SRI LANKA SUPREME COURT **Judgements Delivered (2021)**

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Judgments Delivered in 2021

16/ 12/ 21	SC Case No. SC/CHC/ 35/2008	MMBL Teas (Pvt) Ltd., No. 300, Galle Road, Colombo 3. PLAINTIFF Vs 1. British Ceylon Produce Export (Pvt) Ltd., No. 351/1, Dewanampiyatissa Mawatha, Colombo 10. 2. Abdul Hafeel Ahamed Abbas, No. 619/12, Baseline Road, Colombo 09, Presently of No. 573, Sudarma Mawatha, Wanawasala, Kelaniya. 3. Najiur Rahman Abbas, No. 619/12, Baseline Road, Colombo 09. DEFENDANTS AND NOW MMBL Teas (Pvt) Ltd., No. 300, Galle Road, Colombo 3. PLAINTIFF-APPELLANT Vs 1. British Ceylon Produce Export (Pvt) Ltd., No. 351/1, Dewanampiyatissa Mawatha, Colombo 10. 2. Abdul Hafeel Ahamed Abbas, No. 619/12, Baseline Road, Colombo 09, Presently of No. 573, Sudarma Mawatha, Wanawasala, Kelaniya. 3. Najiur Rahman Abbas, No. 619/12, Baseline Road, Colombo 09. DEFENDANT-RESPONDENTS
16/ 12/ 21	S.C.(F.R.) Application No. 269/2021	01. Rajaye Thakserukaruwange Sangamaya rcfha ;lafiarelrejkaf.a ix.uh (Government Valuers Association) No.146/C/3, 4th Lane, Rajasinghe Mawatha, Korathota, Kaduwela. 02. D. M. Senevirathna General Secretary, Rajaye Thakserukaruwange Sangamaya (Government Valuers Association) No.146/C/3, 4th Lane, Rajasinghe Mawatha, Korathota, Kaduwela. And 218/39, Moragahawatte, Yakahatuwa, Horampella,Minuwangoda. 03. K. G. Nevil Indrajeewa 146/C/3, 4th Lane, Rajasinghe Mawatha, Korathota, Kaduwela. 04. D. Keerthi Abeysekera, 7/6, Pragathi Mawatha, Katuwana Road, Homagama. 05. N. S. Lakshman Rajapaksha No.6A, G. H. Perera Mawatha, Raththanapitiya, Boralesgamuwa. 06. R.L.Jjayantha, 59/12, School Lane, Rukmale, Pannipitiya. Petitioners Vs. 1. P. P. D. S. Muthukumarana Government Chief Valuer, 748, Maradana Road, Colombo 10. 2. Hon. Mahinda Rajapaksa, Minister of Economic Policies & Plan Implementation Ministry of Economic Policies & Plan Implementation 3. Anusha Palpita Secretary, Ministry of Economic Policies & Plan Implementation 04. S. R. Attygalle, Secretary to the Ministry of Finance Ministry of Finance, The Secretariat, Colombo 01. 05. Jagath Balapatabendi Chairman, Public Service Commission. 06. Indrani Sugathadasa, Member, Public Service Commission. 07. C. R.C. Ruberu Member, Public Service Commission. 08. A.L.M. Saleem, Member, Public Service Commission. 09. Leelasena Liyanagama, Member, Public Service Commission. 10. Dian Gomes Member, Public Service Commission. 11. Dilith Jayaweera, Member, Public Service Commission. 12. W. H. Piyadasa, Member, Public Service Commission. 13. M. A. B. Daya Senarath, Secretary. Public Service Commission, All 5th to 13th Respondents at Public Service Commission, No.1200/9, Rajamalwatta Road, Battaramulla. 14. Hon. Attorney General, Attorney General’s Department, Colombo 12. Respondents

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16/12/21	SC Appeal 172/16	Kalukapuge Thomas Perera, 612, Desingghhe Mawatha, Thalangama South, Battaramulla Plaintiff Vs. 1. Kalukapuge Engalthina, 2. Kalukapuge Simiyan, Both of No.612, Desingghhe Mawatha, Thalangama South, Battaramulla 3.Lanka Lands Company Ltd No.347, Union Place, Colombo 02 Defendents AND BETWEEN Lanka Lands Company Ltd No.347, Union Place, Colombo 02 3rd Defendant Appellant Vs. Kalukapuge Thomas Perera, 612, Desinghe Mawatha, Thalangama South, Battaramulla Plaintiff-Respondent (Deceased) Kalukapuge Karthelis Perera 622/A, Desinghe Mawatha, Thalangama South, Battaramulla Substituted Plaintiff -Respondent 1. Kalukapuge Engalthina, 2. Kalukapuge Simiyan, Both of No.612, Desinghe Mawatha, Thalangama South, Battaramulla 1st and 2nd Defendant-Respondents AND BETWEEN Communication and Business Equipment (Pvt) Ltd, (Now known as Apogee International(Pvt) Ltd) No.99/6 Rosmead Place, Colombo 07 Petitioner Vs. Lanka Lands Company Ltd, (Now not a legal person) No.347, Union Place, Colombo 02 3rd Defendant- Appellant - Respondent Kalukapuge Thomas Perera, No.612, Desinghe Mawatha, Thalangama South Plaintiff- Respondent-Respondent (Deceased) Kalukapuge Karthelis Perera No.622/A, Desinghe Mawatha, Thalangama South Substituted Plaintiff-Respondent -Respondent 1. Kalukapuge Engalthina, 2. Kalukapuge Simiyan, Both of No.612, Desinghe Mawatha, Thalangama South, 1st and 2nd Defendant-Respondent - Respondents AND NOW BETWEEN Communication and Business Equipment (Pvt) Ltd, (Now known as Apogee International(Pvt) Ltd) No.99/6 Rosmead Place, Colombo 07 Petitioner-Petitioner Vs. Lands Company Ltd, (Now not a legal person) No.347, Union Place, Colombo 02 3rd Defendant-Appellant-Respondent -Respondent-Respondent Kalukapuge Thomas Perera No.612, Desinghe Mawatha, Thalangama South Plaintiff- Respondent-Respondent -Respondent (Deceased) Kalukapuge Karthelis Perera No.622/A, Desinghe Mawatha, Thalangama South Substituted Plaintiff-Respondent -Respondent-Respondent 1. Kalukapuge Engalthina, 2. Kalukapuge Simiyan, Both of No.612, Desinghe Mawatha, Thalangama South, 1st and 2nd Defendant-Respondent - Respondent-Respondents

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16/ 12/ 21	SC Appeal: 11/2013	Pannala Appuhamilage Kosala Surin Wickramasinghe Appearing by his next friend Panapola Kankanamlage Seetha Kumarihamy of Nawathalwatte, Thalwatte. Plaintiff Vs 1. Pannala Appuhamilage Sumanaweera Wickramasinghe 2. Pannala Appuhamilage Karunaratne Wickramasinghe 3. Pannala Appuhamilage Subadra Wickramasinghe 4. Pannala Appuhamilage Vinusha Lakmal Wickramasinghe 5. Samarasinghe Arachchige Somadasa 6. H.P. Rathnawathi 7. Praveen Wickramasinghe All of Thalangama, Ambepussa. Defendants AND Samarasinghe Arachchige Somadasa Thalangama, Ambepussa. 5th Defendant-Appellant Vs Pannala Appuhamilage Kosala Surin Wickramasinghe Appearing by his next friend Panapola Kankanamlage Seetha Kumarihamy of Nawathalwatte, Thalwatte. Plaintiff-Respondent 1. Pannala Appuhamilage Sumanaweera Wickramasinghe 2. Pannala Appuhamilage Karunaratne Wickramasinghe 3. Pannala Appuhamilage Subadra Wickramasinghe 4. Pannala Appuhamilage Vinusha Lakmal Wickramasinghe 6. H.P. Rathnawathi 7. Praveen Wickramasinghe All of Thalangama, Ambepussa. Defendants-Respondents AND NOW BETWEEN Samarasinghe Arachchige Somadasa Thalangama, Ambepussa. 5th Defendant-Appellant-Petitioner/ Appellant Vs Pannala Appuhamilage Kosala Surin Wickramasinghe Appearing by his next friend Panapola Kankanamlage Seetha Kumarihamy of Nawathalwatte, Thalwatte. Plaintiff-Respondent-Respondent 1. Pannala Appuhamilage Sumanaweera Wickramasinghe (deceased) 1(a) Gamaralage Sumanawathie 1(b) Kapila Rathnaweera 1(c) Thamara Kumari Rathnaweera 2. Pannala Appuhamilage Karunaratne Wickramasinghe (deceased) 2(a) Anoj Indika Wickramasinghe 3. Pannala Appuhamilage Subadra Wickramasinghe 4. Pannala Appuhamilage Vinusha Lakmal Wickramasinghe 6. H.P. Rathnawathi 8. Praveen Wickramasinghe All of Thalangama, Ambepussa. Defendants-Respondents-Respondents
16/ 12/ 21	SC/HCCA/LA 303/2019	Suriya Arachchige Inoka Udayangani, Pebottuwa, Ratnapura. Plaintiff Vs, Kombu Mudiyanselage Thanuja Dilhani, Near the School, Pebottuwa, Ratnapura. Defendant And then Suriya Arachchige Inoka Udayangani, Pebottuwa, Ratnapura. Plaintiff-Appellant Vs. Kombu Mudiyanselage Thanuja Dilhani, Near the School, Pebottuwa, Ratnapura. Defendant-Respondent And Now Between Kombu Mudiyanselage Thanuja Dilhani, Near the School, Pebottuwa, Ratnapura. Defendant-Respondent-Petitioner Vs, Suriya Arachchige Inoka Udayangani, Pebottuwa, Ratnapura. Plaintiff-Appellant-Respondent

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15/12/21	S.C. Appeal No. 181/2014	1. Gayani Manohari Balasuriya (Minor) 2. Hubert Balasuriya (Next Friend) Both of No. 52, Old Road, Veralupe, Ratnapura. Plaintiffs Vs. 1. Ramanayake Arachchilage Lakshman Ramanayake. 2. Ramanayake Sarathchandra Ramanayake. 3. Ramanayake Arachchilage Appuhamy. All of No. 329/1, Kalawana Defendants AND 1. Ramanayake Arachchilage Lakshman Ramanayake. 2. Ramanayake Sarathchandra Ramanayake. 3. Ramanayake Arachchilage Appuhamy. (Deceased) 3A. Ramanayake Arachchilage Lakshman Ramanayake. 3B. Ramanayake Sarathchandra Ramanayake All of 329/1, Kalawana. Defendant-Appellants Vs. 1. Gayani Manohari Balasuriya (Minor) 2. Hubert Balasuriya (Next Friend) Both of No. 52, Old Road, Veralupe, Ratnapura. Plaintiff-Respondents AND NOW BETWEEN 1. Gayani Manohari Balasuriya (Deceased) 1(A). Wijesinhage Priyantha Anuradha Wijesinghe 1(B). Sanuka Damsath Wijesinghe Both of 1/4/D/1, Kospelawinna Road, Weraluppa, Ratnapura. Plaintiff-Respondent-Appellants Vs. 1. Ramanayake Arachchilage Lakshman Ramanayake. 2. Ramanayake Sarathchandra Ramanayake. 3. Ramanayake Arachchilage Appuhamy (Deceased) 3A. Ramanayake Arachchilage Lakshman Ramanayake. 3B. Ramanayake Sarathchandra Ramanayake All of 329/1, Near Lecam Walawwa, Ratnapura Road, Kalawana. Defendants-Appellants-Respondents
15/12/21	SC Appeal No. 46/2016	Seylan Bank PLC, No. 90, Galle Road, Colombo 03. Appellant Vs. The Commissioner General of Inland Revenue, Department of Inland Revenue, Sir Chittampalam A. Gardiner Mawatha, Colombo 2. Respondent AND NOW BETWEEN Seylan Bank PLC, No. 90, Galle Road, Colombo 03. Appellant-Appellant Vs. The Commissioner General of Inland Revenue, Department of Inland Revenue, Sir Chittampalam A. Gardiner Mawatha, Colombo 2. Respondent-Respondent

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15/ 12/ 21	S C (F R) 404/16	1. Hapuhinne Karunadhipathi Divaratne Wasala Mudiyanselage Janaka Bandara Hapuhinna, No. 128/7, Kalugala Road, Katugastota. 2. Liyana Arachchige Ravi Samantha Kosala, C10, Police Quarters, Courts Road, Gampaha. 3. Pradeep Lakshman Wettasinghe, No. 327/33, Sethsiri Uyana, Ganemulla Road, Kadawatha. 4. Gammadde Thandakkarage Ramyasiri Bokkawaladeniya, Midigama, Ahangama. 5. Jayakody Arachchige Thushitha Jayakody, No. 109/3, Kumbaloluwa, Veyangoda. 6. Harischandrage Madawa Atula Lewangama, Gonna, Kohilegedara, Pothuhera. 7. Ranasingha Arachchige Samantha Kumara, Rathupaskatiya, Diyakobala Bibila. 8. Zainul Abdeen Haleelur Rahman, No. 88/A, Al Mannar Road, Maruthamunai – 2 9. Nilmini Nihal Jayasiri Samararaja, Karandawa, Kuratihena Hettipola. PETITIONERS 1. K. W. E. Karaliyadda, Chairman, National Police Commission. 2. Ashoka Wijethilaka, Member, National Police Commission. 3. Savithree Wijesekara, Member, National Police Commission. 4. Y. L. M. Zawahir, Member, National Police Commission. 5. Gamini Nawarathne, Member, National Police Commission. 6. Tilak Collure, Member, National Police Commission. 7. G. Jeyakumar, Member, National Police Commission. 8. Secretary, National Police Commission. All of whom at the Office of the National Police Commission, Block No. 9, BMICH Premises, Baudhaloka Mawatha, Colombo 07. 9. Inspector General of Police, Police Headquarters, Colombo 01. 9A. C. D. Wickramarathne, Acting Inspector General of Police, Police Headquarters, Colombo 01. 10. Secretary, Ministry of Public Administration Local Government and Democratic Governance, Independence Square, Colombo 07. 10A. Secretary, Ministry of Public Services, Provincial Councils and Local Government, Independence Square, Colombo 07. 11. Secretary, Ministry of Law and Order and Southern Development, Floor – 13, ‘Sethsiripaya’, (Stage 11), Battaramulla. 11A. Secretary Ministry of Defence, No. 15/5, Baladaksha Mawatha, Colombo 03. 12. Hon. Sagala Rathnayaka, (Former) Minister of Law and Order and Southern Development, Ministry of Law and Order and Southern Development, Floor – 13, ‘Sethsiripaya’, (Stage 11), Battaramulla. 12A. Minister of Defence, Ministry of Defence, No. 15/5, Baladaksha Mawatha, Colombo 03. 13. Secretary to the Cabinet of Ministers, Cabinet Office, The Republic Building, Colombo 01. 14. Hon. Attorney General, Attorney Generals Department, Colombo 12. RESPONDENTS

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15/ 12/ 21	S C (F R) 383/2016	1. Kaluwahandi Garwin Premalal Silva, Galle Road, Devinigoda, Rathgama. 2. Siyabalapitiyage Don Kusum Chandra Siyabalapitiya, No. 253, Samadi Mawatha, Welagedara Uyana, Kurunegala. 3. Ranasinghe Patikiri Koralalage Anura Wasantha Kumara Ranasinghe, No. 90/5, Ranasinghe Mawatha, Meegahawatta, Siyambalape. 4. Diwale Mahagedara Nilupul Chandana Somasinghe, No. 53/01, Bodhiyangana Mawatha, Bowala. 5. Mohammed Ramzil Noordeen, No. 113, Diddeniya Watta, Dambokka, Boyagane. 6. Mangala Saman Kumara Wickramanayake, Balapaththawa, Awissawella Road, Galigamuwa Town. 7. Doowage Chanaka Pradeep Kumarasinghe, Perakum Mawatha, Medalanda Watta, Kurunegala. 8. Dewanarayanage Ravindra Sampath Dharmadasa, No. 260, Hulangamuwa Road, Matale. 9. Hettiarachchige Nevil Verginton De Silva, No. 124/4/A, Bank Place, Himbutana, Mulleriyawa. 10. Hettiarachchige Don Kamal Sanjeewa Perera, No. 795, Kularathna Mawatha, Colombo 10. 11. Hettiarachchi Halpe Kankanamlage Jagath Chaya Samarasinghe, No. 39/06, Wakunagoda Road, Galle. 12. Welivita Vithanalage Don Gnanabandu Samanthilake, No. 04/05, Police Quarters, Maligawatte, Colombo 10. 13. Lalith Priyantha Warnakulasooriya, No. 20, Kirula Place, Colombo 05. 14. Hemantha Chamindra Ovitigama, No. 177/7, Kalapaluwawa, Rajagiriya. PETITIONERS Vs. 1. K. W. E. Karaliyadda, Chairman National Police Commission. 1A. S. C. S. Fernando, Chairman, National Police Commission. 2. Ashoka Wijethilaka, Member, National Police Commission. 2A. S. Liyanagama, Member, National Police Commission. 3. Savithree Wijesekara, Member, National Police Commission. 3A. A. S. P. S. P. Sanjeewa, National Police Commission. 4. Y. L. M. Zawahir, Member, National Police Commission. 4A. N. S. M. Samsudeen, Member, National Police Commission 5. Gamini Nawathne, Member, National Police Commission. 5A. M. P. P. Perera, Member, National Police Commission. 6. Tilak Collure, Member, National Police Commission. 6A. G. Wickramage, Member, National Police Commission. 7. G. Jeyakumar, Member, National Police Commission. 7A. T. P. Paramaswaran, Member, National Police Commission. 8. Secretary, National Police Commission. All of whom at the Office of the National Police Commission, Block No. 9, BMICH Premises, Baudhaloka Mawatha, Colombo 07. 9. C. D. Wickramathne, Inspector General of Police, Police Headquarters, Colombo 01. 10. Secretary Ministry of Public Administration, Local Government and Democratic Governance, Independence Square, Colombo 07. 10A. Secretary, Ministry of Public Services, Provincial Council and Local Government, Independence Square, Colombo 07. 11. Secretary, Ministry of Law and Order and Southern Development, Floor -13, 'Sethsiripaya', (Stage II), Battaramulla. 11A. Secretary, Ministry of Defence, No. 15/5, Baladaksha Mawatha, Colombo 03. 11B. Secretary, Mininstry of Public Security, "Suhurupaya" Battaramulla. 12. Hon. Sugala Rathnayaka, (Former) Minister of Law and Order and Southern Development, Ministry of Law and Order and Southern Development, Floor-13, 'Sethsiripaya', (Stage II) Battaramulla. 12A. Minister of Defence

15/ 12/ 21	S C (F R) 350/2016	1. Saman Ratnayake, 11/4, Jeswel Place, Mirihana, Nugegoda. 2. Suresh Prasanna Kumara Warnasooriya, 17, Tourbo Housing Scheme, Pitawella Road, Boralesgamuwa. 3. Janaka Indrajit de Alwis Goontileke, 35, Nanda Mawatha, Nugegoda. 4. Liyanage Samansiri Sigera, No. 232/01/A, Makola South, Makola. 5. Kariyawasam Don Anandasiri Weerasinghe, 17/2, Railway Station Lane, Udahamulla, Nugegoda. PETITIONERS Vs. 1. National Police Commission 2. Siri Hettige, (Chairman) 3. P. H. Manatunga, (Member) 4. Savithree Wijesekara, (Member) 5. Y. L. M. Zawahir, (Member) 6. Anton Jayanadan, (Member) 7. Tilak Collure, (Member) 8. Frank de Silva, (Member) 9. N. Ariyadasa Cooray, (Secretary) 1st to 9th are of National Police Commission, Block No. 9 BMICH Premises, Baudhaloka Mawatha, Colombo 07. 10. Pujith Jayasundara, Inspector General of Police, Police Headquarters, Colombo 01. 11. B. M. Basnayaka, Chairman, Committee to inquire into Political Victimization, Ministry of Law and Order and Southern Development, Floor No. 13, Stage II, Sethsiripaya, Battaramulla. 12. Neil Hapuhinne, Secretary, Committee to inquire into Political Victimization,1. National Police Commission 2. Siri Hettige, (Chairman) 3. P. H. Manatunga, (Member) 4. Savithree Wijesekara, (Member) 5. Y. L. M. Zawahir, (Member) 6. Anton Jayanadan, (Member) 7. Tilak Collure, (Member) 8. Frank de Silva, (Member) 9. N. Ariyadasa Cooray, (Secretary) 1st to 9th are of National Police Commission, Block No. 9 BMICH Premises, Baudhaloka Mawatha, Colombo 07. 10. Pujith Jayasundara, Inspector General of Police, Police Headquarters, Colombo 01. 11. B. M. Basnayaka, Chairman, Committee to inquire into Political Victimization, Ministry of Law and Order and Southern Development, Floor No. 13, Stage II, Sethsiripaya, Battaramulla. 12. Neil Hapuhinne, Secretary, Committee to inquire into Political Victimization, Ministry of Law and order and Southern Development, Floor No. 13, Stage II, Sethsiripaya, Battaramulla. 13. Ravi Wijegunawardana, Member, Committee to inquire into Political Victimization, Ministry of Law and order and Southern Development, Floor No. 13, Stage II, Sethsiripaya, Battaramulla. 14. J. Sumith Abeysinghe, Secretary to the Cabinet, Republic Square, Sir Baron Jayathilaka Mawatha, Colombo 01. 15. P. Wijeweera, Secretary, Ministry of Law and order and Southern Development, Floor No. 13, Stage II, Sethsiripaya, Battaramulla. 16. J. J. Rathnasiri, Secretary – Ministry of Public Administration and Management, Independent Square, Colombo 07. 17. S. A. D. M. P. Gunasekara, 43/44, Field Garden, Navinna, Maharagama. 18. Sagala Rathnayaka, Minister of Law and order and Southern Development, Ministry of Law and order and Southern Development, Floor No. 13, Stage II, Sethsiripaya, Battaramulla. 19. Hon. Attorney General, Department of Attorney General, Colombo. RESPONDENTS

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15/ 12/ 21	S C (F R) 336/2016	1. G. T. D. Nishantha Kumara, Kahagollawatte, Pol Abeygoda, Ussapitiya. & 43 others PETITIONERS vs. 1. J. P. Wijeweera, Secretary, Ministry of Law and Order and Southern Development, Floor No. 13 Stage II Sethsiripaya, Battaramulla. & 73 others RESPONDENTS
14/ 12/ 21	SC Appeal 208/2012	Veerasamy Sivathasan Pillaiyar Kovil, Uppukulam, Mannar. 1st Accused – 1st Appellant – Appellant Vs. Honourable Attorney General Attorney General's Department, Colombo 12. Complainant – Respondent – Respondent
14/ 12/ 21	SC /FR/ Application No. 83/2018	Sriyanee Dhammika Kumari Semasinghe, 424/16, Samagi Mawatha, Hokandara. Petitioner Vs, 1. Mr. Dharmasena Dissanayaka, Chairman, 2. Mr. A. Salam Abdul Waid, Member 2a. Prof. Hussian Ismail, Member 3. Ms. D. Shirantha Wijayatilaka, Member 3a. Ms. Sudarma Karunarathna, Member 4. Dr. Prathap Ramanujam, Member 5. Mrs. V. Jegarasasingam, Member 6. Mr. Santi Nihal Seneviratne, Member 6a. Mr. G. S. A. de. Silva P.C, Member 7. Mr. S. Ranugge, Member 8. Mr. D. L. Mendis, Member 9. Mr. Sarath Jayathilaka, Member 10. Mr. H. M. Gamini Seneviratna, Secretary, 10a. M. A. B. Daya Senarath, Secretary, 11. H. A. D. C. Jayasekera, Senior Assistant Secretary, The 1st to 11th Respondents of; Public Service Commission, No. 1200/9, Rajamalwatte Road, Battaramulla. 12. Mr. Sarath Dissanayake, Director General Overseas, Administration Division. 12a. Mr. M. K. Pathmanathan, Additional Director General. 13. Mr. Prasad Kariyawasam, The Secretary, 13a. Mr. Ravinatha Aryasinha, The Secretary, 13b. Admiral Prof. Jayanath Colombage, Secretary, Foreign Ministry The 12th to 13th Respondents of; Ministry of Foreign Affairs, The Public Building, Colombo 01. 14. Hon. Attorney General, Attorney General's Department, Colombo 12. Respondents

