 and 2018 to function as a Judge of those courts.

In accordance with the practice followed by the respondents to admit the children of Judicial Officers to State Schools, the petitioner had submitted her application through the Judicial Service Association for the admission of her daughter to Grade 1 of Visakha Vidyalaya.

The petitioner stated that the Judicial Service Association had submitted the said application to the Judicial Service Commission which had thereafter forwarded the same to the Ministry of Education with a recommendation to admit the child to Grade 1 of Visakha Vidyalaya.

Thereafter, on 17th April, 2017 the petitioner had been informed by the Judicial Service Commission that a meeting was convened by the Minister of Education on 18th April, 2017 to discuss the issues relating to admission of the children of Judicial Officers to State Schools.

The petitioner stated that when she attended the said meeting along with the other judges, the officials of the Ministry of Education informed that they had taken into consideration the recommendations made by the Judicial Service Commission, seniority and transfers as their selection criteria, and handed over a letter of admission to Sirimavo Bandaranayake Vidyalaya for her child. However, since it was not the school of first preference of the petitioner, she had not admitted her child to the said school.

Subsequently, the petitioner found out that the child of a Judicial Officer who is junior to her, had been given admission to Visakha Vidyalaya, while her child was not granted admission to the same.

Accordingly, the petitioner stated that overlooking her request over a junior officer's is discriminatory and inconsistent with the said practice followed by the Ministry of Education to admit the children of Judicial Officers to State Schools.

Further, in addition to the application sent through the Judicial Service Association, the petitioner had made an application for the admission of her child to Visakha Vidyalaya (1st preference) and Sirimavo Bandaranayake Vidyalaya. However, the said application had not been entertained as the petitioner could not fulfil the admission criterion stated in the said Circular applicable for admission to Grade 1.

In the circumstances, the petitioner stated that the respondents have violated the Fundamental Rights of the petitioner as well as her child guaranteed under Article 12(1) of the Constitution.

After both applications were supported, the Court granted Leave to Proceed for the alleged violation of Article 12(1) of the Constitution.

Objections of the 3rd respondent

Re: SC/FR/222/2018

The 3rd respondent filed objections and denied the allegations made by the petitioner and stated that the Ministry of Education is unable to admit all children to schools of their choice as the capacity to accommodate students into more popular schools is limited.

He stated that, every year the Ministry of Education issues a Circular with regard to admissions to State Schools in order to ensure that there is no discrimination, and that parents are afforded an equal opportunity to admit their children to schools.

The 3rd respondent further stated that the Ministry of Education had made every effort to accommodate the requests of Judicial Officers with regard to school admissions in the past. However, as the year 2017 had twenty seven (27) applications, the Ministry of Education had introduced the following new criterion to admit the children of Judicial Officers to State Schools having a greater demand;

" (a) where the transfer of the Judicial Officers has been between two Districts and the school, that had been requested was situated within the District to which the Judicial Officer had been transferred to, then taking into consideration the distance between the two stations, admission was granted to either the school that had been requested or a school of similar standing,

(b) where the transfer of the Judicial Officers has been between two Districts but the school that had been requested was situated in a different District, then the permanent residence of the Judicial Officer was taken into consideration when granting admission to schools. However, in such instances only requests for admissions to Grade 1 were considered,

(c) where the transfer was within the same District or in the case of a promotion, then the distance between the stations were considered when allocating a school. However, in such instances only requests for admissions to Grade 1 were considered, and

(d) in one instance where the Judicial Officer had passed away, the child was given admission to the school that had been requested".

Furthermore, the petitioner's child had been given admission to St. Paul's Milagiriya which is a school of similar standing to Visakha Vidyalaya.

The 3rd respondent further stated that the Circular issued by the Ministry of Education provides different categories under which a person could admit a child to a State School. Thus, the petitioner's claim that the nature of her office prevented her from applying to a State School under the said Circular, is incorrect.

The 3rd respondent claimed that the petitioner had not been treated unequally and the said Circular does not provide for a special procedure to be adopted in favour of the children of Judicial Officers.

Re: SC/FR/223/2018

The 3rd respondent stated that the petitioner in application No. SC/FR/223/2018 had submitted an application privately requesting both Visakha Vidyalaya (1st preference) and Sirimavo Bandaranayake Vidyalaya (2nd preference) under the said Circular in addition to the application that was sent through the Judicial Service Association.

The 3rd respondent stated that the petitioner's daughter was granted admission to Sirimavo Bandaranayake Vidyalaya, which was the petitioner's second preference. Thus, the petitioner is now estopped from stating that the said school is not her choice of preference.

The 3rd respondent further stated that, a Judicial Officer is not barred from applying to a State School under the categories provided in the Circular applicable for ordinary citizens.

Objections of the 5th respondent

SC/FR/222/2018 and SC/FR/223/2018

The 5th respondent filed an affidavit and stated that a few Judicial Officers who had met the Minister of Education personally had got their children admitted to schools of their choice for Grade 1 in the year 2017 and Grade 2 in the year 2018.

Further, it was stated that the Judicial Service Commission had made every effort to prevent any interaction between the Judicial Officers whose children seek admission to State Schools and the officials of the Ministry of Education.

Furthermore, the 5th respondent stated that the Judicial Service Association had forwarded the applications of the petitioners to the Judicial Service Commission, which had thereafter forwarded the same to the Ministry of Education with a recommendation.

Submissions of the petitioners

Both applications were taken up together for hearing as the issues involved in the applications are similar.

At the hearing of the instant applications, the learned President's Counsel for the petitioners submitted that the instant Fundamental Rights applications consist of two aspects:

(a) securing and preserving the independence of the Judiciary as a matter of public interest, and
(b) the grievance of the petitioners, their children and the children of the Judicial Officers in general.

He further submitted that except for the year 2017, all applications for school admissions forwarded by the Judicial Service Commission for the years 2011 to 2019 had been entertained by the Ministry of Education except for one child. Thus, in view of the past practice pertaining to the admission of the children of Judicial Officers to State Schools, the petitioners entertained a legitimate expectation to admit their children to a school of their preference.

Moreover, the learned President's Counsel drew the attention of court to the stipulated criterion in the Circular for the admission of children to Grade 1 of State Schools and submitted that the said criterion is arbitrary and capricious as it does not include the children of Judicial Officers.

The learned President's Counsel further submitted that the petitioners' children were not admitted to their preferred schools because they had declined to meet the Minister of Education personally.

Further, the petitioners' children were denied admission to Visakha Vidyalaya on the ground that there were too many applicants in the year 2017. However, there was no evidence before court to suggest that Visakha Vidyalaya was unable to accommodate the petitioners' children.

Moreover, it was submitted that a Judicial Officer takes on an onerous duty of administration of justice and upholding the independence of the judiciary. Hence,

(a) the personal life of a Judicial Officer is restricted,
(b) the professional requirements of office are demanding and often subject to great personal sacrifice,
(c) Judicial Officers cannot meet persons and interview persons or seek appointments with officials;
(d) Judicial Officers cannot engage in social activities in the ordinary course organized by Past Pupils Associations, School Development Societies etc.

Further, the learned President's Counsel submitted that Judicial Officers are a separate category and thus, cannot be compared with the officers of the Executive. In this regard, the attention of this court was drawn to Article 170 of the Constitution where the definition of a Judicial Officer explicitly excludes a Public Officer.

He contended that only the Judicial Service Commission is vested with the discretion of deciding whether a Judicial Officer is entitled to a benefit or not. Thus, the Executive is precluded from deciding such matters.

In the circumstances, a child of a Judicial Officer should be entitled to a State School of their preference. Hence, the State has an obligation to provide a separate criterion to enable the children of Judicial Officers to obtain an education from a State School of their preference.

Submissions of the respondents

The learned Additional Solicitor General submitted that the doctrine of legitimate expectation is not an absolute notion and has to be balanced against the need to ensure the adaptability of the administrative authorities to meet the changing needs of society.

During the course of his submissions, the learned Additional Solicitor General cited the case of *Hughes v Department of Health and Social Security* (1985) AC 776 HL where Lord Diplock held that: "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 form of constitutional government."

He further cited the judgment in *Ginigathgala Mohandiramlage Nimalsiri v Colonel P.P.J. Fernando* (SC/FR Application No. 256/2010, SC minutes 17th September, 2015) which held that: "Where an expectation is founded on a policy and later a relevant change of policy is notified, the expectation founded on the previous policy cannot be considered as legitimate."

Furthermore, the practice which the petitioners are relying upon, has not been stipulated in any circular or any other document. Thus, even though the Ministry of Education had followed a practice with regard to school admissions referred to by the petitioners in the past, that does not give rise to a legitimate expectation as no formal undertaking has been given that the said practice would continue without any changes.

In support of his submissions, the learned Additional Solicitor General cited the case of *Desmond Perera v Commissioner of National Housing* [1997] 1 SLR 149.

He contended that it was not only the petitioners' children who were not granted their school of preference, but there were many other children of Judicial Officers who were not given admission to their preferred school.

It was further contended that the respondents were compelled to adopt a special formula for the year 2017, in order to cope with the requests of all Judicial Officers applying to get their children admitted to State Schools which have a higher demand.

The learned Additional Solicitor General submitted that the instant applications pertain to personal matters involving the private life of Judicial Officers and do not have any bearing on their official functions as Judicial Officers. Thus, the hardships faced by Judicial Officers in their personal life cannot be interpreted as an interference with the Judiciary.

Furthermore, it was submitted that the refusal to admit the children of the petitioners and other Judicial Officers is not arbitrary and therefore, is not a violation of fundamental rights guaranteed under Article 12(1) of the Constitution.

Have the Petitioners' Fundamental Rights Enshrined in Article 12(1) of the Constitution Been Infringed?

One of the matters that needs to be considered in this application is whether the new criterion applied for the admission of the children of Judicial Officers to State Schools in the year 2017 violates the equal protection of the law guaranteed under Article 12(1) of the Constitution.

(a) The admission criterion applicable to the children of Judicial Officers

In order to consider the above, it is necessary to examine the criterion set out in the aforementioned Circular applicable for the admission of children to State Schools for the year 2017.

Section 6.0 of the Circular No. 17/2016 which is applicable for the admission of children for the year 2017 states that the children of the following categories were entitled to apply for Grade 1 of State Schools:

" (i) Children of residents in close proximity to the school,
(ii) Children of parents who are Past Pupils of the school,
(iii) Brothers / sisters of students already studying in the school,
(iv) Children of persons in the staff of Institutions directly involved in school education,
(v) Children of officers in Public Sector / State Corporations / State Banks receiving transfers on service exigency,

(vi) Children of persons arriving after living abroad with the child" (the details specified in paragraph 6.6 of the said Circular includes persons who have travelled oversees on State service as well as for personal requirements).

Further, Section 12.0 of the said Circular provides a separate category for the admission of the children of the members of the Three Armed Forces and the Police who are/were engaged in operational duties. In terms of the said Section, firstly five children are selected for each parallel class in a State School by the Secretary of the Ministry of Defence and the Secretary of the Ministry of Public Order. Then, a list of the selected children is forwarded to the Ministry of Education which would thereafter refer such children to the relevant school.

Are Judicial Officers included in the said Circular?

In terms of Article 170 (b) of the Constitution a 'Judicial Officer' means:

> "…. any Judge, presiding officer or member of any other Court of First Instance, tribunal or institution created and established for the administration of Justice or for the adjudication of any labour tribunal or other dispute but does not include a person who performs arbitral functions or a public officer whose principal duty or duties is or are not the performance of functions of a judicial nature."
>
> [Emphasis added]

Further, Article 111M (a) of the Constitution defines a 'Judicial Officer' as:

> "… any person who holds office as judge, presiding officer or member of any Court of First Instance, tribunal or institution created and established for the administration of Justice or for the adjudication of any labour or other dispute, but does not include a Judge of the Supreme Court or of the Court of Appeal or of the High Court or a person who performs arbitral functions, or a public officer whose principal duty is not the performance of functions of a judicial nature."
>
> [Emphasis added]

A careful consideration of the Circular applicable for the admission of children to State Schools shows that the categories referred to in the said Circular do not include Judicial Officers and their children.

In view of the above, the Ministry of Education had been adopting the following practice in the years 2011 to 2016, 2018 and 2019 for the admission of the children of Judicial Officers to State Schools:

(i) A Judge seeking admission of a child to Grade 1 would forward an application indicating the school of preference to the Judicial Service Association,

(ii) The said Association would forward the said application to the Judicial Service Commission,

(iii) The Judicial Service Commission would then consider the application and forward it to the Ministry of Education with a recommendation, if it warrants admission of the child,

(iv) Thereafter, the Ministry of Education would admit the child to the preferred school of the Judicial Officer.

(b) Changing the admission criterion applicable to the children of Judicial Officers for the year 2017

The 3rd respondent stated that as there were twenty seven (27) applications from Judicial Officers in the year 2017, the Ministry of Education introduced the new criterion stated in the Objections filed by the 3rd respondent, when allocating schools to the children of Judicial Officers for the year 2017.

Old practice v New criterion

According to the old practice, the children of Judicial Officers were admitted to State Schools based on the recommendation of the Judicial Service Commission as the said Circular issued by the Ministry of Education did not provide for the admission of the children of Judicial Officers to State Schools.

However, the new criterion introduced by the Ministry of Education; for the admission of the children of Judicial Officers for the year 2017, was applicable only for judges who got transfers during that year.

Thus, the said new criterion is a departure from the past practice. Particularly, as the said criterion did not provide for the admission of the children of all Judicial Officers to State Schools on a general basis but on a transfer basis.

Further, the new scheme has done away with the past practice followed by the Ministry of Education to admit the children of Judicial Officers to State Schools since the year 2011.

Circular v New criterion

As stated above, the aforementioned Circular did not provide for the admission of the children of Judicial Officers to State Schools. Thus, the Ministry of Education had introduced and followed the aforementioned past practice to admit the children of Judicial Officers, which is similar to the admission of the children of the members of the Three Armed Forces and the Police who are/were engaged in operational duties and the staff of institutions directly involved in school education.

However, the new criterion introduced by the Ministry of Education for the year 2017 for the admission of the children of Judicial Officers is different to the criterion stipulated in the said Circular for other categories provided for the children of other officers in the Public sector, State Corporations, State Banks, the staff of institutions directly involved in school education, the members of the Three Armed Forces and the Police who are/were engaged in operational duties.

Moreover, the said new criterion introduced to admit the children of Judicial Officers in the year 2017 was only restricted to Judicial Officers who were transferred from one district to another and it did not contain a criterion to admit the children of Judicial Officers other than those who got transfers.

Is the new criterion arbitrary?

The 3rd respondent contended that since there were twenty seven (27) applicants in the year 2017, the Ministry of Education had followed the said criterion when allocating schools to the children of Judicial Officers.

Further, the 3rd respondent contended that the petitioners' children were denied admission to Visakha Vidyalaya on the ground that there were twenty seven (27) applicants for the year 2017.

However, as per the document produced and marked as '3R3' by the 3rd respondent, there were only 5 children out of the 27 applicants seeking admission to Grade 1 at Visakha Vidyalaya in the year 2017 whereas the other applicants had applied to various other schools in the island. This matter is discussed in detail later in the judgment.

Therefore, I hold that the introduction of the new criterion is arbitrary and not warranted by the circumstances that prevailed at the time of admissions.

(c) School admissions made after the stipulated date

The 3rd respondent stated in his Objections that the petitioners' children could not be admitted to Visakha Vidyalaya as there were no vacancies available for the said school. However, the 3rd respondent did not produce any material to show that Visakha Vidyalaya could not accommodate the petitioners' children.

Consequent to an Order made by the court, the 1st to 3rd respondents filed a detailed list of admissions, to Grade 1 for the year 2017 and Grade 2 for the year 2018 to Visakha Vidyalaya, made after the admissions were finalised.

Name of the applicant	**Date of Admission**	**Admitted Grade**	**Admission No.**	**Reason**
Vaishnavi Alexandra Ramanayake	10/01/2017	1	39630	Based on the letter dated 18/04/2017 by the Secretary of the Ministry of Education
Nilasi Devsadi Senanayake	07/12/2017	1	39881	Based on the letter dated 14/11/2017 by the Secretary of the Ministry of Education
A.N. Maligaspekorale	23/01/2018	2	40218	Based on the letter dated 04/01/2018 by the Secretary of the Ministry of Education
K.P.M. Bihansa Kathriarachchi	01/02/2018	2	40222	Based on the letter dated 22/01/2018 by the Secretary of the Ministry of Education
U.S. Dulanya Wijetunga	02/05/2018	2	41226	Based on the letter dated 06/04/2018 by the Secretary of the Ministry of Education
V.G.N. Chethara Karunathilaka	26/06/2018	2	40454	Based on the letter dated 20/06/2018 by the Secretary of the Ministry of Education
K.M.J. Ehansa Kodithuwakku	21/05/2018	2	40315	Based on the letter dated 24/04/2018 by the Secretary of the Ministry of Education

(The details produced above were taken directly from the document produced by the 3rd respondent marked as '3R3.')

However, the 3rd respondent failed to explain as to how the aforementioned children were admitted to Visakha Vidyalaya after the admissions were finalised.

Further, the above details show that the respondents have violated the said Circular issued by the Ministry of Education by granting admission for the above children to Visakha Vidyalaya.

Moreover, the admission of the aforementioned children to Visakha Vidyalaya shows that the explanation given by the 3rd respondent for the failure to follow the longstanding practice and for the introduction of a new criterion for the admission of the children of Judicial Officers to State Schools for the year 2017 is untenable.

(d) Does the Ministry of Education have the power to convene a meeting to admit the children of Judicial Officers?

On 12th April, 2017 the Director of National Schools who is the 3rd respondent in the instant application had sent a letter to the Secretary of the Judicial Service Commission, requesting the Judicial Officers referred to in the said letter to participate in a meeting presided over by the Minister of Education on 18th April, 2017 to admit the children of Judicial Officers to State Schools notwithstanding the fact that there had not been such a practice on previous occasions.

Further, other parents who had applied under the said Circular had not been requested to participate in the said meeting or in any other similar meeting. Moreover, the said Circular applicable for the admission of children to State Schools does not provide for the convening of such meetings.

Hence, I am of the view that the Ministry of Education had no power or authority to convene such a meeting. Moreover, convening the meeting with Judicial Officers to admit their children to schools is illegal and arbitrary to the said Circular.

Is there a violation of Article 12(1) of the Constitution?

In the circumstances, denying admission to the children of the petitioners to State Schools, by introducing the said new criterion for the year 2017, admitting children to State Schools after the admissions were closed and convening a meeting for Judicial Officers to admit their children to State Schools by the Ministry of Education, is a violation of the petitioners' Fundamental Right to equal protection guaranteed by Article 12(1) of the Constitution by the 1st to 3rd respondents.

Did the Petitioners Entertain a Legitimate Expectation to Admit their Children to State Schools?

In order to seek redress under the doctrine of legitimate expectation, a person should have a legitimate expectation which was based on a promise, practice or a policy by the authority that is said to be bound to fulfil the expectation. However, such a practice need not be published or incorporated in a written document.

An expectation reasonably entertained by a person is considered legitimate if the person has justifiable reasons to form such an expectation. However, the applicability of the said doctrine is based on the facts and circumstances of each case.

In *Ginigathgala Mohandiramlage Nimalsiri v. Colonel P.P.J. Fernando* (SC/FR Application No. 256/2010, SC Minutes 17th of September 2015) it was held that the doctrine of legitimate expectation could arise by "believing an undertaking or promise given by a public official or by taking into consideration of established practices of an authority". [Emphasis added]

In this context, it is necessary to examine whether the practice of admitting the children of Judicial Officers to State Schools gave rise to a legitimate expectation.

It is pertinent to note that the said Circular applicable for the admission of children to State Schools did not provide for the admission of the children of Judicial Officers to State Schools. The said void had been filled by admitting the children of Judicial Officers to State Schools on the recommendation of the Judicial Service Commission from the years 2011 to 2017 as a practice. Further, even after the year 2017, the same practice has been followed once again by the Ministry of Education to admit the children of Judicial Officers for the years 2018 and 2019.

The petitioner submitted that the following details pertaining to the applications from Judicial Officers to admit their children to Visakha Vidyalaya since the year 2015.

Year	School	Grade	No. of Applicants
2015	Visakha Vidyalaya	1	3
2016	Visakha Vidyalaya	1	2
2017	Visakha Vidyalaya	1	5
2018	Visakha Vidyalaya	1	0
2019	Visakha Vidyalaya	1	2

Hence, I am of the view that, the expectation formed by the petitioners is within the powers of the decision-maker, and the said practice is not contrary to the Circular applicable for the admission of children to State Schools.

In *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2008] 61, [2009] 1 AC 465 it was held that:

> *"The legitimate expectation may entail either (1) no more than that the decision-maker will take his existing policy into account, or (2) an obligation on the decision-maker to consult those affected before changing his policy, or (3) an obligation for the decision-maker to confer a substantive benefit on an identified person or group. Those categories represent an ascending hierarchy which must be reflected in the precision, clarity and irrevocability of any alleged representation or promise on which the expectation is said to be based. To rely successfully on a substantive expectation a claimant must be able to show that the promise was unambiguous, clear and devoid of relevant qualification, that it was made in favour of an individual or small group of persons affected; that it was reasonable for the claimant to rely on it; and that he did rely on it generally, but not invariably, to his detriment".*

A careful consideration of the practice followed by the Ministry of Education to admit the children of Judicial Officers shows that there was no ambiguity or uncertainty of the said practice. On the contrary, the said practice was precise and filled a void in the admission criterion stipulated in the Circular.

In the aforesaid circumstances, I hold that the past practice of the Ministry of Education, pertaining to the admission of the children of Judicial Officers to State Schools, gave rise to a legitimate expectation as it had admitted the children of Judicial Officers upon the recommendation of the Judicial Service Commission, since the years 2011 to 2016.

Did the Change of the Practice Breach the Legitimate Expectation?

When a public authority intends to deviate from an established practice, which has been in operation for a considerable period giving rise to a legitimate expectation, it is essential that the persons affected by such deviation are given advance notice of the proposed change except in situations where the authority is unable to continue with the relevant practice due to circumstances which warrant such a deviation.

A similar approach was taken in the case of *Dayaratne v. Minister of Health and Indigenous Medicine* (1999) 1 SLR 393 where it was held that "when a change in 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". [Emphasis Added]

Moreover, the need to give notice to affected persons from a change in practice or policy was also discussed in *Hughes v Department of Health and Social Security* (1985) AC 776 HL, where Lord Diplock stated that:

> *"When a change in administrative policy takes place and is communicated in a departmental Circular to, among others, those employees in the category whose age at which they would be compulsorily retired was stated in a previous Circular to be a higher age than 60 years, any reasonable expectations that may have been aroused in them by any previous Circular are destroyed and are replaced by such other reasonable expectations as to the earliest date at which they can be compelled to retire if the administrative policy announced in the new Circular is applied to them."*

In the instant application, it is important to note that the respondents have deviated from the said practice, only in the year 2017 and have reverted to the same practice in the years 2018 and 2019.

Moreover, as stated above the reasons given by the respondents for changing the admission criterion applicable for the admission of the children of Judicial Officers are not warranted by the circumstances that prevailed at the time of admission for the year 2017.

Further, I am of the view that the cases cited by the learned Additional Solicitor General in support of his contentions are not applicable to the instant applications.

In the circumstances, I hold that, the Ministry of Education and the Department of Education have changed the practice applicable for the admission of the children of Judicial Officers for reasons which were not justified by the respondents. Further, introducing the new criterion is violative of the established procedure applicable for the admission of the children of Judicial Officers to State Schools. Moreover, the material produced by the 3rd respondent shows that seven (7) students had been admitted to Visakha Vidyalaya after the applications were closed. This contradicts the position taken by the 3rd respondent for introducing the said new criterion.

Moreover, if a practice is introduced and followed to fill a lacuna in a particular Circular or criterion which led to a legitimate expectation, such practice shall not be changed without

introducing an alternative criterion to fill such a lacuna unless there are compelling reasons to deviate from such a practice.

Hence, I am of the opinion that changing the past practice without giving prior notice and introducing the said new criterion for the year 2017 violated the legitimate expectation of the petitioners.

Orders of Court

Judges are an essential part of the administration of justice. They are required to maintain the honour and dignity of their profession, at all times. It is the responsibility of the judge to adjudicate a dispute honestly and impartially on the basis of the judge's assessment of the facts and in accordance with the conscientious understanding of the law.

Conflicts of interest occur where there is a conflict between the public duty and the private interest of a judge, in which the judge's private interest could improperly influence the performance of their official duties. This needs to be avoided, at all times. In the circumstances, a judge is required to maintain a form of life and conduct more severe and restricted than that of other people.

The Constitution of Sri Lanka has provided the necessary framework for the judiciary to maintain the aforementioned standards and to protect the independence of the judiciary. This position was held in *Jathika Sevaka Samgamaya v Sri Lanka Handabima Authority* (SC Appeal No. 15/ 2013 SC Minutes 16th December, 2015) where it was held:

> *"Article 111C of the Constitution is a manifest intention to ensure the judiciary is free from interferences whatsoever. Thus, there is a clear demarcation of powers between the judiciary and the other two organs of the government, namely, the executive and the legislature."*

Article 27 of the Constitution states:

> "27(2) The State is pledged to establish in Sri Lanka a democratic socialist society, the objectives of which include –
>
> …
> …
> …
>
> (h) the complete eradication of illiteracy and the assurance to all persons of the right to universal and equal access to education at all levels."

In the case of *Watte Gedera Wijebanda v Conservator General of Forests and Other* (2009) 1 SLR 337, it was held that although Directive Principles are not specifically enforceable against the State, they provide important guidance and direction to the various organs of State in the enactment of laws and in carrying out the functions of good governance.

Hence, all children including the children of Judicial Officers are entitled to equal access to education and it is incumbent upon the State to have a proper mechanism to secure the said right. As stated above, the Department of Education and the Ministry of Education had been following the practice referred to above to give effect to the State Policy of equal access to education. Hence, the said practice has led to the formation of a legitimate expectation among the Judicial Officers to admit their children to State Schools.

Thus, such a practice introduced and followed to fill a lacuna in the admission criterion applicable to State Schools cannot be varied or abolished without introducing an alternative criterion to fill the said lacuna.

An underlying principle of natural justice, upon which the principle of legitimate expectation is based, is the right to be heard.

As such, the Ministry of Education and the Department of Education was under a duty to give advance notice if it intended to replace the said established practice which had given rise to the legitimate expectation.

A similar position was held in *Dayaratne v. Minister of Health and Indigenous Medicine* (1999) 1 SLR 393 where it was held that;

> *"when a change of policy is likely to frustrate the legitimate expectations of individuals, they must be given an opportunity of stating why the change of policy should not affect them unfavourably. Such procedural rights have an important bearing on the protection afforded by Article 12 of the Constitution against unequal treatments arbitrarily, invidiously, irrationally, or otherwise unreasonably dealt out by the Executive".*

In the circumstances, I direct the respondents not to change the aforementioned practice followed in the years 2011 to 2016 and 2018 to 2019 without formulating a criterion in consultation with the relevant stakeholders for the admission of the children of Judicial Officers to State Schools.

Further, for the reasons stated above, I direct the Principal of Visakha Vidyalaya and the other respondents to take immediate steps to admit the petitioners' children, Minuwanpitiyage Senoli Yunaya Peiris and Chanima Ranalee Jayaratne, to Visakha Vidyalaya forthwith and place them in an appropriate grade.

I order no costs.

Judge of the Supreme Court

Vijith K. Malalgoda, PC, 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

In the matter of and application in terms of Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka

W.M. Namal Sanjeewa of
No. 24/B, Deepankara Road,
Medaketiya, Tangalle.

SC FR Application No. 244/2012

Petitioner

Vs.

1. Neville Gunawardena
   Director General of Customs,
   Customs House, No. 40,
   Main Street, Colombo 11.

1A. Jagath Wijeweera,
   Director General of Customs,
   Customs House, No. 40,
   Main Street, Colombo 11.

1B. R. Semasinghe,
   Acting Director General of Customs,
   Customs House, No. 40,
   Main Street, Colombo 11.

1C. Mr. Chulananda Perera,
   Director General of Customs,
   Customs House, No. 40,
   Main Street, Colombo 11.

2. Dr. P.B. Jayasundara
Secretary Ministry of Finance and Planning,
Ministry of Finance and Planning,
The Secretariat, Colombo 01.

2A. Dr. R.H.S. Samaratunga
Secretary, Ministry of Finance,
Ministry of Finance, The Secretariat,
Colombo 01.

3. W.M.N.J. Pushpakumara
Commissioner General of Examinations,
Department of Examinations,
Sri Lanka.

4. Sathya Hettige
Chairman

4A. Mr. Dharmasena Dissanayake
Chairman

5. Kanthi Wijetunga
Member

5A. Mrs. V. Jagarasasingam
Member

6. Dr. N.I. Soyza
Member

6A. Mr. Santi Nihal Seneviratne
Member

7. S.I. Mannapperuma
Member

7A. Mr. A. Salam Abdul Waid
Member

7B. Prof. Hussain Ismail
Member

8. Ananda Seneviratne
Member

8A. Ms. D. Shirantha Wijayatilaka
Member

9. S. Thelleinadaraja
Member

9A. Mr. S. Ranugge
Member

10. Sunil A. Sirisena
Member

10A. Mr. Sarath Jayathilaka
Member

11. S.A. Mohamed Nahiya
Member

11A. Mr. D.L.Mendis
Member

12. N.H. Pathirana
Member

12A. Dr. Prathap Ramanujam
Member

13. T.M.L.C. Senerathne
Secretary

13A. H.M.G. Senevirathne
Secretary,
The Public Service Commission,
No.177, Nawala Road, Colombo 05.

14. Sudharma Karunarathna
Customs House,
No.40, Main Street, Colombo 11.

15. P.A. Abeysekara
Deputy Secretary to the Treasury,
Ministry of Finance & Planning,
The Secretariat, Colombo 01.

16. W.P. Karaunadasa
Customs House,
No. 40, Main Street, Colombo 11.

17. The Honorable Attorney-General
Attorney-General Department,
Colombo.

Respondents

Before: Sisira J de Abrew, J.,
Vijith K. Malalgoda, PC J. and
Murdu N.B.Fernando, PC J.

Counsel: Amaranath Fernando for the Petitioner
Rajiv Goonetilake SSC for the Attorney General

Argued on: 31-07-2018

Decided on: 17-07-2020

Murdu N.B. Fernando, PC J.

The Petitioner a graduate of the University of Colombo, an unsuccessful applicant to the post of Assistant Superintendent of Customs, by a petition filed before this Court in 2012

alleged that his fundamental rights guaranteed in terms of Article 12(1) and 14(1)(g) of the Constitution had been violated by the Respondents. The Court on 21-09-2012 granted leave to proceed against all the Respondents in respect of the alleged violation of Article 12(1) of the Constitution.

The facts of this application, as submitted by the Petitioner, albeit brief is as follows:-

By a notice published in the gazette dated 07-01-2011, the then Secretary to the Ministry of Finance and Planning (the 2nd Respondent) called for applications for the post of Assistant Superintendent of Customs Grade II of the Sri Lanka Customs Department.

According to the said notice, an open competitive examination was to have been conducted in or around April 2011 by the 3rd Respondent Commissioner General of Examinations and the applicants had to face a written examination. Those successful at the written examination were to have been called for a structured interview.

The Petitioner applied for the said post and sat for the written examination. Thereafter, the Petitioner was called for the interview by the 1st Respondent District General of Customs by letter dated 26-09-2011 (P2). The said letter indicated that there would be a general interview at which the applicants were required to produce for examination the documentation and certificates called for and a structured interview at which marks would be given for achievements in sports.