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14/12/21	SC/APPEAL 44/15	1. Rupasinghe Arachchige Don Ananda, Kumara Rupasinghe of Mawalgama, Waga.(Deceased) 1a. Welikala Lalitha 1b. Roshan Chinthala Rupasinghe 1c. Roshan Lakmal Rupasinghe all of 128/A, Miriyawatte, Mawalgama, Waga 2. Rupasinghe Arachchige Don Sarath Kumara Ruupasinghe of Mawalagama, Waga. 3. Rupasinghe Arachchige Don Esonsingho of Kudagama, Avissawella. 3a. Rupasinghe Arachchige Don Robert Rupasinghe. PLAINTIFF -VS- 1. Rupasinghe Arachchige Don Jayawardane Rupasinghe. 2. Rupasinghe Arachchige Don Albertsinghe of Mawalgama, Waga. 3. Rupasinghe Arachchige Dona Violet. 4. Hewawasam Puwakpitiyage don Karunarathne. 5. Rupasinghe Arachchige Don Leelarathene, and 15 others Defendants. DEFENDANTS 1. RupasingheArachchige Don Ananda, Kumara Rupasinghe of Mawalgama, Waga.(Deceased) 1a. WelikalaLalitha 1b. Roshan ChinthalaRupasinghe 1c. Roshan LakmalRupasinghe all of 128/A, Miriyawatte, Mawalgama, Waga 2. Rupasinghe Arachchige Don Sarath Kumara Ruupasinghe of Mawalagama, Waga. 3. Rupasinghe Arachchige Don Esonsingho of Kudagama, Avissawella. 3a. Rupasinghe Arachchige Don Robert Rupasinghe. PLAINTIFF-RESPONDENTS 1. Rupasinghe Arachchige Don Jayawardane Rupasinghe. 2. Rupasinghe Arachchige Don Albertsinghe of Mawalgama, Waga. 3. Rupasinghe Arachchige Dona Violet. 4. Hewawasam Puwakpitiyage don Karunarathne. 5. Rupasinghe Arachchige Don Leelarathene DEFENDANTS -RESPONDENTS AND BETWEEN B.A. Piyasena of Mawalagama , Waga DEFENDANT-APPELLANT- PETITIONER Vs. Tharanga Sumuduni Rupasinghe of 'Thusitha',Mawalgama, Waga. Disclosed Defendant Respondent Seeking to be substitution in place of the deceased Rupasinghe Arachchige Don Jayawardena Rupasinghe (1st Defendant –Respondent) and 20 other Defendant Respondents as per the caption. AND NOW IN SUPREME COURT BETWEEN B.A. Piyasena of Mawalagama , Waga 9THDEFENDANT-APPELLANTPETITIONER- PETITIONER Vs. 1. RupasingheArachchige Don Ananda, Kumara Rupasinghe of Mawalgama, Waga.(Deceased) 1a. WelikalaLalitha 1b. Roshan ChinthalaRupasinghe 1c. Roshan LakmalRupasinghe all of 128/A, Miriyawatte, Mawalgama, Waga 2. Rupasinghe Arachchige Don Sarath Kumara Ruupasinghe of Mawalagama, Waga. 3. Rupasinghe Arachchige Don Esonsingho of Kudagama, Avissawella. 3a. Rupasinghe Arachchige Don Robert Rupasinghe. PLAINTIFF-RESPONDENTRESPONDENT- RESPONDENTS 1. Rupasinghe Arachchige Don Jayawardane Rupasinghe. 2. Rupasinghe Arachchige Don Albertsinghe of Mawalgama, Waga. 3. RupasingheArachchige Dona Violet. 4. HewawasamPuwakpitiyage don Karunarathne. 5. Rupasinghe Arachchige Don Leelarathene 6. Rupasinghe Arachchige Don Piyasasa Rupasinghe of Mabula, Waga (Deceased) 6a. Rupasinghe Arachchige JanakaRupasinghe of 15 Waga, Kahahena. 7. Keerthisena Jayasinghe of Mawalgama, Waga. 8. Don Thomas Rupasinghe of Mawalagama, Waga. 10. Rupasinghe Arachchige Dona Susilawathie Nee Bamunu Arachchige Thilakarathne of 30/3, Mawathagama, Homagama. 11. RupasingheArachchigeLilinona of School Lane, Galagedara

12/12/21	S.C. Appeal No. 92/2020	Trans Orbit Global Logistics (Pvt) Limited, No. 260/5B, 1st Floor, Dr. Danister De Silva Mawatha, Colombo 09. Plaintiff Vs. People's Bank, No. 75, Sir Chittampalam A. Gardiner Mawatha, Colombo 02. Defendant AND NOW BETWEEN Trans Orbit Global Logistics (Pvt) Limited, No. 260/5B, 1st Floor, Dr. Danister De Silva Mawatha, Colombo 09. Plaintiff-Appellant Vs. People's Bank, No. 75, Sir Chittampalam A. Gardiner Mawatha, Colombo 02. Defendant-Respondent
07/12/21	SC/Appeal/186/18	In the matter of an application for Leave to Appeal made under Article 127 (2) of the Constitution of the Democratic Socialist Republic of Sri Lanka read together with Article 154P (3) (C) and section 5 C (1) and other provisions of the High Court of Provinces (Special Provisions) Act No.19 of 1990 as amended by Act No. 54 of 2006 in respect of the delivered by the Provincial High Court of the Western Province (Exercising in its Civil Appellate Jurisdiction) holden in Mount Lavinia dated 01/08/2018. Kahandawela Knitwear Industries (Pvt) Limited, 770, Pannipitiya Road, Battaramulla. Plaintiff Vs. Swan Feather (Pvt) Limited, 566, Lake Road, Boralesgamuwa Defendant THERE AFTER Kavin Polymers (Pvt) Limited, 566, Lake Road, Boralesgamuwa Claimant Vs. Kahandawela Knitwear Industries (Pvt) Limited, 770, Pannipitiya Road, Battaramulla. Plaintiff – Respondent Supreme Court Case No. SC/Appeal/186/18 HCCA Mt.Lavinia Case No. WP/HCCA/MT/44/2017/LA DC Mt.Lavinia Case No. 4116/03/M 2 Swan Feather (Pvt) Limited, 566, Lake Road, Boralesgamuwa Defendant – Respondent AND THERE AFTER Kavin Polymers (Pvt) Limited, 566, Lake Road, Boralesgamuwa Claimant – Petitioner Vs. Kahandawela Knitwear Industries (Pvt) Limited, 770, Pannipitiya Road, Battaramulla. Plaintiff- Respondent- Respondent Swan Feather (Pvt) Limited, 566, Lake Road, Boralesgamuwa Defendant – Respondent- Respondent AND NOW BETWEEN Kavin Polymers (Pvt) Limited, 566, Lake Road, Boralesgamuwa Claimant – Petitioner – Petitioner Vs. Kahandawela Knitwear Industries (Pvt) Limited, 770, Pannipitiya Road, Battaramulla. Plaintiff-Respondent- Respondent- Respondent Swan Feather (Pvt) Limited, 566, Lake Road, Boralesgamuwa Defendant – Respondent- Respondent – Respondent
06/12/21	S.C. Appeal No. 55/2017	Ravindra Kahanda Kumara Weragama, Welgala Estate, Weragama, Kaikawela, Matale. Petitioner Vs. M.A.S. Weerasinghe, Commissioner General of Agrarian Development, Department of Agrarian Development, No. 42, Sir Marcus Fernando Mawatha, Colombo 07. Respondent AND NOW BETWEEN Ravindra Kahanda Kumara Weragama, Welgala Estate, Weragama, Kaikawela, Matale. Petitioner-Appellant Vs. M.A.S. Weerasinghe, Commissioner General of Agrarian Development, Department of Agrarian Development, No. 42, Sir Marcus Fernando Mawatha, Colombo 07. Respondent-Respondent

05/ 12/ 21	SC FR 531/2012	Lakshika Dilani Kulathunga, No.06, 1st Lane Galpotta Road, Koswatte. Petitioner Vs. 1. Sisira, Officer in Charge Community Police Unit police station Kottawa. 2. Upali Sub Inspector of Police Acting Officer in Charge police station Kottawa. 3. Mr. Saliya de Silva Senior Superintendent of Police Nugegoda Office of the Senior Superintend of Police Mirihana. 4. Senapathi Assistant Superintendent of Police Homagama South Office of the Assistant Superintend of Police Homagama. 5. Inspector General of Police, Sri Lanka Police Headquarters Colombo 12. 6. Honorable Attorney General Department of the Attorney General, Colombo 12. Respondents
30/ 11/ 21	S.C.(F.R.) Application No: 109/2021	1. Centre for Environmental Justice, (Guarantee Limited), No. 20/A, Kuruppu Road, Colombo 08. 2. Withanage Don Hemantha Ranjith Sisira Kumara, Director and Senior Advisor, Centre for Environmental Justice, No. 20 A, Kuruppu Road, Colombo 08. 3. Edirisinghe Arachchilage Sanjaya Edirisinghe, No. 30/6, Ragama Road, Kadawatha. 4. Panchali Madurangi Panapitiya, No. 565/44, Mihindu Mawatha, Malabe. 5. Weerakkdoy Appuhamilage Manoja Jayaswini Weerakkody, No. 256/34C, Ruhunupura, Thalawathugoda. Petitioners Vs. 1. Hon. Mahinda Rajapaksa, Minister of Buddhasasana, Religious and Cultural Affairs, and Urban Development and Housing, and Economic Policies and Implementation, No. 135, Srimath Anagarika Dharmapala Mawatha, Colombo 07. 2. Hon. R.M.C.B. Ratnayake, Minister of Wildlife and Forest Conservation, Ministry of Wildlife and Forest Conservation, No. 1090, Sri Jayawardenapura Mw, Rajagiriya. 3. Hon. Attorney General, Attorney General’s Department, Colombo 12. Respondents
30/ 11/ 21	SC Appeal 162/15	the matter of an Application for leave to Appeal from the judgement dated 4th August 2014 of the High Court (Civil Appeal) of North Western Province made under and in terms of the Section 5(c) of High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 0f 2006 Sadayan Kanapathi Sandrakala Kadithalamulla, Polgahawela Plaintiff Vs. Mohammed Saththas Issathul Sareena, No.10, Kurunegala Road, Bandawa, Polgahawela Defendant AND Sadayan Kanapathi Sandrakala Kadithalamulla, Polgahawela Plaintiff-Appellent Vs. Mohammed Saththas Issathul Sareena, No.10, Kurunegala Road, Bandawa, Polgahawela Defendent-Respondent IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA SC Appeal 162/15 Application No: SC HC (CA) LA 464/2014 NWP/HCCA/KUR/ 134/2010(F) DC Kurunegala Case No: 9540/M 2 AND NOW Mohammed Saththas Issathul Sareena, No.10, Kurunegala Road, Bandawa, Polgahawela Defendent-Respondent- Petitioner Vs. Sadayan Kanapathi Sandrakala Kadithalamulla, Polgahawela Plaintiff-Appellant-Respondent

29/ 11/ 21	SC/Appeal/ 113/2010	Asarappulige Solomon, of Bowatte, Yakwila Plaintiff -Vs.- 1. Herath Mudiyanselage Senaratne, 2. Herath Mudiyanselage Wijetilleke, 3. Herath Mudiyanselage Ran Menika, 4. Adhikari Mudiyanselage Wijesena, 5. Adhikari Mudiyanselage Jayasekera, 5a.Adhikari Mudiyanselage Ananda Jayaratne All of Bowatte, Yakwila Defendant AND BETWEEN Asarappulige Solomon, of Bowatte, Yakwila. Plaintiff-Appellant 4d.Adhikari Mudiyanselage Punyawathie, 4e.Adhikari Mudiyanselage Kirthi Ashoka, 5.Adhikari Mudiyanselage Jayasekera, 5a.Adhikari Mudiyanselage Ananda Jayaratne All of Bowatte, Yakwila Defendant-Respondent-Respondents
29/ 11/ 21	SC APPEAL NO: SC/ APPEAL/ 166/2018	1. D.M. Gunadasa, No. 22, Sumanatissa Mawatha, Padukka Road, Horana. 2. D.M. Wijepala, Bambaragaha Ulpatha, Kuruwitenne. Plaintiffs Vs. D.M. Somawathie alias Samawathie, 4th Mile Post, Galkotuwawatta, Ketawala, Landewela. Defendant AND BETWEEN 1. D.M. Gunadasa, No. 22, Sumanatissa Mawatha, Padukka Road, Horana. 2. D.M. Wijepala, (Deceased) Bambaragaha Ulpatha, Kuruwitenne. 2A. Senadeera Siriyalatha, 2B. Raveendra Pushpakumara, Dissanayaka, 2C. Piyal Kumara Dissanayaka, 2D. Vajira Kumara Dissanayaka, All of, Bambaragaha Ulpatha, Kuruwitenne. Plaintiff-Appellants Vs. D.M. Somawathie alias Samawathie, (Deceased) 4th Mile Post, Galkotuwawatta, Ketawala, Landewela. Defendant-Respondent D.M. Upali Kusumsiri Bandara, 4th Mile Post, Galkotuwawatta, Ketawala, Landewela. Substituted Defendant-Respondent AND NOW BETWEEN D.M. Gunadasa, No. 22, Sumanatissa Mawatha, Padukka Road, Horana. 1st Plaintiff-Appellant-Appellant Vs. 2A. Senadeera Siriyalatha, 2B. Raveendra Pushpakumara, Dissanayaka, 2C. Piyal Kumara Dissanayaka, 2D. Vajira Kumara Dissanayaka, All of, Bambaragaha Ulpatha, Kuruwitenne. Plaintiff-Appellant-Respondents D.M. Upali Kusumsiri Bandara, 4th Mile Post, Galkotuwawatta, Ketawala, Landewela. Substituted Defendant-Respondent- Respondent

28/ 11/ 21	SC Appeal No. 237/2014	Seylan Bank PLC, (formerly Seylan Bank Limited) No. 90, Galle Road, Colombo 03. Having branch at No. 315-317, Old Moor Street, Colombo 12. Plaintiff Vs. Mohamed Rasheed Mohamed Farook, No. 185, Old Moor Street, Colombo 12. Defendant AND NOW In the matter of an application under sections 754(2) and 757 of the Civil Procedure Code read together with section 5A of the High Court of the Provinces (Special Provisions) (Amendment) Act, No. 54 of 2006. Seylan Bank PLC, (formerly Seylan Bank Limited) No. 90, Galle Road, Colombo 03. Having branch at No. 315-317, Old Moor Street, Colombo 12. SC Appeal No. 237/2014 SC/HCCA/ LA: 447/14 HCCA/A/No.12/14 Case No. DDR/69/13 2 Plaintiff-Appellant Vs. Mohamed Rasheed Mohamed Farook, No. 185, Old Moor Street, Colombo 12. Defendant-Respondent AND NOW In the matter of an appeal under section 5C of the High Court of the Provinces (Special Provisions) (Amendment) Act, No. 54 of 2006. Seylan Bank PLC, (formerly Seylan Bank Limited) No. 90, Galle Road, Colombo 03. Having branch at No. 315-317, Old Moor Street, Colombo 12. Plaintiff-Appellant-Appellant Vs. Mohamed Rasheed Mohamed Farook, No. 185, Old Moor Street, Colombo 12. Defendant-Respondent-Respondent
25/ 11/ 21	SC APPEAL NO: SC/ APPEAL/ 116/2013	Mohomad Mohideen Mohomad Shakeer Mohideen, No. 57, Kandy Road, Thihariya. Plaintiff Vs. Warnakulasuriya Mahawaduge Emalin Peiris, No. 593, Havelock Road, Pamankada, Colombo 05. Defendant AND BETWEEN Warnakulasuriya Mahawaduge Emalin Peiris, (Deceased) No. 593, Havelock Road, Pamankada, Colombo 05. Defendant-Appellant Wannakuwatta Mitiwaduge Agnes Sirimawathie, No. 593, Havelock Road, Pamankada, Colombo 05. Substituted Defendant-Appellant Vs. Mohomad Mohideen Mohomad Shakeer Mohideen, No. 57, Kandy Road, Thihariya. Plaintiff-Respondent AND NOW BETWEEN Wannakuwatta Mitiwaduge Agnes Sirimawathie, No. 593, Havelock Road, Pamankada, Colombo 05. Substituted Defendant-Appellant-Appellant Vs. Mohomad Mohideen Mohomad Shakeer Mohideen, (Deceased) No. 57, Kandy Road, Thihariya. Plaintiff-Respondent-Respondent 1. Sithy Fareeda, 2. Fathima Fareesha, 3. Mohamed Rukshan, 4. Mohamed Mizran, All of, No. 66/17/2, Ali Jinnah Maatha, Thihariya. Substituted Plaintiff-Respondent-Respondents

		1. Herath Mudiyanselage Dilshan Mahela Herath, No.39, Boyagama, Peradeniya. 2. Liyanage Lakni Eshini Perera, 350/2, Sanasa Lane, Nagahawila Road, Kotikawatte. 3. Gajanayaka Mudalige Ashani Mihika Bastiansz, No. 27/6C, Deepananda Mawatha, Waidya Road, Dehiwala. 4. Galawata Henegedara Pamodya Madhubhashini Guruge Niwasa, Wattakgoda, Weligama. 5. Halpandeniya Hewage Charith Madhuranga, No.109/7 Dehiwala Road, Maharagama. 6. Kuruwalana Prabhavi Arushika Chathubashini, “Ramani”, Dharmapala Mawatha, Naththandiya. 7. Weliweriya Liyanage Don Achinthya Sahan Wijesinghe, No.42/B2, Awriyawatta, Sisila Uyana, Alubomulla, Panadura. 8. Wannakuwaththa Mitiwaduge Sachini Shehara Perera, No.42/12A, 6th Lane, Nagoda, Kalutara. 9. Nambu Nanayakkara Palliyaguruge Nayanathara Palliyaguru, “Sri Manthi”, Rikillagaskada. 10. Athapaththu Arachchige Sanduni Athapaththu, 93/46,1st Lane, Pragathipura, Madiwela, Kotte. 11. Wijendra Gamalath Acharige Karunadika Nimaya Veenavi Morayas. 270/Hettiwaththa, Thambagalla, Kakkapalliya. 12. Gamvari Naveen Tharanga “Sri Anura” Bogahawaththa. Ambalangoda. 13. Warnakulasooriya Krishmal Malintha Fernando, Kanubichchiya Dummalasuriya. 14. Wanninayake Mudiyanselage Yasara Amarashmi Kumari Wanninayaka Near the Town Board, Kurunegala Road, Anamaduwa. 15. Weeramuni Arachchilage Seneth Rashmika Deewanjana, No. 133, Hiripitiyawa, Galnewa. 16. Kondasinghepatabandilage Dulakshi Amaya Kularathna, Rathna Iron Works, Thammannawa, Hurigaswawe. 17. Kalpani Erandi Nanayakkara 316/1, Vishwakala Road, Mampe, Piliyandala. 18. Weerasinghe Mudiyanselage Sachintha Piumal , No.26/2, Dalukhinna, Dematawelhinna Badulla. 19. Rathnayaka Mudiyanselage Buddhika Prabhath Rathnayake “Buddhi”.Pahalanagahamura, Nannapurawa Bibila. 20. Adikari Arachchilage Ahinsa Dulanjani Adikari Meegahapelessa. Welipennagahamulla. 21. Pabasara Hansini Handunneththige 202/12,, Kotagedara Road, Bataketththara, Piliyandala. 22. Witharanage Neranjana Thathsarani Pieris, Neranjana Sangeetha Asapuwa, Kajuwaththa Medapura Pohoranwewa Dambulla. 23. Hansini Emali Mallikarathna No. 140/1C, Sethsiri Mawatha Thalahena Malabe. 24. Pahalagedara Hewayalage Udani Hansamala Sandawikumgama Nagahaliyedda Lolgoda. 25. Kodimarakkalage Nashen Madhuhansa Fernando 25/6, Blasius Road, Indibedda Moratuwa. 26. Welathanthrige Miran Archana Botheju Sumangala Road, Assedduma Kuliyapitiya. 27. Welisarage Hiruni Kavindya Perera No. 175/4 Gangadisigama Madapatha Piliyandala. 28. Siripalage Dilshan Madhuranga No.160, Hendegama Kebithigollewa. 29. Konasinghe Arachchilage Dinith Sachintha Sampath No.5, Panthiyawaththa, Munagama Horana. 30. Maliduwa Liyanage Navindi Tharushika N.191/2 Poramba Akuressa. 31. Madawalage Tishani Diwyangi No. 4/25, Sunrise Park Kamburugamuwa Matara. 32. Weligamage Don Kavindi Nimni Rashmika Silva No. 30, Uyanwatta, Dissagewatta Matara. 33. Ovitagala Vithanage Giranka Deshani Princess Tailor Samagi Mawatha Bathalahena Hallala Weligama. 34. Kandapeli

18/ 11/ 21	SC Appeal 06/2014	Jayasinghe Pathman Godamuna Road, Hittahatiya, Indipalegoda, Pitigagala Plaintiff Vs. Korale Kandanamge Somapala Naranowita, Porowagama Defendant Between Korale Kandanamge Somapala Naranowita, Porowagama Defendant-Appellent Vs. Jayasinghe Pathman Godamuna Road, Hittahatiya, Indipalegoda, Pitigagala Plaintiff-Respondent Now Jayasinghe Pathman Godamuna Road, Hittahatiya, Indipalegoda, Pitigagala Plaintiff-Respondent-Petitioner IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA SC Appeal 06/2014 SC/ HCCA/LA No: 136/12 SP/HCCA/GA/ 0115/2004/F DC Elpitiya Case No. 28/L 2 Vs. Korale Kandanamge Somapala Naranowita, Porowagama Defendant-Appellant-Respondent And Now Jayasinghe Pathman Godamuna Road, Hittahatiya, Indipalegoda, Pitigagala Plaintiff-Respondent-Petitioner Vs. Korale Kandanamge Somapala(deceased) Naranowita, Porowagama Defendant-Appellant Respondent 1. Korale Kankanamage Lal Pathmasiri Naranowita, Porowagama 2. Petikiri Koralalage Pemawathi Naranowita, Porowagama (Substituted)Defendant-Appellant-Respondents
15/ 11/ 21	SC Appeal 53/2021	1. K. M. Hema Celsia Fernando, No. 48, St Joseph’s Street, Negombo. 2. N. H. Lourds Sulani Jayasinghe, No. 48/1, St Joseph’s Street, Negombo. PLAINTIFFS. Vs. K. Madhuri Anuradha Rodrigo, No. 48/2, St Joseph’s Street, Negombo. DEFENDANT. AND BETWEEN 1. K. M. Hema Celsia Fernando, No. 48, St Joseph’s Street, Negombo. 2. N. H. Lourds Sulani Jayasinghe, No. 48/1, St Joseph’s Street, Negombo. PLAINTIFF - APPELLANTS. Vs. K. Madhuri Anuradha Rodrigo, No. 48/2, St Joseph’s Street, Negombo. DEFENDANT - RESPONDENT. AND NOW BETWEEN K. Madhuri Anuradha Rodrigo, No. 48/2, St Joseph’s Street, Negombo. DEFENDANT - RESPONDENT - APPELLANT. Vs. 1. K. M. Hema Celsia Fernando, No. 48, St Joseph’s Street, Negombo. 2. N. H. Lourds Sulani Jayasinghe, No. 48/1, St Joseph’s Street, Negombo. PLAINTIFF - APPELLANT - RESPONDENTS.