The Petitioner on the relevant date attended the interview and presented the relevant documentation. Thereafter, at a structured interview 'achievements in sports' were examined by the Board of Interview consisting of the 13th,14th and 15th Respondents.

In April 2012 the Petitioner received a letter from the Department of Examinations indicating the marks the Petitioner obtained at the open competitive examination as follows:-

Aptitude Test	-	074
English Language	-	060
Structured Interview	-	004
Aggregate marks	-	138

The Petitioner also became aware that appointments had been made to the post of Assistant Superintendent of Customs and that several applicants who had obtained an aggregate mark of 139 had been selected and given letters of appointment to the said post.

The Petitioner thereafter made representations to the 1st and 2nd Respondents that at the structured interview for 'achievements in sports' he should have been given nine marks and not four marks as reflected in the letter issued by the Department of Examinations. His contention was that the said additional marks would place him above the cut-off mark of 139 and entitle him to be appointed to the post of Assistant Superintend of Customs.

The 1st Respondent replied the said appeal stating that it was the interview board (appointed by the Public Service Commission) that had given marks and the maximum marks for a single sport that could be given has been awarded to the Petitioner by the said board. Being aggrieved by the said communication the Petitioner came before this Court alleging that his fundamental rights had been infringed by the actions of the Respondents.

The Petitioner further alleged that according to the gazette notice calling for applications (P1), a maximum of 10 marks were to be awarded at the structured interview for achievements in sports at National, District and Zonal Levels, that he had only been given four marks whereas he had produced certificates demonstrating his 'achievements in sports' viz. being placed first in weight lifting (85 kg) at inter divisional secretarial games of the Hambantota District in the year 2009 and 2010; being placed 2nd at the inter district games of the Southern Province in the year 2009; and other achievements at provincial and university level. Therefore, he alleged that his achievements had not been adequately and properly considered and evaluated by the interview board. His main grievance was that he had not been given marks simply because it was for a single sport, namely weight lifting and the said decision is arbitrary, capricious and beyond reasoning.

The Petitioner also alleged that in the said gazette notice marks were to be awarded for achievements at 'National, District and Zonal level' whereas the letter calling the Petitioner for the interview (P2) requested submission of certification pertaining to achievements at 'National, Provincial and District level' and therefore the Petitioner averred that the marking scheme for the structured interview was wrong, arbitrary, unreasonable, capricious, unlawful, malafide and in violation of the principles of natural justice and therefore violated the Petitioners' fundamental rights guaranteed by the Constitution under Article 12(1).

Thus, the Petitioner prayed that the marking scheme be set aside and for a declaration that his fundamental rights were infringed by the Respondents. The Petitioner also moved Court for a direction to place the Petitioner in his proper ranking in terms of the aggregate marks and to take steps to consider the Petitioner for appointment in terms of the gazette

notice and to appoint the Petitioner to the said post with effect from the date of the appointment of the other successful candidates.

In response to the Petition, the 1st Respondent, then Director General of Customs, in his affidavit averred that the Petitioner was only given marks for 'achievements in sports' at the level at which he competed, namely district level. Further, he averred that the gazette notice did not refer to awarding of marks at provincial level or at university level and only considered success in a sport at National, District and Zonal level and in any event success achieved at provincial and university level were equated to district level. The 1st Respondent further averred that in terms of the gazette notice more marks were assigned for candidates who had achieved excellence in more than one sport or many sports at National, District and Zonal level and achieving success for the same sport during different years did not earn additional marks. Elaborating further, the 1st Respondent averred that if a candidate has achieved excellence at National level, District and Zonal level, marks were awared only for success at the National level being the highest level and not for District and Zonal level. Similarly, if a candidate has achieved success at District and Zonal level, marks were awarded only for success at District level being the highest level and not at Zonal level the lowest level of competition.

The 1st Respondent therefore averred that as the Petitioner had participated and achieved excellence only for one sport namely weight lifting, that he was given four marks for the said sport weight lifting and at district level being the highest level at which the Petitioner had competed. Therefore, the 1st Respondent averred that the Petitioners' fundamental rights guaranteed under Article 12(1) of the Constitution was not violated or infringed by the Respondents.

The Petitioner did not submit any material or documentation to counter the said proposition of the 1st Respondent.

Having referred to the factual matrix of this application, let me now move on to consider and analyze the said facts in order to ascertain whether or not the Petitioners' fundamental rights guaranteed under Article 12(1) of the Constitution have been violated by the Respondents.

Article 12(1) of the Constitution reads as follows:-

> "All persons are equal before the law and are entitled to equal protection of the law"

Article 12(1) of the Constitution has been interpreted by this Court on numerous occasions. It is settled law that the said clause treats persons who are 'similarly circumstanced similarly' and permits classification of persons who are 'differently circumstanced differently' based upon accepted norms and principles of law. It is trite law that the said clause prohibits discrimination of citizens by executive and administrative action not only by substantive law but also by procedural law.

Hence, the matter in issue before this Court for determination is whether the actions alleged by the Petitioner falls within the ambit of the said regime.

The grievance of the Petitioner is in respect of the procedural law; allocation of marks at an interview and not in respect of the substantive law.

The Petitioners' main submission before this Court was that he was given less marks by the interview board, a mere four marks out of a possible ten marks whereas he should have been given nine marks for achievements in sports, viz 4 marks for inter divisional secretarial games in 2009; 4 marks for inter divisional secretarial games in 2010; and 1 mark for inter district games in 2010. Thus, the Petitioner submitted that the marking scheme was arbitrary among other grounds and violated his fundamental rights.

The Petitioner also submitted that in the letter calling the Petitioner for the structured interview the terminology used for achievements in sports was 'National, District and Zonal level' at two instances and 'National, Provincial and Zonal Level' at a third instance and the disparity in the reference made the marking scheme referred to in the gazette notice (P1) unlawful and violated the Petitioners' fundamental rights.

In the first instance, I wish to examine the Petitioners' application upon the said submission with regard to the terminology. In my view what is material is the gazette notice (P1) calling for applications. In the letter (P2) calling the Petitioner for the interview the marking scheme was reproduced in its entirety and the correct terminology was used. However, at one point instead of the word 'district', 'provincial' has been used. The gazette notice and the letter calling for the interview are two distinct documents and the above disparity in terminology in my view will not invalidate the gazette notice.

The gazette calling for applications (P1) on the other hand clearly and specifically laid down the criteria for selection. Based upon same, applications were tendered and if conditions were satisfied an applicant was called for the written examination. Upon an applicant obtaining the required marks at the written examination and falling among the

limited number of candidates being called for the interview, an applicant would be evaluated on physical fitness and achievements in sports. Thus, I see no merit in the said submission of the Petitioner that reference to the word 'provincial' at one point in the letter P2 would make the entire marking scheme wrong, arbitrary, capricious, unlawful, unreasonable or malafidae as alleged by the Petitioner.

This brings us to the more contentious submission of the Petitioner pertaining to the award of marks.

According to the gazette notice calling for applications (P1), from among the successful candidates at the written examination the applicants who had obtained the highest marks, were called for a structured interview at which a maximum of 10 marks were to be given for 'achievements in sports' in the following manner.

For individual events and team events respectively,

- at Zonal level - 1st,2nd and 3rd places - 3, 2, 1 marks
- at District level - 1st,2nd and 3rd places - 4, 3, 2 marks
- at National level - 1st,2nd and 3rd places - 5, 4, 3 marks.

Thus, it is observed that a rational criterion has been used to award marks in a scale of 5 to 1 for excellence in sports. Marks were given to a candidate at the highest level of participation either at National, District or Zonal level. Participating and achieving success in more than one sport would entitle a candidate for additional marks, whether it be an individual event or a team event. However, achieving success in the same sport for many years or a continuous number of years will not entitle a candidate for more or additional marks. The total marks awarded to a candidate had to be limited to the maximum ten marks allotted under the said classification. Thus, if a candidate had excelled and placed 1st at national level for two sports he would be awarded 5+5 marks.

In my view the criterion adopted by the Respondents in selecting the best candidate was based upon legitimate, reasonable and intelligible differentia. Hence, the said classification cannot be termed discriminatory or arbitrary as contended by the Petitioner. The main object of the Respondents were to select the most suitable candidates from a number of eligible candidates and an elimination system had to be adhered to, in such a situation.

Therefore, the Petitioners' argument that the marking scheme was unlawful, arbitrary, capricious and violated the Petitioners' fundamental rights is without merit and untenable in law. The Petitioner has also failed to satisfy this Court that he has been discriminated in any

way or establish before us that another similarly circumstanced applicant had been treated differently by the Respondents' to the detriment of the Petitioner.

I wish to consider the grievance of the Petitioner from another perspective. It is common knowledge that sports competitions are conducted at different levels. The successful sportsman at one level then competes at the next level and thereafter at all island or national level. The certificates tendered by the Petitioner clearly establishes that for weight lifting (85kg) he competed at the 2nd level, district level, at an inter divisional secretarial meet of the Hambantota District, in the year 2009 and also in the year 2010 and was placed 1st in both instances. The Petitioner does not aver that he achieved success at zonal or national level in either year. In the year 2009 at another meet, inter district meet of the Southern Province the Petitioner had been placed 2nd for the same sport, under the same weight category. That too was at district level and not at national level. The other meets/games the Petitioner had participated and obtained achievements was at provincial and university level games which were considered on par with district level meets.

In any event, the Petitioners' achievements were evaluated not at 'zonal level' but at 'district level'. Thus, the Petitioners' achievements had been correctly classified as 'district level' and awarded four marks for his success and achievement being placed 1st at district level in weight lifting. This is the highest level the Petitioner has achieved in terms of the marking scheme referred to in P1 and P2 and adopted by the interview board for all candidates. This Court cannot falter the marking scheme applied by the Respondents in respect of the Petitioner in question. Moreover, the guidelines given in the marking scheme had not been violated by the Respondents and the interview board has acted within the said guidelines.

In the said circumstances, I am of the view that the marking scheme adopted by the interview board cannot be deemed arbitrary, capricious or defy reasoning as contented by the Petitioner. Similarly, the marking scheme cannot be deemed unreasonable, or in violation of the fundamental rights of the Petitioner as submitted by the Petitioner before this Court.

If I may consider this application from another angle and accept the contention of the Petitioner that the Petitioners' achievements in weight lifting for each and every year of success should have been considered and marks given, then similarly a candidate who had competed at all levels and come up the ladder and had achieved success at all three levels Zonal, District or National level will also have to be given marks accordingly ignoring the limitation placed on the highest level of achievement. If a candidate has achieved success in a team event in addition to an individual event in more than one occasion then marks will

have to be given to such applicants for the said achievements also. For example, if a candidate was placed 1st at an individual event at Zonal, District and National level in one given sport on a particular year, then he would obtain 3+4+5=12 marks for one sport, which would exceed the maximum ten marks but would be granted only ten marks. If he had competed in the same sport on a different year or in a team event or in a different sport in the same year or on a different year and achieved success, still for all he cannot get any marks for the said success since he had already got the maximum ten marks which would amount to a clear injustice to such a candidate. In my view such a contention would make the marking scheme an absurdity.

In order to avoid such a situation as contended by the Respondents, certain measures were introduced by the interview board for awarding the said ten marks for 'achievements in sports' to give a 'level playing field' so to speak to all candidates. Hence, the criteria referred to earlier was introduced. Marks were awarded only for the highest level of achievement for one sport and limited for one year though a candidate was successful in that sport on more than one occasion. These types of limitation and classifications in my view stand to reason and are required to streamline the suitability of candidates at a highly competitive examination and for this reason too, I cannot accept the submission of the Petitioner, that the scheme adopted by the interview board was, arbitrary, capricious and violated the fundamental rights of the Petitioner.

Another argument put forward by the Petitioner before this Court was that the acts of the Respondents were in any event unreasonable and violated the principles of natural justice from the context of the administrative law regime of this country. Whilst appreciating the fact that the principles governing fundamental rights have incorporated the administrative law principles in granting equal protection to the citizenry, in my view the case presented before this Court does not fall within the said ambit. In this regard, I agree with the dicta of Mark Fernando J, in **Gamaethige Vs Siriwardena and others [1988]1 SLR 384 at page 399**, where his Lordship opined, that *It is useful to appreciate that the remedy under Article 126(2) cannot be equated to prerogative writs*;…. Hence, on the said ground too, the Petitioner has failed to establish that his fundamental rights have been violated by the Respondents.

Before concluding, I wish to observe that unlike in the many reported judgements pertaining to promotions of public officers, in this application the Petitioners' grievance is with regard to the recruitment process to the Public Service itself and the award of marks at a structured interview. As discussed earlier the Petitioner has failed to establish before this Court that an injustice was perpetrated upon him by the Respondents or that the Respondents have failed to comply with accepted legal norms and principles and the due process of the law.

Further the Petitioner has failed to disclose an act clearly and flagrantly wrongful of one or all or any of the Respondents which is discriminatory of him or infringes his fundamental rights.

The Petitioner also has failed to establish that he had been discriminated in any manner or that another similarly circumstanced applicant has been treated differently to the Petitioner. Hence, the question of breach of principles of equal protection of the law does not arise in this application.

For the aforesaid reasons, I hold that the Petitioner has failed to establish that the 1st to 16th Respondents have violated the fundamental rights of the Petitioner guaranteed in terms of Article 12(1) of the Constitution.

Application is 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 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. 288/ 2014

1. W G Gunarathna,
   No. 13,
   Randiya Uyana,
   Palapathwala.

2. M W M Shanika Karunarathna,
   'Sirikatha',
   Udagama,
   Ulapane.

3. D M Pathma Kumari,
   Bamwaththa,
   Gokarella.

4. D C Sunethra Ariyasinghe,
   No. 145,
   Koskotuwa,
   Walawela,
   Matale.

5. S M I R Samarakoon,
   38th Mile Post,

Lenadora.

6. H M S K Herath,
   No. 104/B,
   Magoda,
   Ruwan Eliya,
   Nuwara Eliya.

7. S A C S Kumarathna,
   302/1,
   Aluthwela,
   Karalliyadda,
   Theldeniya.

8. I G H D Somasinghe,
   No. 25,
   Palapathwala,
   Wahakotte.

PETITIONERS

-Vs-

1. Secretary,
   Ministry of Public Administration and
   Home Affairs,
   Independence Square,
   Colombo 07.

2. Director-General Establishments,

Ministry of Public Administration and
Home Affairs,
Independence Square,
Colombo 07.

3. Retired Justice Hon. Sathya Hettige PC,
   Chairman.

4. S C Manapperuma,

5. Ananda Seneviratne,

6. N H Pathirana,

7. S Thillandarajah,

8. A Mohamed Nahiya,

9. Kanthi Wijetunge,

10. Sunil S Sirisena

11. Dr. I M Zoysa Gunasekera,
    All members of the Public Service
    Commission
    No. 177,
    Nawala Road,
    Narahenpita,
    Colombo 05.

12. T M L C Senaratna,
    Secretary,

Public Service Commission,
No. 177,
Nawala Road,
Narahenpita,
Colombo 05.

13. S Premawansha,
Chief Secretary of the Central Province,
Chief Secretary's Office,
Kandy.

14. K Kekulandara,
Secretary,
Ministry of Health, Indigenous Medicine,
Social Welfare, Probation & Child Care
Services,
Central Province Provincial Council,
Sangaraja Mawatha,
Kandy.

15. Dr. K A Shanthi Samarasinghe,
Provincial Director of Health Services,
Department of Health Services of the
Central Province,
Sangaraja Mawatha,
Kandy.

16. Secretary,
Ministry of Healthcare and Nutrition,
'Suvasiripaya',

No. 385,
Ven. Baddegama Wimalawansha Thero
Mawatha,
Colombo 10.

17. Director-General of Health Services,
Department of Health,
No. 385,
Ven. Baddegama Wimalawansha Thero
Mawatha,
Colombo 10.

18. Hon. Attorney-General,
Attorney General's Department,
Hulftsdorp Street,
Colombo 12.

RESPONDENTS

Before: **L. T. B. DEHIDENIYA J**

P. PADMAN SURASENA J

S. THURAIRAJA PC J

Counsel: Nishantha Sirimanna with M Dissanayaka for Petitioners.

N Wigneshwaran SSC for the Respondents.

Argued on : 02-03-2020

Decided on : 03-06-2020

P Padman Surasena J

The Petitioners were appointed to the posts of Planning and Programming Officers (Grade II) in the Department of Health of the Central Province during the years 1999-2005. Their appointments were made in such a way that their service would only be within the said department with no transfers being possible to any other Department.

In terms of the salary revisions effected for the entire public service in 2006, the post of the Petitioners was designated under M N - 5 salary code placing them on the initial step of the said M N - 5 salary scale with effect from 01-01-2006. The Petitioners have enjoyed the said status up to date.

In 2014, the Secretary, Ministry of Public Administration and Home Affairs issued the circular No. 22 / 2014, dated 29-08-2014, calling for applications from qualified Sri Lankan citizens for the competitive examination for the recruitment of officers to the Posts of Grade III of Sri Lanka Administrative Service (hereinafter sometimes referred to as SLAS) on the basis of merit.

The Petitioners complain that the Respondents have failed to include in the above circular, the Petitioners, as a category of Public Servants who would be eligible to apply to sit the said examination. The Petitioners have produced the above circular marked **P 6**.

The Petitioners have further stated in their petition that the said ineligibility has caused severe prejudice to them depriving them of the prospects of any such future promotions. The Petitioners have complained that the failure on the part of the 1st to 11th Respondents to include the Planning and Programming Officers as a category of officers eligible to apply to sit the said SLAS merit based competitive examination, to be conducted in December 2014, for recruitment to Grade III of the SLAS as per Public Administration Circular marked **P 6** is illegal, unlawful, ultra vires, arbitrary, unreasonable, unfair, irrational, discriminatory, in breach of the rules of natural justice, without justifiable reasons and has violated the legitimate expectations of the Petitioners. It is the position of the Petitioners that the above failure has amounted to

an infringement of their fundamental rights to equality and/or equal protection of the law as guaranteed by Article 12(1) of the Constitution.

It is in this backdrop that the Petitioners have prayed inter alia for the following relief.

i. A declaration that their fundamental rights to equality and/or equal protection of law, guaranteed by Article 12(1) of the Constitution, have been infringed by the 1st to 11th and/or 13th to 17th Respondents and/or by any one or more of them;

ii. A declaration that any decision taken by the 1st to 11th Respondents and/or by any one or more of them to remove and/or exclude the Petitioners and/or Planning and Programming Officers as a category of public officers eligible to apply for and sit the said SLAS merit based competitive written examination, scheduled to be conducted in December 2014, for the recruitment of officers to Grade III of SLAS, from the said Public Administration Circular bearing No. 22/2014 dated 29/08/2014 (marked **P 6**) is illegal and null and void;

iii. A declaration that the non-inclusion/omission of Planning and Programming Officers as a category of public officers, who are eligible to apply for and sit the said SLAS merit based competitive written examination, scheduled to be conducted in December 2014, for the recruitment of officers to Grade III of SLAS, in the said Public Administration Circular bearing No. 22/2014 dated 29/08/2014 (marked **P 6**) is illegal and null and void;

iv. A declaration that the rejection of the 7th Petitioner's application to sit the said SLAS merit based competitive written examination in 2014 for the recruitment of officers to Grade III of SLAS, by the 1st and/or 13th and/or 15th Respondent(s) is illegal and null and void;

v. A declaration that the said Public Administration Circular bearing No. 22/2014 dated 29/08/2014 (marked **P 6**) and/or the examination sought to be held in

terms the said circular, is illegal and null and void in so far as it fails/omits to specifically include, recognize and/or acknowledge Planning and Programming Officers (including the Petitioners) as a category of public officers who are eligible to apply for and face the said SLAS merit based competitive written examination referred to therein;

vi. A direction on the 1st to 11th and/or 13th to 17th Respondents and/or any one or more of them and their servants and agents to forthwith specifically include and/or recognize and/or acknowledge Planning and Programming Officers as being a category of public officers eligible to apply for and face the said SLAS merit based competitive written examination scheduled to be conducted in December 2014 for the recruitment of officers to Grade III of SLAS in the said Public Administration Circular bearing No. 22/2014, dated 29-08-2014 (marked **P 6**); and/or forthwith amend the said Circular accordingly to reflect the same, call for applications afresh thereafter (as per amended circular) and then conduct the said examination;

vii. A direction on the 1st to 17th Respondents and/or any one or more of them and their servants and agents to forthwith permit the Petitioners to submit their applications for the said SLAS merit based competitive written examination scheduled to be conducted in December 2014 for the recruitment of officers to Grade III of SLAS, as referred to in the said Public Administration Circular bearing No. 22/2014, dated 29/08/2014 (marked **P 6**); and accept their applications and permit them to sit the said examination.

This Court on 02-12-2014 having heard the submissions of the learned counsel for the Petitioners 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 Article 12(1) of the Constitution.

It is to be noted at the outset that the Public Administration Circular No. 22 / 2014 **(P 6)** is merely a circular issued for the purpose of inviting applications from the eligible

persons to sit the competitive examination for the recruitment of officers to Grade III of SLAS for the year 2013/2014 through the Merit Stream. The eligibility criteria for the said recruitment stipulated in clause 6 of that circular is nothing more than a mere reproduction of the eligibility criteria for such recruitment under the Merit Stream stipulated in clause 10.2.3 (c) of the Gazette Extraordinary No. 1842/2 dated 23-12-2013 produced marked **P 9(a)**. That is the Minute of the Sri Lanka Administrative Service.

Thus, it is clear that the circular **P 6** which is the scheme of recruitment issued by the Secretary, Ministry of Public Administration and Home Affairs is a mere enforcement step taken in accordance with the Minute of the Sri Lanka Administrative Service published in the Government Gazette marked **P 9(a)**.

Moreover, it is important to note that the vacancies of Grade III SLAS posts are to be filled through three streams of recruitment. This is clearly mentioned in the Minute of the Sri Lanka Administrative Service [**P 9(a)**]. The said three streams of recruitment are as follows.

1) Recruitment under the Open Stream
2) Recruitment under the Limited Stream
3) Recruitment under the Merit Stream

It must be further noted that any person who has a degree from a recognized university is eligible to apply to sit the examination under the Open Stream. Admittedly, the Petitioners are graduates.[1] Therefore, it is open for them to sit the examination under the Open Stream.

As per the salary code in which the Petitioners are placed, they also become eligible to sit the examination under the Limited Stream as well.

However, for a person to be eligible to sit the examination under the Merit Stream, such applicant must;

[1] Paragraph 5 of the petition.

1) be a supra class officer in a permanent and pensionable post in the Public Management Assistant Service or in a Provincial Public Management Assistant Service ; or
2) be an officer with an active and satisfactory period of service not less than 20 years in the Public Management Assistant Service or in a Provincial Public Management Assistant Service with 10 years active and satisfactory service in Class 1 of such service.

Thus, it is clear that the Minute of the Sri Lanka Administrative Service [**P 9(a)**], as a whole, has not sought to exclude the Petitioners as an ineligible category of Public Servants who cannot apply for the recruitment under the Open Stream as well as the Limited Stream.

The above facts show unequivocally that the Petitioners by challenging the eligibility criteria for the recruitment under the Merit Stream set out in clause 6 of the Public Administration Circular bearing No. 22/2014 dated 29/08/2014 (marked **P 6**), is actually challenging, at a belated moment, the eligibility criteria for recruitment under the Merit Stream set out in clause 10.2.3 (c) of the Gazette Extraordinary No. 1842/2 dated 23-12-2013 [i.e. the Minute of the Sri Lanka Administrative Service produced marked **P 9(a)**].

It is in that backdrop that the learned Senior State Counsel in addition to his arguments based on the merits of the case, has also raised the issue of the failure of the Petitioners to file this application within the period specified by law.

In contradistinction to the claim of time bar raised by the Respondents, the Petitioners, relying on clause 01 of the Minute of the Sri Lanka Administrative Service [**P 9(a)**], have sought to argue that **P 9(a)** has been made operative without prejudice to the Combined Service circular No. 01 / 2007, dated 05-02-2007 issued by the Secretary, Ministry of Public Administration and Home Affairs (produced marked **P 3**). The Petitioners contended that the said circular (**P 3**) is one of the steps taken or purported to have been taken to amend the provisions of the Minute of the Sri Lanka Administrative Service at one point of time.

Making further submissions on this point, the learned counsel for the Petitioners stated that even if the Petitioners ought to have been aware in view of **P 9(a)** that they would not be qualified to sit the examination under the Merit Stream under clause (10.2.3)(c) of the said Gazette, they still had a legitimate expectation of being allowed to sit the said competitive examination as **P 9(a)** has come into operation without prejudice to the circular **P 3**.

In order to consider this argument it would be prudent to reproduce below, clause 01 of **P 9(a)**, relied upon by the Petitioners. It is as follows.

*"**01. Effective date**: This Minute shall come into operation with effect from 01st July 2012 without prejudice to any step taken or purported to have been taken in terms of provisions as per the amendments made from time to time to the said Minute of the Sri Lanka Administrative Service dated 28th October, 2005 published in the Gazette Extraordinary No. 1419/3 of 14th November, 2005."*

The plain reading of the above clause clearly shows that the purpose of the said clause was to preserve the steps taken in terms of the provisions of the Minute of the Sri Lanka Administrative Service dated 28th October 2005 published in the Gazette Extraordinary No. 1419/3 of 14th November 2005 as amended from time to time. This is because it was that Minute which was in force before **P 9(a)**.

This is also evident from the first paragraph of **P 9(a)** which states thus *"The following Minute of the Sri Lanka Administrative Service shall come into operation with effect from 01st July 2012 substituting the Minute of the Sri Lanka Administrative Service dated 28th October, 2005 published in the Gazette Extraordinary No. 1419/3 of 14th November 2005 of the Democratic Socialist Republic of Sri Lanka and the amendments thereto from time to time."*

According to the Public Administration circular No. 16 / 2006, dated 17-08-2006 issued by the Secretary, Ministry of Public Administration and Home Affairs (produced marked **P 4**), the new Minute of the Sri Lanka Administrative Service published in the Gazette Extraordinary No. 1419/3 of 14th November 2005 in substitution to the Minute of the Sri

Lanka Administrative Service dated 28th October 2005, published in the Gazette Extraordinary No. 1419/3 of 27th May 1988 published in the Gazette Extraordinary No. 509/7 dated 07th June 1998 has come in to force with effect from 01-01-2005.[2]

Closer look at the Combined Service circular No. 01 / 2007, dated 05-02-2007 (**P 3**) clearly shows that the application of the said circular **P 3** has been clearly restricted to the year 2004 only. This is clearly mentioned in the heading of **P 3** as follows.

"කුසලතා උසස් කිරීම් මගින් ශ්‍රී ලංකා පරිපාලන **සේවයේ** (ii) පන්තියේ (ii) ශ්‍රේණියට පත් කිරීම් - 2004"

Moreover, when one considers the qualifications specified in **P 3**, it is clear that the main qualification for one to be eligible for appointment to class II grade II of SLAS as per **P 3**, had been the completion of 15 years of service as at 31-12-2004. This clearly indicates that the said qualification was meant to apply only for the said recruitment in that year (2004).

Further, the fact that there is no such date specified in clause 10.2.3 (c) in **P 9(a)** is another factor, which establishes that **P 3** was only meant for such appointments to be made in the year 2004.

For the above reasons, it is clear that the application of the circular **P 3** had ended with the completion of the said recruitment process for the year 2004. Therefore, it is not open for the Petitioners to argue that the Public Service Commission is obliged to stick to circular **P 3** (instead of **P 6** which was issued in 2014) on the basis that clause 1 of **P 9(a)** has exempted the circular **P 3** from the application of **P 9(a)**.

The above positions have clearly established that it is the eligibility criteria for recruitment under the Merit Stream set out in clause 10.2.3 (c) of the Gazette Extraordinary No. 1842/2 dated 23-12-2013 [the Minute of the Sri Lanka Administrative Service marked **P 9(a)**] which the Petitioners in the instant case in fact attempt to challenge, in a circuitous way, at this belated moment.

[2] Vide first paragraph of **P 4**.

This Court has been consistent in holding that the applications of this nature must be filed within the period specified in Article 126 (2) of the Constitution. Although one can lay hands on many such judgments, I would in the circumstances of this case, refer only to Dayaratne and others Vs National Savings Bank and others[3].

The ten petitioners who filed the fundamental rights application in that case, were supervisory grade employees of National Savings Bank. They complained against the failure of the respondent bank (National Savings Bank) to promote them to the Executive Grade. It was the scheme of promotion published on 12-02-2001, which directly applied to the said petitioners. The applications were called for by the notice dated 15-02-2001 in which the closing date was set as 08-03-2001. Interview procedures ended on 28-06-2001. It was on 07-08-2001 that the Respondents announced the list of the officers selected for promotions. The fundamental rights application was filed in the Supreme Court on 30-08-2001, which was within one month from 07-08-2001.

The 1st limb of the preliminary objection raised by the Respondents is that the Petitioners were barred from challenging the scheme of promotion in view of the time bar specified in Article 126 (2) of the Constitution. His Lordship Justice Mark Fernando in his judgment upholding the said preliminary objection stated as follows.

"*… The 1st Respondent was entitled from time to time, and in the interests of the institution, to lay down the basis on which employees would be promoted, and that became part of the contract of employment. The scheme of promotion published on 12-02-2001 was directly and immediately applicable to the Petitioners, and became part of the terms and conditions of their employment. If they did not consent to those terms and conditions, as being violative of their rights under Article 12, they should have complained to this Court within one month. They failed to do so. Instead, they acquiesced in those terms and conditions by applying for promotion without any protest. I therefore uphold the objection. …*"

[3] 2002 (3) Sri L. R. 116.

In the instant case, the Petitioners were clearly aware of the eligibility criteria for recruitment under the Merit Stream set out in clause 10.2.3 (c) of the Gazette Extraordinary No. 1842/2 dated 23-12-2013 [the Minute of the Sri Lanka Administrative Service marked **P 9(a)**] and the fact that it came in to force with effect from 01-01-2005.[4]

Therefore, the Petitioners have clearly failed to file the instant application within one-month period specified in Article 126 (2) of the Constitution. I therefore dismiss this application with costs.

JUDGE OF THE SUPREME COURT

L. T. B. Dehideniya J

I agree,

JUDGE OF THE SUPREME COURT

S. Thurairaja PC J

I agree,

JUDGE OF THE SUPREME COURT

[4] Vide first paragraph of **P 4**.

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. 288/ 2017,

1. Dr. W M P N Weerasinghe,

   No 9/11,

   Ranasinghe Mawatha,

   Hiripitiya,

   Pannipitiya.

   PETITIONER

   -Vs-

1. University of Colombo,

   College House,

   No. 94,

   Kumaratunga Munidasa Mawatha,

   Colombo 03.

2. Prof. Lakshman Dissanayake,

   Vice Chancellor,

   University of Colombo.

3. K A S Edward,

   Secretary / Registrar,

University of Colombo.

4. Dr. R C K Hettiarachchi,

   Rector,

   Sri Palee Campus,

   University of Colombo.

5. Prof. M D A L Ranasinghe,

   Dean,

   Faculty of Arts,

   University of Colombo.

6. Prof. M V Vithanapathirana,

   Dean,

   Faculty of Education,

   University of Colombo.

7. Ms. Indira Nanayakkara,

   Dean,

   Faculty of Law,

   University of Colombo.

8. Dr. R Senathiraja,

   Dean,

   Faculty of Management and Finance,

   University of Colombo.

9. Prof. Jennifer Perera,

Dean,

Faculty of Medicine,

University of Colombo.