11/11/21	SC/FR APPLICATION 79/2016	N.K. Sooriyabandara D 30, Old Galaha road, Peradeniya. PETITIONER Vs 1. University of Peradeniya, Peradeniya. 2. Prof. Upul B. Dissanayake Vice Chancellor. 3. (b) Prof. S.H.P. Parakrama Karunaratne, Deputy Vice Chancellor. 4. (a) Dr. M. Alfred. 5. (a) Prof. O.G. Dayaratne Bandara 6. Prof. W.M. Tilakaratne. 7. Prof. Leelananda Rajapaksha. 8. Prof. V.S. Weerasinghe. 9. (a) Prof. D.K.N.P. Pushpakumara. 10. Prof H.B.S Ariyaratne 11. Prof. D.B.M. Wickramaratne. 12. (a) Prof. N.A.A.S.P. Nissanka. 13. (a) Prof. Anoma Abeyratne. 14. Prof. S.R. Kodituwakku. 15. Mrs. K.D. Gayathri M. Abeygunasekera. 16. Dr. Ranil Abeysinghe. 17. (a) Prof. C.M. Maddumabandara. 18. Mr. U.W. Attanayake. 19. (a) Prof. I.M.K. Liyanage. 20. Mr. G.S.J. Dissanayake. 21. Mr. E.H.M. Palitha Elkaduwa. 22. Mr. Upul Kumarapperuma. 23. Prof. P.B. Meegaskumbura. 24. Dr. Mohamed Thaha Ziyard Mohamed. 25. Prof. K.N.O. Dharmadasa. 26. Dr. Selvy Tiruchandran. 27. (c) Maneesha Seneviratne. 27. (i) Mr. Rawana Wijeratne. 28. Mr. Lal Wijenayake. 29. (a) Dr. M.A.J.C. Marasinghe. Dean, Faculty of Allied Health Sciences. 30. (a) Dr. J.A.V.P. Jayasinghe. Dean, Faculty of Dental Science. 31. (a) Prof. G.B. Herath. Dean, Faculty of Engineering. 32. (a) Dr. D.M.S. Munasinghe. Dean, Faculty of Veterinary Science. 33. (a) Prof. A.S. Abegunawardana. Dean, Faculty of Medicine. 34. (a) Most Ven. Niyangoda Vijithasiri Council Member. 35. (a) Mr. Samantha Rathwaththe Council Member 36. (a) Nihal Rupasinghe Council Member 37. (a) Dr. D.M.R.B. Dissanayaka Council Member 38. (a) Mr. Udayana Kirigoda Council Member 39. (a) Mr. Prasanna Gunathilaka Council Member 40. (a) Eng. Mahendra Wijepala Council Member 41. (a) Dr. Gamini Buthpitiya Council Member 42. (a) Dr. Syril Wijesurendra Council Member 43. (a) Prof. N.D. Samarawicrama Council Member 44. (a) Mr. Janaka Chaminda Warnakula Council Member 45. (a) Mr. Gamini Dissanayaka Council Member 46. (a) Prof Geri Pieris Council Member 2nd to 46(a) Respondents all of University of Peradeniya but 6th ,7th ,8th ,10th,11th ,15th ,16th ,17(a) ,18th, 19(a), 20th, 21st, 22nd, 23rd, 24th, 25th ,26th, 27(c) and 27 are no more present 29. Prof. Lakshman Wijeyaweera Faculty of Dental Sciences, University of Peradeniya, Peradeniya 30. Dr. S.B. Ekanayake. University of Peradeniya, Peradeniya. 31. University Grants Commission, No. 20, Ward Place, Colombo 07. 32. Hon. Attorney – General, Attorney – General's Department, Hulftsdorp Street, Colombo 12. RESPONDENTS

10/ 11/ 21	SC Appeal No. 79/2017	Weherage Joan Rohini Peiris Nilwala Estate, Akkara Panaha, Kimbulapitiya Road, Negombo. Plaintiff Vs. 1. Weherage Herbert Stanely Peiris 2. Weherage Helan Chandani Peiris 3. Chakrawarthige Dona Mary Inoka all of Palawiya, Puttlam 4. Hatton National Bank No.482. T.B. Jaya Mawatha,Colombo. 5. Weherage Christy Lionel Peiris 6. Weherage Roy Maxwell Peiris Palawiya, Puttlam. Defendants AND Weherage Christy Lionel Peiris Palawiya, Puttlam. 5th Defendant- Appellant Vs. Weherage Joan Rohini Peiris Palawiya, Puttlam. Plaintiff-Respondent 1.Weherage Herbert Stanly Peiris 2.Weherage Helan Chandani Peiris 3.Chakrawarthige Dona Mary Inoka Dilrukshi Both of Palawiya, Puttlam. 4.Hatton National Bank No.482. T.B.JayaMawatha,Colombo. 5.Weherage Roy Maxwell Peiris Palawiya, Puttlam. Defendants – Respondents AND NOW BETWEEN Weherage Joan Rohini Peiris Palawiya, Puttlam. Plaintiff-Respondent-Petitioner/Appellant Vs. Weherage Christy Lionel Peiris 49/5, Palawiya, Colombo Road, Palawiya, Puttlam. 5thDefendant-Appellant-Respondent 1.Weherage Herbert Stanly Peiris No.41, Colombo Road, Palawiya, Puttlam. 2.Weherage Helan Chandani Peiris No.41, Colombo Road, Palawiya, Puttlam. 3.Chakrawarthige Dona Mary Inoka Dilrukshi. No.40, Colombo Road, Palawiya, Puttlam. 4.Hatton National Bank No.482. T.B.Jaya Mawatha,Colombo 5.Weherage Roy Maxwell Peiris No.189, Chillaw Road, Daluwatotawa, Kochchikade Defendants-Respondents- Respondents
09/ 11/ 21	SC (FR) Application No. 184/2018	Herath Mudiyanselage Podi Kumarihami, No. 237, Pooja Nagaraya, Mahiyanganaya. Petitioner Vs. 1. Officer-in-Charge, Mahiyanganaya Police Station, Mahiyanganaya. 2. Senadheera, Police Officer, Mahiyanganaya Police Station, Mahiyanganaya. 3. Wimalasena, Police Officer, Mahiyanganaya Police Station, Mahiyanganaya. 4. Senior Superintendent of Police, Office of the Senior Superintendent of Police, Badulla. 5. Pujith Jayasundara, Inspector General of Police, Police Headquarters, Colombo 01. 6. Hon. Attorney General, Attorney General's Department, Hulfsdrop, Colombo 12. Respondents

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07/ 11/ 21	SC Appeal No. 24/2020	Bastian Koralalage Kingsley Rodrigo, No. 616/D, Karaththawela, Nugape, Bopitiya. Plaintiff Vs. 1. Bastian Koralalage Camillus Sunny Rodrigo, No. 616/B, Karaththawela, Nugape, Bopitiya. 2. W.D. Sumudu Madhuwantha, No. 685, Nugape, Bopitiya. 3. J. Edward Perera, Nugape, Bopitiya, Pamunugama. Defendants NOW BETWEEN 1. Bastian Koralalage Camillus Sunny Rodrigo, No. 616/B, Karaththawela, Nugape, Bopitiya. 1st Defendant-Petitioner Vs. Bastian Koralalage Kingsley Rodrigo, No. 616/D, Karaththawela, Nugape, Bopitiya. Plaintiff-Respondent 2. W.D. Sumudu Madhuwantha, No. 685, Nugape, Bopitiya. 3. J. Edward Perera, Nugape, Bopitiya, Pamunugama. Defendant-Respondents AND NOW BETWEEN 1. Bastian Koralalage Camillus Sunny Rodrigo, No. 616/B, Karaththawela, Nugape, Bopitiya. 1st Defendant-Petitioner-Petitioner Vs. Bastian Koralalage Kingsley Rodrigo, No. 616/D, Karaththawela, Nugape, Bopitiya. Plaintiff-Respondent-Respondent 2. W.D. Sumudu Madhuwantha, No. 685, Nugape, Bopitiya. 3. J. Edward Perera, Nugape, Bopitiya, Pamunugama. Defendant-Respondent-Respondents
04/ 11/ 21	SC(FR) Application No:257/16	Gayani Amitha Wickramasekara, “Dhampalle Gedara” Welpitiya, Weligama. Petitioner Vs. 1. Dharmasena Dissanayake, Chairman, Public Service Commission. 2. Salam Abdul Waid, Member, Public Service Commission. 3. D. Shiranthi Wijayatilaka, Member, Public Service Commission. 4. Dr. Prathap Ramanujam, Member, Public Service Commission. 5. V. Jegarasasingam, Member, Public Service Commission. 6. Santi Nihal Seneviratne, Member, Public Service Commission. 7. S.Ranugge, Member, Public Service Commission. 8. D.L. Mendis, Member, Public Service Commission. 9. Sarath Jayathilaka, Member, Public Service Commission. 10. H.M.G. Senevirathne, Secretary, Public Service Commission. 1st to 10th Respondents are of No:177, Nawala Road, Narahenpita, Colombo 05. 11. Mr. J.J. Ratnasiri, Secretary, Ministry of Public Administration And Management, Independence Square, Colombo 07. 12. Ms. K.V.P.M.J. Gamage, Director General of Combined Services, Ministry of Public Administration And Management, Independence Square, Colombo 07. 13. Hon. Attorney General, Attorney General’s Department, Hulftsdorp, Colombo 12. Respondents

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04/ 11/ 21	S.C. Appeal No.144/2016	1. M. A. Sugathadasa, (deceased) 1A. Chandra Jayaweera, 2. Jayaweera Arachchige Chandra Podimenike All of Barandawatta, Henduwawa. Keppetiwalana Plaintiffs Vs. Abesinghe Mudiyanselage Ranjith Gamini Abeysinghe Athuruwala Dambadeniya Defendant And 1A. Chandra Jayaweera, 2. Jayaweera Arachchige Chandra Podimenike All of Barandawatta, Henduwawa. Keppetiwalana Plaintiff-Appellants Vs. Abesinghe Mudiyanselage Ranjith Gamini Abeysinghe Athuruwala Dambadeniya Defendant-Respondent AND NOW BETWEEN 1. Abesinghe Mudiyanselage Ranjith Gamini Abeysinghe (Now deceased) Athuruwala Dambadeniya Defendant-Respondent-Petitioner. 1A. Edirisinghe Mudiyanselage Sumana Mallika 1B. Abeysinghe Mudiyanselage Wimantha Indeewara Abeysinghe 1C. Kasun Thisara Abeysinghe 1D. Isuri Palika Abeysinghe Substituted-Defendant-Respondent-Appellants Vs. 1A. Chandra Jayaweera, 2. Jayaweera Arachchige Chandra Podimenike All of Barandawatta, Henduwawa. Keppetiwalana Plaintiff-Appellant-Respondents
04/ 11/ 21	S.C. Appeal No.115/2015	Hewayalage Margaret, Thalgasmote, Veyangoda. (Deceased) Plaintiff Weerakkody Samaradivakarage Hemachandra Manel Indika No.6/58, Court Road, Gampaha. Substituted – Plaintiff Vs. 1. Manikpura Dewage Soma, “Claristan”, Helen Mawatha, Wennappuwa. 2. Manikpura Dewage Sapin, Thalgasmote, Veyangoda. (Deceased) 2A. Manikpura Dewage Soma, “Claristan”, Helen Mawatha, Wennappuwa. 3. Manikpura Dewage Cyril Piyaratne, No.255, Thalgasmote, Veyangoda. Defendants And Between in the Provincial High Court of Western Province Manikpura Dewage Cyril Piyaratne, No.255, Thalgasmote, Veyangoda. 3rd Defendant-Appellant Vs. Weerakkody Samaradivakarage Hemachandra Manel Indika No.6/58, Court Road, Gampaha. Substituted – Plaintiff-Respondent 1. Manikpura Dewage Soma, “Claristan”, Helen Mawatha, Wennappuwa., Presently at ‘Shrinath’, Sandalankawa, Sandalankawa. 2A. Manikpura Dewage Soma, “Claristan”, Helen Mawatha, Wennappuwa; Presently at ‘Shrinath’, Sandalankawa, Sandalankawa. 1st and 2A Defendant- Respondents And Now Between in the Supreme Court Manikpura Dewage Cyril Piyaratne, No.255, Thalgasmote, Veyangoda. 3rd Defendant-Appellant-Petitioner Vs. Weerakkody Samaradivakarage Hemachandra Manel Indika No.6/58, Court Road, Gampaha. Substituted – Plaintiff-Respondent-Respondent 1. Manikpura Dewage Soma, “Claristan”, Helen Mawatha, Wennappuwa. Presently at ‘Shrinath’, Sandalankawa, Sandalankawa, 2A. Manikpura Dewage Soma, “Claristan”, Helen Mawatha, Wennappuwa. Presently at ‘Shrinath’, Sandalankawa, Sandalankawa, 1st and 2A Defendant-Respondent- Respondents

02/ 11/ 21	SC Appeal No. 45/2014	Gardihewa Kodikara Mallika Ratnapremi Fonseka No. 380B, Preeethipura, Kalalgoda, Pannipitya Applicant Vs. Sri Lanka Insurance Corporation Limited, No. 21, Vauxhall Street, Colombo 02. Respondent AND BETWEEN Sri Lanka Insurance Corporation Limited, No. 21, Vauxhall Street, Colombo 02. Respondent-Appellant Vs. Gardihewa Kodikara Mallika Ratnapremi Fonseka No. 380B, Preeethipura, Kalalgoda, Pannipitya Applicant-Respondent AND NOW BETWEEN Sri Lanka Insurance Corporation Limited, No. 21, Vauxhall Street, Colombo 02. Respondent-Appellant-Appellant Vs. Gardihewa Kodikara Mallika Ratnapremi Fonseka No. 380B, Preeethipura, Kalalgoda, Pannipitya Applicant-Respondent-Respondent
28/ 10/ 21	SC Appeal 26/2021	the matter of an Application for Special Leave to Appeal against the order of the Court of Appeal in case baring No. CA Writ 416/17 in terms of Article 128 (2) of the Constitution Mr. Jaliya Wickramasuriya, 6525, Riada Ct. Mc Donough, GA 30253, USA Petitioner Vs, 1. Hon. Thilak Marapana, Minister of Foreign Affairs, Colombo 01. 2. Prasad Kariyawasam, Secretary, Ministry of Foreign Affairs, Colombo 01. 3. Hon. Attorney General, Attorney General's Department, Colombo 12. Respondents And Between Now Mr. Jaliya Wickramasuriya, 6525, Riada Ct. Mc Donough, GA 30253, USA Petitioner-Petitioner Vs, 1. Hon. Thilak Marapana, Minister of Foreign Affairs, Colombo 01. 1A. Hon. Dr. Sarath Amunugama, Minister of Foreign Affairs, Colombo 01. 1B. Hon. Dinesh Gunawardena, Minister of Foreign Relations, Silk Development, Employment and Labour Relations, Ministry of Foreign Relations, Republic Building, Sir Baron Jayathilaka Mawatha, Colombo 01. Substituted Respondent-Respondent 2. Prasad Kariyawasam, Secretary, Ministry of Foreign Affairs, Colombo 01. 2A. Ravintha Ariyasinha, Secretary, Ministry of Foreign Relations, Colombo 01. And Presently at, Ravintha Ariyasinha, Ministry of Foreign Relations, Republic Building, Sir Baron Jayathilaka Mawatha, Colombo 01. 2B. Admiral Prof. Jayanath Colombage, Secretary, Ministry of Foreign Relations, Republic Building, Sir Baron Jayathilaka Mawatha, Colombo 01. Substituted Respondent-Respondent 3. Hon. Attorney General, Attorney General's Department, Colombo 12. Respondent-Respondent

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27/ 10/ 21	SC. FR. Application No. 270/2016	G.G.H.N. Gunasekera, 95/35, Sumudu Place, Samagi Mawatha, Magammana, Homagama. Petitioner Vs, 1. Chief Secretary, Provincial Council of the Western Province, Office of the Chief Secretary - Western Province, “Sravasthhi Mandiraya”, 32, Sri Marcus Fernando Mawatha, Colombo 07. Presently at No. 204, Western Provincial Council Office Complex, Level 4, Denzil Kobbekaduwa Mawatha, Battaramulla. 2. Deputy Chief Secretary (Planning), Provincial Council of the Western Province, Office of the Chief Secretary - Western Province, “Sravasthhi Mandiraya”, 32, Sri Marcus Fernando Mawatha, Colombo 07. Presently at No. 204, Western Provincial Council Office Complex, Level 4, Denzil Kobbekaduwa Mawatha, Battaramulla. 3. Director (Planning), Provincial Council of the Western Province, Office of the Chief Secretary - Western Province, “Sravasthhi Mandiraya”, 32, Sri Marcus Fernando Mawatha, Colombo 07. Presently at No. 204, Western Provincial Council Office Complex, Level 4, Denzil Kobbekaduwa Mawatha, Battaramulla. 4. Deputy Chief Secretary (Administration), Provincial Council of the Western Province, Office of the Chief Secretary - Western Province, “Sravasthhi Mandiraya”, 32, Sri Marcus Fernando Mawatha, Colombo 07. Presently at No. 204, Western Provincial Council Office Complex, Level 4, Denzil Kobbekaduwa Mawatha, Battaramulla. 5. Hon. Ranjith Maddumabandara, Minister of Public Administration and Management, Ministry of Public Administration and Management, Independent Square, Colombo 07. 5A. Hon. Ranjith Maddumabandara, Minister of Public Administration, Disaster Management and Rural Economic Affairs, Ministry of Public Administration, Disaster Management and Livestock Development, Independent Square, Colombo 07. 5B. Hon. Janaka Bandara Thennakoon, Minister of Public Administration, Home Affairs, Provincial Councils and Local Government, Ministry of Public Administration, Home Affairs, Provincial Councils and Local Government, Independent Square, Colombo 07. 5C. Hon. Janaka Bandara Thennakoon, Minister of Public Service, Provincial Councils and Local Government, Ministry of Public Service, Provincial Councils and Local Government, Independent Square, Colombo 07. 6. Secretary, Ministry of Public Administration and Management, Independent Square, Colombo 07. 6A. Secretary, Ministry of Public Administration, Disaster Management and Livestock Development, Independent Square, Colombo 07. 6B. Secretary, Ministry of Public Administration, Home Affairs, Provincial Councils and Local Government, Independent Square, Colombo 07. 6C. Secretary, Ministry of Public Service, Provincial Councils and Local Government, Independent Square, Colombo 07. 7. Hon. Attorney General, Attorney General’s Department, Colombo 12. 8. The Governor, Western Province, 5th Floor, 109, Galle Road, Colombo 03. Presently at No. 204, Western Provincial Council Office Complex, Level 10, Denzil Kobbekaduwa Mawatha, Battaramulla. Respondents

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27/10/21	SC Appeal:19/2015	Dehiwattage Rukman Dinesh Fernando, No. 552/A, Dandugama Road, Ja-Ela. Applicant Vs. Union Apparel (Pvt) Ltd, No. 184/01, Negombo Road, Mudukatuwa, Marawila. Respondent AND BETWEEN Union Apparel (Pvt) Ltd, No. 184/01, Negombo Road, Mudukatuwa, Marawila. Respondent-Appellant Vs. Dehiwattage Rukman Dinesh Fernando, No. 552/A, Dandugama Road, Ja-Ela. Applicant AND NOW BETWEEN Union Apparel (Pvt) Ltd, No. 184/01, Negombo Road, Mudukatuwa, Marawila. Respondent-Appellant-Appellant Vs. Dehiwattage Rukman Dinesh Fernando, No. 552/A, Dandugama Road, Ja-Ela. Applicant-Respondent-Respondent
26/10/21	SC FR Application 52/2021	1. Welikadage Nadeeka Priyadarshani Perera 2. Ranmuthu Chamodya Hansani (Minor) 1st and 2nd Petitioners above, both of No. 43/6B, R.E. De Silva Road, Heppumulla, Ambalangoda. Petitioners Vs 1. Prof. G. L. Peiris Hon. Minister of Education 2. Prof. K. Kapila C. K. Perera Secretary, Ministry of Education 1st and 2nd Respondents above, both of Isurupaya, Battaramulla. 3. Hasitha Kesara Veththimuni, Principal, Dharmashoka Vidyalaya, Galle Road, Ambalangoda. 4. B. Anthony 5. T. M. Dayarathne 6. L. N. Madhavee Dedunu 7. N. Channa Jayampathy 4th to 7th Respondents above, all of Members of Interview Board (Admission to Year 1) C/O Dharmashoka Vidyalaya, Galle Road, Ambalangoda. 8. Gamini Jayawardhane 9. Rekha Mallwarachchi 10. J. P. R. Malkanthi 11. S. A. B. L. S. Arachchi 12. Rasika Prabodha Hendahewa 8th to 12th Respondents above, all of Members of Board of Appeal (Admission to Year 1) C/O Dharmashoka Vidyalaya, Galle Road, Ambalangoda. 13. Kithsiri Liyanagamage Director- National Schools, Isurupaya, Battaramulla. 14. J. D. N. Thilakasiri, Provincial Director of Education Upper Dickson Road, Galle. 15. Hon. Attorney General Attorney General’s Department, Hulftsdorp, Colombo 12. Respondents

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20/ 10/ 21	SC/HCCA/ LA/119/2015	Hettige Don Thilakaratne of Dodamulla, Galapatha. Plaintiff Vs. 1. Kumarapattiyage Don Allis Pieris of Panapitiya, Waskaduwa 2. Bamunuge Premawathie 3. Amarathungage Don Siriwardena 4. Kahawalage Nandawathie 5. Amarathungage Don Lionel 6. Hettige Don Allis Singho All of, Dodamulla, Galapatha. 7. Ariyapala Wilbert Amarathunga of Paraduwa, Galapatha. 8. Amarathungage Dona Pyaseeli 9. Amarathungage Don Karunasena 10. Amarathungage Don Cyril Buddhadasa 11. Amarathungage Don Chandradasa 12. Amarathungage Don Tissa 13. Amarathungage Don Gamini 14. Amarathungage Dona Susila Khanthi 15. Amarathungage Dona Jayanthi 16. Hettige Don Lilson 17. Amarathungage Dona Masilin Nona 18. Amarathungage Dona Karunawathie 19. Amarathungage Dona Wimalawathie 20. Amarathungage Don Carolis 21. Mallika Amarathunga 22. Lambert Amarathunga 23. Leelaratne Amarathunga 24. Pattiyawatage Henry Perera All of Dodamulla, Galapatha. Defendants AND BETWEEN Hettige Don Thilakaratne of Dodamulla, Galapatha. Plaintiff – Appellant Vs. 1. Kumara Pattiyage Don Allis Pieris of Panapitiya, Waskaduwa. (Deceased) 1A. Kumarapattige Hemasiri Pieris of, “Sunil Paya”, Panapitiya, Waskaduwa And others, 2. Bamunuge Premawathie 3. Amarathungage Don Siriwardena 4. Kahawalage Nandawathie (Deceased) 4A & 5. Amarathungage Don Lionel (Deceased) 4B & 5A. Gamatige Dona Leelawathie 6. Hettige Don Allis Singho, All of Dodamulla, Galapatha. 7. Ariyapala Wilbert Amarathunga of Paraduwa, Galapatha (Deceased) 8. Amarathungage Dona Piyaseeli 9. Amarathungage Don Karunasena 10. Amarathungage Don Cyril Buddhadasa 11. Amarathungage Don Chandradasa 12. Amarathungage Don Tissa 13. Amarathungage Don Gamini 14. Amarathungage Dona Susila Kanthi 15. Amarathungage Dona Jayanthi 16. Hettige Don Lilson 17. Amarathungage Dona Masilin Nona (Deceased) 18. Amarathungage Dona Karunawathie 19. Amarathungage Dona Wimalawathie 20. Amarathungage Don Carolis 21. Mallika Amarathunga 22. Lambert Amarathunga 23. Leelaratne Amarathunga 24. Pattiyawatage Henry Perera All of Dodamulla, Galapatha. Defendant – Respondents AND NOW BETWEEN 2. Bamunuge Premawathie 4. Kahawalage Nandawathie (Deceased) 4A & 5. Amarathungage Don Lionel (Deceased) 4B & 5A. Gamatige Dona Leelawathie Both of Dodamulla, Galapatha. 8. Amarathungage Dona Piyaseeli Dodamulla, Galapatha. Now at, “Chandanie”, Panapitiya, Waskaduwa. 9. Amarathungage Don Karunasena 10. Amarathungage Don Cyril Buddadhasa 11. Amarathungage Don Chandradasa 12. Amarathungage Don Tissa All of Dodamulla, Galapatha. 14. Amarathungage Dona Susila Kanthi Dodamulla, Galapatha. Now at, “Anusha Stores”, Panapitiya, Waskaduwa. (Deceased) 14A. Liyana Arachchige Don Noel Ranjith No. 893, Panapitiya, Waskaduwa. 15. Amarathungage Dona Jayanthi Dodamulla, Galapatha. Now at, Temple Road, Panapitiya, Waskaduwa. 18. Amarathungage Dona Karunawathie 19. Amarathungage Dona Wimalawathie 20. Amarathungage Don Carolis All of Dodamulla, Galapatha. Defendant – Respondent – Petitioners Vs. Hettige Don Thilakaratne of Dodamulla, Galapatha

20/ 10/ 21	SC/Appeal No. 101/ 2018	Waduge Sumanasiri Fernando, No. 7/1, D.S. Senanayake Mawatha, Panadura. Plaintiff. Vs. K. Dayananda Perera No. 315, Suduwella Road, Wekada, Panadura. Defendant. AND K. Dayananda Perera No. 315, Suduwella Road, Wekada, Panadura. Defendant – Appellant. Vs. Waduge Sumanasiri Fernando, No. 7/1, D.S. Senanayake Mawatha, Panadura. Plaintiff – Respondent. AND NOW BETWEEN K. Dayananda Perera No. 315, Suduwella Road, Wekada, Panadura. Defendant – Appellant – Petitioner. Vs. Waduge Sumanasiri Fernando, No. 7/1, D.S. Senanayake Mawatha, Panadura. Plaintiff – Respondent – Respondent.
20/ 10/ 21	SC/HC/LA/ 40/2018	Green Lanka Shipping Limited Green Lanka Tower, 46/46, Nawam Mawatha, Colombo 02. Evergreen Marine Corporation (Taiwan) Limited No.166, Sec 2, Mingsheng East Road, Taipei 104, Taiwan, Republic of China. Petitioner AND NOW Green Lanka Shipping Limited Green Lanka Tower, 46/46, Nawam Mawatha, Colombo 02. Company Ordered to be Wound Up - Petitioner VS 1. Evergreen Marine Corporation (Taiwan) Limited No.166, Sec 2, Mingsheng East Road, Taipei 104, Taiwan, Republic of China. Petitioner-Respondent 2. Mercantile Investments & Finance PLC No. 236, Galle Road, Colombo 03. Creditor- Respondent 3. G.J David SJMS Associates, Chartered Accountants, Level 03, No.11, Castle Lane, Colombo 04. Liquidator- Respondent
20/ 10/ 21	SC/FR APPLICATIO N 46/2018	Gurusinghe Senevirathnage Tharindu Priyan Akalanka. No.18, Missaka Mawatha, Mihinthale. PETITIONER Vs 1. Wijesinghe, Police Sergeant 26852 Circuit Crime Investigation Division. Anuradhapura. 2. Dharmasiri, Police Sergeant 16876, Circuit Crime Investigation Division. Anuradhapura. 3. Wanninayake, Police Constable 6998, Circuit Crime Investigation Division, Anuradhapura. 4. Asanka, Police Constable 39938, Circuit Crime Investigation Division, Anuradhapura. 5. Udayantha, Police Constable 38491, Circuit Crime Investigation Division, Anuradhapura. 6. Amila, Police Constable 48059, Circuit Crime Investigation Division, Anuradhapura. 7. Sirimal, Police Constable 62953, Circuit Crime Investigation Division, Anuradhapura. 8. Uddhika, Police Constable Driver 33601, Circuit Crime Investigation Division, Anuradhapura. 9. Nawarathne, Chief Inspector, Circuit Crime Investigation Division, Anuradhapura. 10. Thilina Hewapathirana, Superintendent of Police, Circuit Crime Investigation Division, Anuradhapura. 11. Sandun Gahawatte, Deputy Inspector General of Police, Office of Deputy Inspector General North Central Province, Anuradhapura. 12. Pujith Jayasundara, Inspector General of Police, Police Headquarters, Colombo 01. 13. Hon. Attorney General, Attorney General's Department, Colombo 12. RESPONDENTS

14/ 10/ 21	SC APPEAL NO: SC/ APPEAL/ 66/2011	1. Irene Leticia Haththotuwa, 2. Gamage Don Mayurasinghe Haththotuwa, Both of No.162/10, Rajagiriya Road, Rajagiriya. Plaintiffs Vs. 1. Warnakulasuriya Wargakkarige Lalitha Fernando, 2. Hettiarachchige Upali Perera Wijegunasekara, (Deceased) Both of No.166, Rajagiriya Road, Rajagiriya. Defendants AND BETWEEN Warnakulasuriya Wargakkarige Lalitha Fernando, No.166, Rajagiriya Road, Rajagiriya. Defendant-Appellant Vs. 1. Irene Leticia Haththotuwa, 2. Gamage Don Mayurasinghe Haththotuwa, Both of No.162/10, Rajagiriya Road, Rajagiriya. Plaintiff-Respondents AND NOW BETWEEN 1. Irene Leticia Haththotuwa, 2. Gamage Don Mayurasinghe Haththotuwa, (Deceased) 2A. Nadira Yasanthi Haththotuwa, Both of No.162/10, Rajagiriya Road, Rajagiriya. Plaintiff-Respondent-Appellants Vs. Warnakulasuriya Wargakkarige Lalitha Fernando, No.166, Rajagiriya Road, Rajagiriya. Defendant-Appellant-Respondent
14/ 10/ 21	SC APPEAL NO: SC/ APPEAL/ 39/2021	1. T.I.G. Suriyaarachchi, 2. D.N. Suriyaarachchi, 3. P.N. Suriyaarachchi, All of Halpathota, Baddegama. Plaintiffs Vs. 1. L.C. Liyanage alias Gunawardena, No. 5/5A, Sri Naga Vihara Road, Pagoda, Nugegoda. 2. People's Bank, Sir Chittampalam A. Gardiner Mawatha, Colombo 02. Defendants AND BETWEEN 1. T.I.G. Suriyaarachchi, 2. D.N. Suriyaarachchi, 3. P.N. Suriyaarachchi, All of Halpathota, Baddegama. Plaintiff-Appellants Vs. 1. L.C. Liyanage alias Gunawardena, No. 5/5A, Sri Naga Vihara Road, Pagoda, Nugegoda. 2. People's Bank, Sir Chittampalam A. Gardiner Mawatha, Colombo 02. Defendant-Respondents AND BETWEEN 1. T.I.G. Suriyaarachchi Halpathota, Baddegama. 1st Plaintiff-Appellant-Appellant Vs. 1. L.C. Liyanage alias Gunawardena, No. 5/5A, Sri Naga Vihara Road, Pagoda, Nugegoda. 2. People's Bank, Sir Chittampalam A. Gardiner Mawatha, Colombo 02. Defendant-Respondent- Respondents 2. D.N. Suriyaarachchi, 3. P.N. Suriyaarachchi, (Deceased) 3A. K.G. Ananda Ratnasiri, All of Halpathota, Baddegama. 2nd and 3rd Plaintiff-Appellant-Respondents AND NOW BETWEEN 1. T.I.G. Suriyaarachchi Halpathota, Baddegama. 1st Plaintiff-Appellant-Appellant- Appellant Vs. 1. L.C. Liyanage alias Gunawardena, No. 5/5A, Sri Naga Vihara Road, Pagoda, Nugegoda. 2. People's Bank, Sir Chittampalam A. Gardiner Mawatha, Colombo 02. Defendant-Respondent- Respondent-Respondents 2. D.N. Suriyaarachchi, 3A. K.G. Ananda Ratnasiri, All of, Halpathota, Baddegama. 2nd and 3rd Plaintiff-Appellant-Respondent-Respondents

14/ 10/ 21	SC APPEAL NO: SC/ APPEAL/ 32/2021	B.K. Winson De Paul Rodrigo, No. 73, Thimbirigasyaya, Hendala, Wattala. Plaintiff Vs. 1. K.D.H Ferdinandez, 2. Annette Fernando, Both of No. 3/12, Weliamuna Road, Hendala, Wattala. Defendants AND BETWEEN 1. K.D.H Ferdinandez, 2. Annette Fernando, Both of No. 3/12, Weliamuna Road, Hendala, Wattala. Defendant-Appellants Vs. B.K. Winson De Paul Rodrigo, No. 73, Thimbirigasyaya, Hendala, Wattala. Plaintiff-Respondent AND NOW BETWEEN B.K. Winson De Paul Rodrigo, (Deceased) No. 73, Thimbirigasyaya, Hendala, Wattala. Plaintiff-Respondent-Appellant Bridget Rodrigo, No. 73, Thimbirigasyaya, Hendala, Wattala. Substituted Plaintiff-Respondent-Appellant Vs. 1. K.D.H Ferdinandez, (Deceased) 1A. Ernard Treshiya Fernando, 2. Annette Fernando, All of No. 3/12, Weliamuna Road, Hendala, Wattala Defendant-Appellant-Respondents
14/ 10/ 21	SC APPEAL NO: SC/ APPEAL/ 23/2021	Commercial Leasing and Finance PLC, (Formerly known and named as Commercial Leasing and Finance Limited) No. 68, Bauddhaloka Mawatha, Colombo 04. Plaintiff Vs. Niranjan Canagasooriyam, No. 12, Palm Grove, Colombo 03. Defendant AND NOW BETWEEN Niranjan Canagasooriyam, No. 12, Palm Grove, Colombo 03. Defendant-Appellant Vs. Commercial Leasing and Finance PLC, (Formerly known and named as Commercial Leasing and Finance Limited) No. 68, Bauddhaloka Mawatha, Colombo 04. Plaintiff-Respondent

14/ 10/ 21	SC APPEAL NO: SC/ APPEAL/ 2/2019	1. Maligaspe Koralalage Arwin Peter Nanayakkara, (Deceased) 1A. Kariyawasam Hegoda Gamage Uma, Both of Panagamuwa, Wanchawala. Plaintiff Vs. 1. Epage Dayananda, 2. Epage Jeedrick, (Deceased) 2A. Mandalawattage Alisnona, 3. Dolamulla Kankanamge Selenchihamy, (Deceased) 3A. Maligaspe Koralage Bartin Nanayakkara, 4. M.K. Bartin Nanayakkara, Pinnaketiyawatta, Panagamuwa, Wanchawala. 5. Thomas Udugampala, Panagamuwa, Wanchawala. 6. S.P. Gunawardena, Panagamuwa, Kalahe, Wanchawala. 7. M.K.A. Nanayakkara, Pinnaketiyawatta, Panagamuwa, Wanchawala. 8. D.L. Karunawathie, Panagamuwa, Wanchawala. Presently at, No. 39/3, Morris Road, Milidduwa, Galle. Defendants AND BETWEEN 4. M.K. Bartin Nanayakkara, (Deceased) Pinnaketiyawatta, Panagamuwa, Wanchawala. 4A. Maligaspe Koralage Leelani Priyanthi, Kalahe, Wanchawala. 5. Thomas Udugampala, Panagamuwa, Wanchawala. 7. M.K.A. Nanayakkara, Pinnaketiyawatta, Panagamuwa, Wanchawala. 4th, 5th and 7th Defendant-Appellants Vs. 1A. Kariyawasam Hegoda Gamage Uma, Panagamuwa, Wanchawala. Plaintiff-Respondent 1. Epage Dayananda, 2A. Mandalawattage Alisnona, (Deceased) 2B. Epage Premadasa, Panagamuwa, Kalahe, Wanchawala. 3A. Maligaspe Koralage Bartin Nanayakkara, 6. S.P. Gunawardena, (Deceased) Panagamuwa, Kalahe, Wanchawala. 6A. Indika Panditha Gunawardena, 6B. Anushka Kumari Panditha Gunawardena, Panagamuwa, Kalahe, Wanchawala. 8. D.L. Karunawathie, Panagamuwa, Wanchawala. Presently at, No. 39/3, Morris Road, Milidduwa, Galle. Defendant-Respondents AND NOW BETWEEN 4A. Maligaspe Koralage Leelani Priyanthi, Kalahe, Wanchawala. Defendant-Appellant-Appellant Vs. 1A. Kariyawasam Hegoda Gamage Uma, Panagamuwa, Wanchawala. Plaintiff- Respondent-Respondent 1. Epage Dayananda, 2B. Epage Premadasa, Panagamuwa, Kalahe, Wanchawala. 3A. Maligaspe Koralage Bartin Nanayakkara, 6A. Indika Panditha Gunawardena, 6B. Anushka Kumari Panditha Gunawardena, Panagamuwa, Wanchawala. 8. D.L. Karunawathie, Panagamuwa, Wanchawala. Presently at, No. 39/3, Morris Road, Milidduwa, Galle. Defendant-Respondent-Respondents 5. Thomas Udugampala, Panagamuwa, Wanchawala. 7. M.K.A. Nanayakkara, Pinnaketiyawatta, Panagamuwa, Wanchawala. 5th and 7th Defendant-Appellant-Respondents

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14/10/21	SC LA NO: SC/HCCA/LA/36/2021	Ruwa Anouka De Silva, No. 79/14, Dr. C.W.W. Kannangara Mawatha, Colombo 07. Plaintiff Vs. Saman Karl Jayasinghe, No. 3, Park Avenue, Borella, Colombo 08. Presently at 1201, Canal Street Apt. 362, New Orleans, LA 70112, United States of America. Defendant AND BETWEEN Saman Karl Jayasinghe, No. 3, Park Avenue, Borella, Colombo 08. Presently at 1201, Canal Street Apt. 362, New Orleans, LA 70112, United States of America. Defendant-Petitioner Vs. Ruwa Anouka De Silva, No. 79/14, Dr. C.W.W. Kannangara Mawatha, Colombo 07. Plaintiff-Respondent Registrar General, Registrar General's Department, No. 234/A3, Denzil Kobbekaduwa Mawatha, Battaramulla. Respondent AND BETWEEN Saman Karl Jayasinghe, No. 3, Park Avenue, Borella, Colombo 08. Presently at 1201, Canal Street Apt. 362, New Orleans, LA 70112, United States of America. Defendant-Petitioner-Petitioner Vs. Ruwa Anouka De Silva, No. 79/14, Dr. C.W.W. Kannangara Mawatha, Colombo 07. Plaintiff-Respondent-Respondent AND NOW BETWEEN Saman Karl Jayasinghe, No. 3, Park Avenue, Borella, Colombo 08. Presently at 1201, Canal Street Apt. 362, New Orleans, LA 70112, United States of America. Defendant-Petitioner-Appellant-Petitioner Vs. Ruwa Anouka De Silva, No. 79/14, Dr. C.W.W. Kannangara Mawatha, Colombo 07. Plaintiff-Respondent-Respondent-Respondent
14/10/21	SC APPEAL NO: SC/APPEAL/208/2014	G.B. Piyadasa, Baddewewa Udakella, Near the Primary Court, Embilipitiya. Plaintiff Vs. G.W. Dayasena, Near Concrete Yard, New Town, Embilipitiya. Defendant AND BETWEEN G.B. Piyadasa, Baddewewa Udakella, Near the Primary Court, Embilipitiya. Plaintiff-Appellant Vs. G.W. Dayasena, Near Concrete Yard, New Town, Embilipitiya. Defendant-Respondent AND NOW BETWEEN G.B. Piyadasa, Baddewewa Udakella, Near the Primary Court, Embilipitiya. Plaintiff-Appellant-Appellant Vs. G.W. Dayasena, Near Concrete Yard, New Town, Embilipitiya. Defendant-Respondent-Respondent

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14/ 10/ 21	SC APPEAL NO: SC/ APPEAL/ 161/2019	1. Geekiyanage Sardha Maheshini Amarasinghe, 2. Dona Kusuma Sardhalatha Amarasinghe, Both of “Sisira”, Sisirawatte, Narammala. Plaintiffs Vs. 1. Geekiyanage Nirosha Prasadini Kahandawarachchi (nee Amarasinghe), 2. Chanaka Ravindra Kahandawarachchi, Both of No. 2, Esther Place, Park Road, Colombo 05. 3. Geekiyanage Thanuja Sanjeewani Amarasinghe, No.14, Vijitha Road, Nedimala, Dehiwala. 4. Commercial Bank, Bristol Street, Colombo 01. Defendants AND BETWEEN 1. Geekiyanage Nirosha Prasadini Kahandawarachchi (nee Amarasinghe), 2. Chanaka Ravindra Kahandawarachchi, Both of No. 2, Esther Place, Park Road, Colombo 05. 1st and 2nd Defendant-Appellants Vs. 1. Geekiyanage Sardha Maheshini Amarasinghe, 2. Dona Kusuma Sardhalatha Amarasinghe, Both of “Sisira”, Sisirawatte, Narammala. Plaintiff-Respondents 3. Geekiyanage Thanuja Sanjeewani Amarasinghe, No.14, Vijitha Road, Nedimala, Dehiwala. 4. Commercial Bank, Bristol Street, Colombo 01. 3rd and 4th Defendant-Respondents AND NOW BETWEEN 1. Geekiyanage Sardha Maheshini Amarasinghe, 2. Dona Kusuma Sardhalatha Amarasinghe, Both of “Sisira”, Sisirawatte, Narammala. Plaintiff-Respondent-Appellants 1. Geekiyanage Nirosha Prasadini Kahandawarachchi (nee Amarasinghe), 2. Chanaka Ravindra Kahandawarachchi, Both of No. 2, Esther Place, Park Road, Colombo 05. 1st and 2nd Defendant-Appellant-Respondents 3. Geekiyanage Thanuja Sanjeewani Amarasinghe, No.14, Vijitha Road, Nedimala, Dehiwala. 4. Commercial Bank, Bristol Street, Colombo 01. 3rd and 4th Defendant-Respondent-Respondents
14/ 10/ 21	SC APPEAL NO: SC/ APPEAL/ 101/2017	Sri Lanka Mahaweli Authority, No. 500, T.B. Jaya Mawatha, Colombo 10. Plaintiff Vs. Dharshani Construction, No. 42, Pothgull Road, Polonnaruwa. Under the sole ownership of Amarasiri Masakorala, No. 18, Habarana Road, Polonnaruwa. Defendant AND BETWEEN Sri Lanka Mahaweli Authority, No. 500, T.B. Jaya Mawatha, Colombo 10. Plaintiff-Appellant Vs. Dharshani Construction No. 42, Pothgull Road, Polonnaruwa. Under the sole ownership of Amarasiri Masakorala, No. 18, Habarana Road, Polonnaruwa. Defendant-Respondent AND NOW BETWEEN Dharshani Construction, No. 42, Pothgull Road, Polonnaruwa. Under the sole ownership of Amarasiri Masakorala, No. 18, Habarana Road, Polonnaruwa. Defendant-Respondent-Appellant Vs. Sri Lanka Mahaweli Authority, No. 500, T.B. Jaya Mawatha, Colombo 10. Plaintiff-Appellant-Respondent