10. Prof. K R R Mahanama,

    Dean,

    Faculty of Science,

    University of Colombo.

11. Prof. Nayani Melegoda,

    Dean,

    Faculty of Graduate Studies,

    University of Colombo.

12. Prof. Janaka de Silva
13. Prof. J K D S Jayanetti
14. Rajan Asiriwatham
15. Dr. Harsha Cabraal PC
16. Thilak Karunaratne
17. Nigel Hatch PC
18. Prof. Lakshman Ratnayaka
19. Dr. Mrs.Ranee Jayamaha
20. J M Swaminathan
21. Prof. Rohan Jayasekera,

    All of, the Council of the University of Colombo.

22. Ms. D D N N Dissanayake

23. Ms. S D P S Dissanayake

Both, lecturers (probationary),

Department of Mass Media,

Sri Palee Campus,

Wewala,

Horana.

24. Dr. D Sri Ranjan,

Senior Lecturer,

Sri Palee Campus,

Wewala,

25. 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:

Upul Jayasuriya PC with P Radhakrishnan for the Petitioner.

Uditha Egalahewa PC with Nalliah Ashokbharan for the 1st, 2nd and 3rd Respondents.

Viran Correa with Sarita de Fonseka for the 4th and 24th Respondents.

S W Wilwaraarachchi for the 22nd and 23rd Respondents.

Rajiv Goonetilleke, SSC for the Hon. Attorney General.

Argued on : 28 - 01-2020

Decided on : 20-07-2020

P Padman Surasena J

The Petitioner had served as the Head of the Department of Mass Media at the Sri Palee Campus of the University of Colombo and had held the substantive post of Senior Lecturer (Grade II) in the University Service at the time of his interdiction from service, which occurred on 10-03-2016. It was in mid-February 2016 that several members of the academic staff of the Sri Palee Campus had submitted written complaints against the Petitioner. Among them were the 22nd and 23rd Respondents who were at that time, lady probationary lecturers. The said two lady probationary lecturers had complained that they were subjected to sexual harassment by the Petitioner. The said complaint also alleged that the Petitioner had abused his authority as the Head of the Department. The said 22nd and 23rd Respondents have produced the copies of the written complaints made by them marked **R 2 A** and **R 2 B** respectively. They also have produced (marked **R 2 C**) the joint complaint made by six other senior lecturers of the academic staff which had set out the alleged unacceptable general conduct of the Petitioner.

Upon the receipt of the above complaints, the 1st Respondent University, having caused a preliminary investigation conducted against the Petitioner, had taken steps to interdict the Petitioner by the letter dated 10-03-2016, produced marked **P 3**.

Thereafter, the 1st Respondent University having followed the necessary steps with regard to the conduct of disciplinary proceedings, had issued the charge sheet dated 19-09-2016 (produced marked **P 11**) against the Petitioner. The said charge sheet has alleged that the Petitioner being the Head of the Department of Mass Media at the Sri Palee Campus, had;

i. sexually harassed the 22nd and 23rd Respondents,

ii. engaged in discriminatory practices against the 22nd and 23rd Respondents, causing them to fear for the security of their jobs and their carriers,

iii. created a hostile work atmosphere for the two lady probationary lecturers (the 22nd and 23rd Respondents) making it difficult for them to carry out their duties and responsibilities effectively.

The charge sheet has alleged that the Petitioner by committing one or more of the above offences, has brought into disrepute, his position and the institution which has resulted in the first Respondent University losing the confidence it has placed in him as a Senior Lecturer in the University of Colombo.

The Petitioner in his petition, inter alia, has taken up the following main positions.

i. The two probationary lady lecturers had been instigated to make false complaints against him.

ii. Placing him on interdiction is not warranted and contrary to clause 18.1(a) and 18.7 of the University Establishments Code produced marked **P 6** (the same document has been produced by the 22nd and 23rd Respondents marked **R 5**).

iii. The 1st Respondent University has failed to conclude the disciplinary inquiry within 3 months as per clause 11.1 of the University Establishments Code.

iv. The 1st Respondent University has failed to reinstate him after the lapse of one year from the date of his interdiction, as stipulated in clause 22.1 of the Government Establishments Code read with clause 18.3 of the University Establishments Code.

It is on the above basis that the Petitioner alleges that the 1st to 24th Respondents or anyone or more of them had acted illegally, arbitrarily, unreasonably and outside their powers in order to achieve an ulterior motive to the detriment of the Petitioner's holding the above post at the Sri Palee Campus.

This Court on 07-03-2018 having heard the submissions of the learned President's Counsel for the Petitioner, the learned counsel who appeared for the 1st to 3rd and 22nd to 24th Respondents and the submissions of the learned Deputy Solicitor General who appeared for the Hon. Attorney General, had decided to grant leave to proceed in respect of the alleged violations of Article 12(1) of the Constitution.

I observe that the learned counsel for the 1st to 3rd and 22nd to 24th Respondents on 07-03-2018 itself had raised a preliminary objection with regard to time bar. The Court when granting leave to proceed on that day, having considered the complexity of events referred to in the application, had thought it appropriate to consider the said objection at the time of argument of the case. As has been indicated in the aforesaid manner, the Respondents, in addition to their arguments based on the merits of the case, have indeed raised the issue that the Petitioner has failed to file this application within the period specified by law.

Therefore, I would at this point, proceed to consider whether the Petitioner has filed this application within one month from the act (by the Respondents) which has allegedly given rise to the infringement of the Petitioner's fundamental rights under Article 12(1). In order to ascertain the above, I have to ascertain the date on which the aforesaid alleged four acts of infringement complained by the Petitioner had occurred.

The first ground is that the two probationary lady lecturers had been instigated to make false complaints against him. If that is the case, the Petitioner should have felt and known it at the time of his interdiction. This is because the Petitioner is taking up the position that false evidence was fabricated against him for the purpose of interdicting him. If he has had nothing to do with the allegations leveled against him and if he is convinced that the two probationary lady lecturers had been instigated to make false complaints against him, he should have forthwith challenged his interdiction on that ground. However, the Petitioner has filed the instant application on 15-08-2017, which is more than one year and five months since the date of his interdiction from service, which occurred on 10-03-2016. Therefore, the Petitioner has failed to challenge the alleged infringement of his fundamental right on this ground within the time specified in Article 126 (2) of the Constitution.

The second ground urged by the Petitioner in his petition is that his interdiction is not warranted and contrary to clause 18.1(a) and 18.7 of the University Establishments Code.[1]

If the interdiction of the Petitioner is not warranted and contrary to the University Establishments Code as alleged by the Petitioner he should have challenged it on that ground within one-month which is the time period specified in Article 126 (2) of the Constitution.

The third ground urged by the Petitioner in his petition is that the 1st Respondent University has failed to conclude the disciplinary inquiry within 3 months as per clause 11.1 of the University Establishments Code. If that is the case, I cannot see any impediment, which could have prevented the Petitioner from challenging the alleged infringement on that ground within one-month, which must start running immediately after the lapse of 03 months referred to in the said clause. This is because the alleged infringement on that ground would have completely occurred with the lapse of the said 03 months period.

Therefore it is clear that the Petitioner has failed to file the instant application as regards the above three grounds within the time period specified in Article 126 (2) of the Constitution. For those reasons, I uphold the preliminary objection raised by the Respondents that the Petitioner has failed to file this application within one-month time period specified in Article 126 (2) of the Constitution as regards the above three grounds. I would now consider whether the Petitioner has failed to file his application in respect of the fourth ground (referred to above), within one-month, as specified in Article 126 (2) of the Constitution.

The Petitioner was interdicted on 10-03-2016 and the one-year period reckoned from the date of interdiction lapses on 10-03-2017. Therefore the 1st Respondent University could only have reinstated the Petitioner (if it decided to act as per the clauses referred

[1] Produced marked **P 6** by the Petitioner and also marked **R 5** by the 22nd and 23rd Respondents.

to in the fourth ground above), only after 10-03-2017. Therefore any infringement as alleged by the Petitioner on this ground can occur only after this date (i.e. 10-03-2017).

As has been mentioned earlier, the Petitioner has filed this application on 15-08-2017. However, even as at that date, the 1st Respondent University has not reinstated him. This is despite the said one-year period from the date of his interdiction has already lapsed. By such an act, if the 1st Respondent University infringes any fundamental right of the Petitioner, I am of the view that such an infringement would be a continuing infringement. This is because the 1st Respondent University, if it so decides, could have reinstated the Petitioner at any time up until the time the Petitioner had filed this application. I also observe that the alleged infringement complained by the Petitioner on this ground is a failure on the part of the 1st Respondent University as opposed to a positive action. The alleged failure had continued. Therefore, I am of the view that the Petitioner's application on that ground is not time barred as the alleged infringement is in the nature of a continuing infringement.

I would now proceed to consider whether the 1st Respondent university has infringed the fundamental rights guaranteed to the Petitioner by Article 12(1) of the Constitution by failing to reinstate him after the lapse of one year from the date of his interdiction, as stipulated in clause 22.1 of the Government Establishments Code read together with clause 18.3 of the University Establishments Code, as alleged by the Petitioner.

It is a fact that the formal disciplinary inquiry against the Petitioner, upon the charge sheet issued against him by the 1st Respondent University, had commenced on 13-07-2017. The said inquiry had proceeded on number of days thereafter.

It is the contention of the Petitioner that he is entitled to be reinstated in his post, after the lapse of one year from the date of his interdiction in terms of clause 22:1:1 of the Government Establishments Code.

At the time of interdiction, the Petitioner was serving as the Head of the Department of Mass Media of the Sri Palee Campus, University of Colombo, and held the substantive post of Senior Lecturer –Grade II in the University Service. Thus, it is primarily the

Establishments Code of the University Grants Commission (hereinafter sometimes referred to as UGC E-Code) which must apply to him. However, it is the contention of the Petitioner that since there is no specific provision in the said UGC E-Code on the above contentious point, it is the Government Establishments Code provisions, which must apply to him on the issue in question. The Petitioner relies on University Grants Commission Circular No. 911 dated 14-05-2009.[2] The said Circular has made the provisions of the Government Establishments Code applicable to matters for which specific provisions have not been provided in the Establishments Code of the University Grants Commission and Higher Educational Institutions (as amended).

In contradistinction to the position taken up by the Petitioner, the Respondents rely on clause 18.3 of the UGC E- Code to argue that it should be the only provision, which must apply to the Petitioner in this situation. It is to be noted that the said clause 18.3 only states that in a situation where an officer has been interdicted, the disciplinary inquiry against him, must as far as possible, be concluded without delay. The said provision is general in its nature. One can clearly observe that the UGC E-Code has not specifically provided any mechanism to be adopted when the disciplinary inquiry against an interdicted officer cannot be concluded without delay. Provisions in clause 18.3 cannot be considered as having provided for such a situation. Indeed, it is totally silent about such a situation. Thus, there is clearly a lacuna on this point in the UGC E-Code. Therefore, I conclude that the provision contained in clause 22:1:1 of the Public Administration Circular No. 06 / 2004 (1) dated 30-12-2011 [**P 6 (c)**] must apply to the Petitioner, as it is a matter for which the UGC E-Code has not made any specific provision.

The above conclusion does not lay the matter in hand to rest. This Court has to next consider the effect of clause 22:1:1 in **P 6 (c)** to the given situation.

As per the Public Administration Circular No. 06 / 2004 (1) dated 30-12-2011,[3] if the disciplinary authority fails to conclude the disciplinary proceedings and issue a disciplinary order within one year after the issuance of the charge sheet against an officer who is

[2] Produced marked **P 6 (a)**.
[3] Produced marked **P 6 (c)**.

under interdiction, due to a reason other than a delay attributable to the said accused officer, then the said disciplinary authority has the discretion to reinstate the accused officer in service and pay him his salary.

This is a circular, which has amended the previous circular, which was hitherto in force, namely the Public Administration Circular No. 06 / 2004 dated 15-12-2004.[4] Clause 22:1 of the said circular (No. 06 / 2004 dated 15-12-2004) shows that it was imperative (as it was then) on the disciplinary authority to reinstate such accused officer in service when the relevant disciplinary authority fails to conclude the disciplinary inquiry and issue a disciplinary order within one year from the date the charge sheet was issued. This provision had been made applicable to the charges other than a charge mentioned in clause 31:11.

Thus, it can be seen as per this clause (22:1:1) as it stood as at 15-12-2004 and up until 30-12-2011, the disciplinary authority in such circumstances, had not been given any discretion to decide whether it should reinstate such accused officer.

Quite contrary to the above position, by the Public Administration Circular No. 06 / 2004 (1) dated 30-12-2011, the disciplinary authority has now clearly been given a discretion to decide whether such an accused officer should be reinstated in service after the lapse of one year from the date of the issuance of the charge sheet. Indeed, it is relevant to observe that in the year 2011, this amendment [**P 6 (c)**] has been brought solely for the purpose of conferring on the disciplinary authority, the hitherto lacked discretionary power, to decide the reinstatement of an accused officer after one year as mentioned above.

This leads me to consider a yet another question. That is the question whether the non-re-instatement of the Petitioner after the said one-year period has amounted to any infringement of the fundamental right of the Petitioner to equal protection of law under Article 12(1) of the Constitution.

[4] Produced marked **P 6 (b)**.

At the outset, as has already been mentioned above, one needs to be mindful that the imperative duty placed on the disciplinary authority to reinstate such an accused officer who is in a situation described in clause 22:1:1 in **P 6 (b)** has been deliberately removed by the circular **P 6 (c)**. Thus, as at present, the disciplinary authority has been vested with a discretion to decide whether such an accused officer who is in such a situation should be re-instated in service after the lapse of one year from the date of issuance of charge sheet. This is by virtue of the circular **P 6 (c)**.

The complaints made against the Petitioner are written complaints. One of them was jointly made by several senior members of the academic staff. They include Deans of several faculties. Moreover, as has already been mentioned above, the 22nd and 23rd Respondents are female probationary lecturers who have complained that the Petitioner abusing the powers of his post as the Head of the Department, has sexually harassed them. The said probationary lecturers have also given evidence in the disciplinary inquiry against the Petitioner. A copy of the said proceedings have been produced before this Court by the Respondents. Indeed, the disciplinary authority is obliged to afford equal protection of law to the 22nd and 23rd Respondents in the same manner as its obligation to the Petitioner.

Perusal of the proceedings of the disciplinary inquiry shows that number of days have been spent by the Petitioner's counsel to cross examine the witnesses. This includes the two female probationary lecturers as well. Thus, the question whether it would be in the best interest of justice to allow the Petitioner to continue to function in his post as the Head of the Department when two female probationary lecturers under him were to testify against him would definitely be a factor which the 1st Respondent University should consider.

Thus, having regard to the circumstances of the instant case, non-re-instatement of the Petitioner by his disciplinary authority after the lapse of one year from the date of issuance of the charge sheet, cannot be viewed as a wrong exercise of the discretion by the said disciplinary authority.

For the foregoing reasons, I am of the view that the allegation that the Respondents have failed to afford the equal protection of the law to the Petitioner must fail.

Therefore, I dismiss this application with 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 126 of the Constitution.

SC FR 322/2011

1. Mrs. D.W.D.E. Randeniya
No. 394, Old Road, Kottawa, Pannipitiya.

2. Mrs. Thushari Anuruddhika
No. 475c, Samudra Mawatha
Arangala, Hokandara (North).

3. Mr. B.A.T. Balasooriya
53 K, Pahalagama, Gampaha.

4. Mrs. Nilanthi Perera
127/1C, 9, Jayawardana Mawatha,
Pahala Karagahamuna, Kadawatha.

5. Mrs. Rupika Kannangara
C A 7/3, Ranpokunagama, Nittambuwa.

6. Mrs. Deepa Priyanthi de Alwis
"Senani" Kalawana, Minuwangoda.

7. Chithrani Abeygunawardana
No. 25, Suwarnapura, Horana.

8. Mrs. G.A. Chandrani,
106, Nalluruwa, Panadura.

9. Mr. M.R.S. Bopage
"Manel" Kahawathugoda, Ahangama.

10. Mr. Priyantha Wijegunasekera
"Sahana" Samagi Mawatha, Godagama,
Matara.

11. Mrs. Kamal Kanthi Weerathunga
Kokmaduwa Niwasa, Paragahahena,
Weralaliya, Welipitiya.

12. Mr. Ravindra Kumara Dias,
Panetiyana, Weligama.

13. Mr. K.K.P. Padmasiri
"Upali" Kithalagama East, Thihagoda.

14. Mr.T.H.J. Thilanath
Kadagahawaththa, Eluwawala, Denipitiya.

15. Mr. E.L Bandularama
"Akashi" Panamulla, Nihiluwa, Beliatta.

16. Mr. R.K. Wimalarathne
"Sanudima" Pissubedda Walasmulla.

17. Mrs. P. Hema Malani
179/A, Pallekanda, Walasmulla.

18. Mr. D.M. Gunawardana
Waliwaththa, Yappannawa, Iwala, Bibile.

19. Mr. W.B.M.A. Wijekoon
397, Hamparawa, Bandarawela.

20. Mrs. K.A.S. Seelarathna
"Danushka" Puranwela, Udubadana,
Keppetipola.

21. Mr. R.K. Mugunuwal a
"Sandamali", Imbulgoda, Galapitamada.

22. Mr. D.K. Wanigathunga
182/1, Uthuru Uduwa, Kuda Uduwa,
Horana.

23. Mr. E.V.G. Epitakumbura
Univercity Road, Pambahinne, Belihuloya.

24. Mrs. W.R.M.N.S. Wijekoon
No. 31/10, Manel Mawatha, Kurunegala.

25. Mrs. R.D. Hemalatha
Aluthhena, Pahamune, Narammala.

26. Mrs. M.M.S.R. Pushpakumari
C/o. Anura Wijethunga
Mawila Road, Weerahena, Naththandiya.

27. Mrs. D.M.G. Vijitha Padmawathi
113, Arippu Road, Old City, Anuradhapura

28. Mr. R.P.P.Wimalasiri
436/1, RA Ela, Palin Ela, Polonnaruwa.

29. Mr. R.M.P.G. Ranasinghe Bandara
141/1, Yaya 6,Nawanagaraya, Medirigiriya.

30. Mr. W.J.G. Wijesinghe
455, Yaya 4,Nawanagaraya, Medirigiriya.

31. Mr. Y.K.P. Tissa Nimal
"Thilina" Bumalla, Rikillagaskada.

32. Mr. E.H. Priyantha Padmakumara
488, Kongaspitiya, Ampitiya.

33. Mr. I.M.D.A.B. Rathwita
Ihala Rathwitha, Gokarella.

34. Mr. S.M.T. De Alwis
446 Matale Road, Alawathuwala.

Petitioners

Vs.

1. Prof. Dayasiri Fernando,
Chairman
Public Service Commission.

Added 1A. Hon. Justice Sathya Hettige PC
Chairman
Public Service Commission.

Added 1B Dharmasena Dissanayake
Chairman
Public Service Commission.

2. Palitha M. Kumarasinghe
Member, Public Service Commission.

Added 2A Kanthi Wijethunga
Member, Public Service Commission.

Added 2B Justice A.W.A. Salam
Member, Public Service Commission.

Added 2C Proff. Hussain Ismail

3. Sirimavo Wijeratne
Member, Public Service Commission.

Added 3A Sunil Sirisena
Member, Public Service Commission.

Added 3B V. Jegarajasingam
Member, Public Service Commission.

	4.	S.C. Mannapperuma Member, Public Service Commission.
Added	4A.	Nihal Seneviratne Member, Public Service Commission.
Added	4B	Mrs. Sudharma Karunaratne Member, Public Service Commission.
	5.	Ananda Seneviratne Member, Public Service Commission.
Added	5A.	Dr. Prathap Ramanujam Member, Public Service Commission.
	6.	N.M. Pathirana Member, Public Service Commission.
Added	6A.	S. Ranugge Member, Public Service Commission.
	7.	S. Thilanadarajah Member, Public Service Commission.
Added	7A.	D.L. Mendis Member, Public Service Commission.
	8.	N.D.W. Ariyawansa Member, Public Service Commission.
Added	8A.	Dr. I.N. Soysa Gunasekera Member, Public Service Commission.
Added	8B	Sarath Jayatilake Member, Public Service Commission.
	9.	Mohamed Nahiya Member, Public Service Commission.
Added	9A.	Dhara Wijethilake Member, Public Service Commission.
Added	9B	Mr. G.S.A. de Silva, PC. Member, Public Service Commission.
	10.	Mrs. T.M.L. Senarathne Secretary, Public Service Commission.

All of the Office of the
Public Service Commission
175, Nawala Road,.Narahenpita
Colombo 05.

11. Mr. M.W. Bandusena
Secretary,
Ministry of Productivity Promotion
249, Stanley Tillakaratne Mawatha
Nugegoda.

Added 11A. Mr. Upali Marasinghe
Secretary,
Ministry of Productivity Promotion
9th Floor Sethsiripaya, Battaramulla.

Added 11B. Mr. Herath Yapa
Secretary,
Ministry of Productivity Promotion
9th Floor Sethsiripaya, Battaramulla

12. Mr. P. Siriwardana
Director General (Establishments)
Ministry of Public Administration and Home Affairs, Independence Square, Colombo 07.

Added 12A. Mr. W.,D. Somadasa
Director General (Establishments)
Ministry of Public Administration and Home Affairs, Independence Square, Colombo 07.

Added 12B Chandana Kumarasinghe

13. Mr. Saliya Mathew
Co-Chairman
Salaries and Cadres Commission.

14. Mr. M.N. Junaid
Co-Chairman
Salaries and Cadres Commission.

15. Mr. Ariyapala de Silva, Member.

16. Mr. S.C. Mannapperuma, Member

17. Deshabandu M. Macky Hashim, Member

18. Prof. Carlo Fonseka, Member.

19. Mrs. Soma Kotakadeniya, Member.

20. Dr. Gerry Jayawardana, Member.

21. Dr. Loyed Fernando, Member.

22. Mr. Leslie Devendra, Member.

23. Mr. V. Kanagasabapathy, Member.

24. Dr. Gunapala Wicremaratne, Member.

25. Mr. B. Wijeratne
Secretary,
National Salaries and Cadres Commission
Room No. 2 G 10, BMICH,, Colombo 07.

26. Mr. P.B. Jayasundera
Secretary to the Treasury,
Ministry of Finance,
Galle Face Secretariat, Colombo 01.

Added 26A. Dr. R.H.S. Samarathunga
Secretary to the Treasury,
Ministry of Finance,
Galle Face Secretariat, Colombo 01.

Added 26B Mr. S.R. Attygalle
Secretary to the Treasury,
Ministry of Finance,
Galle Face Secretariat, Colombo 01.

27. Mr.C.P.W. Gunathilaka
Director General,
Department of Manpower and Employment,
(Ministry of Productivity Promotion)
249, Stanley Tillakaratne Mawatha
Nugegoda.

Added 27A. Mr. K.D.N. Ranjith Asoka
Director General,
Department of Manpower and Employment,
9th Floor Sethsiripaya, Battaramulla.

Added 27B. H.G.G.K. Dharmasena
Director General,
Department of Manpower and Employment,
9th Floor Sethsiripaya, Battaramulla.

Added 27C Neil Bandara Hapuhinne
Director General
Department of Manpower and Employment
9th Floor, Sethsiripaya,
Battaramulla.

Added 27D Mr. Lal Samarasekera
Director General(acting)
Department of Manpower and Employment
9th Floor, Sethsiripaya,
Battaramulla.

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

Respondents

29. D.H. Neville Piyadigama, Co-Chairman
National Pay Commission
Room No. 2G 10, BMICH, Colombo 07.

30. J.R. Wimalasena Dissanayake, Co-Chairman
National Pay Commission
Room No. 2G 10, BMICH, Colombo 07.

31. G.L. Wimaladasa Samarasinghe, Member.

32. V. Jegarajasingam, Member.

33. G. Piyasena, Member.

34. R.A.D.R. Malini Peiris, Member

35. Dayananda Widanagamachchi, Member.

36. S. Swarnajothi, Member.

37. B.K. Ulluwishewa, Member.

38. Sujeewa Rajapakse, Member,

39. H.W. Fernando, Member.

40. Sampath Amarathunga, Member.

41. Ravi Liyanage, Member

42. W.K. Hemachandra Wegapitiya, Member.

43. Keerthi Kotagama, Member.

44. Reyaz Mihular, Member.

45. Priyantha Fernando, Member.

46. L. Shelton Devendra, Member.

47. W.W.D. Sumith Wijesinghe, Member.

48. G.D. Somaweera Chandrasiri, Member.

49. W.H. Piyadasa, Member.
31st to 49 Respondents all of the National Pay Commission, Room No. 2G 10, BMICH, Colombo 07.

Added Respondents

50. Mr. Gotabaya Jayaratne,
Secretary
Ministry of Labour and Trade Union Relations, Labour Secretariat,
Narahenpita, Colombo 05.

Added 50A R.P.R. Rajapaksha

Added 50B Sarath Abeygunawardena
Secretary
Ministry of Labour and Trade Union Relations, Labour Secretariat,
Narahenpita, Colombo 05.

51. K.L.L. Wijeratne, Chairman.

52. Nimal Bandara (member).

53. Dayananda Widanagamachchi(member).

54. J. Charitha Ratwatte(member).

55. Prof. Kithsiri Madapatha Liyanage (member).

56. Leslie Shelton Devendra (member).

57. Suresh Shah (member).

58. Sanath Jayantha Ediriweera (member).

59. V. Ragunathan(member).

60. Kamal Mustapa(member).

61. Prof. Gunapala Nanayakkara (member).

62. Nandapala Wickremasuriya (member).

63. Madam Sujatha Cooray (member).

64. Gerry Jayawardana (member).

65. S. Thillainadarajah (member).

66. Dr. Anura Ekanayake (member).

67. Sembakuttige Swarnajothi(member).

68. P.K.U. Nilantha Piyaratne(member).

69. N.H. Pathirana(member).

70. H.T. Dayananda(member).

71. T.B. Maduwegedera(member),

72. Dr. Wimal Karandagoda (member).

73. A. Kadiravelupillai(member).

74. Asoka Jayasekera (Secretary).

National Salaries and Cadre Commission
Room No. 2 G 10, BMICH,, Colombo 07.

Added Respondents

75. S. Ranugge, (Chairman)

76. C.P. Siriwardene (Member)

77. Dr. Damitha de Zoysa (Member)

78. Lalith Kannangara (Member)

79. Janaka Sugathadasa (Member)

80. Chithrangani Wagiswara (Member)

81. Chandrani Senaratne (Member)

82. Kingsley Fernando (Member)

83. G.S. Edirisinghe (Member)

84. M.C. Wickremesekera (Member)

85. Dr. Palitha Abeykoon (Member)

86. D. Abeysuriya (Member)

87. Leslie Devendra (Member)

88. Anura Jayawickreme Perera (Secretary)

National Salaries and Cadre Commission
Room No. 2 G 10, BMICH, Colombo 07.

Added Respondents

Before : Jayantha Jayasuriya, PC, CJ

Murdu N.B. Fernando, PC, J

S. Thurairaja, PC, J.

Counsel : Faiz Musthapa , PC with Ms. Thushani Machado for the Petitioners .

Ms. Viveka Siriwardene, DSG for the 1st -10th, 30th – 43rd Added Respondents and 28th Respondent.

Argued on : 13.01.2020

Decided on : 06.07.2020

Jayantha Jayasuriya, PC, CJ

There are thirty-four Petitioners in this matter. In the year 1999, they along with several others were recruited to the Ministry of Youth Affairs and Sports as Graduate Trainees. Approximately ten thousand persons had been recruited under the said programme. Those recruits had been posted to different departments under different Ministries. The Petitioners in this application, thirty-four in number, were functioning as Career Guidance Officers attached to the Ministry of Productivity Promotion at the time of filing this application (13 September 2011).

In the year 2000, the Petitioners had been issued with letters of appointment to the post of "Career Guidance Officer" and were placed at the salary scale of Rs. 72,600 – 14x1560 - 3x2,460 - 106,740. Three years thereafter, in 2003, they had been confirmed in the said post. From 25th April 2006, the Petitioners had been placed at the salary scale MN4 in accordance with the Public Administration Circular No. 6 of 2006. At that stage, the Petitioners were attached to the Ministry of Labour Relations and Foreign Employment. On 10.05.2006 the Secretary of the aforesaid Ministry had written to the Chairman of the National Salaries and Cadres Commission seeking guidance as to the appropriate salary scale and the step in which the Petitioners should be placed on. Thereafter in December 2006 the same Secretary had recommended to the Secretary Ministry of Public Administration that the Petitioners be placed at the salary scale MN6. However, three years thereafter on 27 March 2009, the same Secretary had informed the Association to which the Petitioners belonged to, that the Salaries and Cadres Commission has not approved a salary revision and therefore, there is no provision to place the petitioners in the scale MN5. The salary scale approved to the Petitioners is MN4. Petitioners contend that they should have been placed at the salary scale of MN6 instead of MN4. In the year 2010, a new Department called Department of Manpower and Employment had been established under the Ministry of Labour Relations and Manpower and the petitioners were absorbed in to the newly established Department. At the time of establishing the new department, Department of Management Services on 09.02.2010, had approved the cadre positions on the recommendations of the National Salaries and Cadres Commission in the newly established department.

Thereafter in June 2010, the Secretary Ministry of Labour Relations had sought the approval of the Department of the Management Services to suppress 38 existing positions of Career Guidance Officers and to create thirty-eight Supra Grade positions and to place the petitioners at the salary scale MN7. However, The Salaries and Cadres Commission had not recommended creating Supra Grade positions. They had observed that the officers who are currently in service could be absorbed into a structured grading system and that thereby more responsibilities can be attached to the officers who would be absorbed into higher grades. The Petitioners contend that the said decision of the National Salaries and Cadres Commission is arbitrary, capricious, unreasonable and discriminatory. They further contend that the said decision amounts to an infringement of their fundamental right to equality as guaranteed by Article 12(1) of the Constitution.

Petitioners pray, that the aforesaid decision of the Salaries and Carders Commission be declared null and void and of no force or avail in law. They further seek an Order directing the Director General (Establishments) and the members of the National Salaries and Cadres Commission to recommend to the public Service Commission to create and or to make order that the Petitioners are entitled to be promoted to the Supra Grade carrying the salary scale of MN7. They further seek an Order of this Court directing the Respondents to place Petitioners at the salary scale MN6 pending the creation of Supra Grade or in the alternative to place Petitioners at the salary scale MN6 or any other salary scale that the Court may consider fit and proper.

The Petitioners' plea for theses reliefs is based on two main grounds. First they contend that they are assigned with duties and in fact they do perform such duties that are similar to the duties assigned to those officers who are placed in the MN7 salary scale. Second, they claim that those other recruits who were recruited initially under the same programme along with the Petitioners – the Graduate Trainee Programme – and assigned to other Departments and Ministries are now functioning in different capacities placed at the salary scale of MN7. It is their contention that therefore the failure to create a Supra Grade and place them in MN7 salary scale is discriminatory.

The Learned Deputy Solicitor General who represented all the Respondents submitted that the Petitioners' claim is misconceived in law. It is her contention that the decision not to recommend suppression of existing thirty eight positions in the relevant Department and create thirty eight supra grade positions to facilitate petitioners to be placed at salary scale MN7 is in accordance

with the established rules and practices and reflect the actual need in the relevant Department. The Co-Chairman of the National Pay Commission – the twenty ninth Respondent - contends that the entitlement to a particular salary scale in the public service is mainly dependent on the basic qualifications required for the particular post and not based on any qualifications acquired by an individual officer while in service. Such factors as well as the success at the Efficiency Bar examinations will be taken into account in situations of either confirmation or promotions. It is further contended that the duties of the Career Guidance Officers cannot be equated with the duties assigned to Project Officers and therefore they belong to two different categories. Further, the two schemes of recruitments in relation to these two categories are different to each other. Petitioners through their counter affidavits have reiterated their initial positions.

An examination of all the material placed before this Court establishes that the Petitioners who possessed under graduate degrees were initially appointed as trainees in the year 1999. They were not recruited through a competitive examination. They had been assigned to the Ministry of Samurdi, Youth Affairs and Sports. It is reasonable to conclude that the co-recruits who were recruited under the same scheme along with the petitioners would have been assigned to different ministries. They were initially placed on a one-year trainee period and thereafter they were to be appointed to a permanent position within the respective ministry if they successfully complete the relevant training and the aptitude test.

The Circular issued by the Secretary of Finance in July 2000, regulates the appointment of those trainees to the permanent posts. (P9). This was issued to *interalia* all Secretaries and Heads of Departments. According to the said circular the basic salary scale set out had been Rs 72,600 - 14x1560 – 5x2460 – 1,06,740. However, this circular further recommends to select trainees with higher qualifications and skills through a structured interview if they are to be appointed to posts which have salary scales greater than the aforesaid.

In October 2000, when the Petitioners were appointed to the post of Career Guidance Officer, they were placed at the salary scale 72,600 – 1,560 x14 – 2,460x3 – 1,06,740/-(P11). In the scheme of recruitment issued two years later - in 2002 - for the post of Career Guidance Officer the same salary scale had been prescribed (P10). I observe that the initial salary scale of a staff grade officer at that stage was Rs. 74,160/. Therefore, the Petitioners had at no stage been placed at a salary scale of Staff Grade Officers. It is pertinent to note that the Petitioners do not raise any concern over the salary scale that they were placed in when they were appointed to the post of

Career Guidance Officers in the year 2000. They do not raise any concern regarding the salary scale prescribed in the scheme of recruitment formulated two years thereafter – in 2002.

The decision Petitioners are challenging, through these proceedings, is the decision of the National Salaries and Cadres Commission not to recommend the suppression of thirty-eight existing positions and creating a similar number of Supra Grade positions. This decision is reflected in the letter, dated 09.09.2010 (P32). It is pertinent to note that the decision so challenged observes that the current officers can be absorbed in to a structured graded system having prepared a scheme of recruitment in compliance with the Public Administration Circular 06/2006 and thereby attach more responsibilities to officers who would be absorbed in to higher grades. I further observe, that the Salaries and Cadre Commission in the same document had expressed the view that it is more appropriate to take a decision on this matter after taking into account the instructions in the circular issued pursuant to the Cabinet decision approving the proposal of the Minister of Finance submitted on 20 July 2010 to establish a scheme of transfer in addressing the concerns of the graduate trainees recruited by the Government (paragraphs 03 and 04 of P-32).

I am of the view that the impugned decision and the views expressed therein, should be considered in the context of the changes that had taken place between the year 2000 and 2010 namely the time of appointment of the petitioners to the relevant post and the date of impugned decision. In the year 2006, through the Public Administration Circular No 06 dated 25 April 2006, Salaries in the Public Service were restructured based on the Budget Proposals presented in the same year. This circular sets out the basis and criteria that need to be adopted in the conversion of salaries as provided therein. It is admitted that the Petitioners were placed at the salary scale MN4. This conversion has been made in accordance with the said Circular in correspondence to the salary scale on which they were placed in at the time the Circular came into operation. However, the Petitioners contend that they should have been placed in the scale MN6 instead of MN4.

It is pertinent to note that the salary conversion placing them in the scale MN4 took place in 2006 and they have invoked the jurisdiction of this Court through these proceedings only in the

year 2011. The Petitioners claim that they entertained a legitimate expectation that they would be placed at salary scale MN7 at a subsequent stage. The basis for the Petitioners claim that they had a legitimate expectation that they would be placed at a salary scale higher than MN4 is two fold. First they claim that by being provided special training enabling them with the necessary skills to perform their duties when promoted, had given rise to a legitimate expectation. Secondly, duties they were performing were equivalent to the duties of a field officer as well as a staff grade officer and thereby they entertained a legitimate expectation.

It is settled law that infringing a legitimate expectation of an individual by an executive or administrative decision could lead to a violation of the Right to equality guaranteed by Article 12(1) of the Constitution. In **Dayarathna and others v Minister of Health and Indigenous Medicine** (1999) 1 SLR 393, His Lordship Amarasinghe, J observed that ,

> " 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" (supra at p 413).

His Lordship Priyantha Jayawardane PC J in **G.M. Nimalasiri v Colonel P.P.J. Fernando *et al***. (SC FR 256/2010, SC minutes of 17th September 2015) cited with approval **Dayarthna** (supra) and with reference to the doctrine of legitimate expectation held that,

> "It arises from establishing an expectation believing an undertaking or promise given by a public official or establishing an expectation taking into consideration of established practice of an authority".

His Lordship Prasanna Jayawardane PCJ, in **Ariyaratne *et al.* v Illangakoon *et al***. (SC FR 444/2012, SC minutes of 30th July 2019 at pp 56-57), observed that

> "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, un ambiguous 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]",

The impugned decision (P32) clearly sets out the reasons and the basis for the decision not to recommend the suppression of existing posts and creating Supra Grade posts, at that stage. The Salaries and Cadres Commission had observed that the Cabinet had approved to establish a transfer scheme for graduate employees in the public sector. Such approval was granted having considered the proposal submitted by the Minister of Finance in July 2010 to address the concerns relating to them. The Salaries and Cadres Commission has expressed the view that it is more appropriate to take a decision on the proposal to suppress existing posts and creating Supra Grade posts after taking into account the instructions in the circular that would be issued in giving effect to the transfer scheme referred to hereinbefore. The Salaries and Cadres Commission has recommended to develop a scheme of recruitment in line with the Circular 6/2006 taking into account the cabinet decision dated 18.11.2009 which approved the creation of the department in which the Petitioners serve. It is their view that such process will provide an opportunity to assign more responsibilities based on seniority and will create an environment to enjoy a scheme of structured unhindered promotions. It is pertinent to note, that this Court had observed that

> "PA Circular No. 6/2006, which deals with the Budget proposals is not a document prepared merely for the purpose of increasing the salary of government employees. On the contrary, the said document had been prepared for the purpose of restructuring the Public Service salaries based on Budget proposals for 2006."…. "By these proposals, (as stated by the 5th respondent), 126 different salary scales that had existed previously had been reduced to 37". – Her Ladyship Dr Shirani A Bandaranayake CJ in **Akarawita et al v Dr Nanda Wickramasinghe,** SC FR 320/2007, SC minutes of 02.11.2010.

The impugned decision taken in the context of the observations and recommendations of the Salaries and Cadres Commission as reflected in the letter dated 09.09.2010 (P32) demonstrates

that the decision in question is rational and reasonable. In my view it addresses the concerns and requirements of the officers concerned, interests of the Department they serve as well as the overall policy regarding the public sector. All these interests had been taken into consideration in making the recommendations therein. Therefore, I am unable to hold that the impugned decision is unreasonable and / or capricious and / or arbitrary.

It is important to note,

> "a mere hope or an expectation cannot be treated as having a legitimate expectation", **Siriwardane v Seneviratne and 4 others** ([2011] 2 SLR 1 at p 7).

In **Siriwardane** (*supra* at p 8) Her Ladyship Dr Shirani A Bandaranayake J, further observed

> "A careful consideration of the doctrine of legitimate expectation, clearly shows that, whether an expectation is legitimate or not is a question of fact. This has to be decided not only on the basis of the application made by the aggrieved party before court, but also taking into consideration whether there had been any arbitrary exercise of power by the administrative authority in question".

Petitioners contend that the documents produced marked P28, P29 and P24 reflect that the respondents 'held out a promise' that the Petitioners would be placed on a higher salary scale. This court observes that the document marked P29 contains a proposal submitted by the Secretary of the Labour Relations Ministry, to suppress 38 posts of Career Guidance Officers and create 38 Supra Grade positions. P28 is a document where the Secretary of the National Salaries and Cadres Commission confirmed that the Commission would submit its recommendations if called for on the proposal to appointment Career Guidance Officers as Field Supervising Officers. P24 is a record of discussion where it had been proposed to submit a new Cabinet Memorandum and to seek recommendations of the National Salaries and Cadres Commission on the proposal to create twenty-five supra grade positions. However, I am unable to accept this assertion. None of theses documents reflect that the Respondents did hold out a promise to the Petitioners. If at all they contain only recommendations and / or proposals.

When the facts of this case are considered in the context of the jurisprudence setting out the parameters of the doctrine of legitimate expectation, as have been setout hereinbefore, it is clear that the conduct of any of the Respondents or any other public authority could not have created a legitimate expectation in the Petitioners that they would be placed in a position, with a higher salary scale. Petitioners were initially recruited as Graduate Trainees in 1999 and were paid an allowance of Rupees 4000/- per month. The Petitioners do not raise any concerns regarding the salary scale in which they were placed, when they were appointed Career Guidance Officers in the year 2000 (RS 72,600 – 1,560 x14 – 2,460x3 – 1,06,740/-) (P11). In fact the salary scale on which they were placed correspond to the salary scales referred to in the general circular governing "the attachment to permanent positions" (P9) as well as the scheme of recruitment approved in the year 2002 (P10). They had not been placed at the salary scale of a staff grade officer of which the initial salary step remained at Rs 74, 160/-. The salary conversion that took place with the introduction of the circular in 2006 is in line with the provisions of that circular and they were placed at the salary scale of MN4. Therefore, the conduct of any of the respondents could not have created a legitimate expectation on the petitioners that they would be placed on a higher salary scale than MN4.

The other submission of the Petitioners is that, the Petitioners' right to equality has to be considered in the proper context of all surrounding facts and circumstances including the current salary scales and steps in which the fellow recruits had been placed in the other Ministries and or Departments. Fellow recruits who joined as Graduate Trainees in the year 1999 along with them are now placed on salary scales MN5 and or MN6. It is contended that those who hold the positions such as Statistical Officers of the Department of Census and Statistics, Labour Officers, Counselling Officers attached to the Ministry of Child Development and Women's Affairs, Family Counsellors of the Ministry of Justice and Child Rights Development Promotion Officers attached to the Department of Probation and Child Care are placed at salary scales higher than the salary scale that the Petitioners are placed in, namely MN4. However, document X1 submitted by the Petitioners along with the motion dated 5th February 2020 reflects that the graduates who were recruited under the same programe launched in 1999 had been appointed to the Ministry of Science and Technology as Science and Technology Officers in the year 2000,

and were placed at a similar salary scale on which the petitioners were placed in at the time of appointment as Career Guidance Officers (Rs 72,600 – 14x1,560 – 5x2,460- 106,740/-).

It is pertinent to note that the basic qualifications required at the time of entry to a particular position could vary according to the different nature of tasks that needs to be performed and the skills required. Some of those positions may require the officer to possess a post-graduate qualification at the time of entry. It is artificial and un realistic to claim that all ten thousand persons who were initially recruited under the same scheme as trainees should be placed on the same or identical salary scale when they have been appointed into permanent positions in different Departments and Ministries. The salary scale of a particular post will have to be dependent on many factors. Therefore the fact that a group of persons who were recruited under a particular scheme as trainees had later been placed on permanent posts with passage of time in different ministries, departments and institutions attracting different salary scales *per se* cannot result in a claim of unequal treatment.

Decisions on the creation of new posts, required qualifications at the entry point to hold such posts, mode of recruitment and the salary scales relating to such posts have to be made by authorities based on an array of considerations. In fact according to the document marked X tendered by the Petitioners along with the motion dated 5th February 2020, the Director-General of Combined Services on 11th September 2019 had called for observations from all Secretaries on the possibility of creating a supervisory position relating to Development Officers with the salary scale MN7. Needs of each ministry or the department will be unique and a proper appraisal in regard to all relevant aspects in the context of the overall policy on the structure in the public service should be made in reaching a final decision on such matters. Wishes and views of different groups including the current employees in the relevant institution who are potential beneficiaries, is only one factor that may be considered in the process of making such decisions. Document marked X2 submitted by the Petitioners along with the motion dated 5th February 2020, reflect that it is only in the year 2018, a scheme of recruitment had been approved to create a post of District Vidatha Officers of the Management Assistant Supra Class with the salary scale MN7. Approval of a scheme of recruitment in relation to a particular post would require a process of consultations, negotiations and discussions.

Her Ladyship Dr. Shirani Bandaranayake J in **Tuan Ishan Raban and Others v Members of the Police Commission** ([2007] 2 SLR 351 at 359-360) observed, that

> "Article 12(1) of the Constitution ensures the protection from arbitrary and discriminatory action by the executive and / or the administration. The objective of Article 12(1) of the Constitution therefore is to give persons equal treatment. However such guarantee does not forbid reasonable classification, which is founded on intelligible differentia. The concept of equality only forbids action which is unreasonable, arbitrary and capricious, and not the classification that is reasonable. This is based on the theory that a classification which is good and valid cannot be regarded as arbitrary".

The Supreme Court in **Ananda Dharmadasa and Others v Ariyaratne Hewage and Others** ([2008] 2 SLR 19 at 33) observed that "that every differentiation would not constitute discrimination and accordingly classification could be founded on intelligible differentia".

In **Akarawita *et al*** (supra) it was observed that,

> "Article 12(1) of the Constitution therefore brings in a guarantee that there shall be no discrimination between one person and another, who are equals. This does not however mean that there cannot be any classifications between groups. Classifications are allowed if they are not arbitrary and as stated in **Ram Krishna Dalmia v Justice Tendolka** (AIR 1985 S.C. 538), classifications have been founded upon intelligible differentia. The objective of this is to treat equals equally and not unequally".

Facts and circumstances relating to the case under consideration as discussed hereinbefore clearly demonstrate that the respondents at no stage had acted unreasonably, arbitrarily or capriciously. Members of a group of nearly ten thousand possessing similar qualifications, recruited together but placed in different positions in different departments cannot be assured with similar opportunities during the entire career including in relation to the opportunities or avenues for promotions. Promotions will be dependent on many criteria and they will be unique. The structure of each individual Department or Institution will depend on the needs of each such individual department or institution and will have to be in line with the policy in relation to the

public sector. Therefore, maintaining different schemes of promotions in different departments and institutions does not create an inequality between the employees in one such department or institution as against the employees in another institution or department even though they possess similar qualifications and were recruited as a single group and later posted to such different institutions and / or Departments.

In view of the above findings, I hold that the Petitioners have failed to establish a violation of their fundamental rights – the Right to equality guaranteed under Article 12(1) of the Constitution.

It is also pertinent to note that the Petitioners had invoked the jurisdiction of this Court on 29th July 2011- more than ten months since the impugned decision. Respondents contend that the Petitioners have failed to satisfy Article 126(2) of the Constitution – the requirement to invoke the jurisdiction of the Supreme Court within one month of the alleged violation of the Fundamental Right. In reply, the Petitioners claim that they are entitled to the benefit of section 13(1) of the Human rights Commission of Sri Lanka Act No 21 of 1996. However, Respondents further contend that the Petitioners through the documents produced marked P33 and P34 had failed to demonstrate that there was an inquiry pending before the Human Rights Commission at the time the Petitioners invoked the jurisdiction of this Court.

His Lordship S.N. Silva CJ in **H.K. Subasinghe v The Inspector General of police *et al*.** SC (Spl) No 16 of 1999, SC minutes of 11.09.2000, observed that

> "The petitioner seeks to bring a complaint within the time limit on the basis that he made a complaint to the Human Rights Commission of Sri Lanka within the stipulated time. In this regard the petitioner relies on section 31 of the Human Rights Commission of Sri Lanka Act, No. 21 of 1996 which provides that where a complaint has been made within a period of one month to the Human Rights Commission, the period within which the inquiry into such complaint was pending before the Commission will not be taken into

account in computing the period within which an application should be filed in this Court.

The petitioner has failed to adduce any evidence that there has been an inquiry pending before Human Rights Commission. In the circumstances, we have to uphold the preliminary objection raised by learned State Counsel".

In **Divalage Upalika Ranaweeera *et al* v Sub Inspector Vinisias *et al***,[1] SC FR 654/2003, SC minutes of 13.05.2008, His Lordship Amaratunga J observed that

"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".[2]

I observe that P33 is a copy of an undated and unsigned application of one K.K.Palitha Padmasiri submitted to the Human Rights Commission. P34 is a letter issued by the Human Rights Commission on 16th November 2010. It is addressed to Mr. K.K.Palitha Padmasiri. It refers to an application submitted on 06th October 2010. The Human Rights Commission had directed that further details be submitted by 15 December 2010. However, Petitioners claim that P34 is a copy of a letter the 13th Petitioner received from the Human Rights Commission informing that observations have been called from the Respondents. This assertion is factually incorrect. As described above, P34 is a letter calling further details from the Petitioner in relation to the response of the Respondents dated 26th October 2010. There is no material indicating that the

[1] It is pertinent to note that the judgment referred to in this paragraph is reported in [2008] 1 SLR at page 260 under the name **Ranaweera and Others v Sub-Inspector Wilson Siriwardane and Others**. An examination of the Petition and the Affidavit of the Petitioners in this case reveal that the 01st Respondent named therein is "Sub Inspector Vinisias" and not "Wilson Siriwardane". "Wilson Siriwardane" is the person who is named as "care of" in the postal address of the three Petitioners.

[2] [2008] 1 SLR 260 at 273

13th Petitioner did in fact submit further details called by the Human Rights Commission. There is no material placed before this court to demonstrate that there was an inquiry pending before the Human Rights Commission at the time the Petitioners invoked the jurisdiction of this Court, more than ten months after the impugned decision P32.

Under these circumstances, Petitioners have failed to establish that they have complied with Article 126(1) of the Constitution in invoking jurisdiction of this Court. However, I observe that this Court on 14.05.2013 had granted leave to proceed in this matter. There is no material indicating that the Court considered the 'time bar' when granting leave to proceed. At the argument stage Court heard submissions of both parties on merits even though the learned Deputy Solicitor-General raised an objection on the basis of time bar. Therefore, I proceeded to consider all such submissions and to make the determination on merits, following the practice adopted in **Ananda Dharmadasa *et al* v Ariyaratne Hewage *et al***, [2008] 2 SLR 19, even though this application could have been dismissed in *limine* on the basis of time bar.

In view of my findings on the merits of this matter as recorded hereinbefore, the Petitioners have not been successful in establishing that their Fundamental Right guaranteed in terms of Article 12(1) of the Constitution had been infringed by the Respondents. This application is accordingly dismissed. No costs ordered.

Chief Justice

Murdu N.B. 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.

1. R. A. P. de C. Ranaweera
   101/22-1/2, B Block
   Police Quarters, Kew Road, Colombo 02.

2. B. P. B. Ayupala,
   No. 35, Sri Medananda Mawatha, Panadura.

3. L.A.S. Lekamge
   32/1, Gangadara Mawatha, Off Templars Road,
   Mt. Lavinia.

SC/FR No. 520/2009 — Petitioners

1. Jayantha Wickramaratne
   Inspector General of Police, Police Headquarters, Colombo 01.

1(b). Pujitha Jayasundara
   Inspector General of Police, Police Headquarters, Colombo 01.

2. Gotabhaya Rajapaksha
   Secretary, Ministry of Defence, Public Security, Law and Order,
   Ministry of Defence,
   No.15/5, Baladaksha Mawatha, Colombo 03.

2(a). Karunasena Hettiarachchi
   Secretary, Ministry of Defence, Public Security, Law and Order,
   Ministry of Defence,
   No.15/5, Baladaksha Mawatha, Colombo 03.

3. Gamini Senarath
   Additional Secretary to the President,
   President House, Colombo 01.

4. Hasitha Kumari Balasuriya
   Additional Secretary, Ministry of Defence (Police),
   No. 15/5, Baladaksha Mawatha, Colombo 03.

5. K. C. Logeshwaran
   Secretary, National Police Commission,
   Rotunda Tower, Level 3, 109, Galle Road, Colombo 03.

5(a). N. A. Cooray,
   Secretary,
   National Police Commission,
   Rotunda Tower, Level 3, 109,
   Galle Road, Colombo 03.
   (Members of the interview board)

6. Fabiel Mitchel
   Deputy Inspector General of Police
   (Personnel), Personnel Division,
   Police Headquarters, Colombo 01.

7. H. S. Dayananda
   Deputy Inspector General of Police,
   DIG (Police) Office, Puttlam.

8. T. M. A. Senanayake
   Deputy Inspector General of Crimes,
   Police Headquarters, Colombo 01.

9. N. M. Munasinghe
   Deputy Inspector General of Police,
   Criminal Investigation Department,
   New Secretariat Division, 4th Floor,
   Colombo 01.

10. Y. R. W. Wijegunawardena
    Deputy Inspector General of Police,
    DIG (Police) Office, Vavuniya.

11. D. S. S. Lugoda
    Deputy Inspector General of Police,
    Senior Gazetted Officer's Quarters,
    101/20/3/2, Kew Road,
    Colombo 02.

12. D. J. Gammanpila
    Deputy Inspector General of Police,
    Police Office, Nuwara Eliya.

13. S. A. D. T. N. Wijegunerwardena
    Deputy Inspector General of Police,
    Criminal Records Division, 526, Torrington Square,
    Colombo 07.

14. W.F.U. Fernando,
Deputy Inspector General of Police,
IT Division, Police Headquarters, Colombo 01.

15. L.M. Dayananda Bandara,
Deputy Inspector General of Police, DIG (Police Office), Jaffna.

16. U.N.A.S. Rodrigo
Deputy Inspector General of Police,
86A, Welikadamulla, Mabola, Wattala.

17. H.K.S. Pinidiya
Deputy Inspector General of Police, Recruitment Division, Police Headquarters, Colombo 01.

18. P.S.K. Dayananda
Deputy Inspector General of Police,
DIG (Police) Office, Anuradhapura.

19. L.L.C. Perera
Deputy Inspector General of Police,
DIG (Police) Office, Mannar.

20. S.W.M.T.S. Samarakoon
Deputy Inspector General of Police,
DIG (Police) Office, Vavuniya.

21. M.P. Samaradivakara
Deputy Inspector General of Police,
Logistics Division, Police Headquarters,
Colombo 01.

22. D.L.S.G.L. Pieris
Deputy Inspector General of Police,
DIG Traffic Headquarters Colombo.

23. Jayantha Kulathilaka
Deputy Inspector General of Police,
DIG (Police) Office, Fort, Galle.

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

25. Prof. Siri Hettige- Chairman

26. P.H. Manatunga

27. Mrs. Savithree Wijesekera

28. Y.L.M. Zawahir

29. Anton Jeyanandan

30. Thilak Collure

31. Frank De Silva

25th -31st Respondents; all of
National Police Commission,
Block 9, BMICH Premises,
Bauddhaloka Mawatha, Colombo 07.

Respondents

Before: Buwaneka Aluwihare, PC. J.
Murdu N.B. Fernando, PC. J.
S. Thurairaja, PC. J

Counsel: J.C. Weliamuna PC with Pasindu Silva and Haushi Samarathunga for the Petitioners.

Nerin Pulle, Deputy Solicitor General for the Respondents.

Argued on: 06. 05. 2019 and
14. 10. 2019

Decided on: 09. 06. 2020

JUDGEMENT

Aluwihare PC. J.,

1. Of the three Petitioners to the present application, the 1st Petitioner was serving as a Senior Superintendent of Police (SSP) of the Sri Lanka Police while the 2nd and the 3rd Petitioners had held similar positions in the Police, but had retired from service sometime before the filing of this application.

2. The grievance of the Petitioners is that, they have not been granted the promotion to the next senior rank of Deputy Inspector General of police (DIG).

3. Leave to proceed in this matter had been granted on the alleged infringement of Article 12(1) of the Constitution.

4. When this matter was taken up for argument, the learned counsel on behalf of both the Petitioners as well as the Respondents submitted that the only issue where the parties were at variance, was the 'allocation of marks' to the three petitioners who were prospective applicants for the promotion to the rank of DIG.

5. Although the Petitioners took up the position that the National Police Commission (NPC) should have been the appointing authority, in this instance, however, the appointments were made by the Cabinet of Ministers, the reason being that the NPC was defunct at the time relevant to the granting of the promotions. The Petitioners, however, have not challenged the *vires* of the appointments in these proceedings.

6. When this matter was supported for leave to proceed (on 03-09-2009) the learned counsel for the Petitioners stated that the Petitioners are not interested in

challenging the appointments of the successful candidates as DIGs. Subsumed in this contention is that the Petitioners are not challenging the allocation of marks awarded to the successful candidates. As such, if the Petitioners are to succeed in this application, it has to be established that they have been deprived of marks for which they were entitled to, and that their aggregate marks were 71 or above. In this context, the only issue that the court would be focusing on in the instant case is, as to whether the Petitioners have been denied any marks they were entitled to and consequently whether the aggregate marks would add up to the cut off mark.

Case of the Petitioners

7. The common position taken up by the Petitioners was that, at the time material to the issue in the case, they were serving as Senior Superintendents of Police with an excellent service record. All three Petitioners had been promoted as Chief Inspectors of Police on 01-01-1980 and then to the rank of Senior Superintendent of Police on 01-06-1999.

8. It was the assertion of the Petitioners that they responded to the calling of applications to fill 13 vacancies in the cadre of DIGs and they faced an interview in that regard in May 2009.

9. The Petitioners have subsequently come to know that 15 applicants had been appointed as DIGs to fill the aforesaid vacancies, but not the Petitioners. It is alleged that among the promotees were two officers who had already retired from the police service by then. It was further alleged that, at no point were the marks obtained by the candidates at the interview released.

10. The Petitioners allege that the document containing the marks obtained by each applicant cannot be acted upon, as it is not clear as to who was responsible for the preparation of that document (marked and produced as "Y") in the absence

of any authentication of the same. The Petitioners also complain that the said document does not show a breakdown of the marks obtained by the respective candidates who faced the interview, in particular the applicants who were promoted as DIGs.

11. The gravamen of the Petitioner's contention was that they were prejudiced due to erroneous allocation of marks to the candidates and that it affected the promotional prospects of the Petitioners adversely. In the circumstances aforesaid, it was argued on behalf of the Petitioners that, for want of accuracy and the numerous mistakes made in the allocation of marks, the document "Y" cannot be acted upon for the selection of candidates for the impugned promotions.

12. It was the position of the Petitioners that this situation was brought about by misapplication of the marking scheme ("P9") and the failure on the part of the interview panel to adhere to the said marking scheme.

13. I shall now advert to the alleged mistakes on the part of the interview panel as asserted on behalf of the Petitioners:
It is alleged that the maximum marks that can be allocated for the 'period of service' is 40, however candidate W.F.U. Fernando had been allocated 40.5 marks. Similarly, maximum marks that can be allocated for 'outstanding performance' is 15, whereas four of the candidates had been allocated 17 marks. In emphasising the haphazard manner in which the marks had been allocated by the panel of interviewers, it was pointed out on behalf of the Petitioners that, although the 1st Petitioner did not possess a degree, he had been allocated 2 marks for a degree, for which he was not entitled to.

14. The Petitioners have also adverted to certain instances where mistakes had been made in the calculation of the aggregate marks due to errors in the addition of marks allotted to some candidates. It was the position of the Petitioners that the

numerous flaws in the allocation of marks and the erroneous computation of marks, are demonstrative of the haphazard manner in which the entire interview process was carried out, thus, raising a serious doubt as to the credibility of the manner in which marks were awarded to the candidates at the interview. These matters, however, are of little relevance to decide the issue before us, because of the position taken up by the Petitioners; that they would not be challenging the selection of the successful candidates. Thus, all what is left to be done is to scrutinise as to whether the Petitioners have been awarded marks in accordance with the marking scheme ("R2") and in the event an anomaly has taken place in that regard, whether the correct marks would carry them over the cut off mark. I shall now consider the case of each Petitioner: -

The case of the 1st Petitioner

15. It is common ground that the cut off mark for the promotion to the rank of DIG was 71. The 1st Petitioner had been awarded 70 marks, but claims that he ought to have been allocated 73.5 marks.

16. The 1st Petitioner had been awarded the full marks claimed by him for, period of service (38), communication skills (3), outstanding performance (5), and language proficiency (4). Although the 1st Petitioner had not claimed any marks, he had been given 4 marks for personality, 2 marks for Degree by the interview board. Thus, the Interview board had awarded to the 1st Petitioner a total of 6 marks which the 1st Petitioner, according to his own estimation, had not claimed.

17. The 1st Petitioner had been awarded 14 marks for 'capacity assessment' where as the 1st Petitioner claims he ought to have been given 17 marks.

18. Similarly, for 'leadership' he had been awarded 4 marks, whereas according to the 1st Petitioner, he claims that he should have been awarded 6 marks. Under 'special achievements', he had been allocated 3 marks, whereas the Petitioner claims he was entitled to 4 marks.

19. From the foregoing, it appears that, at the interview, the Interview board had made an objective assessment of the 1st Petitioner's qualifications and the relevant characteristics and awarded marks. This is apparent from the fact that the Board of interview has thought it fit to grant the 1st Petitioner more marks under certain categories than even what the Petitioner himself thought he should be entitled to. Thus, it cannot be said that the Interview board had acted with the objective of denying the 1st Petitioner marks. Even with regard to the instances where the 1st Petitioner claims that he should have got more marks than what was allotted to him, in my view the court would not interfere with the decision of the Board of interview in that regard unless it can be clearly demonstrated that the 1st Petitioner had been arbitrarily denied marks.

20. In this respect, the 1st Petitioner asserts that under "Special Qualifications," he had been given only 1.5 marks for the Diploma. He claims that he has obtained 4 diplomas and had undergone other training and the marks that should have been allocated was 9.5. ("P11-a"). On this basis, it was the contention on his behalf that the 1st Petitioner was entitled to more marks than what was allocated and had the correct marks been allocated, he would have obtained more marks than the cut off which was 71 marks.

21. The "marking scheme" has been pleaded in these proceedings as part of the 5th Respondent's affidavit ("R2") and the Respondent's position appears to be that under the category "Specialised Qualifications" a candidate was entitled to a maximum of 10 marks. It was pointed out that the category of "Specialised Qualifications" had 7 sub-categories ("R2").

1. Master's Degree - 4 marks
2. Post Graduate Diploma - 3 marks
3. Degree - 2 marks
4. Attorney-at-Law - 2 marks
5. Diploma - 1.5 marks
6. Overseas Training Courses -**1 mark for each**
7. Certificate Courses - Local - **0.5 marks for each**

22. The position of the Respondents was that, other than the last two sub categories referred to above, (overseas training and local certificate courses), irrespective of the number of qualifications possessed by each candidate, they were allotted marks only for one qualification. For example, even if a candidate had two Master's Degrees, they were allotted only 4 marks. This position was distinguished in relation to the last two sub-categories where it is specifically stated ***"… marks for each"***. We find such instructions under certain other sub-categories in "R2". For example, "His Excellency's Commendations 2 marks each" and "special increments 3 marks each". The words "…marks each" does not appear in relation to a number of other sub-categories and it appears that the Interview board has applied that distinction in awarding marks to the candidates. If all candidates had been evaluated applying the said criteria, then awarding 1.5 marks for each of the Diplomas the 1st Petitioner had, cannot be justified. On the other hand, the Petitioners have failed to demonstrate that a different criterion in awarding marks had been applied when evaluating other candidates. In the circumstances, I hold that awarding 1.5 marks for the Diplomas the 1st Petitioner possessed is not erroneous and cannot be construed as a violation of the 1st Petitioner's fundamental right.