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14/10/21	SC APPEAL NO: SC/APPEAL/81/2020	Liyana Arachchige Sujatha Hatnapitiya Wijesundara, “Sujeewa”, Watappitiya, Parakaduwa. Plaintiff Vs. 1. Hatnapitiya Gamaethi Ralalage Elisabeth Weerasinghe, (Deceased) “Sinha Niwasa”, Watappitiya, Parakaduwa. 1A. Wijesinghe Arachchillage Pushpa Ranjanie Dharmaratne Wijesinghe, “Siri Niwasa”, Parakaduwa. 2. J.M. Dayananda, (Deceased) Pothgul Vihara Mawatha, Muwagama, Ratnapura. 2A. Manori Samarakoon, No.8, Pothgul Vihara Mawatha, Muwagama, Ratnapura. 3. Weerasinghe Arachchillage Pushpa Ranjanie Dharmaratne Wijesinghe, “Sisila Niwasa”, Parakaduwa. 4. Weerasinghe Arachchillage Sujatha Nandanie Weerasinghe, Pathberiya, Parakaduwa. 5. Kuruwita Gamalathge Priyanka Gamlath, Thalavitiya, Parakaduwa. Defendants AND BETWEEN Liyana Arachchige Sujatha Hatnapitiya Wijesundara, “Sujeewa”, Watappitiya, Parakaduwa. Plaintiff-Appellant Vs. 1A. Wijesinghe Arachchillage Pushpa Ranjanie Dharmaratne Wijesinghe, “Siri Niwasa”, Parakaduwa. 2A. Manori Samarakoon, No.8, Pothgul Vihara Mawatha, Muwagama, Ratnapura. 3. Weerasinghe Arachchillage Pushpa Ranjanie Dharmaratne Wijesinghe, “Sisila Niwasa”, Parakaduwa. 4. Weerasinghe Arachchillage Sujatha Nandanie Weerasinghe, Pathberiya, Parakaduwa. 5. Kuruwita Gamalathge Priyanka Gamlath, Thalavitiya, Parakaduwa. Defendant-Respondents AND BETWEEN 4. Weerasinghe Arachchillage Sujatha Nandanie Weerasinghe, Pathberiya, Parakaduwa. 4th Defendant-Respondent-Appellant Vs. Liyana Arachchige Sujatha Hatnapitiya Wijesundara, “Sujeewa”, Watappitiya, Parakaduwa. Plaintiff-Appellant-Respondent 1A. Wijesinghe Arachchillage Pushpa Ranjanie Dharmaratne Wijesinghe, “Siri Niwasa”, Parakaduwa. 2A. Manori Samarakoon, No.8, Pothgul Vihara Mawatha, Muwagama, Ratnapura. 3. Weerasinghe Arachchillage Pushpa Ranjanie Dharmaratne Wijesinghe, “Sisila Niwasa”, Parakaduwa. 5. Kuruwita Gamalathge Priyanka Gamlath, Thalavitiya, Parakaduwa. 1st to 3rd and 5th Defendant-Respondent-Respondents AND NOW BETWEEN 4. Weerasinghe Arachchillage Sujatha Nandanie Weerasinghe, Pathberiya, Parakaduwa. 4th Defendant-Respondent-Appellant-Appellant Vs. Liyana Arachchige Sujatha Hatnapitiya Wijesundara, “Sujeewa”, Watappitiya, Parakaduwa. Plaintiff-Appellant-Respondent-Respondent 1A. Wijesinghe Arachchillage Pushpa Ranjanie Dharmaratne Wijesinghe, “Siri Niwasa”, Parakaduwa. 2A. Manori Samarakoon, No.8, Pothgul Vihara Mawatha, Muwagama, Ratnapura. 3. Weerasinghe Arachchillage Pushpa Ranjanie Dharmaratne Wijesinghe, “Sisila Niwasa”, Parakaduwa. 5. Kuruwita Gamalathge Priyanka Gamlath, Thalavitiya, Parakaduwa. 1st to 3rd and 5th Defendant-Respondent-Respondent- Respondents

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13/ 10/ 21	S C Appeal No. 75/2012	Ceylon Bank Employees' Union, (on behalf of B. D. Niroshan), No. 20, Temple Road, Maradana, Colombo 10. APPLICANT Vs. Hatton National Bank PLC, Head Office, No. 479, T. B. Jayah Mawatha, Colombo 10. RESPONDENT AND THEN BETWEEN Hatton National Bank PLC, Head Office, No. 479, T. B. Jayah Mawatha, Colombo 10. RESPONDENT-APPELLANT Vs. Ceylon Bank Employees' Union, (on behalf of B. D. Niroshan), No. 20, Temple Road, Maradana, Colombo 10. APPLICANT-RESPONDENT AND NOW BETWEEN Ceylon Bank Employees' Union, (on behalf of B. D. Niroshan), No. 20, Temple Road, Maradana, Colombo 10. APPLICANT-RESPONDENT-APPELLANT -Vs- Hatton National Bank PLC, Head Office, No. 479, T. B. Jayah Mawatha, Colombo 10. RESPONDENT- APPELLANT-RESPONDENT

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03/10/21	S.C. Appeal No. 132/2010	Herath Mudiyanselage Sarath Chandra Herath, Postal Division of Mahawewa, Mahawewa Plaintiff Vs. 1. Rathnayake Mudiyanselage Kusumawathie, C/O, A.M. Jayathilaka, Postal Division of Kottaramulla, Paluwelgala. 2. Rathnayake Mudiyanselage Somawathie, Near the Aswedduma Temple, Postal Division of Kuliyapitiya. 3. Herath Mudiyanselage Gamini Herath, Postal Division of Welipennagahamulla, Gallahemulla. 4. Rathnayake Mudiyanselage Jayasinghe Ratnayake, Yakwila, Kithalahitiyawa. 5. Rathnayake Mudiyanselage Abeyarathana, Postal Division of Yakwila, Kithalahitiyawa. 6. Jahapu Appuhamilage Malanie Hemalatha, Postal Division of Yakwila, Kithalahitiyawa. 7. Rathnayake Mudiyanselage Priyanthika Mali Ratnayake, Postal Division of Yakwila, Kithalahitiyawa. 8. Rathnayake Mudiyanselage Inoka Shamalee Ratnayake, Postal Division of Yakwila, Kithalahitiyawa. 9. Rathnayake Mudiyanselage Harischandra, Postal Division of Yakwila, Kithalahitiyawa. 10. Rathnayake Mudiyanselage Lakshman Kithsiri Ratnayake, Postal Division of Yakwila, Kithalahitiyawa. Defendants AND BETWEEN Herath Mudiyanselage Sarath Chandra Herath, Postal Division of Mahawewa, Mahawewa. Plaintiff-Appellant Vs. 1. Rathnayake Mudiyanselage Kusumawathie, C/O, A.M. Jyathilaka, Postal Division of Kottaramulla, Paluwelgala. 2. Rathnayake Mudiyanselage Somawathie, Near the Aswedduma Temple, Postal Division of Kuliyapitiya. 3. Herath Mudiyanselage Gamini Herath, Postal Division of Welipennagahamulla, Gallahemulla. 4. Rathnayake Mudiyanselage Jayasinghe Ratnayake, Yakwila, Kithalahitiyawa. 5. Rathnayake Mudiyanselage Abeyarathana, Postal Division of Yakwila, Kithalahitiyawa. 6. Jahapu Appuhamilage Malanie Hemalatha, Postal Division of Yakwila, Kithalahitiyawa. 7. Rathnayake Mudiyanselage Priyanthika Mali Ratnayake, Postal Division of Yakwila, Kithalahitiyawa. 8. Rathnayake Mudiyanselage Inoka Shamalee Ratnayake, Postal Division of Yakwila, Kithalahitiyawa. 9. Rathnayake Mudiyanselage Harischandra, Postal Division of Yakwila, Kithalahitiyawa. 10. Rathnayake Mudiyanselage Lakshman Kithsiri Ratnayake, Postal Division of Yakwila, Kithalahitiyawa. Defendant-Respondents AND NOW BETWEEN 4. Rathnayake Mudiyanselage Jayasinghe Ratnayake, 4A. Rathnayake Mudiyanselage Sumeda Ratnayake, Yakwila, Kithalahitiyawa. Defendant-Respondent-Appellant Vs. Herath Mudiyanselage Sarath Chandra Herath, Postal Division of Mahawewa, Mahawewa. Plaintiff-Appellant-Respondent 1. Rathnayake Mudiyanselage Kusumawathie, C/O, A.M. Jyathilaka, Postal Division of Kottaramulla, Paluwelgala. 2. Rathnayake Mudiyanselage Somawathie, Near the Aswedduma Temple, Postal Division of Kuliyapitiya. 3. Herath Mudiyanselage Gamini Herath, Postal Division of Welipennagahamulla, Gallahemulla. 5. Rathnayake Mudiyanselage Abeyarathana, Postal Division of Yakwila, Kithalahitiyawa. 6. Jahapu Appuhamilage Malanie Hemalatha, Postal Division of Yakwila, Kithalahitiyawa. 7. Rathnayake Mudiyanselage Priyanthika Mali Ratnayake, Postal Division of Yakwila, Kithalahitiyawa. 8. Rathnayake Mudiyanselage Inoka Shamalee Ratnayake, Postal Division of Yakwila

03/ 10/ 21	S.C. Appeal No. 28/2017	Mayandi Suhumaran, Ward No. 03, Udappu. Plaintiff Vs. Mookan Sathiyaseelan, Ward No. 03, Udappu. Defendant AND BETWEEN Mayandi Suhumaran, Ward No. 03, Udappu. Plaintiff-Appellant Vs. Mookan Sathiyaseelan, Ward No. 03, Udappu. Defendant-Respondent AND NOW BETWEEN Mayandi Suhumaran, Ward No. 03, Udappu. Plaintiff-Appellant-Appellant Vs. Mookan Sathiyaseelan, Ward No. 03, Udappu. Defendant-Respondent-Respondent
28/ 09/ 21	SC/APPEAL/ 222/2016	Kuruwita Arachchillage Jagath Kumara Abeythunga, A27, Galpatha, Ruwanwella. PLAINTIFF Vs 1. Kuruwita Arachchillage Jayatilake Kiriporuwa, Ampagala 2. Agas Pathirennehelage Gunaratna, Galpatha, Ruwanwella. DEFENDANTS AND BETWEEN 1. Kuruwita Arachchillage Jayatilake Kiriporuwa, Ampagala 2. Agas Pathirennehelage Gunaratna, Galpatha, Ruwanwella. DEFENDANT- APELLANTS Vs Kuruwita Arachchillage Jagath Kumara Abeythunga, A27, Galpatha, Ruwanwella. PLAINTIFF- RESPONDENT AND NOW BETWEEN 1. Kuruwita Arachchillage Jayatilake Kiriporuwa, Ampagala 2. Agas Pathirennehelage Gunaratna, Galpatha, Ruwanwella. DEFENDANT-APELLANTS- APPELLANTS Vs Kuruwita Arachchillage Jagath Kumara Abeythunga, A27, Galpatha, Ruwanwella. PLAINTIFF-RESPONDENT- RESPONDENT

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28/ 09/ 21	SC APPEAL NO. 55/2016	1. Wickramasinghe Mudiyanselage Podimenike. 2. Wickramasinghe Mudiyanselage Menikhamy. 3. Wickramasinghe Mudiyanselage Dolimenika. All of Hanthihawa, Halmillawewa. PLAINTIFFS -VS- 1. Wickramasinghe Mudiyanselage Peiris Singho. 2. Wickramasinghe Mudiyanselage Podinona 3. Wickramasinghe Mudiyanselage Kirimenika 4. Wickramasinghe Mudiyanselage Piyadasa 5. Wickramasinghe Mudiyanselage Jinadasa 6. Wickramasinghe Mudiyanselage Dingirimenika 7. Wasala Mudiyanselage Rosalin Nona. All of Hanthihawa, Halmillawewa. DEFENDANTS AND BETWEEN 2. Wickramasinghe Mudiyanselage Menikhamy. 3. Wickramasinghe Mudiyanselage Dolimenika. All of Hanthihawa, Halmillawewa. 2ND AND 3RD PLAINTIFFS - APPELLANTS -VS- 1. Wickramasinghe Mudiyanselage Podimenike. (Deceased) 1A. Rajapaksha Mudiyanselage Dassanayake Both of Hanthihawa, Halmillawewa SUBSTITUTED 1ST PLAINTIFF- RESPONDENT 1. Wickramasinghe Mudiyanselage Peiris Singho (Deceased). 1A. Wasala Mudiyanselage Rosalin Nona 2. Wickramasinghe Mudiyanselage Podinona 3. Wickramasinghe Mudiyanselage Kirimenika 4. Wickramasinghe Mudiyanselage Piyadasa 5. Wickramasinghe Mudiyanselage Jinadasa (Deceased) 5A. Gajanayake Mudiyanselage Indrani Gajanayake 6. Wickramasinghe Mudiyanselage Dingirimenika 7. Wasala Mudiyanselage Rosalin Nona. All of Hanthihawa, Halmillawewa. DEFENDANTS - RESPONDENTS AND NOW BETWEEN 1. Wickramasinghe Mudiyanselage Peiris Singho (Deceased). 1A. Wasala Mudiyanselage Rosalin Nona (Deceased) 1B. Wickramasinghe Mudiyanselage Gnanalatha 1C. Wickramasinghe Mudiyanselage Rathnalatha Wickramasinghe 1D. Wickramasinghe Mudiyanselage Karunasena Wickramasinghe 1E. Wickramasinghe Mudiyanselage Pathmalatha Wickramasinghe 1F. Wickramasinghe Mudiyanselage Chandralatha Wickramasinghe 1G. Wickramasinghe Mudiyanselage Swarnalatha Wickramasinghe 1H. Wickramasinghe Mudiyanselage Karunathilake Wickramasinghe 1I. Wickramasinghe Mudiyanselage Bandula Kumara Wickramasinghe All of Hanthihawa, Halmillawewa. SUBSTITUTED 1B-1I DEFENDANTS – RESPONDENTS – APPELLANTS 7. Wasala Mudiyanselage Rosalin Nona. (Deceased) 7A. Wickramasinghe Mudiyanselage Gnanalatha 7B. Wickramasinghe Mudiyanselage Rathnalatha Wickramasinghe 7C. Wickramasinghe Mudiyanselage Karunasena Wickramasinghe 7D. Wickramasinghe Mudiyanselage Pathmalatha Wickramasinghe 7E. Wickramasinghe Mudiyanselage Chandralatha Wickramasinghe 7F. Wickramasinghe Mudiyanselage Swarnalatha Wickramasinghe 7G. Wickramasinghe Mudiyanselage Karunathilake Wickramasinghe 7H. Wickramasinghe Mudiyanselage Bandula Kumara Wickramasinghe All of Hanthihawa, Halmillawewa. SUBSTITUTED 7A-7H DEFENDANTS – RESPONDENTS – APPELLANTS -VS- 2. Wickramasinghe Mudiyanselage Menikhamy. 3. Wickramasinghe Mudiyanselage Dolimenika (Deceased) Both of Hanthihawa, Halmillawewa 3A. Rajapaksha Mudiyanselage Jayalath Egoda Rakupola, Ilukhena, Udubaddawa. 3B. Rajapaksha Mudiyanselage

05/08/21	SC/Appeal 132/2016	Suriyarachchige Raju of No. 4, Suriyagama, Haburugala Applicant Vs. Barberyn Reef Hotel Ltd., Beruwala Respondent And Barberyn Reef Hotel Ltd., Beruwala Respondent-Appellant Vs. Suriyarachchige Raju of No. 4, Suriyagama, Haburugala Applicant-Respondent And Now Suriyarachchige Raju of No. 4, Suriyagama, Haburugala Applicant-Respondent-Petitioner Vs. Barberyn Reef Hotel Ltd., Beruwala Respondent-Appellant-Respondent
05/08/21	SC (FR) Application No. 104/2016	Kasthuri Achchilage Chamarie Samaradisa No. 1, Algamawatta, Danowita PETITIONER VS. 1. Prasantha Welikala Chief Inspector of Police Officer in Charge Police Station Nittambuwa 2. P.C. 39009 Priyantha 3. P.C. 67518 Ranil 4. P.C. 77184 Dinuka 5. P.C. 40134 Ruwan 6. Tharindu Kokawala Sub Inspector All of Nittambuwa Police Station Nittambuwa 7. N.K Ilangakoon 7A. Pujith Jayasundara Inspector General of Police Police Headquarters Colombo 01 8. Hon. Attorney General Attorney General's Department Colombo 12 RESPONDENTS
03/08/21	SC Appeal 191/2016	Officer-in-Charge, Police Station, Wennappuwa. Plaintiff Vs. Wijesinghe Dewage Lalith Indrawansa Rupasinghe, 'Nishanthi Arts', Suhadha Mawatha, Potuwila, Madampe. Accused AND NOW BETWEEN Wijesinghe Dewage Lalith Indrawansa Rupasinghe, 'Nishanthi Arts', Suhadha Mawatha, Potuwila, Madampe. Petitioner-Petitioner Vs. 1. Officer-in-Charge, Police Station, Wennappuwa. Plaintiff-Respondent-Respondent 2. Attorney Genaral, Attorney General's Department, Colombo 12. Respondent-Respondent

02/ 08/ 21	S C Appeal No. 31/2019	Pathirana Mudiyanselage Leelawathie, Divula Watta Kehelwathugoda, Dewalegama. PLAINTIFF (Deceased) 1a. Vitharanage Indunil Priyantha, 1b. Vitharanage Biso Menike, 1c. Vithranage Hiran, All of Kehelwathugoda, Dewalegama. 1d. Vitharanage Anura, Horanapola, Kuliyapitiya. 1e. Vitharanage Nadeera, Kehelwathugoda, Dewalegama. SUBSTITUTED PLAINTIFFS Vs. Peramuna Gamlath Ralalage Gunerathne, Divula Watta, Kehelwathugoda, Dewalegama. DEFENDANT (Deceased) 1a. Soma Gunarathne, 1b. Pushpa Kumuduni Kumari Gunarathne, 1c. Chandra Sisira Kumara Gunarathne, 1d. Geethani Kumari Gunarathne, 1e. Damayanthi Kumari Gunarathne. SUBSTITUTED DEFENDANTS AND BETWEEN (In the Provincial High Court of Sabaragamuwa) 1a. Soma Gunarathne, 1b. Pushpa Kumuduni Kumari Gunarathne, 1c. Chandra Sisira Kumara Gunarathne, 1d. Geethani Kumari Gunarathne, 1e. Damayanthi Kumari Gunarathne. SUBSTITUTED DEFENDANT-APPELLANTS Vs. 1a. Vitharanage Indunil Priyantha, 1b. Vitharanage Biso Menike, 1c. Vitharanage Hiran, All of Kehelwathugoda, Dewalegama. 1d. Vitharanage Anura, Horanapola, Kuliyapitiya. 1e. Vitharanage Nadeera, Kehelwathugoda, Dewalegama. SUBSTITUTED PLAINTIFF-RESPONDENTS AND NOW BETWEEN (In the Supreme Court) 1a. Vitharanage Indunil Priyantha, 1b. Vitharanage Biso Menike, 1c. Vitharanage Hiran, All of Kehelwathugoda, Dewalegama. 1d. Vitharanage Anura, Horanapola, Kuliyapitiya. 1e. Vitharanage Nadeera, Kehelwathugoda, Dewalegama. SUBSTITUTED PLAINTIFF-RESPONDENT-APPELLANTS 1a. Soma Gunarathne 1b. Pushpa Kumuduni Kumari Gunarathne 1c. Chandra Sisira Kumara Gunarathne 1d. Geethani Kumari Gunarathne 1e. Damayanthi Kumari Gunarathne All of Kehelwathugoda, Dewalegama. SUBSTITUTED DEFENDANT-APPELLANT-RESPONDENTS
28/ 07/ 21	SC. FR. Application No. 257/2018	Charith Eshanka Hopwood, No. 60/5, Kerawalapitiya Road, Hendala, Wattala. Petitioner Vs. 1. Inspector of Police Gunawardena, Officer-in-Charge, Minor Offences Branch, Police Station, Ragama. 2. Chief Inspector of Police Gunasekera, (Acting Officer-in-Charge), Police Station, Ragama. 3. Inspector General of Police, Police Headquarters, Colombo 01. 4. Hon. Attorney General, Attorney General’s Department, Colombo 12. Respondents

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26/ 07/ 21	SC (HCCA) LA Application No. 51/2017	P. M. Dissanayake, Deputy Commissioner, Unit 14, Department of Inland Revenue, Colombo 02. Complainant Vs. Gifuulanka Motors (Pvt.) Limited, No. 50/2, Vijaya Road, Gampaha. Respondent And Between Gifuulanka Motors (Pvt.) Limited, No. 50/2, Vijaya Road, Gampaha. Respondent-Petitioner Vs. P. M. Dissanayake, Deputy Commissioner, Unit 14, Department of Inland Revenue, Colombo 02. Complainant-Respondent Kalyani Dahanayake, Commissioner General of Inland Revenue, Department of Inland Revenue, Sir Chittampalam A. Gardiner Mawatha, Colombo 02. Respondent And Now Between Gifuulanka Motors (Pvt.) Limited, No. 50/2, Vijaya Road, Gampaha. Respondent-Petitioner-Petitioner Vs. P. M. Dissanayake, Deputy Commissioner, Unit 14, Department of Inland Revenue, Colombo 02. Complainant-Respondent-Respondent Ivan Dissanayake, Commissioner General of Inland Revenue, Department of Inland Revenue, Sir Chittampalam A. Gardiner Mawatha, Colombo 02. Respondent-Respondents
25/ 07/ 21	S.C. (FR) Application No: 388/2010	Herath Mudiyanselage Wasantha Anura Kumara of Thammitagama, Nagollagama. Petitioner Vs. 1. Headquarters Inspector Channa Abeyratne Police Station, Maho. 2. Sub-Inspector of Police Ananda Police Station, Maho. 3. Police Sergeant 55008 Asanka Police Station, Maho. 4. Police Constable 55037 Navaratne Police Station, Maho. 5.Deputy Inspector General of Police North Western Province, D. I. G's Office, Kurunegala. 6. Mahinda Balasuriya, Inspector General of Police, Police Headquarters, Fort, Colombo 1. 7. The Hon. Attorney General, Attorney General's Department, Hulftsdorp, Colombo 12. Respondents
14/ 07/ 21	SC Contempt No. 03/16	1) Hee Jung Kim Alias Kim Hee Jung No. 51A-24/2-23rd Floor Empire Tower Baybrooke Place, Colombo 2 And also No 47, Alexandra Place, Colombo 07 And Hoiryong Poonglin Iwant Apt 203- 701 Howon-dong 308 139 Uijeongbusi Kyeongkido South Korea 2) Some Rupali Jayasinghe No 8/5, Pansalahena Road Kolonnawa Petitioners Vs Don Bandumali Jayasinghe [nee Welikala] No. 40/19 Longden Place, Colombo 7 Respondent
13/ 07/ 21	S C (F R) 449/2017	1. Jayamuni Anuradha Nilmini Vijesekara, "Mihinish" 259/1/2B, Rassapana Road, Ihala Bomiriya, Kaduwela. PETITIONER -Vs- 1. Sumedha Thushanga, Police Constable, Peiliyagoda Police Station, Peliyagoda. 2. Indika Priyadharshana, Police Constable, Peiliyagoda Police Station, Peliyagoda. 3. Chanaka Rukman, Police Constable, Peiliyagoda Police Station, Peliyagoda. 4. Ajith Jayalal, Police Constable, Peiliyagoda Police Station, Peliyagoda. 5. Lahiru Roshan, Police Constable, Peiliyagoda Police Station, Peliyagoda. 6. Senior Superintendent of Police (SSP), Western Province, Colombo 01 7. Hon. Attorney-General, Attorney General's Department, Hulftsdorp Street, Colombo 12. RESPONDENTS