23. According to the document "P11-a", The 1st Petitioner claims that he has undergone 5 training courses (page 3 of "P11-a"). The training listed as (a) in the said document, appears to be overseas training for which the 1st Petitioner had been awarded 1 mark which again is in accordance with "R2" and 2.5 marks

for the certificate courses which is also in accordance with the marking scheme "R2". Under 'Specialised Qualifications' the 1st Petitioner has been awarded 7 marks, in fact 2 marks more than what he was entitled to.

24. Considering the foregoing, I am of the view that the 1st Petitioner has failed to establish that his fundamental right under Article 12(1) of the Constitution has been violated by the Respondents.

The case of the 2nd Petitioner

25. The 2nd Petitioner has placed before the court an extensive description of the services rendered by the 2nd Petitioner as a police officer along with his numerous achievements. I do not wish to advert to them here, as what is crucial is the reasons attributed by the Respondents for not granting the promotion to the 2nd Petitioner, the rank of DIG.

26. In response to the assertions (of the 2nd Petitioner) the 5th Respondent in his objections has stated that the rank of DIG is a senior gazetted officer in the police Department and they perform core command functions in the Department. The said Respondent had stated further, that given the pivotal and important nature of the functions of the office of DIG, the promotions to the said rank are only by way of a *viva voce* and only Superintendents of Police of Grade 1, with an unblemished record during the period of five years immediately preceding, are eligible to apply. It was contended on behalf of the Respondents that the 2nd Petitioner has suppressed and misrepresented facts in that the 2nd Petitioner has not disclosed the fact that disciplinary proceedings were pending against him and that he was retired under Section 12 of the minutes of pension.

27. According to the Scheme of Recruitment and Promotions of Senior Gazetted officers ("R1"), one criteria of eligibility (paragraph 4) is that the candidate must be a Superintendent of Police Grade 1 with an unblemished record during the five years immediately before the date of promotion.

28. It was the submission of the learned Deputy Solicitor General that even at the time the 2nd Petitioner submitted his application for the promotion, two preliminary inquiries were being conducted against the 2nd Petitioner by Special Investigation Unit. It was pointed out that these disciplinary proceedings relate to the performance of duty on the part of the 2nd Petitioner in connection with a suicide bomb attack by the LTTE. It was the contention of the learned DSG that the 2nd Petitioner was not eligible to be considered for promotion as he had failed to satisfy clause 4.1 of the Scheme of Recruitment.

29. The 2nd Petitioner alleges that he ought to have been given 70 marks by the Interview Board but he has been given only 67. It appears that the said Petitioner's claim that he should have been allocated 70 marks is based on his own estimation as to marks that ought to have been allocated.

30. Thus, it is significant to consider in the context of the alleged violation of the fundamental rights as to whether the allocation of marks had been done in an arbitrary or irrational manner with the objective of denying the promotion to the 2nd Respondent.

31. As stated earlier, the cut off mark for the promotion to the rank of DIG was 71 and even if one goes by the marks the 2nd Petitioner says he should have been given (which was 70), still the 2nd Petitioner falls short of the cut off mark and thus would not be eligible to be promoted.

32. It is interesting to note that the difference between the marks allocated by the interview board to the 2nd Petitioner and his own estimation is only 2.5 marks.

33. The Interview board has granted the 2nd Petitioner 3 marks out of 6 for personality whereas the Petitioner had claimed none and similarly the 2nd Petitioner had been given 4 out of maximum 6 for commendations by the Inspector General of Police whereas the Petitioner has claimed only 2. The Board had given the Petitioner 1.5 marks for "Diploma" but the 2nd Petitioner has claimed no marks. For communication skills the 2nd Petitioner had been awarded full marks (3 out of 3) whereas the 2nd Petitioner feels that he deserves only 2.

34. From the foregoing, it is clear that the Board of Interview had allocated marks applying an objective criterion and that there is no material to come to a conclusion that the 2nd Petitioner has been deprived any marks arbitrarily.

35. Considering the above, I conclude that the 2nd petitioner has failed to establish that his fundamental right enshrined in Article 12(1) of the Constitution has been infringed, and as such his application should necessarily fail.

The case of the 3rd Petitioner

36. The 3rd Petitioner has been awarded 58.5 marks by the Interview board. The 3rd Petitioner, however, claims that he should have been allotted 69.5 marks. As in the case of the 2nd Petitioner, assuming for the sake of argument that the 3rd Petitioner was awarded the 69.5 marks that he claims, he still falls short of the cut off mark of 71 and would not have been eligible for the promotion to the rank of DIG.

37. For the reasons set out above, I hold that none of the Petitioners have been able to satisfy the court that their fundamental right under Article 12(1) of the Constitution had been violated by the Respondents and accordingly this application is dismissed.

In the circumstances of this case I do not order costs.

Application dismissed.

JUDGE OF THE SUPREME COURT

JUSTICE MURDU 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 under and in terms of Article 126 reads with Article 17 of the Constitution against an impugned violation of fundamental rights under Article 12(1) of the Constitution of Democratic Socialist Republic of Sri Lanka.

SCFR 21/2019

1. Jayasekera Arachchige Senudhi Methanga,
   M23/3, Dabare Mawath,
   Narahenpita
   Colombo 05.
   (Minor)

2. Jayasekera Arachchige Chamila Prabath,
   M23/3, Dabare Mawath,
   Narahenpita,
   Colombo 05.

Petitioners

VS.

1. A.R.M.R. Herath,
   Principal and the chairperson
   of the Interview Board to
   admit students to Grade 1,
   Sirimavo Bandaranayake
   Vidyalaya,
   Stanmore Crescent,
   Colombo 07.

2. Rukmali Kariyawasam,
   Primary Principal and member
   of the Interview Board to
   admit students to Grade 1,
   Sirimavo Bandaranayake
   Vidyalaya,
   Stanmore Crescent,
   Colombo 07.

3. Jayantha Seneviratne
   Member of the Interview
   Board to admit students to
   Grade 1,
   Sirimavo Bandaranayake
   Vidyalaya,

Stanmore Crescent,

Colombo 07.

4. Oshara Panditharathna,

Principal,

Dharmapala Vidyalaya,

Pannipitiya.

5. Padmasiri Jayamanne,

Secretary,

Ministry of Education

Isurupaya, Pelawatta,

Battaramulla.

6. Ranjith Chandrasekera,

Director of National Schools ,

Isurupaya, Pelawatta,

Battaramulla.

7. Honourable Attorney General,

Attorney General's Department,

Colombo 12.

Respondents

Before : Jayantha Jayasuriya PC, CJ

L.T.B. Dehideniya, J

E.A.G.R. Amarasekera, J

Counsel : Upul Kumarapperuma with Ms. Sharleen Fernando for Petitioners.

Rajive Goonethilleke , SSC for 1st, 5th, 6th, and 7th Respondents

Argued on : 14.11.2019

Decided on : 13.02.2020

Jayantha Jayasuriya PC, CJ

The first petitioner is a five-year old child whose father is the second petitioner. This court by its order dated 21 May 2019, granted leave to proceed in this application on the alleged infringement of Article 12(1) of the Constitution.

The second petitioner submitted the application dated 16 June 2018, to admit the first petitioner to grade one at Sirimavo Bandaranayake College for the year

2019. The application was submitted under the category - children of residents living in close proximity to the school (proximity category).

It is the contention of the second petitioner that he had been residing at the address given in the application since his childhood and the first petitioner at the same address, since birth. It is his contention that his mother became the legal owner of the said premises in the year 2004. She has gifted the same premises to the second petitioner by the deed of gift attested on 18 October 2017.

The second petitioner had submitted all necessary documentation including the two deeds, an affidavit from the mother, birth certificates of the applicant and the child, marriage certificate of the applicant, certificate of residence and the extracts of the electoral register issued by the Grama Niladari. Copies of these documents are produced before this court marked P4(a) – P4(y).

He was called for an interview before a panel comprising of the first, second and third respondents where the first respondent was the chairperson. The board of interview had awarded a total of 47 marks of which 03 marks were assigned under the heading documents in proof of residency. Petitioners dispute the marks assigned under this heading and claim that they have been denied 18.4 marks that should have been assigned under the said heading in addition to the 3 marks already assigned. They claim that the 3 marks awarded represent the period of residence from the date on which the second petitioner became the legal owner of the premises namely the day on which the mother of the second petitioner gifted the premises to him. It is their contention that additional 18.4

marks should have been awarded taking in to account the 13 year time period in which the mother of the second petitioner remained the legal owner of the premises in which the second petitioner resided.

It is their contention that the circular relating to school admissions for the year 2019 makes provision for the same. They further contend that if those 18.4 marks were awarded the total marks awarded to the petitioners would be 65.4 and thereby would have qualified to be admitted. The cutoff marks for the school they applied was 60.2.

Being aggrieved with the decision of the board of interview, the petitioners presented an appeal on 21 November 2018. The second petitioner presented himself before the Appeal and Objection Investigation Board comprising of the 4th Respondent and another member whose identity is unknown to him. However, the second petitioner claims that he was not informed of the decision of the said appeal board.

Petitioners submit that the refusal to admit the 1st petitioner to Sirimavo Bandaranayake Vidyalaya is illegal, unreasonable, unlawful, arbitrary, discriminatory and contrary to the relevant circular.

The first respondent who is the principal of the school and the chairperson of the interview board contends that the petitioners were correctly awarded 3 marks for the Deed of the property which the second petitioner had been the owner of, for a period between six months to one year. It is her further contention that

there is no provision in the relevant circular to add marks for the previous ownership of the property.

The fifth respondent who was the Secretary to the Ministry of Education contended that the school authorities have correctly awarded 3 marks for the deed of the property of which the second petitioner had been the owner of, for a period more than six months and less than one year. Further he contends that there is no provision in the relevant circular to add marks taking into account the previous ownership of the property. He further contended that the Admission circular issued in the year 2013 permitted the aggregation of the period of previous ownership of the property by the grandparent of the child in situations where the parent of the child had owned the property for less than three years. Further he contends that the notice issued by the Ministry of Education relating to school admissions in the year 2020 had re-introduced the aggregation of the period of previous ownership by the grandparent of the child.

The mark sheet in respect of the school admission application of the petitioners is marked P6 and R3. They are in two different formats. However, both these documents confirm that the petitioners were awarded 3 marks under the heading "documents confirming residency".

The relevant circular relating to school admissions for the year, namely Circular 24/2018 of the Ministry of Education (hereinafter referred to as the Circular) is produced marked P2 and R1.

Clauses 7.2, 7.2.1 and the relevant part of clause 7.2.1.1 of the said circular are reproduced herein below:

7.2 පාසලට ආසන්න පදිංචිකරුවන්ගේ ළමයින් - 50%

මෙම ගණය යටතේ පෝෂිත ප්‍රදේශය තුළ (4.7 උපවගන්තියට අනුව) පදිංචි වී සිටින සියළු දෙනාටම අයදුම් කළ හැකිය. මෙහි දී අයදුම්කරුවන් අයදුම් කරන ස්ථානයේ පදිංචි වී සිටීම සහ ඒ බව සනාථ කිරීම අනිවාර්ය වේ. අයදුම්කරුගේ සැබෑ පදිංචිය භෞතික ව සනාථ කර ගැනීම මෙම චක්‍රලේඛයේ 9.3.3. හි සඳහන් ස්ථානීය පරීක්ෂාව මගින් ද, ලිඛිත ව සනාථ කර ගැනීම පදිංචියට අදාළ ප්‍රධාන ලේඛන පරීක්ෂාව මගින් ද, සිදු කළ යුතුය.

මෙහි දී පදිංචිය සනාථ කිරීමට අදාළ ව ඉදිරිපත් කළයුතු ලේඛන පහත දැක්වේ.

7.2.1 පදිංචිය තහවුරු කරන ප්‍රධාන හා අතිරේක ලේඛන
පදිංචිය තහවුරු කරන ප්‍රධාන හා අතිරේක ලේඛන අදාළ පුද්ගලයාගේ නමට පැවරී, ඉල්ලුම්පත් භාර ගන්නා අවසන් දින සිට ආසන්න පුර්ව වර්ෂ 5 ක කාලය සැළකිල්ලට ගෙන පහත ප්‍රතිශත අනුව ඊට හිමි ලකුණු ලබා දිය යුතුය.

වර්ෂ 05 ක් හෝ ඊට වැඩි	**100%**
වර්ෂ 05 ට අඩු වර්ෂ 04 දක්වා	**80%**
වර්ෂ 04 ට අඩු වර්ෂ 03 දක්වා	**60%**
වර්ෂ 03 ට අඩු වර්ෂ 02 දක්වා	**40%**
වර්ෂ 02 ට අඩු වර්ෂ 01 දක්වා	**20%**
වර්ෂ 01 ට අඩු මාස 06 දක්වා	**10%**
මාස 06 ට අඩු	**05%**

7.2.1.1. පදිංචිය තහවුරු කරන ප්‍රධාන ලේඛන
පදිංචිය තහවුරු කරන ප්‍රධාන ලේඛන ලෙස පහත ලේඛන පිළිගැනේ.

- ✓ **සින්නකර ඔප්පු**
- ✓ **තෑගි ඔප්පු**
- ✓ **දීමනා පත්‍ර**
- ✓ **රජයේ ප්‍රධාන (හිමිකරු මිය ගොස් ඇත්නම් අයදුම්කරු / කලත්‍රයා අනුප්‍රාප්තිකයෙකු ලෙස නම්කර තිබිය යුතු අතර, අදාළ බලධාරියා විසින් ඒ බව සනාථ කළ යුතුය.)**

- ✓ විහාර හා දේවාල ගම් පනත යටතේ බෞද්ධ කටයුතු කොමසාරිස් ජනරාල් විසින් නිකුත් කරන ලද බදු ඔප්පු හෝ බෞද්ධ කටයුතු කොමසාරිස් ජනරාල් විසින් සහතික කරන ලද අදාළ විහාරාධිපති විසින් නිකුත් කරන සහතික.
- ✓ පත් ඉරු මගින් සනාථ කර ඇති වසර 10කට වැඩි කාලයක් සහිත ප්‍රකාශන ඔප්පු
- ✓ ගෙවිමේ පදනම මත මිල දි ගෙන ඇති නිවාස ලේඛන (අයිතිකරු සමග ඇති කරගත් ගිවසුම් හා ගෙවීම් කරන ලද ලදුපත්)

(සින්නක්කර ඔප්පු හා තෑගි ඔප්පු ප්‍රකාශන ඔප්පුවකින් ලියා ඇත්නම් එම ප්‍රකාශන ඔප්පුව වසර 10ක් හෝ ඊට වැඩි කාලයක් ලියාපදිංචි වී තිබිය යුතුය.)

(i) පදිංචි ස්ථානයේ හිමිකම ඔප්පු කිරීමට ඉදිරිපත් කරනු ලබන ඉහත ලේඛන ඉල්ලුම්කරුගේ / කලත්‍රයාගේ නමට ඇත්නම් - ලකුණු 30

(ii) ඉල්ලුම්කරුගේ / කලත්‍රයාගේ මවගේ හෝ පියාගේ නමට හිමිකම ඇත්නම් - ලකුණු 23

(හිමිකම අනෙකුත් අයගේ නමට ඇත්නම් මෙම ලකුණු ලබා නොදිය යුතුය.)

අවශ්‍ය වන්නේ නම් පත් ඉරු හා දෙවන පිටපත් පරීක්ෂා කර හිමිකම තහවුරු කරගත යුතුය.

Petitioners in this application claim that additional 18.4 marks under sub clause (ii) of clause 7.2.1.1 should have been awarded to their application. It is their contention that these marks should have been awarded for the transfer deed no. 1232 attested on 24 November 2004. This deed had been made by the National Housing Development Authority in favour of the mother of the second petitioner conveying the ownership of the premises to the latter. Thirteen years thereafter the ownership was transferred to the second petitioner through a deed of gift that was attested on 18 October 2017. Three marks were awarded to the

petitioners under sub clause (i) of clause 7.2.1.1 in relation to the said deed of gift.

The respondents contend that they awarded 3 marks to the Deed of Gift under which the second petitioner acquired lawful ownership. They further submit that no marks were awarded to the aforesaid Deed of Transfer through which the mother of the second petitioner gained lawful ownership. It is their contention, that no such aggregation of marks is permitted under the Circular. They contend that marks can be awarded to deeds falling under one of the two sub categories only.

The core issue that has to be considered in this application is whether the failure to award marks for the deed of transfer which confirmed the lawful ownership of the mother of the second petitioner from 2004 to 2017 is contrary to the circular and therefore is arbitrary and / unreasonable and / irrational.

In deciding this issue, it is important to examine the whole circular with a view to comprehend the rationale and the object and the purpose of the whole scheme provided thereunder. An interpretation of any specific individual Rule or Rules needs to be guided by the findings of such an examination.

According to the Circular, six different categories have been recognised under which the applications could be submitted. A common factor applicable to all six categories is that the parents or the legal guardian should reside in the “feeder

area" of the relevant school. Therefore "Residency" of the applicants has an important bearing in the ultimate decision to admit a child under the Circular.

Clause 3.1 of the Circular recognises "Children of the residents living in close proximity to school" as one of such categories relating to school admissions (proximity category). Clause 7.1 (i) of the circular provides that, fifty percent of the vacancies should be filled by the applicants who come under proximity category. Clause 7.2 set out the different criteria under which marks should be awarded when applications under proximity category is considered. Clause 7.2.1 recognises two categories of documents that can be considered in proof of residency. The two categories recognised therein are "the main documents" and "additional documents". Further, the circular sets out the maximum marks that can be assigned to the acceptable documents under each category. Actual marks that can be awarded in a given situation is determined in accordance with the percentage of marks that can be assigned out of the maximum marks based on the 'age' of the document. One hundred percent is assigned for documents which are five years or older from the closing date of the applications. The lowest percentage namely, five percent is assigned to the documents less than 6 months old. Documents between 6 moths to one year old attract ten percent of the assigned maximum marks. The above scheme as recognised by the Circular therefore mainly focuses on the duration of residency in deciding the actual marks that will be awarded to an applicant. The focus is on the five year period immediately prior to the last date of submitting applications. An applicant who proves residency for five or more years will receive the maximum of one hundred percent marks for the documents proving residency.

Documents proving residency are divided into two categories namely “main” and “additional” documents. Clause 7.2.1.1 set out the type of documents that are considered “main” documents proving residency. It recognizes, *interalia* Deeds of transfer and Deeds of gift as “main” documents confirming residency. These main documents are further divided into two sub-categories based on the person in whose benefit such documents have been executed. A description of these two sub categories are found in sub clauses (i) and (ii) of clause 7.2.1.1. Further the said sub clauses set out the maximum marks that can be assigned under each of these two sub categories. First sub - category described under sub clause (i) of clause 7.2.1.1 is the documents that are in the name of the applicant or the spouse of the applicant. Maximum of 30 marks can be awarded to the documents that would fall under the said sub category. The second sub category recognised under sub clause (ii) of clause 7.2.1.1. is, the documents that are in the name of either of the parents of either the applicant or the spouse of the applicant. Maximum of 23 marks is assigned for the documents under this category.

It is pertinent to note that the circular has no specific provision either prohibiting or allowing the aggregation of marks that can be awarded for the documents that would fall under the two sub categories of documents recognised under sub clauses (i) and (ii) of clause 7.2.1.1.

When the objective of clause 7.2 is considered in its context, it is clear that the said clause set out the criteria under which school admissions will be made under the proximity category. The prime focus under this category is the place of

residence of an applicant. The circular recognizes two types of documents that can be taken into account in proof of place of residence. They are the “main documents” and “additional documents”. While clause 7.2.1.1. describes different types of documents that will be considered as “main documents” sub clauses (i) and (ii) of the said clause determine the maximum marks that can be assigned to such documents depending on the person under whose name, such document exists. The actual marks that can be awarded is determined according to the different percentages of the maximum marks prescribed to each category, based on the age of the document. Further, the same clause specifically excludes assigning any marks to documents made in favour of any person other than the categories recognised under sub clauses (i) and (ii). Therefore, to qualify to receive any marks for a document that can be classified as a “main document” such document should be in the name of the applicant, the spouse of the applicant, mother or father of the applicant or the mother or father of the spouse of the applicant (hereinafter referred to as “accepted parties”). The actual marks will depend on two factors. Namely, first the person in whose name the document exists, and second the age of the document. It is clear that the detailed scheme of marks will ensure that a maximum of 30 marks will be awarded to an applicant who produces a “main document” that is five years or older in the name of the applicant or the spouse of the applicant. Lowest of 1.15 marks will be awarded to an applicant who produces a “main document” that is less than 6 months old which is in the name of either of the parents of the applicant or the spouse of the applicant.

The over all scheme set out above ensures that marks are assigned on a reasonable scale when the proof of residency is considered, under the proximity category. It is pertinent to emphasise that the core factor in this category is the "residency" of the applicant and the threshold maximum period of residency considered is five years prior to the closing date of the applications. The scheme set out above clearly accepts the residency at premises belonging either to the applicant or the spouse or either parents of the applicant or the spouse. Therefore if an applicant had been residing at premises belonging to a parent of either the applicant or the spouse and had continued to reside in the same premises after it was transferred to the applicant or the spouse should have the benefit of receiving marks covering the full term of residency. Depriving any marks due to the change of lawful ownership between the "accepted parties" will not only be arbitrary but also causes grave prejudice to an applicant.

The second petitioner had resided in the premises since his childhood along with his parents. In the year 2004, the mother of the second petitioner had become the lawful owner of the same premises by the Deed 1232 dated 24 November 2004. Thirteen years therefrom she had transferred the lawful ownership of the premises to the second petitioner by the Deed of Gift executed on 18 October 2017. Therefore during the immediate prior five year period from the closing date of applications namely between 1st July 2013 and 30th June 2018, the second petitioner who is the applicant and his mother had been the lawful owners of the premises for periods of eight months and four years and four moths respectively. There has been no interruption on the legal ownership of the premises other than the transfer between the second petitioner and his mother.

It is also pertinent to observe that the Petitioners would have been awarded with 23 marks for "main documents" if no change of ownership took place between the mother and the second petitioner and continued to remain with the mother of the second petitioner.

Therefore, in my view the contention that no aggregation of marks is possible in situations where the lawful ownership had changed between "accepted parties" (change between parents and grand parents of the child) without a specific provision permitting such aggregation, is not only contrary to the whole scheme relating to the proximity category set out under the Circular but also causes prejudice to such applicants.

I have considered the Judgment of this Court in **S.M.N.S. Thilakaratne and another v M.W.D.T.P Wanasinghe and others** (SC FR 30/18, SC minutes of 28.05.2019). In the said Judgment one of the issues that had been considered is whether the denial to award marks for a title deed in the name of the father of the applicant was in violation of the Circular 22/2017. The Court did not accept the Petitioner's contention that marks should have been awarded to the deed, which was in the name of the father in addition to the marks assigned to the deed in her name. The Court reached this decision based on two factors. First that the circular 22/2017 speaks only of "one person" when it says that, if five or more years have lapsed between the date of the deed on which the deed relating to proof of residency has been made in the name of the "relevant person" full marks should be awarded. Second, that *"it (the circular) 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". I further observe that the language in both these Circulars – Circular 22/2017 and Circular 24/2018 are similar in relation to the documents in proof of residency.

However, it is accepted law that a *"classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced and shall be treated alike"* [Royster Guano Co v Commonwealth of Virginia – 1920-253 US 412 at 415 cited with approval in **Haputhantirige and Others v Attorney-General** [2007] 1 SLR 101 at 117]. It is further held, that a Court should consider the object of the relevant law and whether a classification could be related to reasonably achieving such object, when the Court has to consider if any classification violates the principle of equality. Similar views are expressed by this Court in **M.K.Wijethunga & two others v the Principal, Southlands College** [SC FR 612/2004, Decided on 07.11.2005, 2005 B.L.R 19at 22]

On examination of the scheme and the scope of these Circulars, it is clear that one of the categories under which an application for admission to grade one can be made is the "proximity category". For an applicant to succeed under this category it is essential to prove his or her residency. Title deeds of premises is one type of document that can be submitted to establish such residency. These deeds *interalia* are considered "main documents establishing the residency". However, the marking scheme further classifies these type of documents based on two main factors. First the time period of residency that can be establish through

these deeds and secondly the person under whose name, such deeds are made. One such classification made is the documents that establish residency for five or more years. Documents falling within this classification will attract one hundred percent of the marks assigned. Marks assigned are scaled down depending on the time period and the minimum percentage of five percent is awarded for documents that are valid for a period of less than 6 months, as at the date of closing applications. The other factor taken into account is the person in whose name such deed is made. Distinction made under this classification is between the applicant or his spouse and either of the parents of the applicant or the spouse. Different marks are assigned to these two groups. As provided under Circular 24/2018, a maximum of 30 marks to the documents in the name of the applicant of the spouse and a maximum of 23 marks for the documents in the name of either of the parents of the applicant or the spouse. In addition, a further classification made under the said clause is the total exclusion of documents that are in the name of any person other than the persons who are recognised under (i) and (ii) of clause 7.2.1.1.

All these classifications specifically recognised under clause 7.2.1 of the Circular reasonably achieves the over all object of provisions relating to the applications submitted under the "proximity" category. The duration of residency as well as the person in whose name the main document to establish residency are criteria based on which a reasonable classification can be made in assigning marks. However a further classification restricting these marks, defeats the overall objective of the scheme set out in the selection process relating to applicants who come under the "proximity" category.

Examination of the Mark sheet relating to the Petitioner, which is produced marked R3, clearly reflects that provision is made to assign marks under three broad headings. They are (i) Registration in the voters list to establish residency, (ii) Documents establishing residency and (iii) Proximity to the school from the place of residence. Under heading (i) the period that has to be considered is the five-year period from 2013 to 2017. The applicant had been awarded full marks assigned under the heading Registration in the voters list (25 marks) as he had proved that the names of the applicant and the spouse was registered covering the entire period of 2013 to 2017. The fact that the applicant had been awarded full marks under heading (i) above is indicative of the fact that the Petitioners had been resident at the address in question since 2013. Under the second heading – Documents establishing residence – one sub category is Ownership of the place of residence. This sub category is further divided into two sub categories namely Deeds written in the name of the applicant or the spouse and the deeds written in the name of the Mother or Father of the Applicant or Spouse. These two sub categories are recognised as independent from each other. They are not set out as alternate sub categories. Petitioners had been awarded 03 marks for the deed in the second petitioner's name that had been made on 18 October 2017. This is the Deed of Gift made by the Mother of the second petitioner. This deed is produced marked P-4(b)(ii). However, no marks have been awarded under the subcategory - deeds made in the name of mother or father of the applicant or the spouse.

In my view assigning marks under the sub category "Ownership of the place of residence" coming under the heading "Documents establishing residence" must be considered in the backdrop of the chain of events that had taken place relating to the title of the property during the relevant period – the immediate past five year period from the closing date for applications. By the execution of the deed of gift in favour of the second petitioner in 2017 his right to occupy the premises at the given address was not diminished but on the contrary enhanced.

Hypothetically if the deed of gift was not executed, the Petitioner would have been entitled to full marks assigned under the sub category "deeds in the name of the mother or father of the applicant or the spouse". Thus it would seem artificial to deprive the marks that ought to have been assigned to the applicant because of the intervening act of executing the deed that enhanced the rights of the petitioner and the opportunity to occupy the house, now as the owner.

It is pertinent to note that the paper notice relating to school admissions for the year 2020 which was produced marked R2 makes a specific provision for aggregation of marks in situations where a transfer of ownership had taken place between the accepted parties within the immediately preceding five year period from the closing date of applications. Presumably, the reason for aggregation of marks was made possible in the 2020 school admission circular, would have been to eliminate the injustice that might result from a situation of this nature.

For the reasons I have enumerated hereinbefore the denial of any marks to the Deed of Transfer made by the National Housing Development Authority in the

name of the mother of the applicant on 24th November 2004, which is produced marked P-4(b)(i) fail to achieve the object of the Circular. Further the said denial is contrary to the object and purpose of the circular as well as the scheme of marks developed for the proximity category Such denial in my view is arbitrary, unfair and unreasonable. It defeats the purpose of the whole scheme developed by the Circular.

This Court in, **Karunathilaka and another v Jayalath de Silva and others**, [2003] 1 SLR 35 at 41-42 held *"The basic principle governing the concept of equality is to remove unfairness and arbitrariness. It profoundly forbids actions, which deny equality and thereby becomes discriminative. The hallmark of the concept of equality is to ensure that fairness is meted out."*

Under these circumstances I hold that the failure to award marks to the deed of transfer reflecting the lawful ownership of the mother of the second petitioner is a violation of Rights guaranteed under Article 12(1) of the constitution. Therefore the denial to assign marks on the deed in the name of the mother of the second petitioner is a violation of the Rights guaranteed under Article 12(1) of the Constitution.

This court appreciate that the hands of the Respondents were tied to an extent with regard to the assigning marks in the absence of any guidelines as to how marks should be assigned in a scenario of this nature.

In granting relief to the Petitioners, I am mindful of the fact that the application was submitted to admit the first petitioner to grade one at Sirimavo Bandaranayake Vidyalaya, Colombo 7 for the year 2019. The academic year 2019 had already come to an end. Therefore it is just and equitable to direct the first respondent – the Principal of Sirimavo Bandaranayake Vidyalaya, Colombo 7 - to admit the first petitioner to the second grade of Sirimavo Bandaranayake Vidyalaya, Colombo 7 forthwith, enabling the first petitioner to commence her education at the said school without further delay.

Taking into account the importance of the subject matter in relation to this application namely, the education of a child and the need to ensure that no unfair or unnecessary disruption is caused on any child's education, the Registrar is directed to send copies of this Judgment to the Principal of Sirimavo Bandaranayake Vidyalaya, Stanmore Crescent Colombo 7 and the Secretary of the Ministry of Education, Isurupaya, Pelawatte, Battaramulla for appropriate steps. The Honourable Attorney-General is directed to provide necessary advise to the relevant state authorities to ensure that necessary steps are taken to give effect to this judgment, without any delay.

Chief Justice

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

Judge of the Supreme Court

E.A.G.R. Amarasekera, J

I had the advantage of reading in draft, the Judgment written by His Lordship the Chief Justice. With all due respect to his lordship's 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 his lordship has summarized the facts of this case, I need not repeat some of them here again.

His lordship has referred to the judgment of this court in **S.M.N.S. Thilakaratne and another M.W.D.T.P. Wanasinghe and others** (SC FR 30/18, SC minutes of 28.05.2019) which was decided in relation to the Circular 22/2017. The Circular relevant to the case at hand is Circular 24/2018 of the Ministry of Education which is marked as P2. The relevant provisions in Circular 24/2018 in relation to the main documents in proof of residency are similar to the provisions in relation to documents in proof of residency discussed in the aforesaid case in relation to Circular 22/2017.

The document marked as R1 which seems to be the Circular relevant to school admissions in 2013 indicates that there were specific instructions in the past when there was a change of ownership from Grand Parent to the Applicant Parent. As per the instructions given in R1, it appears that the policy of the Ministry of Education at that time was not to aggregate the ownership of the parent and the grand parent of the child to be admitted in giving marks for the documents in proof of residency, but to consider the total period of ownership as

that of the grand parent if the ownership of the parent of the child was less than 3 years or else if the ownership of the parent of the child was more than 3 years not to consider the period of ownership of the grand parent. However, it appears that with the change of policy such instructions were taken away from the circulars relating to 2017 and 2018. There was no indication that such instructions were taken away to provide for the aggregation of the ownership of the parent and the grand parent. It should also be noted that the policy existed prior to the said circulars as mentioned above, was not for the aggregation of ownership. In that backdrop, I find it difficult to find fault with the Respondents, who had to interpret the Circular 24/2018 which does not have instructions how to give marks when there is a change of ownership from a grand parent to a parent, when they interpret relevant provisions as per the plain language used in the said circular.

As per the clauses 7.2.1 and 7.2.1.1 of the said Circular 24/2018, which provides a marking scheme for the documents in proof of residency in a similar manner to the clauses 7.2.2 and 7.2.2.1 of Circular 22/2017 discussed in the aforesaid case **S.M.N.S.Thilakarathne and Another V M.W.D.T.P. Wanasinghe**, marks are given for the deeds or documents that proves the title or entitlement of the relevant person to the place of residence. A careful reading of the relevant clauses indicates that the relevant person referred to above has to be one of the following persons:

- The applicant (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 7.2.1 of Circular 24/2018 allocates marks for the documentary proof of title or entitlement 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 four years—80% of the full marks.
- If it is less than four years and more than three years – 60% of the full marks.
- If it is less than three years and more than two years – 40% of the full marks.
- If it is less than two years and more than one year – 20% of full the marks.
- If it is less than one year and more than six months - 10% of the full marks.
- If it is less than six months - 05%

As per the said clauses 7.2.1.1 of Circular 24/2018, the maximum one can gain under the heading 'Main Documents in Proof of Residency' is 30 marks. However, when one reads clause 7.2.1 with clause 7.2.1.1 (i), and (ii), it is clear that;

- 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 30 marks subject to the percentages referred to above in relation to the period of ownership.

- If the ownership or entitlement is in the name of the mother/father of the applicant/spouse, the applicant can gain only 23 marks out of the maximum of 30 marks, which is further subject to the percentages referred to above in relation to the period of ownership.
- If the applicant's residency is based on a registered leasehold right or as an occupant of a government quarter or as a tenant under the Rent Act, the applicant can gain only 12 marks out of the maximum 30 marks subject to the percentages referred to above in relation to his entitlement to the residential property.

The Petitioner's contention is that marks should have been considered under clause 7.2.1.1 (ii) for the 2nd Petitioner's mother's deed and the Respondents failed to give marks for the said deed. However, I cannot find fault with the Respondents since the plain reading of clause 7.2.1 gives marks to the document in proof of residency which is in the name of the relevant person. It contemplates only one relevant person and not many. In the instant case, it is the Petitioner not her predecessors in title.

Furthermore, as per the clause 7.2.1, 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 mother of the 2nd Petitioner,

the predecessor in title, did not hold the ownership in her name at the final date given to tender applications, since she gifted her right to the 2nd Petitioner by executing deed marked as P4(b)(1). Therefore, it is my view that the Respondents cannot be blamed for not giving marks for the deed in the name of the predecessor in title since the plain reading of the relevant clause does not warrant to consider further marks for the deed of the predecessor in title as she was not the relevant person who held the title as at the final date given to tender the applications. 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.

It is now revealed that the Ministry of Education has again amended the Policy for the year 2020 allowing aggregation of the period of ownership of the Parent with the ownership of the grand parent when there is a change of ownership - Vide R2. Such a benefit was not there for the Respondents of this case when they consider the application of the Petitioners. Hence, I cannot hold that there is a violation of fundamental rights of the Petitioners by the Respondents since they have given a possible literal Interpretation to the relevant clauses.

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.

W.P.S. Wijerathna
No. 02, Kaluwalgoda,
Markawita.

Petitioner

SC. FR. Application No. **256/17**

Vs.

1. **Sri Lanka Ports Authority**
   No. 19, Chaithya Road,
   Colombo 1.

2. **Chief Human Resources Manager**
   Sri Lanka Ports Authority,
   No. 19, Chaithya Road,
   Colombo 1.

3. **S.H.S. Padmini**
   Deputy Chief Human Resources Manager,
   Sri Lanka Ports Authority,
   No. 19, Chaithya Road,
   Colombo 1.

4. A. Hewawitharana
   Harbour Master,
   Sri Lanka Ports Authority
   No. 19, Chaithya Road,
   Colombo 1.

5. S.A.R. Jayathilaka
   Chief Fire Officer,
   Sri Lanka Ports Authority,
   No. 19, Chaithya Road,
   Colombo 1.

6. Nelum Anawarathna
   Acting Chief Human Resources Manager,
   Sri Lanka Ports Authority,
   No. 19, Chaithya Road,
   Colombo 1.

7. Nirmal De Fonseka
   Manager,
   Mahapola Training Centre,
   Sri Lanka Ports Authority,
   No. 19, Chaithya Road,
   Colombo 1.

8. B.M. Anulawathie
   Deputy Chief Manager of Administrative and Engineering,
   Sri Lanka Ports Authority,
   No. 19, Chaithya Road,
   Colombo 1.

9. **R.G. Hettiarachchi**
   Superintendent of Audit,
   Auditor General's Department,
   No. 306/72, Polduwa Road,
   Battaramulla.

10. **Auditor General**
    Auditor General's Department,
    No. 306/72, Polduwa Road,
    Battaramulla.

11. **Honourable Attorney General**
    Attorney General's Department,
    Colombo 12.

Respondents

Before: **Hon. Murdu N.B. Fernando, PC, J.**
Hon. S. Thurairaja, PC, J.
Hon. Yasantha Kodagoda, PC, J.

Counsel: Niranjan de Silva with Kalhara Gunawardana for the Petitioner.
Sureka Ahmed, State Counsel for the Respondents.

Argued on: 9th July 2020

Decided on: 11th December, 2020

JUDGMENT

YASANTHA KODAGODA, PC, J.

This Judgment relates to an Application filed in terms of Article 126 of the Constitution by one W.P.S. Wijerathna (hereinafter referred to as "the Petitioner") alleging the infringement of his Fundamental Rights guaranteed by the Constitution, and seeking *inter-alia* a declaration that his Fundamental Rights guaranteed by Articles 12(1) and 14(1)(g) of the Constitution have been violated by one or more of the Respondents to this Application.

Position of the Petitioner

By his Petition to this Court dated 17th July 2017, the Petitioner stated that, on 5th January 1987, he joined the Sri Lanka Ports Authority (hereinafter sometimes referred to as "the 1st Respondent Authority") as a 'Fireman'. Consequently, he had been attached to the 'Fire Brigade' of the Sri Lanka Ports Authority (1st Respondent Authority). Following confirmation in service, he served the 1st Respondent as a Fireman for a continuous period of 15 years. In March 1998, the Petitioner has passed the preliminary examination of the Institution of Fire Engineers, which according to the Petitioner amounts to a 'Diploma'. On 15th October 2001, the Petitioner was appointed as a 'Landing and Delivery Clerk' of the 1st Respondent Authority. Though the Petitioner has not specifically stated in his affidavit, it became apparent at the argument stage of this Application, that this appointment was sequel to the Petitioner having applied for that post, and being selected. In view of that appointment, the Petitioner left the Fire Brigade and became attached to the Supply & Services Division of the 1st Respondent Authority. The Petitioner continues to-date to function as a 'Landing and Delivery Clerk' of the 1st Respondent Authority.

In 2006, the Chief Human Resources Manager (hereinafter referred to as 'the 2nd Respondent") of the 1st Respondent Authority called for applications for the post of 'Station Officer' of the Fire Brigade of the 1st Respondent Authority. Since he had the requisite minimum qualifications to be eligible for appointment as 'Station Officer', he preferred an application for the post. However, he had not been recruited on the premise that, the Petitioner had not completed the required period of 'continuous service' at the

Fire Brigade of the 1st Respondent Authority. In his Petition to this Court, the Petitioner has not impugned the decision of the 2nd Respondent acting on behalf of the 1st Respondent Authority in not having appointed him to the post of 'Station Officer' of the Fire Brigade, on that occasion.

By a Notice dated 28th March 2012, the 2nd Respondent once again called for applications to fill the post of 'Station Officer' of the Fire Brigade of the 1st Respondent Authority. According to the said Notice calling for applications (a copy of which was produced attached to the Petition marked "P4"), to be eligible for appointment for the post of 'Station Officer', an applicant had to possess the following three qualifications ('minimum / threshold qualifications'):

(1) Be a permanent employee of the 1st Respondent Authority.

(2) Satisfy one out of the three following eligibility criteria referred to in the said Notice:

(i) Passed three subjects at the GCE (A/L) examination at the same sitting, possess a level five certificate of National Vocational Qualification certified by the Institute of Fire Engineers and 3 years experience in the 'T/NT wage scale'.

(ii) Passed six subjects including Language and Mathematics at the GCE (O/L) examination in not more than two sittings, possess a level five certificate of National Vocational Qualification certified by the Institute of Fire Engineers and 5 years experience in the T/NT wage scale.

(iii) Performed minimum of 20 years service at the 1st Respondent Authority, and out of that, eight years in the 'T/NT wage scale' and possess a level four certificate of National Vocational Qualification.

(3) Possess a 'satisfactory' level of performance.

The Notice further stated that, applicants would be required to (a) sit and pass written and practical tests pertaining to professional experience, (b) pass the interview or if relevant to the post, pass the medical test. Though not of particular significance, it may be noted that, as per the Notice "P4", criteria "(b)" that is passing the interview and passing the medical test were *ex-facie* alternate requirements, as opposed to two distinct criteria to be accomplished to be successful. As the Petitioner possessed the eligibility

criteria referred to in the Notice, he preferred an application for the post of 'Station Officer'.

Subsequently, the Petitioner had got to know that, by letter dated 23rd April 2013, the 3rd Respondent - Deputy Chief Human Resources Manager of the Sri Lanka Ports Authority (hereinafter sometimes referred to as "the 3rd Respondent") had notified the 4th Respondent - Harbour Master of the 1st Respondent Authority (hereinafter sometimes referred to as "the 4th Respondent") that though six applications had been received for the vacancy of 'Station Officer', the Petitioner was the only qualified applicant, and in the circumstances had sought the 'consent' of the 4th Respondent to hold an interview and a practical examination as components of the selection process. In response, by letter dated 11th May 2013, the 4th Respondent had taken up the position that he was 'not agreeable' to the holding of the interview and the practical examination, on the premise that, the Petitioner had not completed the required period of 'continuous service' at the Fire Brigade of the 1st Respondent Authority. In the circumstances, notwithstanding the fact that the Petitioner was the only eligible applicant, he was not called for an interview and was not required to face a practical examination. Accordingly, the Petitioner was not appointed to the post of 'Station Officer'.

The Petitioner claims that, (a) he was the only applicant who had successfully met the required minimum / threshold qualifications, (b) at the time he preferred the afore-stated Application, he had served the Fire Brigade of the 1st Respondent Authority for 15 years (though at the time he preferred the application he was not attached to the Fire Brigade and was attached to another Division of the 1st Respondent Authority), (c) there was no rule at the Sri Lanka Ports Authority that only persons employed at a particular Division were entitled to an appointment to a higher position within that same Division, and (d) 65 Firemen of the Fire Brigade of the 1st Respondent Authority had signed a letter dated 20th June 2013 which was addressed to the Director of Human Resources of the 1st Respondent Authority by the Petitioner, requesting that he be called for an interview for the position of 'Station Officer'. A copy of the said letter was submitted attached to the Petition marked "P6". This letter according to the Petitioner indicated that, none of those employed at the Fire Brigade had any objection to the Petitioner being called for an interview and for a practical examination being held to consider him being appointed to

the post of 'Station Officer'. It appears that, there was no favourable response to the Petitioner's letter dated 20th June 2013.

Being aggrieved by his not being called for an interview, the Petitioner had by letters dated 21st and 28th December 2012 appealed to the Chairman of the 1st Respondent Authority to issue a direction to the Human Resources and Development Division to call him for an interview for the post 'Station Officer'. Consequently, by letter dated 23rd September 2013, the Petitioner was called for an interview and a practical test, to be held on 26th September 2013. Though the Petitioner does not specifically disclose so, according to material placed before this Court and the submissions made by learned Counsel, it is evident that the Petitioner had presented himself for both the interview and the practical test. The Petitioner claims that, he was not notified of the outcome of the interview and the practical test.

In 2014, an audit had been conducted by the Auditor General's Department regarding the vacancy of the post 'Station Officer' not having been filled. The circumstances under which this audit was commissioned and held, have not been placed before this Court by either party. However, a copy of the corresponding Report dated 13th November 2014 authored by Superintendent of Audit R.G. Hettiarachchi of the Auditor General's Department (hereinafter referred to as 'the 9th Respondent') and addressed to the Chairman of the Sri Lanka Ports Authority was presented to this Court attached to the Petition marked "P8". According to "P8", the 9th Respondent had formed the opinion that, notwithstanding the Petitioner having fulfilled the eligibility criteria, the reason as to why the Petitioner was not called for an interview and for a practical test in response to his application tendered in 2012, was because the divisional head, namely, the Harbour Master (4th Respondent) having refused to give his 'consent', and due to the Human Resources Division of the 1st Respondent Authority seeking to delay the selection process until a workman of the Fire Brigade became eligible for the post of 'Station Officer'. The 9th Respondent in his Report further observes that, (a) the 1st Respondent Authority does not have a policy of making appointments to higher positions, only from among eligible employees of the same Division, and (b) the relevant 'scheme of recruitment' does not contain a condition which requires the position in issue to be filled from among only serving employees of the relevant Division, in this instance the 'Fire Brigade'. As regards the interview held in 2013, the Report comments adversely regarding (a) the composition

of the interview panel which interviewed the Petitioner (in that it comprised of a nominee of the 4th Respondent, which was contrary to precedent), and (b) the nature of the sole question asked from the Petitioner at the interview and the corresponding comment entered in the mark sheet. Further, regarding the practical test, the Report comments adversely on (a) the short notice given to the Petitioner to get ready for the practical test (eighteen hours), and (b) the marks assigned to the Petitioner by the nominee of the 4th Respondent, notwithstanding his having asked only a single question regarding a particular chemical substance. The Report reveals that the Petitioner had scored 30 out of 45 marks at the interview and 59 out of 100 marks at the practical test. In view of the foregoing reasons, having concluded that the entire process had resulted in an 'injustice' being caused to the Petitioner, the 8th Respondent has sought observations from the Chairman of the 1st Respondent Authority regarding the contents of the Report, and information on what steps he proposes to take with regard to the filling of the relevant vacancy.

Following the release of the Audit Report ("P8"), an inquiry had been held at the 1st Respondent Authority, and consequently, a decision had been taken to hold a fresh interview. The Petitioner had protested at the holding of the interview for the second time without releasing the results of the initial interview. However, a fresh interview had been held on 11th March 2016. It is evident that only the Petitioner had been called for that interview too. On that occasion, the interview panel assigned to the Petitioner 28 out of 40 marks for his performance at the interview, and 40 marks for the 'trade test', seemingly out of 60 marks. Thus, the Petitioner had scored a total of 68 marks. According to the Petitioner, the interview panel had 'recommended' the appointment of the Petitioner to the post of 'Station Officer'. The Petitioner alleges that, notwithstanding the recommendation of the interview panel, the Acting Chief Human Resources Manager (presently functioning as the Manager of the Mahapola Training Centre of the 1st Respondent Authority and cited as the 7th Respondent) had recommended that the interview findings be 'cancelled' and fresh applications be called for the post of 'Station Officer'. Accordingly, a fresh Notice calling for applications had been published. A copy of the said Notice dated 19th June 2017 was produced before this Court attached to the Petition marked "P13". The Petitioner alleges that, without selecting him based on the results of the interview held on 11th March 2016, the process of selection was delayed till another person became eligible to apply for the post of 'Station Officer'.

In the foregoing circumstances, the Petitioner alleged that, not having appointed him to the post of 'Station Officer' of the Fire Brigade of the Sri Lanka Ports Authority based on the interview for that post held on 11th March 2016 and calling for fresh applications as reflected in Notice dated 19th June 2017 (produced marked "P13") was arbitrary, capricious and unreasonable and was an infringement of his Fundamental Rights guaranteed by Articles 12(1) and 14(1)(g) of the Constitution.

Leave to proceed and grant of interim relief

Following the issue of Notice of this Application to the Respondents, the Petitioner's Application was sought to be Supported on 10th August 2017. On that occasion, the Honourable Attorney General (cited as the 11th Respondent) who was represented by learned State Counsel, sought time to obtain instructions from the other Respondents. Learned State Counsel submitted that, the Respondents will not take steps to hold interviews sequel to the issue of the Notice calling for application ("P13") until this Application was Supported. On that occasion, this Court directed the Respondents to submit to Court the marks sheets of the previous interviews held by the 1st Respondent Authority in respect of the post of 'Station Officer'. The Respondents complied with the said order of Court, by producing the marks sheets pertaining to the interviews held on 26th September 2013 ("X3A"), 10th February 2016 ("X2") and 11th March 2016 ("X1").

On 27th October 2017, having heard submissions of both the learned counsel for the Petitioner and the learned State Counsel for the Attorney General, this Court decided to grant leave to proceed to the Petitioner in respect of the alleged infringement of his Fundamental Rights guaranteed in terms of Articles 12(1) and 14(1)(g) of the Constitution. The Court also granted a Stay Order as prayed in paragraph "e" of the prayer to the Petition, staying further processing of applications received in response to Notice dated 19th June 2017 ("P13") and staying until the final determination of this Application the holding of interviews, and practical examinations, and making an appointment to the post of 'Station Officer' of the Fire Brigade of the 1st Respondent Authority. The Respondents were given time to file Objections to the Application, and the matter was fixed for Argument. Accordingly, Statement of Objections of the 1st Respondent Authority was filed on 1st June 2018 and Counter Affidavit of the Petitioner was filed on 25th November 2019.

On 28th November 2019, learned State Counsel made an application to this Court on behalf of the 1st Respondent Authority. She submitted that, in addition to the vacancy of the post 'Station Officer' to which the Petitioner had applied, due to the retirement of an employee, another vacancy of the same post had arisen. In the circumstances, she sought permission of this Court to call for applications to fill such second vacancy. Having heard Counsel, this Court allowed the said application, since the 1st Respondent Authority undertook to retain the previous vacancy to be filled by the Petitioner, in the event this Court holding in favour of the Petitioner.

Position of the Respondents

The position of the Respondents is reflected in the affidavit filed on behalf of the 1st Respondent Authority by its Managing Director H.D.A. Sarath Kumara Premachandra. In his affidavit, referring to the first occasion when applications for the post of 'Station Officer' were called in 2006, he has submitted that, there were two vacancies for the post of 'Station Officer', and seven candidates including the Petitioner had applied. Interviews had been held on 10th April 2007. Following the adoption of the selection procedure, based on merit, three of the applicants had been selected. Of them, the interview panel had recommended the appointment of the first two applicants. The third had been placed on a waiting list. The Petitioner had received 52½ marks and had been placed 5th. Accordingly, the Petitioner had not been selected. As noted above, the Petitioner is not impugning his non-selection for the post of 'Station Officer' on that occasion.

Referring to the applications that were received in 2012 in response to Notice dated 28th March 2013 ("P4"), the Managing Director admits that the Petitioner preferred an application for the post of 'Station Officer'. He asserts that, after the Petitioner submitted his application, there was an exchange of letters between the Chief Human Resources Manager and the Harbour Master, but does not venture to explain the purpose for which such an exchange of letters took place. Nor does he reveal the contents thereof. He has also refrained from stating the outcome of the exchange of these letters. He has further submitted in his affidavit that, pursuant to the Notice calling for applications dated 28th March 2013, interviews were held on 26th September 2013. The Petitioner was the sole candidate. Two out of the three interviewers had not recommended the appointment of the Petitioner. The relevant mark sheets were produced marked "R2(a)", "R2(b)" and

"R2(c)". In the circumstances, the Petitioner had not been selected. Along with the mark sheets, a letter dated 27th September 2013 marked "R2(d)" was produced, addressed to the Chief Human Resources Manager by the Senior Harbour Safety Officer W.A.M.J Perera, who served as a member of the interview panel. The Managing Director of the 1st Respondent Authority offers no explanation as to why this particular member of the interview panel wrote that letter to the Chief Human Resources Manager and what the latter's response was.

The Managing Director of the 1st Respondent Authority has not contested the fact that an Audit was conducted by the 9th Respondent, and that "P8" is a copy of the Audit Report. He has not commented on or disagreed with the findings contained therein. According to the Managing Director, after the audit query raised by the 9th Respondent, a domestic inquiry had been conducted into this matter, and it was decided to hold fresh interviews. Hence, by letter dated 8th February 2016, the Petitioner was called to face another interview to be held on 10th February 2016. The Petitioner did not present himself for that interview. However, another interview was held on 11th March 2016, and the Petitioner participated at that interview. He scored 68 marks, and members of the interview panel had recommended that the Petitioner be appointed to the post 'Station Officer'. However, according to the Managing Director, the selection process had 'not been concluded'. Thereafter, the Acting Chief Human Resources Manager had recommended the 'cancellation' of the interview held on 11th March 2016. The Managing Director has not given any reason for the said recommendation to cancel the interview held on 11th March 2016. Though not specifically stated, the Managing Director seems to imply that someone in authority had agreed with the said recommendation of the Acting Chief Human Resources Manager that the interview held on 11th March 2016 be cancelled, since he has in his affidavit acknowledged that once again a Notice dated 19th June 2017 was published calling for applications all over again. Finally, the Managing Director of the 1st Respondent Authority has stated that, "the Petitioner does not possess requisite 'experience' to fulfill the duties of the post of Station Officer". However, he has not ventured to explain reasons for his view on the matter.

Rebuttal of the Petitioner

By his affidavit dated 25th November 2019, the Petitioner has stated that, the mark sheets tendered on behalf of the Respondents marked "R2(a)", "R2(b)" and "R2(c)" which

reflect the marks assigned by three members of the interview panel who conducted the interview on 26th September 2016, do not support the position taken up by the 1st Respondent Authority that two out of the three interviewers had not recommended the appointment of the Petitioner. The Petitioner asserts that the letter dated 27th September 2013 written by interview panel member W.A.M.J. Perera was a malicious act with the intention of preventing the Petitioner being appointed to the post of 'Station Officer'.

The Petitioner has asserted that, since the members of the interview panel that interviewed him on 11th May 2016 had recommended that he be appointed to the post of 'Station Officer', he became entitled to be appointed to that post.

Denying the position of the 1st Respondent Authority that the Petitioner does not have the requisite experience, the Petitioner has submitted that having served the Fire Brigade of the Sri Lanka Ports Authority for 15 years, he has acquired sufficient experience to fulfill the duties of the post of 'Station Officer' of that Fire Brigade.

Submissions made on behalf of the Petitioner

Learned Counsel for the Petitioner having explained to Court the factual narrative referred to in the initial and counter Affidavits of the Petitioner and associated documents, submitted that, it is of particular importance to note that based on the performance of the Petitioner at the interview held on 11th May 2016, the panel of interviewers had recommended the appointment of the Petitioner to the post of 'Station Officer'. In the circumstances, learned Counsel submitted that there was no reason whatsoever for the Petitioner to have been denied the appointment. He lay special emphasis on the findings contained in the Audit Report ("P8") prepared on behalf of the Auditor General by the 9th Respondent, and drew the attention of the Court to the finding that an 'injustice had been caused to the Petitioner' by not appointing him to the post of 'Station Officer'. Learned Counsel further submitted that, the refusal on the part of the Respondents to appoint the Petitioner to the post of 'Station Officer' was arbitrary, capricious, unreasonable and was an infringement of the Fundamental Rights of the Petitioner guaranteed under Articles 12(1) and 14(1)(g) of the Constitution. Learned Counsel for the Petitioner drew the attention of Court to his Written Submission, which the Court found to be useful.

Submissions made on behalf of the Respondents

Learned State Counsel who appeared on behalf of the Respondents defended the decision of the Respondents in not appointing the Petitioner to the post of 'Station Officer'. Her submission was that, as the Petitioner did not continuously serve at the Fire Brigade of the 1st Respondent, and as at the time he applied for the post he was working as a 'Landing and Delivery Clerk' in a different Division of the 1st Respondent Authority, he did not possess the required experience to function as a 'Station Officer'. She also drew the attention of the Court to letter dated 27th September 2013 sent to the Chief Human Resources Manager of the 1st Respondent Authority by member of the interview panel W.A.M.J. Perera, stating that at the interview held on 26th September 2013, the Petitioner failed to answer most of the questions which had been posed by him relating to 'general safety' and 'dangerous cargo', and hence the Petitioner was not up to the required standard. Learned State Counsel submitted that member of the interview panel W.A.M.J. Perera had not recommended the Petitioner to be appointed as 'Station Officer'.

Learned State Counsel also drew the attention of the Court to an endorsement made seemingly by the same interviewer on the 'marks sheet', which states that the Petitioner had 'nil knowledge' regarding 'dangerous cargo', 'chemicals' and 'port safety'. She further submitted that, under such circumstances, the Respondents were justified in not appointing the Petitioner to the post 'Station Officer' of the Fire Brigade of the Sri Lanka Ports Authority. In the circumstances, learned State Counsel submitted that the treatment of the Petitioner by the administration of the Sri Lanka Ports Authority did not amount to discrimination and hence the Fundamental Rights of the Petitioner guaranteed in terms of Articles 12(1) and 14(1)(g) of the Constitution had not been infringed by the Respondents. Accordingly, learned State Counsel pleaded that the Application of the Petitioner be dismissed.

Though it is a requirement under the Rules of the Supreme Court, no Written Submissions were tendered on behalf of the Respondents, before the date fixed for argument. It is unfortunate that, even after this Court having drawn the attention of learned State Counsel to the fact that Written Submissions had not been filed on behalf of the Respondents, no attempt was made to seek and obtain the permission of the Court to file Written Submissions even after the conclusion of argument.

Time and again this Court has emphasized the need and usefulness of Written Submissions being filed, in addition of course to the mandatory duty cast by the Rules of the Supreme Court on all Counsel cum instructing attorneys to file Written Submissions. Particularly, at the argument stage, most counsel generally crystalize their submissions and press only certain matters, while not strenuously arguing some other matters. Particularly due to brevity of time that can be allocated for a matter, they support their key arguments, leaving out certain other matters. Particularly in such circumstances, it is extremely helpful to Court if 'post argument written submissions' are tendered with the leave of Court.

Analysis by Court and findings

In this matter, the core issues to be determined by this Court is (i) whether the non-appointment of the Petitioner to the post of 'Station Officer' of the Fire Brigade of the Sri Lanka Ports Authority following the interview for that post held on 11th March 2016, and / or (ii) in the backdrop of all the circumstances of this matter including the outcome of the interview held on 11th March 2016, whether the publication of a Notice dated 19th June 2017 ("P13") calling for applications for the post of 'Station Officer' by one or more of the Respondents to this Application, amount to an infringement of the Petitioner's Fundamental Rights guaranteed in terms of Articles 12(1) and 14(1)(g) of the Constitution.

Article 12(1) of the Constitution

I will initially deal with the first declaration sought by the Petitioner, namely that the Fundamental Right guaranteed by Article 12(1) of the Constitution has been infringed by one or more of the Respondents.

Article 12(1) of the Constitution provides as follows:

"All persons are equal before the law and are entitled to the equal protection of the law."

It is well settled law that, at the core of Article 12 of the Constitution is a key concept, namely the concept of 'equality'. The concept of equality is founded upon the premise that, all human beings are born as equals and are free. Equality confers equal value, equal

treatment, equal protection and equitable opportunities to all persons, independent of or notwithstanding various demographic, geographic, social, linguistic, religious and political classifications based on human groupings prevalent in contemporary society, some of which are immutable or *born to* and others acquired. The concept of 'equality' was originally aimed at preventing discrimination based on or due to such immutable and acquired characteristics, which do not on their own make human being unequal. It is now well accepted that, the *'right to equality'* covers a much wider area, aimed at preventing other 'injustices' too, that are recognized by law. Equality is now a right as opposed to a mere privilege or an entitlement, and in the context of Sri Lanka a 'Fundamental Right', conferred on the people by the Constitution, for the purpose of curing not only injustices taking the manifestation of discrimination, but a host of other maladies recognized by law. While all Fundamental Rights are of equal importance and value, the *'right to equality'* reigns supreme, as it can be said that, all the other Fundamental Rights stem from the *'right to equality'*. The ability of human beings to live in contemporary society (as opposed to merely existing), and develop and reap the fruits of social, scientific, economic and political developments, is based on their ability to exercise fully the *'right to equality'*. Similarly, for human civilizations may they be national or international, to reap the full benefits of knowledge, skills, experience, talents and wisdom that people possess, people of such societies must enjoy the *'right to equality'*.

A pre-condition for the maintenance of peaceful co-existence of any plural society, sustainable peace, cohesiveness between different communities, and achieving prosperity, is the conferment of the right to equality to all persons of such society. The right to equality is a fundamental feature of the Rule of Law, which is a cornerstone of the Constitution of Sri Lanka, and hence the bounded duty of the judiciary to uphold. In fact, representative democracy, which the Constitution of Sri Lanka recognizes to be the form of governance of the country, is also founded upon equality.

It is necessary to highlight that, as the Preamble to the Constitution of the Democratic Socialist Republic of Sri Lanka provides, the Constitution has been adopted with the objectives of *inter-alia* assuring to all Peoples of Sri Lanka freedom, equality, justice, fundamental human rights and the independence of the judiciary, as the intangible heritage that guarantees the dignity and well-being of succeeding generations of the People of Sri Lanka and of all the People of the World, who come to share with those

generations the effort of working for the creation and preservation of a just and free society.

During the very early stages of the evolution of the legal concept of equality in Sri Lanka, Chief Justice Sharvananda in *Elmore Perera v. Major Montague Jayawickrema, Minister of Public Administration and Plantation Industries and Others*[1] explaining the nature of Article 12, held that it forbids the State from denying to any person equality before the law and equal protection of the law. It means that all persons are equally subject to the law and have a right to equal protection of the law, in similar circumstances, both as regards privileges and liabilities imposed by the law. It ensures that, laws have to be applied equally to all persons, and that there must be no discrimination between one person and another, when their position is substantially the same. The principle which underlines Article 12 is that, equals must be treated equally, operate equally on all persons, under like circumstances. Article 12 guarantees equality among equals. It is violated both by unequal treatment of equals and equal treatment of the unequal. Indeed, the concept of equality does not involve the idea of absolute equality among human beings. Thus, equality before the law does not mean that persons who are different shall be treated as if they were the same. Article 12 does not absolutely preclude the State from differentiating between persons and things. The State has the power of what is known as 'classification' on a basis of rational distinction relevant to the particular subject dealt with. So long as all persons falling into the same class are treated alike, there is no question of discrimination and there is no question of violating the equality clause. The discrimination that is prohibited, is treatment in a manner prejudicial as compared to another person in similar circumstances. So long as classification is based on a reasonable and a justifiable basis, there is no violation of the constitutional right to equality. What is forbidden is invidious (unfair / offensive / undesirable) discrimination. The guarantee of equal protection is aimed at preventing undue favour to individuals or class privilege, on the one hand, and at hostile discrimination or the oppression of equality on the other. Since the essence of the right guaranteed by Article 12 and the evils which it seeks to guard against are the avoidance of designed and intentional hostile treatment, or discrimination on the part of those entrusted with the administering of the same, a person setting up grievances of denial of equal treatment must establish that between persons

[1] [1985] 1 Sri L.R. 285

similarly circumstanced, some were treated to their prejudice and the differential treatment had no reasonable relevance to the object sought to be achieved. He must show that, the other person was similarly situated or equally circumstanced. He must make out that not only had he been treated differently from others, but had been so treated from persons similarly placed without any reasonable basis, and such differential treatment is unjustifiable. Chief Justice Sharvananda continued to explain that, the expression 'discrimination' indicates an unjust, unfair or unreasonable bias in favour of one person or a class, as well as bias against any person or class. Discrimination can exist only where two persons or two subjects are treated in different ways. It arises only from two dissimilar treatments and from similar treatment. There is no discrimination when two equals are treated alike. Discrimination can exist only where two persons or two subjects are treated in different ways. Chief Justice Sharvananda finally held that, what Article 12 strikes at is not unjust treatment or wrongful treatment, but unequal treatment or unjust discrimination.