08/ 07/ 21	SC /FR/ Application No. 187/2014	1. D. H. B. Edirisinghe 2/57, Melpati watta, Kotawala, Kaduwela. 2. P. M. Ratnapala 87, Bellantara Road, Dehiwala. 3. M. D. S. A. Perera Pahala Kosgama, Kosgama. 4. N. M. A. Amaradewa 232/6, Imaduwa Road, Kurunduwatte, Ahangama. 5. W. P. S. K. Fernando Mount Pleasant, Hapugala, Wakwella. 6. L. P. S. Kumara 62-3, Ginthota Road, Kalegana, Galle. 7. P. Ariyasena 1st Lane, Kalutara Road, Moranthuduwa. 8. Sri Lanka Accountants' Service Association, 335-3/1, Olcott Mawatha, Colombo 10. Petitioners Vs, 1. B. M. S. Batagoda Former Deputy Secretary to the Treasury, Ministry of Finance and Planning the Secretariat, Colombo 01. 2. Dayasiri Fernando Former Chairman, Public Service Commission, No, 177, Nawala Road, Narahenpita, Colombo 05. 3. Palitha M. Kumarasinghe Former Member of the Public Service Commission, No, 177, Nawala Road, Narahenpita, Colombo 05. 4. Sirimavo A. Wijerathne Former Member of the Public Service Commission, No, 177, Nawala Road, Narahenpita, Colombo 05. 5. M. D. W. Ariyawansa Former Member of the Public Service Commission,No, 177, Nawala Road, Narahenpita, Colombo 05. 6. Sathya Hettige Former Chairman, Public Service Commission, No, 177, Nawala Road, Narahenpita, Colombo 05. 7. S. C. Mannapperuma Former Member 8. Ananda Seneviratne Former member 9. N. H. Pathirana Former Member 10. S. Thillei Nadarajaa Former Member 11. S. A. Mohomed Yahiya Former Member 12. Kanthi Wijetunga Former Member 13. Sunil A. Sirisena Former Member 14. I. N. Soyza Former Member 7th to 14th Respondents Above; all at Public Service Commission, No, 177, Nawala Road, Narahenpita, Colombo 05. 15. Hon. Attorney General Attorney General's Department, Colombo 12. 16. Dharmasena Dissanayake Chairman, Public Service Commission, No, 177, Nawala Road, Narahenpita, Colombo 05. 16A. Hon. Justice Jagath Balapatabendi Chairman, Public Service Commission, 1200/9, Rajamalwatta Road, Battaramulla. 17. A. Salam Abdul Waid Former Chairman 17A. Hussain Ismail, Member 17B. Mrs. Indrani Sugathadasa, Member, Public Service Commission, 1200/9, Rajamalwatta Road, Battaramulla. 18. D. Shirantha Wijayatilake, Former Member 18A. Sudharma Karunaratne, Member 18B. Mr. V. Shivagnanasothy, Member, Public Service Commission, 1200/9, Rajamalwatta Road, Battaramulla. 19. Prathap Ramanujam, Member 19A. Dr. T. R. C. Ruberu, Member, Public Service Commission, 1200/9, Rajamalwatta Road, Battaramulla. 20. V. Jegarasasingam Member 20A. Mr. Ahamod Lebbe Mohomed Saleem, Member, Public Service Commission, 1200/9, Rajamalwatta Road, Battaramulla. 21. Santi Nihal Seneviratne, Former Member 21A. G. S. A. D. Silva PC Member 21B. Mr. Leelasena Liyanagama, Member, Public Service Commission, 1200/9, Rajamalwatta Road, Battaramulla. 22. S. Ranugge Member 22A. Mr. Dian Gomes, Member, Public Service Commission, 1200/9, Rajamalwatta Road, Battaramulla. 23. D. L. Mendis Member 23A. Mr. Dilith Jayaweera, Member, Public Service Commission, 1200/9, Rajamalwatta Road, Battaramulla. 24. Sarath Jayathilaka Member 24A. Mr. W.H. Piyadasa, Member, Public Service Commission, 1200/9, Rajamalwatta Road, Battaramulla. 25. J. J. Rathnasiri Former

08/07/21	SC Appeal 61/2020	Dhinayadura Jinadasa, Moonugoda Road, Seenigama, Hikkaduwa Applicant Vs. The Trustee, Sri Devol, Maha Devalaya, Seenigama, Hikkaduwa. Respondent And Between Dhisenthuwa Handi Sarath, The Trustee, Sri Devol, Maha Devalaya, Seenigama, Hikkaduwa. Respondent-Appellant Vs. Dhinayadura Jinadasa, Moonugoda Road, Seenigama, Hikkaduwa Applicant-Respondent And Now Between Dhinayadura Jinadasa, Moonugoda Road, Seenigama, Hikkaduwa Applicant-Respondent-Appellant Vs. Dhisenthuwa Handi Sarath, The Trustee, Sri Devol, Maha Devalaya, Seenigama, Hikkaduwa. Respondent-Appellant-Respondent
08/07/21	SC (Appeal) No. 43/2019	Rajagopal Rajendran, No. 84, Main Street, Norwood. As the Power of Attorney holder of the Licensee of Udaya Wine Stores, namely Liyanage Charitha, No. 14, Gouravilla Colony, Upcot. PETITIONER Vs 1. D.G.M.V. Hapuarachchi, Director General of Excise, Department of Excise, No. 34, W.A.D. Ramanayake Mawatha, Colombo 02. 2. Wasantha Dissanayake, Deputy Commissioner of Excise, No. 34, W.A.D. Ramanayake Mawatha, Colombo 02. RESPONDENTS AND NOW BETWEEN Rajagopal Rajendran, No. 84, Main Street, Norwood. As the Power of Attorney holder of the Licensee of Udaya Wine Stores, namely Liyanage Charitha, No. 14, Gouravilla Colony, Upcot. PETITIONER-APPELLANT VS 1. D.G.M.V. Hapuarachchi, Commissioner General of Excise, Department of Excise, No. 34, W.A.D. Ramanayake Mawatha, Colombo 02. L.K.G. Gunawardane, Commissioner General of Excise, Department of Excise, No. 34, W.A.D. Ramanayake Mawatha, Colombo 02. 1A ADDED RESPONDENTRESPONDENT Mrs. K.H.A. Meegasmulla, Commissioner General of Excise, Department of Excise, No. 34, W.A.D. Ramanayake Mawatha, Colombo 02. 1B ADDED RESPONDENTRESPONDENT Presently at Department of Excise, No. 33, Kotte Road, Rajagiriya. Mrs. Ranasinghe Semasinghe, Commissioner General of Excise, Department of Excise, No. 33, Kotte Road, Rajagiriya. 1C ADDED RESPONDENTRESPONDENT 2. Wasantha Dissanayake, Deputy Commissioner of Excise, No. 34, W.A.D. Ramanayake Mawatha, Colombo 02. RESPONDENT- RESPONDENTS
08/07/21	SC Appeal No. 133/2016	Jathika Sevaka Sangamaya, (On behalf of P. Titus Jayantha) No. 416, Kotte Road, Pitakotte. APPLICANT -VS- Sri Lanka Transport Board, No.200, Kirula Road, Colombo 05. RESPONDENT AND Sri Lanka Transport Board, No.200, Kirula Road, Colombo 05. RESPONDENT- APPELLANT -VS- Jathika Sevaka Sangamaya, (On behalf of P. Titus Jayantha) No. 416, Kotte Road, Pitakotte. APPLICANT-RESPONDENT AND NOW BETWEEN P. Titus Jayantha. Kudagammana, Giriulla. APPLICANT-RESPONDENT-APPELLANT -VS- Sri Lanka Transport Board, No.200, Kirula Road, Colombo 05. RESPONDENT-APPELLANT- RESPONDENT

06/ 07/ 21	SC/HC/LA/ 50/2020	Kaluappu Hannadi Lalith Priyantha 58/5, Nellammahara Road, Godagamuwa, Maharagama. APPLICANT Vs. Asia Broadcasting Corporation (Private) Limited Level 35 and 37, East Tower, World Trade Center, Colombo 01. RESPONDENT AND BETWEEN Asia Broadcasting Corporation (Private) Limited Level 35 and 37, East Tower, World Trade Center, Colombo 01. RESPONDENT-APPELLANT Vs. Kaluappu Hannadi Lalith Priyantha 58/5, Nellammahara Road, Godagamuwa, Maharagama. APPLICANT-RESPONDENT AND NOW BETWEEN Asia Broadcasting Corporation (Private) Limited Level 35 and 37, East Tower, World Trade Center, Colombo 01. RESPONDENT-APPELLANT-PETITIONER -Vs- Kaluappu Hannadi Lalith Priyantha 58/5, Nellammahara Road, Godagamuwa, Maharagama. APPLICANT-RESPONDENT-RESPONDENT
06/ 07/ 21	SC Appeal 159 / 2018	Agampodi Wijepala de Soyza, Katuwila, Ahungalla. ACCUSED - APPELLANT – APPELLANT -Vs- 1. Officer-in-Charge, Police Station, Ahungalla. COMPLAINANT - RESPONDENT - RESPONDENT 2. Hon. Attorney General, Attorney General’s Department, Colombo 12. RESPONDENT - RESPONDENT
05/ 07/ 21	S.C.(F.R.) Application No: 452/2011	Peduru Arachchige Janaka Pushpakumara (LL 27759), No.29, Sisil Uyana, Panamura Road, Thelbaduara, Embilipitiya. Petitioner Vs. 1. Director General, (Electric and Electronic Division) Sri Lanka Navy Headquarters, Colombo 01. 2. Director General, (Personnel and Training) Sri Lanka Navy Headquarters, Colombo 01. 3. Commander of the Navy, Sri Lanka Navy Headquarters, Colombo 01. 4. Lieutenant Commander T.R. Dahanayake, Sri Lanka Navy Headquarters, Colombo 01. 5. Hon. Attorney General, Attorney General’s Department, Colombo 12 Respondents

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05/07/21	S.C. Appeal No. 198/2012	Vidanalage Dingiri Banda (Deceased), of Kurunegoda, Kotiyakumbura. Plaintiff Vithanalage Senathileke of Kurunegoda, Kotiyakumbura. Substituted Plaintiff Vs. 1. Henaka Ralalage Punchi Banda alias Vijitha Bandara, Kurunegoda, Kotiyakumbura. 2. Henaka Ralalage Podi Appuhamy (Deceased), No. 29, Kurunegoda, Kotiyakumbura. 2A. Henaka Ralalage Wimalasiri Menike, No. D27, Kurunegoda, Kotiyakumbura. 3. V.P.C. Vitharana, No. D34, Kurunegoda, Kotiyakumbura. 4. Henaka Ralalage Somarathne, No. D33, Kurunegoda, Kotiyakumbura. 5. Henaka Ralalage Wijeratne (Deceased), No. D33/1, Kurunegoda, Kotiyakumbura. 5A. Henka Ralalage Sriyani Wijeratne, No. 400/1, Kadurugashena, Hiyare East, Hiyare, Galle. 6. Henaka Ralalage Dingiri Appuhamy (Deceased), Kurunegoda, Kotiyakumbura. 6A. Henaka Ralalage Piyarathne, Kurunegoda, Kotiyakumbura. 7. Henaka Ralalage Mohotti Appuhamy (Deceased), Kurunegoda, Kotiyakumbura. 7A. Henaka Ralalage Kamalawathie, No. D29, Kurunegoda, Kotiyakumbura. 8. Henaka Ralalage Gunathilake, Kurunegoda, Kotiyakumbura. 9. Henaka Ralalage Dingiri Appuhamy (Deceased), Kurunegoda, Kotiyakumbura. 9A. Henaka Ralalage Piyaratne, Kurunegoda, Kotiyakumbura. 10. Ranasinghe Hettiarachchige Gunasekara, Kurunegoda, Kotiyakumbura. 11. H.R. Podiralahamy (Deceased), Kurunegoda, Kotiyakumbura. 11A. Henaka Ralalge Premadasa, Kurunegoda, Kotiyakumbura. 12. Henaka Ralalage Piyaratne, Kurunegoda, Kotiyakumbura. 13. Henaka Ralalge Wimalsiri Manike (legal representative of the 2nd Defendant deceased), Kurunegoda, Kotiyakumbura. 14. P.R.Ranmenike, Kurunegoda, Kotiyakumbura. Defendants AND 3. V.P.C. Vitharana, No. D34, Kurunegoda, Kotiyakumbura. 4. Henaka Ralalage Somarathne, No. D33, Kurunegoda, Kotiyakumbura. 5. Henaka Ralalage Wijeratne (Deceased), No. D33/1, Kurunegoda, Kotiyakumbura. 5A. Henka Ralalage Sriyani Wijeratne, No. 400/1, Kadurugashena, Hiyare East, Hiyare, Galle. 10. Ranasinghe Hettiarachchige Gunasekara, Kurunegoda, Kotiyakumbura. Defendant-Appellants Vs. Vidanalage Dingiri Banda (Deceased), of Kurunegoda, Kotiyakumbura. Plaintiff-Respondent Vithanalage Senathileke of Kurunegoda, Kotiyakumbura. Substituted Plaintiff-Respondent 1. Henaka Ralalage Punchi Banda alias Vijitha Bandara, Kurunegoda, Kotiyakumbura. 2. Henaka Ralalage Podi Appuhamy (Deceased), No. 29, Kurunegoda, Kotiyakumbura. 2A. Henaka Ralalage Wimalasiri Menike, No. D27, Kurunegoda, Kotiyakumbura. 6. Henaka Ralalage Dingiri Appuhamy (Deceased), Kurunegoda, Kotiyakumbura. 6A. Henaka Ralalage Piyarathne, Kurunegoda, Kotiyakumbura. 7. Henaka Ralalage Mohotti Appuhamy (Deceased), Kurunegoda, Kotiyakumbura. 7A. Henaka Ralalage Kamalawathie, No. D29, Kurunegoda, Kotiyakumbura. 8. Henaka Ralalage Gunathilake,Kurunegoda, Kotiyakumbura. 9. Henaka Ralalage Dingiri Appuhamy (Deceased), Kurunegoda, Kotiyakumbura. 9A. Henaka Ralalage Piyaratne, Kurunegoda, Kotiyakumbura. 11. H.R. Podiralahamy (Deceased), Kurunegoda, Kotiyakumbura. 11A. Henaka Ralalge Premadasa, Kurunegoda, Kotiyakumbura. 12. Henaka Ralalage Piyaratne, Kurunegoda, Kotiyakumbura. 13. Henaka Ralalge

29/ 06/ 21	SC APPEAL NO: SC/ CHC/ APPEAL/ 4/2002	The Maharaja Organisation Limited, No.146, Dawson Street, Colombo 02. Petitioner Vs. 1. Viacom International Inc., 1515, Broadway, New York, United States of America. 2. The Director General of Intellectual Property, “Samagam Medura”, D.R. Wijewardena Mawatha, Colombo 10. Respondents AND NOW BETWEEN The Maharaja Organisation Limited, No.146, Dawson Street, Colombo 02. Petitioner-Appellant Vs. 1. Viacom International Inc., 1515, Broadway, New York, United States of America. 2. The Director General of Intellectual Property, “Samagam Medura”, D.R. Wijewardena Mawatha, Colombo 10. Respondent-Respondents
29/ 06/ 21	SC APPEAL NO: SC/ CHC/ APPEAL/ 3/2006	Viacom International Inc., 1515, Broadway, New York, United States of America. Plaintiff Vs. 1. The Maharaja Organisation Limited, No.146, Dawson Street, Colombo 02. 2. The Director General of Intellectual Property, 3rd Floor, “Samagam Medura”, D.R. Wijewardena Mawatha, Colombo 10. Defendants AND NOW BETWEEN The Maharaja Organisation Limited, No.146, Dawson Street, Colombo 02. 1st Defendant-Appellant Vs. 1. Viacom International Inc., 1515, Broadway, New York, United States of America. Plaintiff-1st Respondent 2. The Director General of Intellectual Property, 3rd Floor, “Samagam Medura”, D.R. Wijewardena Mawatha, Colombo 10. 2nd Defendant-Respondent
29/ 06/ 21	SC/FR No. 94/2013	1. Hettiarachchige Srimathi Devika Tissera 2. Welgamage Yoshika Nadishani Perera 3. Welgamage Vishan Madusha Perera All of No. 505/B, Yakkaduwa, Ja-Ela and No. 441/B, Niwandama, Ja-Ela Petitioners Vs. 1. Police Constable Madagammeddegedara Nirosha Sanjeewa Jayasekara (88696), Police Station, Ja-Ela. 2. Police Constable Rajakaruna Mudiyanselage Saman Sanjeewa Bandara (79186), Police Station, Ja-Ela. 3. Police Constable Fernando (29644), Police Station, Ja-Ela. 4. Inspector of Police Weerathilake, Officer-in-Charge (Minor Offences Branch), Police Station, Ja-Ela. 5. Chief Inspector Chandana Kandewatta, Officer-in-Charge, Police Station, Ja-Ela. 6. Udaya Hemantha, Assistant Superintendent of Police (Peliyagoda), ASP’s Office, Peliyagoda. 7. Senior Superintendent of Police, Police Headquarters, Colombo 01. 8. The Honourable Attorney General, Department of the Attorney General, Colombo 12. Respondents

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29/ 06/ 21	SC Appeal No.34/2017	Sri Lanka National Cooperative Council Limited No.455, Cooperative House, Galle Road, Colombo 03 Plaintiff Vs 1. Perera Ramanayake Don Vipula Perera No 60/34, Yadessa Cemetery Road, Siddamulla, Piliyandala 2. Radiant Trading Company (Private) Limited No 1 B, 1-1-10, 9th Lane Colombo 3 3. Radiant AC Cabs (Private) Limited No 1 B, 1-1-10, 9th Lane Colombo 03 4. Lakpathirana Ajith Rohana Kumara No.24/4, Gammana Road, Maharagama 5. Gurunnaselage Don Dulani Chandima Wijesinghe No.60/34, Yadessa Cemetery Road Siddamulla,Piliyandala 6. Ranwalage Sudath Priyantha No.195/32, Weliwita Road, Malabe Defendants AND NOW BETWEEN Sri Lanka National Cooperative Council Limited No.455, Cooperative House, Galle Road, Colombo 03 Plaintiff-Petitioner-Appellant Vs 1. Perera Ramanayake Don Vipula Perera No 60/34, Yadessa Cemetery Road, Siddamulla, Piliyandala 2. Radiant Trading Company (Private) Limited No 1 B, 1-1-10, 9th Lane Colombo 3 3. Radiant AC Cabs (Private) Limited No 1 B, 1-1-10, 9th Lane Colombo 03 4. Lakpathirana Ajith Rohana Kumara No.24/4, Gammana Road, Maharagama 5. Gurunnaselage Don Dulani Chandima Wijesinghe No.60/34, Yadessa Cemetery Road, Siddamulla, Piliyandala 6. Ranwalage Sudath Priyantha No.195/32, Weliwita Road, Malabe Defendant-Respondents
29/ 06/ 21	SC APPEAL NO: SC/ CHC/ APPEAL/ 28/2003	Viacom International Inc., 1515, Broadway, New York, United States of America. Plaintiff Vs. 1. The Maharaja Organisation Limited, No.146, Dawson Street, Colombo 02. 2. The Director General of Intellectual Property, 3rd Floor, “Samagam Medura”, D.R. Wijewardena Mawatha, Colombo 10. Defendants AND NOW BETWEEN Viacom International Inc., 1515, Broadway, New York, United States of America. Plaintiff-Appellant Vs. 1. The Maharaja Organisation Limited, No.146, Dawson Street, Colombo 02. 2 The Director General of Intellectual Property, 3rd Floor, “Samagam Medura”, D.R. Wijewardena Mawatha, Colombo 10. Defendant-Respondents
27/ 06/ 21	SC Appeal No. 155/14	Officer in Charge Special Crimes Division, Colombo. Complainant vs. Mananage Susil Dharmapala No. 132C, Pitumpe Road, Padukka. Accused AND BETWEEN Mananage Susil Dharmapala No. 132C, Pitumpe Road, Padukka. Accused Appellant v s Officer in Charge Special Crimes Division, Colombo. Complainant Respondent AND NOW BETWEEN Mananage Susil Dharmapala No. 132C, Pitumpe Road, Padukka. Accused Appellant Appellant vs. Officer in Charge Special Crimes Division, Colombo. Complainant Respondent Respondent

27/ 06/ 21	SC Appeal No. 70/17	Pannipitiya Medical Services (Pvt.) Ltd. No. 334/4, Hokandara Road, Moraketiya, Pannipitia. Plaintiff Vs. Nadeeka Udayani Dharmapala No. 61/4, Thapassarakanda, Kalawana. Defendant AND Nadeeka Udayani Dharmapala No. 61/4, Thapassarakanda, Kalawana. Defendant – Appellant Vs. Pannipitiya Medical Services (Pvt.) Ltd. No. 334/4, Hokandara Road, Moraketiya, Pannipitia. Plaintiff – Respondent AND NOW BETWEEN Pannipitiya Medical Services (Pvt.) Ltd. No. 334/4, Hokandara Road, Moraketiya, Pannipitia. Plaintiff – Respondent - Appellant Vs. Nadeeka Udayani Dharmapala No. 61/4, Thapassarakanda, Kalawana. Defendant – Appellant - Respondent
22/ 06/ 21	S C (F R) Application No. 216/2014	W. A. D. S. Wanasinghe, Hanthinawa, Halmillawewa Kurunegala. PETITIONER -Vs- 01. Kamal Paliskara Assistant Superintendent of Police (II) Nugegoda. 02. Inspector General of Police, Police Headquarters, Colombo 01. 03. Hon. Attorney General, Attorney General’s Department, Colombo 12. RESPONDENTS
22/ 06/ 21	S C CHC Appeal No. 14/2014	People’s Merchant PLC, (formerly People’s Merchant Bank PLC), No. 21, Navam Mawatha, Colombo 03. PETITIONER -Vs- Udaya Saman Subhasinghe, No. 125/5/1, Monarathenna Watta, Palliya Road, Bogamuwa, Yakkala. RESPONDENT AND NOW BETWEEN Udaya Saman Subhasinghe, No. 125/5/1, Monarathenna Watta, Palliya Road, Bogamuwa, Yakkala. RESPONDENT-APPELLANT -Vs- People’s Merchant PLC, (formerly People’s Merchant Bank PLC), No. 21, Navam Mawatha, Colombo 03. PETITIONER-RESPONDENT

17/06/21	SC/APPEAL/93/2017	Geethani Nilushika Samarawickrama, Polgedara, Denipitiya. Plaintiff Vs. 1. Waruni Harshani Samarawickrama, No. 15/2, Gomas Park, Colombo 05. 2. Dilhar Agasha Jinadasa, No. 260, Park Road, Colombo 05. 3. Nishamani Serosha Jinadasa, No. 260, Park Road, Colombo 05. 4. Indrani Samarawickrama, 5. Nanda Samarawickrama, 6. Adarawathi Samarawickrama, 7. Malani Samarawickrama, 8. Eujin Samarawickrama, 9. Kananke Suriarachchi Liyanage Indika Thilak Kumara, All of Elagawa Gedara, Eluwawila, Denipitiya. 10. Nihal Ranjith Samarawickrama, No. 13/3, Sri Mahabodhi Road, Dehiwala. Defendants AND BETWEEN 4. Indrani Samarawickrama, 5. Nanda Samarawickrama, 6. Adarawathi Samarawickrama, 7. Malani Samarawickrama, 8. Eujin Samarawickrama, 9. Kananke Suriarachchi Liyanage Indika Thilak Kumara, All of Elagawa Gedara, Eluwawila, Denipitiya. 10. Nihal Ranjith Samarawickrama, No. 13/3, Sri Mahabodhi Road, Dehiwala. 4th-10th Defendant-Petitioners Vs. Geethani Nilushika Samarawickrama, Polgedara, Denipitiya. Plaintiff-Respondent 1. Waruni Harshani Samarawickrama, No. 15/2, Gomas Park, Colombo 05. 2. Dilhar Agasha Jinadasa, No. 260, Park Road, Colombo 05. 3. Nishamani Serosha Jinadasa, No. 260, Park Road, Colombo 05. 1st–3rd Defendant-Respondents AND NOW BETWEEN 4. Indrani Samarawickrama, 5. Nanda Samarawickrama, 6. Adarawathi Samarawickrama, 7. Malani Samarawickrama, 8. Eujin Samarawickrama, 9. Kananke Suriarachchi Liyanage Indika Thilak Kumara, All of Elagawa Gedara, Eluwawila, Denipitiya. 4th-9th Defendant-Petitioner-Appellants Vs. Geethani Nilushika Samarawickrama, Polgedara, Denipitiya. Plaintiff-Respondent-Respondent 1. Waruni Harshani Samarawickrama, No. 15/2, Gomas Park, Colombo 05. 2. Dilhar Agasha Jinadasa, No. 260, Park Road, Colombo 05. 3. Nishamani Serosha Jinadasa, No. 260, Park Road, Colombo 05. 1st–3rd Defendant-Respondent-Respondents 10. Nihal Ranjith Samarawickrama, No. 13/3, Sri Mahabodhi Road, Dehiwala. 10th Defendant-Petitioner-Respondent
16/06/21	SC Appeal 154/2016	Lulwala Hewayalage Tilanganee Weerasuriya, 182/A/1 Suraweera Mawatha, Walpola, Ragama. 1b and 2a Substituted Defendants-Respondents-Petitioner Vs. Kirigalbadage Gamini Chandrasena No. 186, Boystown Road, Walpola, Batuwatte. Plaintiff-Appellant-Respondent