It would thus be seen that, former Chief Justice S. Sharvananda's views of the concept of equality is akin to the *'reasonable classification doctrine'* which is consonant with the conventional description of discrimination founded upon the concept of *'equality between similarly placed persons'*. Of course, since the pronouncement of the majority judgment in *Elmore Perera v. Major Montague Jayawickrema, Minister of Public Administration and Plantation Industries and Others,* the Supreme Court of Sri Lanka has somewhat distanced itself from the interpretations provided by Chief Justice S. Sharvananda to the concepts of 'equality' and 'discrimination', and provided an expansive and more progressive definition of the concept of equality, founded upon the concept of *'substantive equality'*, aimed at protecting persons from arbitrary, unreasonable, malicious and capricious executive and administrative action. After careful examination and consideration of the law and the need for such law, respectfully, I am also inclined to distance myself from the conservative interpretation given by Chief Justice Sharvananda to the concept of equality, while expressing my agreement with the subsequent views expressed by their Lordships enumerated in the judgments referred to below, which encompass the broad concept of *'substantive equality'*. It is necessary to place on record that the *'reasonable classification doctrine'* continues to play an important role in certain factual situations, in determining whether the *right to equality* has been infringed.

However, prior to doing so, I need to refer to a monumental exploration of the concept of equality contained in Indian jurisprudence. Former Chief Justice of India, Justice Bhagwati has somewhat poetically held in *E.P. Royappa v. State of Tamil Nadu*[2] the following:

> *"Now, what is the content and reach of this great equalizing principle? It is a founding faith, to use the words of Bose J, 'a way of life', and it must not to be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be cribbed, cabined and confined within traditional doctrinal limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are 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."*

Article 14 of the Constitution of India is significantly similar to Article 12 of the Constitution of Sri Lanka. However, *ex-facie* it is apparent that, Article 12 of the Constitution of Sri Lanka is wider in scope than Article 14 of the Constitution of India. On the other hand, the jurisdiction of the Supreme Court of India relating to petitions and appeals alleging violation of rights is wider than the jurisdiction of the Supreme Court of Sri Lanka conferred by Article 126 of the Constitution. However, those differences in nature and scope, in my view, should not debar Sri Lankan justices from where appropriate, taking persuasive cognizance of Indian jurisprudence relating to the interpretation of the substantive legal concepts embodied in the 'right to equality'.

It would thus be seen that, both *'equality between similarly placed persons'* and *'substantive equality'* come within the scope of Article 12(1) of the Constitution.

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[2] AIR 1974 SC 555

As former Chief Justice Parinda Ranasinghe has pointed out in *Ramuppillai v. Festus Perera, Minister of Public Administration, Provincial Councils and Home Affairs and Others*[3], Article 12 requires that, (i) among equals, the law should be equal and it should be equally administered, (ii) like should be treated alike, (iii) all persons are equal before the law and are entitled to the equal protection of the law, (iv) no citizen shall be discriminated against on grounds of race, religion, language, caste, sex, political opinion, place of birth or any such grounds, (v) equality of opportunity is an instance of the application of the general rule underlying Article 12, (vi) whilst Article 12 does not confer a right to obtain State employment, it guarantees a right to equality of opportunity for being considered for such employment, (vii) what is postulated is equality of treatment to all persons in utter disregard of every conceivable circumstance of difference as may be found amongst people in general, (viii) it prohibits class legislation, but that reasonable classification is not forbidden, and (ix) in instances where a classification exists, it must appear that not only that a classification has been made, but also that the classification is one based on some reasonable ground or some difference which bears a just and proper relation to the purpose of the classification.

Justice Dr. Shirani Bandaranayake (as she then was) has pointed out in *Kanapathipilli v. Sri Lanka Broadcasting Corporation and Others*[4], that the concept of equality, is a *"dynamic concept"*. It is based on the principle that the status and dignity of all persons should be protected whilst preventing inequalities, unfairness and arbitrariness.

It is also necessary to point out that in *Wickremasinghe v. Ceylon Petroleum Corporation and others*[5] Chief Justice Sarath Silva has pointed out that, although the objective of the right to equality is to ensure that all persons, similarly circumstanced are treated alike, it is seen that the essence of this basic standard is to ensure 'reasonableness' being a positive connotation, as opposed to 'arbitrariness' being the related negative connotation. If legislation or the executive or administrative action in question is 'reasonable' and 'not arbitrary', it necessarily follows that all persons similarly circumstanced will be treated alike, being the end result of applying the guarantee of equality.

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3 [1991] 1 Sr. L.R. 11
4 [2009] 1 SLR 406
5 [2001] 2 Sri L.R. 409

In *Weligodapola v. Secretary, Ministry of Women's Affairs*[6], Justice Dr. A.R.B. Amerasinghe has held that, though Article 12 of the Constitution does not especially mention the right to equality of opportunity for all citizens in matters relating to employment under the State, it is 'a necessary incident of application of the concept of equality' enshrined in Article 12.

It is possible that, Justice Dr. A.R.B. Amerasinghe made specific reference to this fact, since unlike Article 16 of the Constitution of India which makes specific reference to public officers' right to equal opportunity, the 1978 Constitution of Sri Lanka contains no specific Fundamental Right to that effect. It is noteworthy to mention that, the 1972 Constitution (referred to as the 'first republican Constitution of Sri Lanka') contained such a Fundamental Right in Article 18(1)(h).

As Justice Mark Fernando has pointed out in *Ramuppillai v. Festus Perera, Minister of Public Administration, Provincial Councils and Home Affairs and Others,* the term 'the law' contained in Article 12(1) relates not only to the 'law' as it is conventionally understood and interpreted, it would include both subordinate legislation and executive action. Thus, for the purpose of Article 12, schemes of recruitment, promotion and appointment would come within the scope of the term 'the law'. Thus, both the very nature of schemes of recruitment, promotion and appointment of public institutions such as the 1st Respondent Authority, and, should there be an infringement of the application of such a scheme, such infringement too would come within the scope of Article 126 of the Constitution, and thereby the Supreme Court would have jurisdiction to inquire into such complaint alleging an infringement of Article 12(1). This enables employees of public institutions to secure justice from the Supreme Court pertaining to their grievances relating to executive and administrative action in their employment setting. Furthermore, not only in instances where an employer – employee relationship exists or is sought to be entered into, in instances where a contractual relationship existed, exists or is sought to be entered into, the right to equality may be invoked as regards executive or administrative treatment of such contracting party or potential contracting party which is

6 1989 (2) SLR 63 at 85

a public institution. This is evident upon a consideration of the judgment of Justice Mark Fernando in *Gunaratne v. Ceylon Petroleum Corporation*[7].

With the afore-stated judicial pronouncements in mind, the primary focus of this judgment is to consider the application of the fundamental *'right to equality'* in relation to the non-appointment of the Petitioner to the post of 'Station Officer' at a public statutory authority, namely the Sri Lanka Ports Authority.

The 1st Respondent – Sri Lanka Ports Authority has been established in terms of the Sri Lanka Ports Authority Act, No. 51 of 1979, as amended from time to time. Section 7(1)(b) empowers the Sri Lanka Ports Authority to employ such officers and servants as may be necessary for carrying out the work of the Authority. Section 7(1)(e) of the Act empowers the Authority to make rules in relation to the officers and servants of the Authority, including their appointment, promotion, remuneration, discipline, conduct, leave, working times, holidays and the grant of loans and advances of salary to them. Therefore, it is apparent that the 1st Respondent Authority has the power to make in the form of rules and enforce *inter-alia* schemes for the selection and appointment of persons to various positions at the Sri Lanka Ports Authority, which would include the Ports of Colombo, which is a *specified port* in terms of the Act. In any event, the promulgation of such schemes is part of the inherent administrative power of any organization, including statutory authorities such as the Sri Lanka Ports Authority. Such schemes for the selection, appointment and promotion of persons particularly for positions in the public sector, should (a) be founded upon the recognition and compliance with the concept of equality, (b) contain a rational basis, (c) be capable of objective application, (d) be compatible with the organization's objectives, and (e) be aimed at ensuring that the most suitable are selected for the relevant positions. Particularly in the public sector, it would be necessary to develop, have in place, and enforce schemes of appointment and promotion which are compatible with the concepts of equality, for the purpose of (a) providing an environment in which the objectives of the organization are given effect in an efficient manner, (b) ensuring meritocracy, (c) preventing arbitrary and unreasonable decision making and nepotism, (d) preserving effective administration, (e) preventing abuse, (f) preventing corruption, (g) ensuring transparency, (h) maintaining the morale of

[7] [1996] 1 Sri L.R. 315

the workforce, and (i) ensuring that the public has confidence in such public institutions. Once such schemes are promulgated, it is equally important and necessary to ensure that, they are enforced correctly, comprehensively, uniformly, consistently and objectively. Recruitment and appointment of persons to positions in the public sector cannot be left to be decided according to the whims and fancies of persons in authority. As pointed out by learned counsel for the Petitioner, it has been held by Justice Mark Fernando in *Jayawardena v. Dharani Wijayatilake, Secretary, Ministry of Justice and Constitutional Affairs and Others*[8], that, powers of appointment and dismissal are conferred on various authorities in the public interest, and not for private benefit, that they are held in trust for the public and that the exercise of these powers must be governed by reason and not caprice.

It would thus be seen that arbitrariness and unreasonableness in decision-making in selections, appointments and promotions particularly in public sector institutions is inconsistent with the concept of equality. In fact, as pointed out repeatedly by numerous erudite judges, *'arbitrariness is the anathema of equality'*. In India's former Chief Justice Bhagwati's words, *'equality and arbitrariness are sworn enemies'.*

In my view, principally, schemes for the selection, appointment and promotion of persons for employment positions should contain mechanisms enabling the selection of the most suitable person for the relevant position, whilst embodying the principle of equality. The objective sought to be achieved by doing so, is the imposition of compulsion on persons in authority who are empowered to take decisions relating to selections, appointments, recruitment and promotions, to arrive at objective and reasonable decisions, and thereby securing protection against arbitrary decision-making. While conferring discretionary authority on elected and appointed higher officials is necessary, it is equally necessary to ensure that, such discretion is exercised for the purpose for which discretionary authority has been conferred, and not for the purpose of giving effect to personal objectives which are inconsistent with equality and influenced by irrational and subjective criteria. In all probability, the conferment of unregulated discretionary power would result in violations of the rule of law, and arbitrary, unreasonable and capricious decision-making, and should therefore be avoided at all cost. Particularly in

[8] [2001] 1 Sri L.R. 132

and with regard to governance of nation States and management and administration of public institutions, it is of critical importance that, discretionary authority is exercised by Executive and by administrative authorities in *public trust,* only for the purpose of securing the purpose for which such power had been conferred, for the best interests of the organization concerned, for the best interests of the State, and in overall public interest. Not adhering to these vital norms, can certainly result in an infringement of Article 12 of the Constitution, in injustice, and in the long-term, in calamity.

Whether the 1st to the 8th Respondents have acted in conformity with these legal principles, or contrary to the right to equality conferred on the Petitioner by the Constitution, is the purpose of the following analysis of the evidence.

It would be seen that, in this matter, it was of fundamental importance that the Respondents placed the relevant 'scheme of selection and appointment' pertaining to the post of 'Station Officer' of the Fire Brigade of the Sri Lanka Ports Authority (1st Respondent) before this Court. In its absence, this Court can only proceed on the footing that the 'Notice' calling for applications ("P4" and "P13") reflect the relevant scheme of appointment.

Now, I wish to consider whether (i) the non-appointment of the Petitioner to the post of 'Station Officer' of the Fire Brigade of the Sri Lanka Ports Authority following the interview for that post held on 11th March 2016, and / or (ii) in the backdrop of all the circumstances of this matter including the outcome of the interview held on 11th March 2016, the publication of a Notice dated 19th June 2017 ("P13") calling for applications for the post of 'Station Officer' breached the principles of equality and non-discrimination.

During the argument stage of this Application, this Court specifically inquired from the learned State Counsel as to whether the appointment of a person as a 'Station Officer' of the Fire Brigade of the Sri Lanka Ports Authority was governed by a formal 'Scheme of Recruitment / Appointment'. She specifically answered that enquiry in the affirmative. Though unsupported by an affidavit, I am ready to accept that answer, since it was made by a Counsel from the Bar table in response to a question posed by Court. Court thereafter inquired from learned State Counsel as to why she did not plead the relevant scheme as an attachment to the affidavit of the Managing Director of the Sri Lanka Ports

Authority, which was the only evidence placed before this Court on behalf of all the Respondents. Learned State Counsel did not respond to that enquiry and remained silent. She offered no explanation either for her persistent silence.

In this regard, it is necessary to point out that, the primary duty of Attorneys-at-Law is to assist Court in the due administration of justice. Their duties and obligations towards their respective clients are subordinate to the duty they have towards Court. This is more so with regard to officers of the Attorney General's Department, who are quite rightly deemed to be *ministers of justice*, due to some of the quasi-judicial functions conferred on the office of the Attorney-General by law. Therefore, officers of the Attorney General's Department are required to actively aid Court in the discovery of the truth and administer justice according to law. It is of critical importance to bear in mind that, officers of the Attorney General's Department are duty bound to act in the best interests of the State, as doing so would be in public interest. Thus, the overall objective of legal professionals serving the State, should be the protection and fostering of public interest. Protecting and acting in the best interests of the State and public officials, is circumscribed by the overarching professional duty legal officers of the State have towards Courts to assist in the administration of justice. Legal Officers of the State are certainly not required and should not protect or defend public officials who have committed any illegality or otherwise acted contrary to law.

I wish to reproduce a passage from Justice Dr. A.R.B. Amerasinghe's treatise on *"Professional Ethics and Responsibilities of Lawyers",* which provides as follows:

> *"An attorney has a duty to act in the best interests, of his client. However, in undertaking the conduct of a case in court he takes on himself an office in the performance of which he has other duties. Justice will be done, and then to the imperfect level which human nature allows, if the courts and those assisting them act with integrity and fairness. An attorney's duty to court, to the standards of his profession and to the public which may, and often does, lead to a conflict with his client's wishes or with what the client thinks are his personal interests.*
>
> *Where there is any doubt, an attorney must put the public interest before the apparent interests of his client. Otherwise, there would not be that implicit trust*

between the Bench and the Bar which does so much to promote the smooth and speedy conduct of the administration of justice."

I must emphasize that, for a moment I have not in this instance inferred that the learned State Counsel refrained from responding to the question posed by Court, occasioned by any improper motive. She may have erroneously though or sincerely assumed that, she owed a duty towards her clients to remain silent not answering the question put to her by Court.

Therefore, when questions are posed by Court, State Counsel as well as members of the unofficial Bar must, necessarily answer, and answer truthfully. Remaining silent is no answer at all. If providing an answer is not possible, Counsel must seek the indulgence of Court to remain silent, by explaining why it is not possible to provide an answer.

Be that as it may, in the circumstances, this Court is compelled to recognize the 'Notice' dated 28th March 2012 (which was produced by the Petitioner marked "P4") calling for applications to fill the vacancy of 'Station Officer' and which led the Petitioner to submit an application and subsequently being interviewed initially on 23rd September 2013 and subsequently on 11th March 2016, as substantially reflecting the relevant 'scheme of recruitment / appointment'. I have to also infer that the formal 'scheme of recruitment / appointment' was not presented to this Court by the Respondents, as the production of that document would have either supported the case of the Petitioner, or run contrary to the position taken up by the 1st Respondent Authority, or have contributed towards both.

I propose to commence the analysis of the factual matrix relating to this application by a consideration of the eligibility criteria or as learned Counsel for the Petitioner put it 'the threshold requirement' contained in the Notice dated 28th March 2012 ("P4") calling for applications for the post 'Station Officer'. It contains three alternate eligibility criteria or certain 'minimum qualifications', which have been referred to above under the narrative of the Petitioner's position. The position of the Petitioner is that, at the time he preferred the application for the post of 'Station Officer' he possessed both the first and second eligibility criterion, though he was required to fulfill only one. In addition to such minimum qualifications, the Notice also states that, applicants should possess a 'satisfactory performance' level. The Petitioner's position is that he possessed that level

of performance too. The 1st Respondent Authority has not challenged either of these factual positions taken up by the Petitioner. In the circumstances, I conclude that the Petitioner had satisfied the eligibility criteria contained in "P4".

Under 'Notes', "P4" states that, (i) all applicants should pass a written / practical examination aimed at assessing the professional experience applicable for the applied post, and (ii) the applicant should pass the 'interview' or if applicable to the post, pass the 'medical test'. In recognition of its normal usage, I infer that the symbol "/" in Note "(i)" above, denotes alternatives. Thus, what was contemplated was to conduct either a written or a practical examination. It seems that the term 'or' in Note "(ii)" above is a typographical error or a mistake in the 'Notice' calling for applications. Thus, I conclude that what is actually meant is that applicants will be interviewed, and where relevant to the post applied for, be required to subject themselves to a medical examination. The Managing Director of the 1st Respondent Authority has not stated in his affidavit that the post of 'Station Officer' required applicants to pass a 'medical examination'. Nor does the Petitioner state that he was required to subject himself to a medical examination. Therefore, it must be concluded that, according to the 'scheme of recruitment / appointment', applicants who possess the minimum or threshold qualifications referred to above, would be required to face an interview and sit for a written or a practical test. Marks would be given based on their performance, and if only one vacancy existed, the applicant who earned the highest marks would be selected and appointed to the post. There appears to be no other requirement to be satisfied for the purpose of being selected. It is pertinent to bear in mind that, according to this scheme, following the conduct of the interview, if the applicant is recommended for appointment by the panel of interviewers, there is no further step to be taken, than to offer the appointment to the selected candidate.

In this backdrop, I will now examine what actually happened. Sequel to the publication of "P4" the Petitioner and five others have presented applications. Only the Petitioner possessed the minimum qualifications / eligibility criteria. Thus, according to the scheme referred to above, the 2nd and 3rd Respondents, namely the Chief Human Resources Manager and the Deputy Chief Human Resources Manager, respectively, were required to constitute an interview panel, set or cause the setting of a written or practical examination for the purpose of assessing whether the Petitioner had the necessary

practical experience for the post 'Station Officer', and thereafter call the Petitioner to face the interview and sit for the examination. Instead of doing so, the 3rd Respondent had written a letter dated 23rd April 2013 to the 4th Respondent seeking his consent to hold the interview and the examination. This step which the 3rd Respondent has taken is not a procedural requirement contained in the 'scheme of appointment'. The flaw in the procedure followed, commences at that stage.

The Managing Director of the 1st Respondent Authority in his affidavit offers no explanation as to why it was necessary to seek the consent of the 4th Respondent. By letter dated 11th May 2013, the 4th Respondent declined to give his consent. The Petitioner claims that the reason for the 4th Respondent refusing to give his 'consent' was because the Petitioner had not completed the required period of 'continuous service' at the Fire Brigade of the Sri Lanka Ports Authority. The Petitioner's position in this regard seems to be founded upon the contents of the Audit Report marked "P8". The Managing Director of the 1st Respondent has neither admitted nor denied this position. In the circumstances, it is necessary to examine whether the relevant 'scheme of recruitment / appointment' contains such a requirement that applicants should possess 'continuous' service at the Fire Brigade. This is pertinent, as admittedly, the Petitioner had not been attached to the Fire Brigade continuously. Furthermore, learned State Counsel too in her submissions relied on the fact that the Petitioner had applied for and obtained another appointment at a different division, and hence at the time he presented the application was not attached to the Fire Brigade. She submitted that, this was a factor that justified the Petitioner not being selected for the post 'Station Officer'. An examination of the "P4" reveals that there exists no requirement that applicants should have continuously been attached to the Fire Brigade or that only serving employees of the Fire Brigade were entitled to apply for the post 'Station Officer'. Further, the Respondents have not taken up the position that, there exists an overarching policy at the 1st Respondent Authority, that a person may apply and thereby be selected for a post at a particular Division of the 1st Respondent Authority, only if he had previously continuously served in the same division. In the circumstances, I conclude that, consequent to the Petitioner having applied for the post, the 3rd Respondent need not have sought the 'consent' of the 4th Respondent, and the 4th Respondent having refused to give his 'consent' was not founded upon a provision in the applicable 'scheme of recruitment / appointment' or a policy of the 1st Respondent Authority. Furthermore, the material placed before this Court by the

Respondents, does not justify the position that, only a serving officer of the Fire Brigade was competent to be appointed and serve as a 'Station Officer'. In the circumstances, I conclude that, this ground urged on behalf of the Respondents seeking to justify the Petitioner not being called for an interview sequel to the original publication of "P4" is both unreasonable and arbitrary.

As the 2nd and 3rd Respondents failed to conduct the interview and the examination, the Petitioner had to appeal to the Chairman of the 1st Respondent Authority. This resulted in the Petitioner being called for an interview, which had been held on 26th September 2013. The Petitioner was the only applicant who was called for the interview, seemingly because he was the only eligible applicant. It seems from the relevant 'marks sheet' (produced by the Respondents marked "X3A") the interview and the written / practical examination had been combined by holding a composite 'interview'. This by itself is a violation of the 'scheme of recruitment / appointment'. According to the affidavit of the Managing Director, two out of the three interviewers of the interview panel had not recommended the selection of the Petitioner for the post 'Station Officer'. Thus, according to the Managing Director, it was decided not to appoint the Petitioner. In support of that position, the Managing Director produced marked "R2(a)", "R2(b)" and "R2(c)" being the 'marks sheets' perfected by the interviewers. It was on this occasion that the nominee of the 4th Respondent who served on the interview panel, namely, W.A.M.J. Perera, wrote a letter marked "R2(d)" to the 2nd Respondent, stating his reasons for not recommending the Petitioner for appointment.

With regard to the 'marks sheets', I wish to make the following observations. The 'marks sheets' indicate by designation and name, the composition of the four-member interview panel. However, the affidavit of the Managing Director reveals that only a three-member interview panel conducted the interview. Further, only three 'marks sheets' were presented to court. No explanation has been given as to why only three officials conducted the interview, instead of the designated four interviewers who were supposed to interview the Petitioner. Further, the three 'mark sheets' submitted do not reveal which of the interview panel member perfected which 'mark sheet'. Further, they have not been signed and dated by the respective members of the interview panel, except for an illegible initial possibly placed by of one possible member. Thus, the integrity of those 'mark sheets' is in serious doubt. As stated above, the affidavit of the Managing Director does

not reveal any reason as to whether in fact a written / practical examination was conducted. The Petitioner claims that he presented himself to 'an interview and a practical test'. However, the Respondents have not presented to this Court the examination paper that was administered or a document indicating the performance of the Petitioner at the 'practical test'. Marks sheets "R2(a)", "R2(b)" and "R2(c)" do not contain columns in which marks can be assigned for performance at such a 'practical test'. However, "R2(a)" contains an unsigned endorsement that states *"Dangerous Cargo (chemical knowledge) – Nil"*. "R2(b)" also contains an unsigned endorsement that states *"Dangerous Cargo, Chemical knowledge, Port safety – Nil knowledge"*. Further, "R2(c)" contains an endorsement stating that the Petitioner's answers to questions on 'fire extinguishing' were *'good'*. Thus, it seems that, without conducting an examination as contained in the 'scheme of recruitment / appointment', the three interviewers have asked a few questions and assessed the Petitioner. In all the circumstances referred to above, it is difficult to place any reliance on the outcome of this interview cum selection process.

It must be observed that, the afore-stated selection process lacked transparency and compliance with the 'scheme of recruitment / appointment'. In the circumstances, it is quite understandable that the Audit Superintendent (8th Respondent) who conducted the Audit of which the Report was produced marked "P8" had multiple criticisms regarding the selection process and the outcome of it, and concluded that 'injustice' had been caused to the Petitioner. Therefore, it is quite understandable as to why the Managing Director of the 1st Respondent did not venture to critique the said Audit Report. From the mere fact that upon the release of the Audit Report ("P8") the management having decided to conduct an 'inquiry' into the matter and having subsequently decided to conduct a fresh interview, reveals clearly that the interview held on 22nd September 2013 and its outcome were flawed in many respects.

On 11th March 2016, the Petitioner was required to present himself for a fresh interview. At that interview, instead of strict compliance with the 'scheme of appointment', a composite interview had been conducted, which seems to have included testing the knowledge and experience of the Petitioner as well. He was interviewed by four interviewers and he received a total of 68 marks. The interviewers 'recommended' his appointment as 'Station Officer'. The relevant marks sheet was produced marked "R4".

Unlike the previous marks sheets produced marked "R2(a)", "R2(b)" and "R2(c)", the authenticities of which are in serious doubt, this marks sheet was signed by the relevant interviewers. *Ex-facie*, there is no doubt regarding the authenticity of this marks sheet relating to the interview held on 11th March 2016.

Notwithstanding the recommendation by the interview panel, the Managing Director in paragraph 21 of his affidavit states that, *"the process such as Interview Panel Report signed by the interview panel members seeking approval of the Chairman for the respective appointment has not been concluded consequent to the interview held on 11.03.2016"*. This sentence does not enable the Court to understand which step in the selection process was not fulfilled. Once, the interview panel had 'recommended' the appointment of the Petitioner to the post 'Station Officer', what was the remaining step in the 'scheme of selection and recruitment / appointment' to be taken? In the absence of such a step that is evident, I am compelled to conclude that, the Managing Director had included that sentence in his affidavit, merely for the purpose of attempting to justify what the Acting Human Resources Manager of the time, who has been cited as the 7th Respondent, had done. Namely, make a recommendation to 'cancel' the interview held on 11th March 2016, and hold a fresh interview. Affidavits of the 2nd, 3rd and 7th Respondents have not been filed. Thus, there is no explanation whatsoever, as to the possible justification for the 7th Respondent to have taken this step, which in the absence of an explanation can be labeled only as an unreasonable and arbitrary act. It is apparent that, it was that arbitrary decision which resulted in a further decision being taken to publish a fresh Notice dated 19th June 2017 ("P13") calling for applications for the post of 'Station Officer' all over again.

It is therefore my conclusion that, the entire process of calling for applications by Notices dated 28th March 2012 ("P4") and 19th June 2017 ("P14"), processing of the corresponding applications, conduct of the selection processes, and the non-selection and non-appointment of the Petitioner for the post of 'Station Officer' of the Fire Brigade of the Sri Lanka Ports Authority were seriously flawed, and contrary to the relevant 'scheme of recruitment / appointment'. In the circumstances enumerated above and the reasoning contained in this judgment, I hold that the non-appointment of the Petitioner for the post of 'Station Officer' of the Fire Brigade of the Sri Lanka Ports Authority following the holding of an interview on 11th March 2016 and the ensuing calling for fresh

applications by Notice dated 19th June 2017 was neither reasonable nor justifiable, and was arbitrary, unreasonable and capricious.

There is every reason to believe that, one or more of the 2nd, 3rd, 4th, 6th and 7th Respondents had acted maliciously and connived with each other to prevent the Petitioner from receiving the appointment of 'Station Officer' of the Fire Brigade of the Sri Lanka Ports Authority, which he was legitimately entitled to receive in response to his application submitted in 2012. Had the relevant authorities applied the relevant 'scheme of recruitment / appointment' pertaining to that post in *good faith* and with due diligence, while the Petitioner would have become entitled to hold the post 'Station Officer' in 2012 itself, the Sri Lanka Ports Authority would have had the services of a 'Station Officer' to its Fire Brigade. Particularly for an establishment such as the Colombo Port, I have to take judicial notice of the fact that, the services of a 'Station Officer' of its Fire Brigade would be extremely important.

Article 14(1)(g) of the Constitution

I shall now deal with the second declaration sought by the Petitioner, namely a declaration that the Fundamental Right guaranteed by Article 14(1)(g) of the Constitution has been infringed by one or more of the Respondents.

Article 14(1)(g) of the Constitution states as follows:

> *"Every citizen is entitled to – the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise."*

It would thus be seen that, Article 14(1)(g) of the Constitution confers on citizens of Sri Lanka the Fundamental Right to be entitled to the freedom to engage by himself or in association with others, in any lawful occupation, profession, trade, business or enterprise.

Article 15(5) of the Constitution, which provides possible restrictions to the Fundamental Right guaranteed by Article 14(1)(g), states as follows:

> *"The exercise and operation of the fundamental right declared and recognized by Article 14(1)(g) shall be subject to such restrictions as may be prescribed by law in the interests of national economy or in relation to -*

(a) the professional, technical, academic, financial and other qualifications necessary for practicing any profession or carrying on any occupation, trade, business or enterprise and the licensing and disciplinary control of the person entitled to such fundamental right; and

(b) the carrying on by the State, a State agency or a public corporation of any trade, business, industry, service or enterprise whether to the exclusion, complete or partial, of citizens or otherwise."

Further restrictions that may be imposed are found in Article 15(7) of the Constitution. They relate to restrictions that may be prescribed by law in the interests of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or for meeting the just requirements of the general welfare of a democratic society.

Article 15(5)(a) recognizes the fact that, the Fundamental Right contained in Article 14(1)(g) does not confer an absolute right or a right that cannot be restricted or conditioned to engage in any lawful occupation, profession, trade, business or enterprise. In order to effectively engage in certain occupations, professions, trades, businesses and certain enterprises, it would be necessary for the State to ensure that, persons who wish to engage in such activities possess certain educational, academic, professional, technical qualifications, training, experience, and skills. It would also be in the interests of the public to ensure that, persons who wish to be engaged in certain occupations, professions, trades, businesses and other enterprises possess legal authority granted by competent authorities such as licenses and permits to engage in such activities. Furthermore, it would be necessary to ensure that, certain occupations, professions, trades, businesses and enterprises are conducted in terms of an appropriate legal and regulatory framework, and where required, subject persons engaged in such activities to regulatory and disciplinary control. Thus, Article 15(5)(a) enables the legislature to enact laws that prescribe or provide for such measures in the form of restrictions to be imposed.

It must be noted that, certain occupations, professions and trades are employment related. Only those holding particular employment positions are entitled to engage in the related occupation, profession or trade. Thus, a prerequisite to engage in the relevant

occupation, profession or trade, is the requirement to hold the relevant employment position. It should be appreciated that, what Article 14(1)(g) confers is a general right to engage in an occupation, profession, trade, business or enterprise of one's choice. It does not guarantee a Fundamental Right to hold a particular employment related position.

It was held by Chief Justice Sharvananda in *Elmore Perera v. Major Montague Jayawickrema, Minister of Public Administration and Plantation Industries* that, Article 14(1)(g) only recognizes a general right conferred on 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. A similar view was expressed by Justice A.R.B. Amerasinghe in *W.M.K. De Silva v. Chairman, Ceylon Fertilizer Corporation*[9], wherein he held that, Article 14(1)(g) ensures that freedom to engage in any lawful occupation of one's choice, but that does not extend to a right to be employed by a particular master or in a particular place of work.

In this matter, while the Petitioner has been successful in establishing that he has been unreasonably and arbitrarily denied being appointed 'Station Officer' of the Fire Brigade of the 1st Respondent Authority, at a time when he on his own calling was not even employed at the Fire Brigade and was performing job functions unrelated to fire-fighting, he has not established that, non-appointment to the post of 'Station Officer' of the Fire Brigade amounted to an infringement of his Fundamental Right to engage in a lawful occupation or profession of his choice. It appears from the circumstances of this case that, the Petitioner's desire was to be appointed as 'Station Officer' of the Fire Brigade, and not to engage in any particular occupation or profession of his choice. Correspondingly, his grievance was that he was not appointed to the post of 'Station Officer' and not that, he was deprived of his right to engage in a profession or occupation of his choice. In the circumstances, I am of the view that, the Respondents have not infringed the Petitioner's Fundamental Right guaranteed in terms of Article 14(1)(g) of the Constitution.

9 [1989] 2 Sri L.R. 393

Grant of relief and directives of Court

In view of the foregoing circumstances and reasons, I hold that, the 1st, 2nd, 3rd, 4th, 6th, and 7th Respondents have by the afore-stated impugned decisions and conduct, jointly infringed the Fundamental Rights of the Petitioner guaranteed by Article 12(1) of the Constitution, by depriving him of the right to equality.

Therefore, I hereby issue a Declaration that the Petitioner's Fundamental Rights guaranteed by Article 12(1) of the Constitution have been infringed by the 1st, 2nd, 3rd, 4th, 6th, and 7th Respondents.

I further direct that, based on the findings of the panel of interviewers who conducted the interview on 11th March 2016, the Petitioner be forthwith appointed to the post of 'Station Officer' of the Fire Brigade of the Sri Lanka Ports Authority. However, taking into consideration the fact that, had the 2nd, 3rd, 4th, 6th and 7th Respondents correctly and in good-faith applied the 'scheme of recruitment / appointment' of the post 'Station Officer' of the Fire Brigade of the Sri Lanka Ports Authority, the Petitioner would have received the appointment in 2012, I direct that the said appointment be backdated to 1st July 2012.

The Petitioner will not be entitled to receive any back wages.

In the circumstances enumerated above, I make order quashing the Notice dated 19th June 2017 ("P13") calling for fresh applications for the post 'Station Officer' of the Fire Brigade of the Sri Lanka Ports Authority, as prayed for in paragraph (g) of the prayer of the Petition.

On a consideration of the totality of the circumstances of this case, I direct the 1st Respondent – Sri Lanka Ports Authority to pay the Petitioner compensation to the value of Rs. 300,000/=, and the 2nd, 3rd, 4th, 6th and the 7th Respondents to jointly pay the Petitioner further compensation to the value of Rs. 100,000/=.

In the afore-stated circumstances, I allow this Application.

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

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

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

K.N. Kanthi Silva
Batalanda,
Ragama.

(SC/FR/446/16)

Dissanayake Mudiyanselage Udayasiri,
No. 190/A-2, Bulugahawela Road,
Panadura.

(SC/FR/227/16)

Petitioners

SC FR 446/2016 with
SC FR 227/2016

Vs,

1. G. A. N. Jayantha,
Former Commissioner of Provincial Revenue Service,
Department of Provincial Revenue Service of the Western Province,
No. 204, Denzil Kobbekaduwa Mawatha,
Battaramulla.

1A. D.A.S. Dedigama,
Commissioner of Provincial Revenue Service,
Department of Provincial Revenue Service of the Western Province,
No. 204, Denzil Kobbekaduwa Mawatha,
Battaramulla.

2. H. T. Kamal Pathmasiri,
Former Secretary,
Ministry of Provincial Councils and Local Government,
No. 330, Dr. Colvin R. de Silva Mawatha (Union Place)
Colombo 02.

2A. S. D. A. B. Boralessa,
Secretary,
Ministry of Provincial Councils and Local Government,
No. 330, Dr. Colvin R. de Silva Mawatha (Union Place)
Colombo 02.

3. M. A. B. Daya Senarath,
Former Chief Secretary of Western Province,
Office of the Chief Secretary,
"Saraswathi Mandiraya"
No. 32, Sri Marcus Fernando Mawatha,
Colombo 07.

3A. Pradeep Yasarathne,
Chief Secretary of Western Province,
Office of the Chief Secretary,
Denzil Kobbekaduwa Mawatha,
Battaramulla.

4. V. Rajapaksha,
Former Secretary,
Provincial Public Service Commission of the Western Province,
No. 109, Main Street, Battaramulla.

4A. Hemantha Samarakoon,
Secretary (Acting),
Provincial Public Service Commission of the Western Province,
No. 109, Main Street, Battaramulla.

5. K. Sarath Gunathilake,
Former Chairman
Provincial Public Service Commission of the Western Province,
No. 109, Main Street, Battaramulla.

5A. Sunil Abewardena,
Chairman
Provincial Public Service Commission of the Western Province,
No. 109, Main Street, Battaramulla.

6. Sunil Fernando,
Former Member,
Provincial Public Service Commission of the Western Province,
No. 109, Main Street, Battaramulla.

6A. H. Sumanapala,
Member,
Provincial Public Service Commission of the Western Province,
No. 109, Main Street, Battaramulla.

7. S. K. Liyanage,
Former Member,
Provincial Public Service Commission of the Western Province,
No. 109, Main Street, Battaramulla.

7A. Kanthi Wijetunga,
Member,
Provincial Public Service Commission of the Western Province,
No. 109, Main Street, Battaramulla.

8. K. Paranalingam,
Former Member,
Provincial Public Service Commission of the Western Province,
No. 109, Main Street, Battaramulla.

8A. P. G. H. A. Mahendra Silva,
Member,
Provincial Public Service Commission of the Western Province,
No. 109, Main Street, Battaramulla.

8B. Ziyath Gaffoor,
Member,
Provincial Public Service Commission of the Western Province,
No. 109, Main Street, Battaramulla.

9. J. Paranamanna,
Former Member,
Provincial Public Service Commission of the Western Province,
No. 109, Main Street, Battaramulla.

9A. M. I. M. Rezwie,
Member,
Provincial Public Service Commission of the Western Province,
No. 109, Main Street, Battaramulla.

9B. Naganathan Sivahumaran,
Member,
Provincial Public Service Commission of the Western Province,
No. 109, Main Street, Battaramulla.

10. K.C. Logeswaran,
The Governor of the Western Province,
The Secretariat of the Governor of the Western Province,
5th Floor, Rotunda Building, No. 119,
Galle Road, Colombo 03.

10A. M. Asad S. Sally,
The Governor of the Western Province,
The Governor's Office of the Western Province,
10th Floor, No. 628,
Janajaya Building, Nawala Road,
Rajagiriya

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11. Hon. Attorney General,
Department of the Attorney General,
Colombo 12.

(SC/FR/446/16)

01. G. A. N. Jayantha,
Former Commissioner of Provincial Revenue Service,
Department of Provincial Revenue Service of the Western Province,
No. 204, Denzil Kobbekaduwa Mawatha,
Battaramulla.

1A. D. A. S. Dedigama,
Commissioner of Provincial Revenue Service,
Department of Provincial Revenue Service of the Western Province,
No. 204, Denzil Kobbekaduwa Mawatha,
Battaramulla.

1B. G. Amarasekara,
Commissioner of Provincial Revenue Service,
Department of Provincial Revenue Service of the Western Province,
No. 204, Denzil Kobbekaduwa Mawatha,
Battaramulla.

02. Director General of Management Services,
Department of Management Services,
The Secretariat,
Colombo 01.

03. Secretary,
Ministry of Public Administration and Management,
Independent Square,
Colombo 07

04. K. C. Logeswaran,
The Governor of the Western Province,
The Secretariat of the Governor of the Western Province,
5th Floor, Rotunda Building, No. 119,
Galle Road, Colombo 03.

4A. Hemakumara Nanayakkara,
The Governor of the Western Province,
The Secretariat of the Governor of the Western Province,
5th Floor, Rotunda Building, No. 119,
Galle Road, Colombo 03.

4B. M. Azath S. Sally,
The Governor of the Western Province,
The Governor's Office of the Western Province
10th Floor, Janajaya Building, Nawala Road,
Rajagiriya

4C. A. J. M. Muzammil,
The Governor of the Western Province,
The Governor's Office of the Western Province
10th Floor, Janajaya Building, Nawala Road,
Rajagiriya

4D. Dr. Seetha Armbepola,
The Governor of the Western Province,
The Governor's Office of the Western Province
10th Floor, No. 204, Denzil Kobbekaduwa Mawatha,
Battaramlla

05. Secretary,
Ministry of Provincial Councils and Local Government,
No. 330, Dr. Colvin R. de. Silva Mawatha (Union Place),
Colombo 02.

06. Secretary,
Provincial Public Service Commission of the Western Province,
No. 109, Main Street, Battaramulla.

6A. K. Sarath Gunathilake,
The Chairman of the Western Provincial Public Service Commission

6AA.Padmadasa Kodithuwakku,
The Chairman of the Western Provincial Public Service Commission

6B. Sunil Fernando,
Member of the Western Provincial Public Service Commission

6BB.Sunil Abeywardena,
Member of the Western Provincial Public Service Commission

6C. S. K. Liyanage,
Member of the Western Provincial Public Service Commission

6CC.Kanthi Wijetunga,
Member of the Western Provincial Public Service Commission

6D. K. Paranalingam,
Member of the Western Provincial Public Service Commission

6DD.Nissamudeen Udayar Mohomed Ameen,
Member of the Western Provincial Public Service Commission

6E. J. Paranamanna,
Member of the Western Provincial Public Service Commission

6EE.Thambipillai Muthukumaraswamy,
Member of the Western Provincial Public Service Commission

Members of the Provincial Public Service Commission of the Western Province, All of 109, Main Street, Battaramulla

07. Chief Secretary of Western Province,
Office of the Chief Secretary,
"Saraswathi Mandiraya"
No. 32, Sir Marcus Fernando Mawatha,
Colombo 07.

08. Secretary,
National Salaries and Cadre Commission,
Room No. 02-116, B.M.I.C.H,
Bauddaloka Mawatha,
Colombo 07.

8A. Don Herbert Neville Piyadigama

8B. Jayalath Ranasinghe Wimalasena Dissanayake

8C. Gunasekara Liyanage Wimaladasa Samarasinghe

8D. Ginigaddarage Piyasena

8E. Ranatunga Appuhamilage Dona Rupa Malini Peiris

8F. Dayananda Widanagamachchi

8G. Sembakuttige Swarnajothi

8H. Benedict Karunajeewa

8I. Sujeeva Rajapakse

8J. Harsha Warnakula Fernando

8K. Prof. Sampath Amaratunga

8L. Dr. Ravi Liyanage

8M. Wegapitiya Kattadiyalage Hemachandra Wegapitiya

8N. Keerthi Kotagama

8O. Reyaz Mihular

8P. Priyantha Fernando

8Q. Leslie Shelton Devendra,

8R. Wijesingha Wellappili Don Sumith Wijesinghe,

8S. Don Somaweera Chandrasiri

8T. Walgama Hewamaluwage Piyadasa

Member of the National Salaries and Cadre Commission,
All of Room No. 2-116, B.M.I.C.H, Colombo 07.

09. Hon. Attorney General,
Department of the Attorney General,
Colombo 12.

(SC/FR/227/16)

Respondents

Before: **Justice Priyantha Jayawardena PC**

Justice Vijith K. Malalgoda PC

Justice L.T.B. Dehideniya

Counsel: Manohara de. Silva, PC, with Hirosha Munasinghe and Imalka Abeyratne **for the Petitioner in SC FR 446/2016**

Saliya Peiris, PC, with Thanuka Nandasiri **for the Petitioner in SC FR 227/2016**

Uditha Egalahewa, PC, with Sachinthana Rajamuni **for the Intervenient Petitioners in SC FR 227/2016**

Ms. Sureka Ahmed **SC for the 1st to 7th and 9th Respondents in SC FR 227/2016 and for all the Respondents in SC FR 446/2016**

Argued on: 03.02.2020

Decided on: 06.07.2020

Vijith K. Malalgoda PC J

SC FR 227/16 and SC FR 446/16 were taken up for argument together on a decision of this court, made when SC FR 446/16 was supported for leave to proceed on 31.03.2017.

Out of the two applications, SC FR 227/16 was supported for leave on 13.01.2017. On that day court after considering the submissions of both parties, granted leave to proceed for the alleged violation of the Petitioner's Fundamental Rights enshrined on Article 12 (1) of the Constitution with interim relief as prayed in paragraph (b) to prayer of the Petition dated 1st July 2016 to the effect;

> "that the Respondents not to fill the existing vacancies for the post of Deputy Commissioner of Provincial Revenue Service of the Western Province until the final hearing and determination of this application"

The next application before us, namely SC FR 446/ 2016 was filed before the Supreme Court along with a motion dated 14th December 2016 (one month prior to the application 227/16 was supported) and in this application the Petitioner alleged violation of the Petitioner's Fundamental Rights guaranteed under Article 12 (1) and 14 (1) (g) of the Constitution by not promoting her to the vacant post of the Deputy Commissioner Class 1 of the Provincial Revenue Service of the Western Province. This matter too was supported for leave to proceed before this court 27.03.2017 and leave to proceed was granted.

When considering the violations alleged by the two Petitioners it is observed that the position taken up by the two Petitioners in their complaints before this court, are not the same but are exactly the opposite of the other. In this background this court will be considering the material in each case separately and in granting the final relief this court will be mindful of the said positions taken by both parties.

After the leave to proceed had been granted in SC FR 446/16, the Petitioner in SC FR 227/16 made an attempt to intervene in SC FR 446/16, but the said request was turned down by this court on 10.10.2018 but allowed both matters to be taken up for hearing together before the same bench.

In the meantime, two Intervenient Petitioners filed papers in SC FR 227/16 for intervention and the said application was allowed by his court on 01.10.2019.

Position taken by the Petitioner in SC FR 227/2016

The Petitioner in SC FR 227/16 was a Senior Assessor [Class II Grade I] belongs to the Provincial Revenue Service and was attached to the Department of the Provincial Revenue of the Western Province. Having joined the said service as a Tax Officer in the year 1996, he was promoted to the post of Senior Tax Officer in the year 2001. With effect from 01.12.2004 he was promoted to the post of Assessor and was promoted as Senior Assessor with effect from 1st December 2010. According to the Petitioner his next promotion would be to the post of Deputy Commissioner which is a Class I position.

On 30th April 2015 a vacancy occurred in the post of Deputy Commissioner of the Western Provincial Revenue Service at Gampaha office and the Petitioner being the most Senior Assessor in the said service of the Western Province having the required post graduate qualification, preferred an application to the 6th Respondent through the head of his Department. (P-12)

However the 1st Respondent by letter dated 20th October 2015 addressed to the Petitioner, had informed him, that the Petitioner's request to hold an interview to consider his application to fill the existing vacancy of Deputy Commissioner would not arise since the filling of vacancies in the said cadre is done in terms of Clause 9.1 of the existing service minute. (P-13C)

In this regard Petitioner had further submitted that the filling of vacancy in the cadre of Deputy Commissioner in terms of Clause 9.1 of the existing service minute is completely based on seniority

alone, and therefore it is not in conformity with the terms of Public Administrative Circular 6 of 2006 and in the said circumstances he lodged a complaint at the Human Rights Commission. (P-14A)

In support of his contention, Petitioner had produced the existing service minute of the Provincial Revenue Service of the Western Province marked P-8, a covering letter addressed to Deputy Commissioners Colombo, Maharagama, Kalutara, Gampaha and Stamp Division by the Provincial Revenue Commissioner Western Province dated 11.07.2013 marked P-10 and the annexed draft service minute for the Provincial Revenue Service -Western Province marked P-10B, a model scheme of recruitment by the National Pay Commission marked P-11A and a letter dated 02.01.2016 addressed to the Provincial Revenue Commissioner from the Chief Secretary of the Western Province under the heading "බස්නහිර පළාතේ ආදායම් සේවා ව්‍යවස්ථාව රාජ්‍ය පරිපාලන චක්‍රලේඛ 06/2006 අනුව ගැලපීම" marked P-17.

According to P-8, the existing service minute, procedure in promotion to the post of Class I Deputy Commissioner is identified under section 9 as follows;

> "I පන්තියේ නියෝජ්‍යය කොමසාරිස් තනතුරට උසස් කිරීම
>
> පළාත් ආදායම් සේවයේ ජ්‍යෙෂ්ඨත්වය පදනම් කරගෙන සතුටුදායක සේවා කාලයක් සහිත II පන්තියේ I ශ්‍රේණියේ ජ්‍යෙෂ්ඨ තක්සේරු නිළධාරීන් උසස් කිරීමෙන් බඳවාගනු ලැබේ."

In P-17, the Chief Secretary of the Western Province had observed the lapses in the above provision as follows;

> ..... "එමෙන්ම රා. ප. ච 6/2006 අනුව එක් එක් වැටුප් ක්‍රම යටතේ බඳවා ගැනීම සිදුකිරීමට අදාළ අවම අධ්‍යාපන සුදුසුකම් කවරේද යන්නත්, ශ්‍රේණිගත උසස්වීම් ලබාගැනීමේදී සපුරා ගතයුතු සුදුසුකම් පිලිබඳවත් නිර්ණායක හඳුන්වාදී ඇති අතර, දැනට ක්‍රියාත්මක සේවා ව්‍යවස්ථාවේ එම නිර්ණායක වලට අනුකූල නොවන අවස්ථාවන් පවතින බව නිරීක්ෂණය කරමි. උදාහරණයක් ලෙස SL I වැටුප් පරිමාණයේ තනතුරුවල II ශ්‍රේණියේ සිට I ශ්‍රේණියට උසස්වීම සඳහා ක්ෂේත්‍රයට අදාළව පශ්චාත් උපාධියක් සම්පූර්ණ කර තිබියයුතු වන නමුත් SL I වැටුප් ක්‍රමයට අදාල තක්සේරුකරු තනතුරේ II ශ්‍රේණියේ සිට I ශ්‍රේණියට උසස්වීම් සඳහා දැනට අනුමත ආදායම් ව්‍යවස්ථාව තුල පශ්චාත් උපාධිය ලබා තිබීමේ අවශ්‍යතාව ඇතුලත්ව

නැත. එබැවින් බඳවා ගැනීමේ හා උසස් කිරීමේ ක්‍රමවේදයක් හා සුදුසුකම රා. ප. ච 6/2006 හි නිර්ණායක වලට ගලපෙන අයුරින් සකස් විය යුතුය."

According to P-10B the draft service minute circulated for calling observation from the Deputy Commissioner on 11.07.2013, measures were already recommended for the lapses identified by the Chief Secretary in the year 2017, in the following manner.

11.2 II වැනි ශ්‍රේණියේ සිට I වැනි ශ්‍රේණියට උසස් කිරීම:

11. 2. 1 සපුරාලිය යුතු සුදුසුකම්:

i. නිළධර ගණයේ II වැනි ශ්‍රේණියේ වසර හත (07) ක සක්‍රීය හා සතුටුදායක සේවා කාලයක් සම්පූර්ණ කර තිබීම හා නියමිත වැටුප් වර්ධක 07ක් උපයාගෙන තිබීම

ii. දෙවන කාර්යක්ෂමතා කඩඉමේ පරීක්ෂණය නියමිත දිනට සමත්වීම

iii. උසස් කිරීමේ දිනට පූර්වාසන්නතම වසර 05 තුල සතුටුදායක සේවා කාලයක් සම්පූර්ණාකර තිබීම

iv. අනුමත කාර්යසාධන ඇගයීමේ පටිපාටිය අනුව උසස්වීම් සඳහා පෙරාතුව වූ වසර 07 තුළම සතුටුදායක මට්ටමට හෝ ඊට ඉහළ කාර්යසාධනයක් පෙන්නුම්කර තිබීම

v. විශ්ව විද්‍යාල ප්‍රතිපාදන කොමිෂන් සභාව විසින් පිළිගත් විශ්ව විද්‍යාලයකින් හෝ උපාධි ප්‍රධානය කිරීමේ ආයතනයක් වශයෙන් විශ්ව විද්‍යාල ප්‍රතිපාදන කොමිෂන් සභාව විසින් පිළිගෙන ඇති ආයතනයකින් හෝ පළාත් රාජ්‍ය සේවා කොමිෂන් සභාව විසින් පිළිගත් උසස් අධ්‍යාපන ආයතනයකින් 07 පරිශිෂ්ඨයේ සඳහන් විෂයයන්ගෙන් කවර විෂයකට හෝ අයත් විෂය ක්ෂේත්‍රයකින් පශ්චාත් උපාධියක් ලබා තිබීම"

Whilst adverting to the requirements under Public Administration Circular 6 of 2006, the Petitioner had further submitted that the 1st Respondent and his predecessors and the 6th Respondent had taken steps to implement the provisions of the Public Administration Circular 6/2006 within the Western Province with regard salary structures in compatible with the salaries of the employee of the Central Government and took up the position that it is the duty of the 1st and the 6th Respondent to implement the rest of the requirements under the said circular.

In this regard I am mindful of the decision by this court in ***Kamalawathie and Others Vs. The Provincial Public Service Commission, North-Western Province and Others (2001) 1 Sri LR 1*** where *Fernando (J)* had observed,

> "While powers in respect of education have been devolved to provincial councils, those powers must be exercised in conformity with national policy. Once national policy has been duly formulated in respect of any subject, there cannot be any conflicting provincial policy on that subject."

As further observed by me, the Respondent before this court, did not challenged the requirement to implement the provisions of Public Administration Circular 6 of 2006 within the Western Province but took up the position that there is a delay in implementing some of the provisions of the said circular.

The 1st Respondent had responded to the complaint of the Petitioner in the following manner.

a) The new salary structure introduced subsequent to the Public Administration Circular 6/2006 was included in the new service minute dated 7th April 2009 which had been duly approved by the Governor of the Western Province under section 32 of the Provincial Councils Act (IRI)
b) At the time of the new service minute being introduced, the guidelines pertaining to service minutes were not issued by the Public Service Commission.
c) At the time the said service minute was implemented pursuant to Public Administration Circular 6 of 2006, there was no requirement to submit it before the National Pay Commission or the National Salaries and cadre Commission for their approval.
d) According to section 9 of the said service minute the appointment of Deputy Commissioner Class I was based on Seniority only.
e) Secretary to the Ministry of Local Government and Provincial Councils by letter dated 10.06.2013 informed the Chief Secretaries of all the Provinces to submit their observations

and recommendations to a draft service minute submitted by the Southern Provincial Council and the Chief Secretary of the Western Province by letter dated 05.07.2013 forwarded the said document to the 1st Respondent for his observations (IR2)

f) P-10B the said document was circulated among the officers of the Provincial Revenue Service by P10A

g) A daft service minute agreed by the Trade Unions and all the Provincial Revenue Commissioners was submitted to the Deputy Chief Secretary by letter dated 16.07.2013 (IR3 or IR3A)

h) Since then a large number of letters were exchange between several Government agencies including the office of the Chief Secretary Western Province, 1st Respondent, Secretary to the Western Province Governor, Department of Management Service, but until the vacancy in question occurred, i.e. the vacancy of Deputy Commissioner Provincial Revenue Service-Gampaha, there was no finality to the service minute of the Revenue Service of the Western Provincial Council (IR4-IRII)

i) In the said circumstances, the service minute introduced on 07.04 2009 was the only service minute which was in operation by that date.

j) The petitioner had submitted an application through his Superior Officer (i.e. Deputy Commissioner Revenue Service of the Western Province-Maharagama) for the above vacancy requesting to hold an interview, (P-12) but by letter dated 28.10.2015, 1st Respondent had informed the Petitioner that there is no requirement to hold an interview under the provisions of the prevailing service minute and that he had already submitted his recommendation to fill the said vacancy (P-I3C)

k) Based on the prevailing service minute, the name of the Most Senior Officer in Class II Grade I, one Mrs. K. N. K. de Silva's (Petitioner in SC FR 446/16) name was recommended to the above post by letter dated 02.04.2015 (IR28)

l) On the directives received from the Chief Secretary, an application received from the said Mrs. K. N. K. de Silva for the above post was forwarded to the Chief Secretary along with the seniority list of the Officers of the Provincial Revenue Service (IR30 and IR31). According to IR31 the Petitioners seniority was observed 8 positions below Mrs. K. N. K. de Silva. The said recommendation was approved by the Provincial Public Service until a permanent appointment is made, subject to 3 months acting with effect from 30.04.2015 and thereafter covering up the duties of the said post. (IR32)

As revealed before this Court, even up to the date the instant case was taken up for hearing, the service minute of the Revenue Service of the Western Province has not been amended to include the necessary amendments required under public Administration Circular 06/2006, including the amendment for the promotion from Grade II to Grade I, even though the Chief Secretary Western Province had observed several lapses and given directions to the 1st Respondent by letter dated 02.01.2016 (P-17).

The 1st Respondent in his affidavit filed before this court on 23rd October 2017 had taken up the position that by 10.03.2016 he had duly submitted the report by the Chief Secretary in order to amend the prevailing service minute but as revealed before us, so far the service minute had not been amended.

Position taken by the Petitioner in SC FR 446/2016

The Petitioner in SC FR 446/2016 was the Most Senior Assessor (Class II Grade I) belonging to the Provincial Revenue Service -Western Province at the time a vacancy had occurred in the post of Deputy Commissioner (Class I) of the Western Provincial Revenue Service on 29.04.2015.

As submitted by the Petitioner, by 2nd April 2015, the 1st Respondent had written the 3rd Respondent, Chief Secretary of the Western Provincial Council with a copy to the 4th Respondent, the Secretary to the Western Provincial Public Service Commission, that there will be vacancy in the Post of Deputy Commissioner of the Western Provincial Revenue Service and recommending the Most Senior Officer in Class II Grade I with a satisfactory service, namely the Petitioner, under section 9.1 of the service minute of the Western Provincial Revenue Service (P-7). Several letters exchanged with regard to the filling of the said vacancy was produced marked P-8 to P-14 by the Petitioner before this court.

The Petitioner was appointed to the Post of Deputy Commissioner in the Provincial Revenue Service until a permanent appointment is made, subject to 3 months acting and thereafter on a covering up basis with effect from 30.04.2015 by 1R32 filed along with the objection in the Fundamental Rights application SC FR 227/2016 and I have already referred to the above in this Judgment.

The Petitioner dissatisfied with her not being appointed to the permanent cadre under section 9.1 of the service minute of the Provincial Revenue Service of the Western Province, had first complaint to the Human Rights Commission and thereafter filed the instant application for alleged violation under Article 12 (1) and 14 (1) of the Constitution.

However as referred to in this Judgment, by the time the instant application was filed, SC FR 227/2016 had already been filed and leave to proceed had been granted on 03.01.2017 with an interim order preventing the filling of vacancy in the cadre of Deputy Commissioner of Provincial Revenue Service in Western Province. When the instant application was supported for leave to proceed on 27.03.2017, the said interim order was in operation.

Both the Petitioners is SC FR 227/2016 and SC FR 446/2016 argued legitimate expectation of them being appointed to the post of Deputy Commissioner in the Provincial Revenue Service, with the vacancy occurred in the said service with effect from 30.04.2015.

The Petitioner in SC FR 227/2016 claimed legitimate expectation on state policy that required an amendment to the remaining scheme of Recruitment and the draft scheme of Recruitment which was in the calculation since 2013.

However, the positions of the Petitioner in SC FR 446/2016 was based on the Scheme of Recruitment which was in operation at the time the vacancy occurred, since she was the most senior officer in Class II Grade I with a satisfactory service.

In the case of ***Siriwardana Vs. Seneviratne and Others SC FR 589/2009*** SC minute dated 10.03.2011 and ***2011 [2] BLR 336*** *Shirani Bandaranayake J* (as she then was) observed the following requirements in identifying the presence of legitimate expectation in alleged violation of Article 12 (1) of the Constitution

a) A careful consideration of the doctrine of legitimate expectation, clearly shows that, whether an expectation is legitimate or not is a question of fact. This has to be decided not only on the basis of the application made by the aggrieved party before court, but also taking into consideration whether there had been any arbitrary exercise of power by the administrative authority in question.
b) Accordingly, the question that would have to be looked into would be as to whether there was a promise given to the Petitioner or a regular procedure that future vacancies would be filled on the basis of a previously held examination on which there had been selectins made on the results of the said examination
c) The applicability of the doctrine of legitimate expectation imposes in essence a duty to act fairly
d) More hope or an expectation cannot be treated as having a legitimate expectation.

In the case of ***Kurukulasooriya Vs. Edirisinghe and Others SC FR 577/209*** SC Minute 23.02.2011 and ***2012 BLR 66*** *Shirani Bandaranayake J* (as she then was) had further observed;

> "Legitimate expectation has been described as a concept which derives from an undertaking given by someone in authority. There is no compulsion for such an undertaking to be in written formula, but would be sufficient if that could be known through the surrounding circumstances."

In the absence of any promise or undertaking that the draft Scheme of Recruitment would give effect to, at the time the vacancy occurred, it is also important to consider the effect of the draft Scheme of Recruitment with the employees who will be affected by the said draft, if it is implemented by the employer. The above position was considered in the case of,

In ***R (Bancoult) Vs. Secretary of State for Foreign and Commonwealth Affairs (No. 2) [2008] 61, [2009] 1 AC 465*** as follows;

> "The legitimate expectation may entail either
>
> 1) No more than that the decision-maker will take his existing policy into account or
> 2) An obligation on the decision-maker to consult those affected before changing his policy or
> 3) An obligation for the decision-maker to confer a substantive benefit on an identified person or group
>
> Those categories represent an ascending hierarchy which must be reflected in the precision, clarity and irrevocability of any alleged representation or promise on which the expectation is said to be based, to rely successfully on a substantive expectation a claimed must be able to show that the promise was ambiguous, clear and devoid of relevant qualification, that it

> was made in favour of an individual or small group of persons affected; that it was reasonable for the claimant to rely on it, and that he did rely on it generally, but not invariably, to his detriment."

This position was once again considered by this court in ***Dayarathne Vs. Minister of Health and Indigenous Medicine [1999] 1 Sri LR 393*** as follows;

> "When a change of policy is likely to frustrate the legitimate expectations of individuals, they must be given an opportunity of stating why the change of policy should not affect them unfavourably. Such procedural rights have an important bearing on the protection afforded by Article 12 of the Constitution against unequal treatments arbitrarily, invidiously, irrationally or otherwise unreasonably dealt out by the Executive."

When considering the matters already discussed in this Judgment it is observed by me that the legitimate expectation, the Petitioner in SC FR 227/2016 relied upon, is a mere expectation based on the change of policy, which was not implemented at the time the vacancy occurred. His claim that the Respondents have failed to implement the said recommendations, has no bearing on his case before us. In these circumstances, I hold that the Petitioner in SC FR 227/2016 has failed to establish his case before this court.

As further discussed in this Judgment, at the time the Petitioner in SC FR 446/2016 has supported her case before this court, SC FR 227/2016 had already been supported and a stay order preventing the Respondents (are same in both cases) filling the existing vacancy for the post of Deputy Commissioner- Provincial Revenue Service, and the said vacancy could not be filled pending SC FR 227/2016 before this court. As further submitted by the Respondents in SC FR 446/2016 before this court, the 1st Respondent had in fact recommended the name of the Petitioner in SC FR 446/2016 being the most Senior Officer in Class II Grade I with a satisfactory service to fill the said vacancy. In

these circumstances I see no basis to conclude that the Respondents before us had acted in violation of the Fundamental Rights guaranteed under Article 12 (1) of the Petitioner in SC FR 446/2016.

Both Applications before this court are accordingly dismissed.

The Petitioners to bear their costs.

Judge of the Supreme Court

Justice Priyantha Jayawardena PC

I agree,

Judge of the Supreme Court

Justice L. T. B. Dehideniya

I agree,

Judge of the Supreme Court