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09/ 06/ 21	SC APPEAL NO: SC/ APPEAL/ 138/2016	1. Ambawatta Hewage Sisira Kumara, 2. Habaraduwa Pandigamage Mallika, 3. Ambawatta Hewage Chamila Kumari, All of 'Athkam Niwasa', Juwanpullegewatta, Petiyagoda, Kelaniya. Plaintiffs Vs. 1. Ambawatta Hewage Dayliya Kanthi, 2. Buluwa Hewage Ratnasiri, Both of No. 5, Melagoda, Wanchawala, Galle. Defendants AND BETWEEN 1. Ambawatta Hewage Sisira Kumara, 2. Habaraduwa Pandigamage Mallika, 3. Ambawatta Hewage Chamila Kumari, All of 'Athkam Niwasa', Juwanpullegewatta, Petiyagoda, Kelaniya. Plaintiff-Appellants Vs. 1. Ambawatta Hewage Dayliya Kanthi, 2. Buluwa Hewage Ratnasiri, Both of No. 5, Melagoda, Wanchawala, Galle. Defendant-Respondents AND NOW BETWEEN 1. Ambawatta Hewage Sisira Kumara, 2. Habaraduwa Pandigamage Mallika, 3. Ambawatta Hewage Chamila Kumari, All of 'Athkam Niwasa', Juwanpullegewatta, Petiyagoda, Kelaniya. Plaintiff-Appellant-Appellants Vs. 1. Ambawatta Hewage Dayliya Kanthi, 2. Buluwa Hewage Ratnasiri, Both of No. 5, Melagoda, Wanchawala, Galle. Defendant-Respondent-Respondents
09/ 06/ 21	SC APPEAL NO: SC/ APPEAL/ 75/2013	Weerasinghe Thilakaratne, Indilanda, Galpatha. Plaintiff Vs. 1. Mathota Arachchige Shiran Mahinda, Indilanda, Galpatha. 2. Vinietha Chandralatha Edussuriya, Dapiligoda, Agalawatta. Defendants AND BETWEEN 1. Mathota Arachchige Shiran Mahinda, Indilanda, Galpatha. 2. Vinietha Chandralatha Edussuriya, Dapiligoda, Agalawatta. Defendant-Appellants Weerasinghe Thilakaratne, Indilanda, Galpatha. Plaintiff-Respondent AND NOW BETWEEN Weerasinghe Thilakaratne, Indilanda, Galpatha. Plaintiff-Respondent-Appellant Vs. 1. Mathota Arachchige Shiran Mahinda, (Deceased) 1A. Gamage Dona Kamani Chandra Kumari, Both of Indilanda, Galpatha. 2. Vinietha Chandralatha Edussuriya, Dapiligoda, Agalawatta. Defendant-Appellant-Respondents
09/ 06/ 21	SC APPEAL NO: SC/ APPEAL/ 57/2019	Algama Appuhamylage Don Wasantha Lankanayake, Bayawa, Awulegama. Plaintiff Vs. Algama Appuhamylage Don Ananda Algama, Hingurugamuwa, Awulegama. Defendant AND BETWEEN Algama Appuhamylage Don Wasantha Lankanayake, Bayawa, Awulegama. Plaintiff-Appellant Vs. Algama Appuhamylage Don Ananda Algama, Hingurugamuwa, Awulegama. Defendant-Respondent AND NOW BETWEEN Algama Appuhamylage Don Ananda Algama, Hingurugamuwa, Awulegama. Defendant-Respondent-Appellant Vs. Algama Appuhamylage Don Wasantha Lankanayake, Bayawa, Awulegama. Plaintiff-Appellant-Respondent

09/06/21	SC APPEAL NO: SC/APPEAL/53/2016	1. Vithanage Dona Sreema Sarani Swarnalatha Perera, No. 10/B 105/10, Mattegoda Niwasa Housing Scheme, Polgasowita. 2. Violet Gunawickrema, “Dimuthu”, Palatuwa, Malimbada. Plaintiffs Vs. 1. Kamalawathie Munasinghe alias M.A. Kamalawathie, 2. W.D. Padmasiri alias Hemasiri Perera, Both of No. C-B 12/14, Ranpokunagama, Nittambuwa. 3. Sithy Raleena Siddique, No. 146/18, Aramaya Road, Dematagoda. Defendants AND BETWEEN 1. Kamalawathie Munasinghe alias M.A. Kamalawathie, (deceased) 1A. W.D. Padmasiri alias Hemasiri Perera, No. C-B 12/14, Ranpokunagama, Nittambuwa. 2. W.D. Padmasiri alias Hemasiri Perera, No. C-B 12/14, Ranpokunagama, Nittambuwa. 3. Sithy Raleena Siddique, No. 114, Kollonnawa Road, Dematagoda. Defendant-Petitioners Vs. 1. Vithanage Dona Sreema Sarani Swarnalatha Perera, No. 10/B 105/10, Mattegoda Housing Scheme, Polgasowita. 2. Violet Gunawickrema, “Dimuthu”, Palatuwa, Malimbada. Plaintiff-Respondents AND NOW BETWEEN 1. Kamalawathie Munasinghe alias M.A. Kamalawathie, (deceased) 1A. W.D. Padmasiri alias Hemasiri Perera, No. C-B 12/14, Ranpokunagama, Nittambuwa. 2. W.D. Padmasiri alias Hemasiri Perera, No. C-B 12/14, Ranpokunagama, Nittambuwa. 3. Sithy Raleena Siddique, No. 114, Kollonnawa Road, Dematagoda. Defendant-Petitioner-Appellants Vs. 1. Vithanage Dona Sreema Sarani Swarnalatha Perera, No. 10/B 105/10, Mattegoda Housing Scheme, Polgasowita. 2. Violet Gunawickrema, “Dimuthu”, Palatuwa, Malimbada. Plaintiff-Respondent-Respondents

09/06/21	SC APPEAL NO: SC/ APPEAL/ 52/2018	1. Herath Mudiyanselage Podi Nilame, 2. Herath Mudiyanselage Seneviratne, (Deceased) 2A. H.M. Podinilame, All of Bogala Road, Kotiyakumbura. Plaintiffs Vs. 1. Walpola Kankanamalage Gunarathne of Morawawka, Ruwanwella. 2. E.N. Margret Nona of Pattiyamulla, Kotiyakumbura. (Deceased) 2A. Hapuarachchilage Susantha Rohan Hapuarachchi of Pattiyamulla, Kotiyakumbura. 3. Dadagama Ralalage Sumanawathie Menike of Ampe, Kotiyakumbura. 4. Kanthi Asoka of Ampe, Kotiyakumbura. 5. Hapuarachchilage Susantha Rohan Hapuarachchi of Pattiyamulla, Kotiyakumbura. 6. H.M. Chandrasekara of No. 20, Parawatte Janapadaya, Kotiyakumbura. 7. H.M. Chandrawathie Herath, C/O W.A. Gunathilake of Delgamuwa, Warakapola. 8. H.M. Sumanawathie, C/O S.S. Chandrasekara of No. 20, Parawatta Janapadaya, Kotiyakumbura. 9. H.M. Anula Herath, C/O V.G.R.S. Raja of Udapelpita, Weragala, Warakapola. 10. M.N. Saliya Niroshane Herath of No. 10965, Police Official Quarters, Peduru Kotuwa, Trincomalee. Defendants AND BETWEEN 2A. Hapuarachchilage Susantha Rohan Hapuarachchi of Pattiyamulla, Kotiyakumbura. 3. Dadagama Ralalage Sumanawathie Menike of Ampe, Kotiyakumbura. 4. Kanthi Asoka of Ampe, Kotiyakumbura. 5. Hapuarachchilage Susantha Rohan Hapuarachchi of Pattiyamulla, Kotiyakumbura. 2A, 3rd to 5th Defendant-Appellants Vs. 1. Herath Mudiyanselage Podi Nilame, 2A. H.M. Podinilame, All of Bogala Road, Kotiyakumbura. Plaintiff-Respondents 1. Walpola Kankanamalage Gunarathne of Morawawka, Ruwanwella. (Deceased) 1A. Seelawathi Podimanike, 1B. Shayamala Gunarathna, 1C. Nalaka Nishantha Gunarathna, 1D. Chanaka Nishantha Gunarathna, All of Morawaka, Ruwanwella. 6. H.M. Chandrasekara of No. 20, Parawatte Janapadaya, Kotiyakumbura. 7. H.M. Chandrawathie Herath, C/O W.A. Gunathilake of Delgamuwa, Warakapola. 8. H.M. Sumanawathie, C/O S.S. Chandrasekara of No. 20, Parawatta Janapadaya, Kotiyakumbura. 9. H.M. Anula Herath, C/O V.G.R.S. Raja of Udapelpita, Weragala, Warakapola. 10. M.N. Saliya Niroshane Herath of No. 10965, Police Official Quarters, Peduru Kotuwa, Trincomalee. Defendant-Respondents AND NOW BETWEEN 2A. Hapuarachchilage Susantha Rohan Hapuarachchi of Pattiyamulla, Kotiyakumbura. 3. Dadagama Ralalage Sumanawathie Menike of Ampe, Kotiyakumbura. 4. Kanthi Asoka of Ampe, Kotiyakumbura. 5. Hapuarachchilage Susantha Rohan Hapuarachchi of Pattiyamulla, Kotiyakumbura. 2A, 3rd to 5th Defendant-Appellant-Petitioners Vs. 1. Herath Mudiyanselage Podi Nilame, 2A. H.M. Podinilame, All of Bogala Road, Kotiyakumbura. Plaintiff-Respondent-Respondents 1A. Seelawathi Podimanike, 1B. Shayamala Gunarathna, 1C. Nalaka Nishantha Gunarathna, 1D. Chanaka Nishantha Gunarathna, All of Morawaka, Ruwanwella. 6. H.M. Chandrasekara of No. 20, Parawatte Janapadaya, Kotiyakumbura. 7. H.M. Chandrawathie Herath, C/O W.A. Gunathilake of Delgamuwa, Warakapola. 8. H.M. Sumanawathie, C/O S.S. Chandrasekara of No. 20, Parawatta Janapadaya, Kotiyakumbura. 9. H.M. Anula Herath, C/O V.G.R.S. Raja of Udapelpita, Weragala, Warakapola. 10. M.N. Saliya Niroshane Herath of No. 10965, Police Official

01/06/21	SC Appeal No: 127/2014	Yasasiri Kasturiarachchi No.19, Nugegoda Road, Pepiliyana, Boralasgamuwa. Plaintiff -Vs- Peoples' Bank No. 75, Sir Chittampalam A Gardiner Mawatha, Colombo 2. Defendant AND BETWEEN Yasasiri Kasturiarachchi No.19, Nugegoda Road, Pepiliyana, Boralasgamuwa. Plaintiff-Petitioner -Vs- People's Bank No. 75, Sir Chittampalam A Gardiner Mawatha, Colombo 2. Defendant- Respondent AND NOW BETWEEN Yasasiri Kasturiarachchi No.19, Nugegoda Road, Pepiliyana, Boralasgamuwa. Plaintiff- Petitioner- Petitioner/ Appellant -Vs- People's Bank No. 75, Sir Chittampalam A Gardiner Mawatha, Colombo 2. Defendant-Respondent-Respondent

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		Keragalage Aron Perera (Deceased), Nakadamulla, Ranala. Plaintiff Pathmalatha Keragala, Nakadamulla, Ranala. Substituted Plaintiff Vs. 1. Meeriyagallage Soidahami (Deceased), Nakadamulla, Ranala. 1A. Keragalage Caroline Perera (Deceased), No. 43, Sumanasekarapura, Walipillawa, Dadigamuwa. 1B. M.D. Somasiri, No. 43, Sumanasekarapura, Walipillawa, Dadigamuwa. 2. Keragalage Luwis Singho, Nakadamulla, Ranala. 3. Keragalage Misihami, Nakadamulla, Ranala. 4. Keragalage Asinona (Deceased), Nakadamulla, Ranala. 4A. W. Mahawatta, Nakadamulla, Ranala. 5. Keragalage Alis Nona (Deceased), Nakadamulla, Ranala. 5A. Edirisinghe Arachchige Chintha Nilmini Edirisinghe, No. 157, Nakadamulla, Ranala. 6. Keragalage Julis Singho (Deceased), Nakadamulla, Ranala. 6A. Sujeewa Janak Prasanna Keragala, Nakadamulla, Ranala. 7. Lokuhiraluge Podihami, Nakadamulla, Ranala. 8. Meeriyagallage Jane Nona (Deceased), Nakadamulla, Ranala. 8A. Horana Gamage William Singho (Deceased), Nakadamulla, Ranala. 8B. Horana Gamage Caroline Nona, Nakadamulla Ranala. 9. T.K. Magi Nona (Deceased), Nakadamulla, Ranala. 9A,10. D.W. Meeriyagalla No. 287/B, Galahitiyawa, Ganemulla. 11. Rupawathie Meeriyagalla (Deceased), No. 767/5, Millagahawatta Road, Thalangama North, Malabe. 11A. Pushpa Gamage, No. 767/5, Millagahawatta Road, Thalangama North, Malabe. 12. Horana Gamage Piyadasa, Nakadamulla, Ranala. 13. M. Saranelis Perera (Deceased), Kottawa, Pannipitiya. 13A,14. H. Eugine Perera, Kottawa, Pannipitiya. 15. Kalupahanage Shanthilatha (Deceased), Nawalamulla, Ranala. 15A. Arambawattage Karolis alias Gunadasa Rodrigo, No. 37/2, Walawwatta, Ranala. 16. Habarakada Saranelis Perera (Deceased), 745, Katukurunda, Kottawa, Pannipitiya. 16A. Habarakada Eugine Perera, No. 981, Katukurunda, Kottawa, Pannipitiya. Defendants AND BETWEEN Henadirage Chandrasiri, No. 202, Nakadamulla, Dedigamuwa, Ranala. Petitioner Vs. Keragalage Aron Perera (Deceased), Nakadamulla, Ranala. Plaintiff-Respondent Pathmalatha Keragala, Nakadamulla, Ranala. Substituted Plaintiff-Respondent 1. Meeriyagallage Soidahami (Deceased), Nakadamulla, Ranala. 1A. Keragalage Caroline Perera (Deceased), No. 43, Sumanasekarapura, Walipillawa, Dadigamuwa. 1B. M.D. Somasiri, No. 43, Sumanasekarapura, Walipillawa, Dadigamuwa. 2. Keragalage Luwis Singho, Nakadamulla, Ranala. 3. Keragalage Misihami, Nakadamulla, Ranala. 4. Keragalage Asinona (Deceased), Nakadamulla, Ranala. 4A. W. Mahawatta, Nakadamulla, Ranala. 5. Keragalage Alis Nona (Deceased), Nakadamulla, Ranala. 5A. Edirisinghe Arachchige Chintha Nilmini Edirisinghe, No. 157, Nakadamulla, Ranala. 6. Keragalage Julis Singho (Deceased), Nakadamulla, Ranala. 6A. Sujeewa Janak Prasanna Keragala, Nakadamulla, Ranala. 7. Lokuhiraluge Podihami, Nakadamulla, Ranala. 8. Meeriyagallage Jane Nona (Deceased), Nakadamulla, Ranala. 8A. Horana Gamage William Singho (Deceased), Nakadamulla, Ranala. 8B. Horana Gamage Caroline Nona, Nakadamulla Ranala. 9. T.K. Magi Nona (Deceased), Nakadamulla, Ranala. 9A,10. D.W. Meeriyagalla No.

01/06/21	SC/APPEAL/118/18	Walpola Liyanage Premarathne, No. 131/1, Udamadura, Talawa. Plaintiff Vs. Abeydeera Arachchige Charlotte Kalamawathie No. 15, Nildannahinna Defendant AND Abeydeera Arachchige Charlotte Kalamawathie No. 15, Nildannahinna Defendant – Appellant Vs. Walpola Arachchige Premarathne, No. 131/1, Udamadura, Talawa. Plaintiff – Respondent AND Abeydeera Arachchige Charlotte Kalamawathie No. 15, Nildannahinna Defendant – Appellant - Petitioner Vs. Walpola Arachchige Premarathne, No. 131/1, Udamadura, Talawa. Plaintiff – Respondent – Respondent AND NOW Abeydeera Arachchige Charlotte Kalamawathie No. 15, Nildannahinna Defendant – Appellant – Appellant Walpola Arachchige Premarathne, No. 131/1, Udamadura, Talawa. Plaintiff – Respondent - Respondent (Deceased) 1a. M.M.G. Karunawathie, 1b. W.L. Nandawathie, 1c. W.L. Rupawathie, 1d. W.L. Kamalawathie, 1e. W.L. Ariyawathie 1f. W.L. Gunarathne, 1g. W.L. Thusarika Kumari, 1h. W.L. Chandra Kumari, 1i. W.L. Lalitha Kumari, 1j. W.L. Devika Kumari All at No. 48, Udamadura, Talawa, Nildannahinna. 1(a) to 1(j) Plaintiff – Respondent – Respondents
01/06/21	SC Appeal 118/2018	Walpola Liyanage Premarathne, No. 131/1, Udamadura, Talawa. Plaintiff Vs Abeydeera Arachchige Charlet Kamalawathie, No. 15, Nildannahinna. Defendant AND Abeydeera Arachchige Charlet Kamalawathie, No. 15, Nildannahinna. Defendant-Appellant Vs Walpola Liyanage Premarathne, No. 131/1, Udamadura, Talawa. Plaintiff-Respondent AND Abeydeera Arachchige Charlet Kamalawathie, No. 15, Nildannahinna. Defendant-Appellant-Petitioner Vs. Walpola Liyanage Premarathne, No. 131/1, Udamadura, Talawa. Plaintiff-Respondent-Respondent AND NOW Abeydeera Arachchige Charlet, Kamalawathie, No. 15, Nildannahinna. Defendant-Appellant-Appellant Vs. Walpola Liyanage Premarathne, No. 131/1, Udamadura, Talawa. Plaintiff-Respondent-Respondent (deceased) 1a. M.M.G. Karunawathie 1b. W.L. Nandawathie 1c. W.L. Rupawathie 1d. W.L. Kamalawathie 1e. W.L. Ariyawathie 1f. W.L. Gunarathne 1g. W.L. Thusarika Kumari 1h. W.L. Chandra Kumari 1i. W.L. Lalitha Kumari 1j. W.L. Devika Kumari All at No. 48, Udamadura, Talawa, Nildannahinna. 1(a) to 1(i) Plaintiff-Respondent-Respondents

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01/ 06/ 21	SC/APPEAL/ 118/18	Walpola Liyanage Premarathne, No. 131/1, Udamadura, Talawa. Plaintiff Vs. Abeydeera Arachchige Charlotte Kalamawathie No. 15, Nildannahinna Defendant AND Abeydeera Arachchige Charlotte Kalamawathie No. 15, Nildannahinna Defendant – Appellant Vs. Walpola Arachchige Premarathne, No. 131/1, Udamadura, Talawa. Plaintiff – Respondent AND Abeydeera Arachchige Charlotte Kalamawathie No. 15, Nildannahinna Defendant – Appellant - Petitioner Vs. Walpola Arachchige Premarathne, No. 131/1, Udamadura, Talawa. Plaintiff – Respondent – Respondent AND NOW Abeydeera Arachchige Charlotte Kalamawathie No. 15, Nildannahinna Defendant – Appellant – Appellant Vs. Walpola Arachchige Premarathne, No. 131/1, Udamadura, Talawa. Plaintiff – Respondent - Respondent (Deceased) 1a. M.M.G. Karunawathie, 1b. W.L. Nandawathie, 1c. W.L. Rupawathie, 1d. W.L. Kamalawathie, 1e. W.L. Ariyawathie 1f. W.L. Gunarathne, 1g. W.L. Thusarika Kumari, 1h. W.L. Chandra Kumari, 1i. W.L. Lalitha Kumari, 1j. W.L. Devika Kumari All at No. 48, Udamadura, Talawa, Nildannahinna. 1(a) to 1(j) Plaintiff – Respondent – Respondents
01/ 06/ 21	SC/Appeal/ No.68/2015	IN THE DISTRICT COURT OF MAHO. Rangallage Sirimawathie Navaratne. No. 17/6, Malkaduwawa, Circular Road, Kurunegala. Plaintiff. Vs. Semasinghe Wanninayake Mudyanselage Kamalawathie, Rest House Road, Ebalagodayagama, Nikaweratiya. Defendant. IN THE COURT OF APPEAL. Rangallage Sirimawathie Navaratne. No. 17/6, Malkaduwawa, Circular Road, Kurunegala. Plaintiff – Appellant. Vs. Semasinghe Wanninayake Mudyanselage Kamalawathie, Rest House Road, Ebalagodayagama, Nikaweratiya. Defendant – Respondent. IN THE SUPREME COURT. Rangallage Sirimawathie Navaratne. No. 17/6, Malkaduwawa, Circular Road, Kurunegala. Plaintiff – Appellant – Appellant. Vs. Semasinghe Wanninayake Mudyanselage Kamalawathie, Rest House Road, Ebalagodayagama, Nikaweratiya. Defendant – Respondent -Respondent.
30/ 05/ 21	SC/APPEAL/ 177/17	In the District Court of Kandy 1. W. H. Wilson Perera, 2. K. A. Wimalawathie, Both of at; No. 4/6, Uduwela Road, Ampitiya Plaintiffs Vs. 1. Jayawardena Thambulage Kamalawathie, 2. G. V. M. M. Gunesekere, Both of at; No. 3/6, Uduwela Road, Ampitiya Defendants And Between in the Provincial High Court of Central Province 1. W. H. Wilson Perera, 2. K. A. Wimalawathie, Both of at; No. 4/6, Uduwela Road, Ampitiya Plaintiff - Appellants Vs. 1. Jayawardena Thambulage Kamalawathie, 2. G. V. M. M. Gunesekere, Both of at; No. 3/6, Uduwela Road, Ampitiya Defendant – Respondents And Now Between in the Supreme Court 1. W. H. Wilson Perera, 2. K. A. Wimalawathie, Both of at; No. 4/6, Uduwela Road, Ampitiya Plaintiff – Appellant – Petitioners Vs. 1. Jayawardena Thambulage Kamalawathie, 2. G. V. M. M. Gunesekere, Both of at; No. 3/6, Uduwela Road, Ampitiya Defendant – Respondent – Respondents

30/ 05/ 21	SC (CHC) Appeal No.05/2011	Sri Lanka Telecom Ltd, Lotus Road, Colombo 01. Plaintiff Vs. Global Electroteks Limited, Unit C 17, Poplar Business Park, 10, Preston Road London E14 9 RL, United Kingdom. Defendant AND NOW Sri Lanka Telecom Ltd, Lotus Road, Colombo 01. Plaintiff - Appellant Vs. Global Electroteks Limited, Unit C 17, Poplar Business Park, 10 Preston Road London E14 9 RL, United Kingdom. Defendant – Respondent
30/ 05/ 21	SC Appeal No. 93/2015	Meezan Estates Limited No. 8 and 10, Harrison Jones Road, Matale. Plaintiff Vs. Seayed Ismail Mohamed Mohideen (Deceased) Ahmed Faisal No. 166. Main Street, Matale. Presently at No. 24/A, Pallidora Road, Kawdana, Dehiwala. Substituted Defendant And Between Ahmed Faisal No. 166, Main Street Matale Presently at No. 24/A, Pallidora Road, Kawdana, Dehiwala. Substituted Defendant – Appellant Vs. Meezan Estates Limited No. 8 and 10, Harrison Jones Road, Matale. And Now Between Meezan Estates (Private) Limited No. 392, Main Street Matale Plaintiff – Respondent – Petitioner Vs Ahmed Faisal No. 166, Main Street Matale Presently at No. 24/A, Pallidora Road, Kawdana, Dehiwala. Substituted Defendant- Appellant Respondent

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Judgments Delivered in 2021

20/ 05/ 21	SC (FR) APPLICATION NO: 402/2015	Janidhu Charuka Daham Seneviratne, No. 4A, Sapumal Mawatha, Sirimal Uyana, Ratmalana. Petitioner Vs. 1. Sub Inspector Nelumdeniya, Police Station, Mount Lavinia. 2. Officer in Charge, Special Crimes Investigation Unit, Police Station, Mount Lavinia. 3. Chief Inspector Chanaka Iddamalgoda, Head Quarters Inspector, Police Station, Mount Lavinia. 4. N.K. Illangakoon, Inspector General of Police, Police Headquarters, Colombo 01. 5. Hon. Attorney General, Attorney General's Department, Colombo 12. Respondents

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20/05/21	SC APPEAL NO: SC/APPEAL/172/2015	Iluppengamu Appuhamylage Martin Appuhamy (Deceased) Plaintiff Iluppengamu Appuhamylage Milrad Chandrawathie (Formerly the 1st Defendant) Substituted Plaintiff Iluppengamu Appuhamylage Dannet Ranasinghe (Formerly the 5th Defendant) All of Balabowa, Dewalapola. Substituted Plaintiff Vs. 1. Iluppengamu Appuhamylage Milrad Chandrawathie (Deceased) 2. Iluppengamu Appuhamylage Ariyawansa Gemunudasa 3. Iluppengamu Appuhamylage Jacolis Appuhamy (Deceased) 3(a). Iluppengamu Appuhamylage Suraweera 4. Sangapala Arachchige Harriet 5. Iluppengamu Appuhamylage Dannet Ranasinghe 6. Iluppengamu Appuhamylage Sumithra Padmasilie 7. Iluppengamu Appuhamylage Swineetha 8. Iluppengamu Appuhamylage Violet 9. Iluppengamu Appuhamylage Kumaratunga All of Balabowa, Dewalapola. 10. Bowanayaka Arachchige Sumanawathie 11. Iluppengamu Appuhamylage Jayath Both of No. 63/14, Parakum Mawatha, Bandarawatta, Gampaha. 12. Milton Appuhamilage Milton Chandrawathie Balabowa, Dewalapola. 13. Iluppengamage Chandrawathie No. 142, Balabowa, Dewalapola. Defendants AND BETWEEN Iluppengamu Appuhamylage Dannet Ranasinghe (Formerly the 5th Defendant) Balabowa, Dewalapola. Substituted-Plaintiff-Appellant Vs. 1. Iluppengamu Appuhamylage Milrad Chandrawathie (Deceased) 2. Iluppengamu Appuhamylage Ariyawansa Gemunudasa 3. Iluppengamu Appuhamylage Jacolis Appuhamy (Deceased) 3(a). Iluppengamu Appuhamylage Suraweera 4. Sangapala Arachchige Harriet 5. Iluppengamu Appuhamylage Dannet Ranasinghe 6. Iluppengamu Appuhamylage Sumithra Padmasilie 7. Iluppengamu Appuhamylage Swineetha 8. Iluppengamu Appuhamylage Violet 9. Iluppengamu Appuhamylage Kumaratunga All of Balabowa, Dewalapola. 10. Bowanayaka Arachchige Sumanawathie 11. Iluppengamu Appuhamylage Jayalath Both of No. 63/14, Parakum Mawatha, Bandarawatta, Gampaha. 12. Milton Appuhamilage Milton Chandrawathie Balabowa, Dewalapola. 13. Iluppengamage Chandrawathie No. 142, Balabowa, Dewalapola. Defendant-Respondent AND NOW BETWEEN Iluppengamu Appuhamylage Suraweera, Balabowa, Dewalapola 3A Substituted Defendant-Respondent-Petitioner Vs. Iluppengamu Appuhamylage Dannet Ranasinghe (Formerly the 5th Defendant) Balabowa, Dewalapola Substituted Plaintiff-Appellant-Respondent 1. Iluppengamu Appuhamylage Milrad Chandrawathie 2. Iluppengamu Appuhamylage Ariyawansa Gemunudasa 4. Sangapala Arachchige Herriet 5. Iluppengamu Appuhamylage Dannet Ranasinghe (also the Substituted-Plaintiff-Appellant-Respondent) 6. Iluppengamu Appuhamylage Sumithra Padmasilie 7. Iluppengamu Appuhamylage Swineetha 8. Iluppengamu Appuhamylage Violet 9. Iluppengamu Appuhamylage Kumaratunga All of Balabowa, Dewalapola. 10. Bowanayaka Arachchige Sumanawathie 11. Iluppengamu Appuhamylage Jayalath Both of No. 63/14, Parakum Mawatha, Bandarawatta, Gampaha. 12. Milton Appuhamilage Milton Chandrawathie Balabowa, Dewalapola. 13. Iluppengamu Appuhamylage Chandrawathie No. 142, Balabowa, Dewalapola. Defendant-Respondent-Respondents

20/ 05/ 21	SC APPEAL NO: SC/ APPEAL/ 125/2016	Thiththalapitige Tilakaratne, Rukgahawila, Walpola. Plaintiff Vs. 1. Thiththalapitige Chandrawathi Perera, (Deceased) 2. Thiththalapitige Wilbert Perera, 3. Thiththalapitige Ruban Perera, All of Rukgahawila, Walpola. Defendants AND BETWEEN 1. Thiththalapitige Tilakaratne, Rukgahawila, Walpola. Plaintiff-Appellant Vs. 1. Thiththalapitige Chandrawathi Perera, (Deceased) 2. Thiththalapitige Wilbert Perera, 3. Thiththalapitige Ruban Perera, All of Rukgahawila, Walpola. Defendant-Respondents AND NOW BETWEEN 3. Thiththalapitige Ruban Perera, (Deceased) 3A. Thiththalapitige Vipula Namal Priyadharshana Perera, All of Rukgahawila, Walpola. 3rd Defendant-Respondent-Appellant Vs. 1. Thiththalapitige Tilakaratne, Rukgahawila, Walpola. Plaintiff-Appellant-Respondent 2. Thiththalapitige Wilbert Perera Rukgahawila, Walpola. 2nd Defendant-Respondent-Respondent
20/ 05/ 21	SC APPEAL NO: SC/ APPEAL/ 112/2018	Disanayaka Mudiyanselage Chandrapala Meegahaarawa, Karandagamada, Arawa. Plaintiff Vs. Disanayaka Mudiyanselage Samaraweera Meegahaarawa, Karandagamada, Arawa. Defendant AND BETWEEN Disanayaka Mudiyanselage Samaraweera Meegahaarawa, Karandagamada, Arawa. Defendant-Appellant Vs. Disanayaka Mudiyanselage Chandrapala Meegahaarawa, Karandagamada, Arawa. Plaintiff-Respondent AND NOW BETWEEN Disanayaka Mudiyanselage Chandrapala Meegahaarawa, Karandagamada, Arawa. Plaintiff-Respondent-Appellant Vs. Disanayaka Mudiyanselage Samaraweera Meegahaarawa, Karandagamada, Arawa. Defendant-Appellant-Respondent
20/ 05/ 21	Case no.SC/FR/ 157/2014 Case no.SC/FR/ 182/2014 Case no.SC/FR/ 183/2014 Case no.SC/FR/ 184/2014 Case no.SC/FR/ 185/2014	1. Kanda Udage Malika Kosmo Farm, Akurukaduwa, Meegahakiwula. PETITIONER VS. 1. D.M. Aberathna Police Constable, Kandaketiya Police station, Kandaketiya. 2. D.P.K. Gamage, Police Constable, Kandaketiya Police station, Kandaketiya. 3. S.M.R.P. Kumara Police Constable, Kandaketiya Police station, Kandaketiya. 4. S.J.M. Jayasundara Civil Defence Force, Attach to the Kandaketiya Police station, Kandaketiya. 5. D.M. Wijerathna Reserve Staff attach to the Kandaketiya, Police station, Kandaketiya. 6. R.P. Somarathne Sub Inspector, Kandaketiya Police station, Kandaketiya. 7. Officer in Charge Kandaketiya Police station, Kandaketiya. 8. Dr. Jagath Perera District Medical Officer, Meegahakiwula Government Hospital, Meegahakiwula. 9. Senior Superintendent of Police (SSP) Badulla Range, Badulla. 10. Deputy Inspector General of Police Badulla Range, Badulla. 11. Superintendent of Prison Badulla Prison, Badulla. 12. Commissioner of Prison Prison Department, Welikada. 13. Mr. Pujith Jayasundara Inspector General of Police, Police head Quarters, Colombo 01. 14. Hon. Attorney General Attorney-General’s Department, Hultfsdorp, Colombo 12. RESPONDENTS

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19/05/21	SC(CHC)Appeal case No. 11/2014	1. K.K.D.T.Dharmaratne, 2. Mrs.D.P.M. Dharmaratne, Via Santa Maria Dell, Angelo No.32,48018, Faensa (RA), Italy, Presently, “Sridhara”, Dambugahawatta, Hokandara Road, Pannipitiya Petitioners. -Vs- 1. Palm Paradise Cabanas Limited, No.66, Norris Canal Road, Colombo 10. 2. Gonaduwage Upali Perera Gunasekara, (Now deceased), No. 19/2, Sunandarama Road, Kalubowila, Dehiwala. Via Santa Maria Dell, Angelo No.32,48018, Faensa (RA), Italy, Presently, “Sridhara”, Dambugahawatta, Hokandara Road, Pannipitiya Petitioners. -Vs- 1. Palm Paradise Cabanas Limited, No.66, Norris Canal Road, Colombo 10. 2. Gonaduwage Upali Perera Gunasekara, (Now deceased), No. 19/2, Sunandarama Road, Kalubowila, Dehiwala. Petitioner – Appellants 1. Palm Paradise Cabanas Limited, No.66, Norris Canal Road, Colombo 10. 2. Gonaduwage Upali Perera Gunasekara, (Now deceased), No. 19/2, Sunandarama Road, Kalubowila, Dehiwala. 2A. Sunethra Gunasekara, No. 19/2, Sunandarama Road, Kalubowila, Dehiwala. Presently, No.16, Centre Road, Borupana, Ratmalana. 3. Registrar of Companies, Department of Company Registrar, “Samagam Medura” D.R.Wijewardena Mawatha, Colombo 10. Respondents - Respondents
19/05/21	SC/Appeal/227/16	Santak Power (Pvt) Ltd, No. 132, Old Kottawa Road, Nawinna, Maharagama. Plaintiff. Vs. 1. Janatha Estate Development Board, No. 55/75, Vauxhall Lane, Colombo 02. 2. Ramya Nirmali Illeperuma, No.141, Ketawelamulla Road, Colombo 09. 3. Ajith Bathiya Illeperuma, No.141, Ketawelamulla Road, Colombo 09. 4. Ophelia Iyselin Illeperuma, No.141, Ketawelamulla Road, Colombo 09. 5. Ceylon Electricity Board, Sri Chittampalam A Gardiner Mawatha, Colombo 02. Defendants. And between Ramya Nirmali Illeperuma, No.141, Ketawelamulla Road, Colombo 09. 2nd Defendant – Appellant. Vs. 1. Santak Power (Pvt) Ltd, No. 132, Old Kottawa Road, Nawinna, Maharagama. Plaintiff – Respondent. 2. Ajith Bathiya Illeperuma, No.141, Ketawelamulla Road, Colombo 09. Presently of 5511 Katey Inn, Arlington, Texas - 76017 3. Janatha Estate Development Board, No. 55/75, Vauxhall Lane, Colombo 02. 4. Ceylon Electricity Board, Sri Chittampalam A Gardiner Mawatha, Colombo 02. Defendant – Respondents. And Now between Santak Power (Pvt) Ltd, No. 132, Old Kottawa Road, Nawinna, Maharagama. Plaintiff – Respondent – Petitioner. Vs. 1. Janatha Estate Development Board, No. 55/75, Vauxhall Lane, Colombo 02. 1st Defendant – Respondent – Respondent. 2. Ramya Nirmali Illeperuma, No.141, Ketawelamulla Road, Colombo 09. 2nd Defendant – Appellant – Respondent. 3. Ajith Bathiya Illeperuma, No.141, Ketawelamulla Road, Colombo 09. Presently of 5511 Katey Inn, Arlington, Texas - 76017 3rd Defendant – Respondent – Respondent. 5. Ceylon Electricity Board, Sri Chittampalam A Gardiner Mawatha, Colombo 02. 5th Defendant – Respondent – Respondent. 6. Sri Lanka Sustainable Energy Authority, Block 5, 1st floor, BMICH, Colombo 07. Added Respondent.

19/ 05/ 21	SC/Appeal No. 120/2014	Samuel Vivendra Eliyatambi No 248, Whitehorse Road, Corydon CRO 2 LB, Surrey United Kingdom Appearing by his Attorney Reginald Perera Wickramarachchi Saman Mawatha, Nugegoda Plaintiff VS 1. John Cyril Fernando (Now Deceased) No. 83, Gregory's Road, Colombo 07 2. Selwyn Danaraj Eliyatambi No. 1 & 1/1, Elibank Road, Colombo 05 3. Surangani Jayasekera No. 4 & 4 1/1, Elibank Road, Colombo 05 4. Marinie Samantha Jayasekera No. 4 & 4 1/1, Elibank Road, Colombo 05 Defendants AND 1. John Cyril Fernando (Now Deceased) No. 83, Gregory's Road, Colombo 07 3. Surangani Jayasekera No. 4 & 4 1/1, Elibank Road, Colombo 05 4. Marinie Samantha Jayasekera No. 4 & 4 1/1, Elibank Road, Colombo 05 1st ,3rd and 4th Defendants – Appellants VS Samuel Vivendra Eliyatambi No 248, Whitehorse Road, Corydon CRO 2 LB, Surrey United Kingdom Appearing by his Attorney Reginald Perera Wickhramarachchi Saman Mawatha, Nugegoda Plaintiff – Respondent 2. Selwyn Danaraj Eliyatambi No. 1 & 1/1, Elibank Road, Colombo 05 2nd Defendant – Respondent AND NOW BETWEEN 1. John Cyril Fernando (Now Deceased) No. 83, Gregory's Road, Colombo 07 1A. Surangani Jayasekera No. 4 & 4 1/1 Elibank Road, Colombo 05 1st Defendant – Appellant – Appellant VS Samuel Vivendra Eliyatambi No 248, Whitehorse Road, Corydon CRO 2 LB, Surrey United Kingdom Appearing by his Attorney Reginald Perera Wickramarachchi Saman Mawatha, Nugegoda Plaintiff – Respondent – Respondent 2. Selwyn Danaraj Eliyatambi No. 1 & 1/1, Elibank Road, Colombo 05 2nd Defendant – Respondent – Respondent 3. Surangani Jayasekera No. 4 & 4 1/1, Elibank Road, Colombo 05 4. Marinie Samantha Jayasekera No. 4 & 4 1/1, Elibank Road, Colombo 05 3rd and 4th Defendant – Appellant – Respondents

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16/05/21	SC APPEAL NO: SC/ APPEAL/ 176/2014	1. Morawakage Premawathie, 2. Ballantuda Achchige Padmini, 3. Ballantuda Achchige Rohini, All of 350, Katuwana Road, Homagama. Plaintiffs Vs. 1. Ballantuda Achchige Jayasena (Deceased) 1A. M. Hemawathie, 1B. Ballantuda Achchige Lal Chandrasiri, 1C. Ballantuda Achchige Don Wasantha, 1D. Ballantuda Achchige Don Malkanthi, All of 308, Narangaha Hena, Katuwana, Homagama. 2. Ballantuda Achchige Don Wasantha, 308, Narangaha Hena, Katuwana, Homagama. Defendants AND BETWEEN Ballantuda Achchige Don Wasantha, 308, Narangaha Hena, Katuwana, Homagama. 1C and 2nd Defendant-Appellant Vs. 1. Morawakage Premawathie, 2. Ballantuda Achchige Padmini, 3. Ballantuda Achchige Rohini, All of 350, Katuwana Road, Homagama. Plaintiff-Respondents 1. Ballantuda Achchige Jayasena (Deceased) 1A. M. Hemawathie (Deceased) 1B. Ballantuda Achchige Lal Chandrasiri, 1D. Ballantuda Achchige Don Malkanthi, All of 308, Narangaha Hena, Katuwana, Homagama. Defendant-Respondents AND NOW BETWEEN Ballantuda Achchige Don Wasantha, 308, Narangaha Hena, Katuwana, Homagama. 1C and 2nd Defendant-Appellant-Appellant Vs. 1. Morawakage Premawathie, 2. Ballantuda Achchige Padmini, 3. Ballantuda Achchige Rohini, All of 350, Katuwana Road, Homagama. Plaintiff-Respondent-Respondents 1. Ballantuda Achchige Jayasena (Deceased) 1A. M. Hemawathie (Deceased) 1B. Ballantuda Achchige Lal Chandrasiri, 1D. Ballantuda Achchige Don Malkanthi, All of 308, Narangaha Hena, Katuwana, Homagama. Defendant-Respondent-Respondents

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06/05/21	S.C.F.R Application No: SC FR/185/18	1. Attanayake Mudiyansela Thimeth Senuja Bandara Attanayake 2. Attanayake Mudiyansela Indika Umesh Bandara Attanayake 3. Mapa Herath Mudiyanselage Sudarshani Mapa Herath All of; No: 284/A/2, Randipola Watta, Ambilmeegama, Pilimathalawa Petitioners Vs. 1. R.D.M.P. Weerathunga, The Principal and Chairman of the interview board to admit students to Grade 1, Kingswood College, Kandy. 2. B.M.H.A. Bandara, The Vice Principal, Kingswood College, Kandy. 3. S.A. Wijekoon, Secretary of the Interview Board to admit students to Grade 1, Kingswood College, Kandy. 4. P.G.M. Herath, Member of the Interview Board to admit students to Grade 1, Kingswood College, Kandy. 5. R.M. Inoka Lasanthi, Member of the Interview Board to admit students to Grade 1, Kingswood College, Kandy. 6. M. Abegunasekara, President of the Appeals and Objections Board to admit students to Grade 1, Kingswood College, Kandy And Principal, Girl's High School, Kandy. 7. S.P. Vidanagamge, Secretary of the Appeals and Objections Board to admit students to Grade 1, Kingswood College, Kandy. 8. Subashini Hemalatha, Member of the Appeals and Objections Board to admit students to Grade 1, Kingswood College, Kandy And Deputy Principal, Pushpadana Girl's College, Kandy. 9. Kodithuwakku, Member of the Appeals and Objections Board to admit students to Grade 1, Kingswood College, Kandy. 10. Director of National Schools Ministry of Education, Isurupaya, Baththaramulla. 11. Sunil Hettiarachchi, Secretary, Ministry of Education, Isurupaya, Baththaramulla. 12. G.G.S.B. Alahakoon, No: 134/1, Heennarandeniya, Gampola. 13. G.G.C.B. Alahakoon, No: 134/1, Heennarandeniya, Gampola. 14. S.D. Kolambage, No: 71/165, 2nd Lane, Heerassagala Road, Kandy. 15. N.N. Kolambage, No: 71/165, 2nd Lane, Heerassagala Road, Kandy. 16. I.K.D.S.B. Siriwardana, No: 08, Mulgampala Road, Kandy. 17. I.K.D.M. Siriwardana, No: 08, Mulgampala Road, Kandy. 18. Hon. Attorney General, Attorney General's Department, Colombo 12. Respondents
03/05/21	SC Appeal No. 51/18	Kapila Nishshanka Kumarage No. 102/03, Gnananlankara Mawatha, Ratnapura. Accused Appellant Appellant Vs. 1 Officer in Charge, Special Crimes Investigation Bureau Police Station, Ratnapura. Complainant Respondent Respondent 2. Hon Attorney General Attorney General's Department, Colombo. 12. Respondent Respondent

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03/05/21	SC APPEAL NO: SC/APPEAL/66/2012	Thangavetpillai Selvakumar of Nelukkulam, Vavuniya. By his Attorney R. Sellathurai (Deceased) and Letchumy Sellathurai of Nelukkulam, Vavuniya. Plaintiff Vs. Vallipuram Radhakrishnan of Neriyakulam Road, Nelukkulam, Vavuniya. Defendant AND BETWEEN Vallipuram Radhakrishnan of Neriyakulam Road, Nelukkulam, Vavuniya. Defendant-Appellant Vs. Thangavetpillai Selvakumar of Nelukkulam, Vavuniya. By his Attorney R. Sellathurai (Deceased) and Letchumy Sellathurai of Nelukkulam, Vavuniya. Plaintiff-Respondent AND NOW BETWEEN Vallipuram Radhakrishnan of Neriyakulam Road, Nelukkulam, Vavuniya. Defendant-Appellant-Appellant Vs. Thangavetpillai Selvakumar of Nelukkulam, Vavuniya. By his Attorney R. Sellathurai (Deceased) and Letchumy Sellathurai of Nelukkulam, Vavuniya. Plaintiff-Respondent-Respondent
29/04/21	SC/FR APPLICATION 242/2010	1. Hondamuni..Chandima Samanmalee..de..Zoysa Siriwardena, No. 235/A, Station Road, Balapitiya. 2. Sudusinghe Liyanage Pubudu Kumara, No. 21/3 B, Viharagoda, Wathugedara. PETITIONERS Vs 1. Inspector Malaweera, Police Station, Ambalangoda. 2. Sub Inspector Chandrarathna, Police Station, Ambalangoda. 3. Inspector Prashantha, Headquarters Inspector, Police Station, Ambalangoda. 4. Palitha Fernando, Superintendent of Police, Ambalangoda Division, Ambalangoda. 5. Mahinda Balasooriya, Inspector General of Police, Police Headquarters, Colombo 01. 6. Hon. Attorney – General, Attorney – General's Department, Hulftsdorp Street, Colombo 12. RESPONDENTS
29/04/21	SC APPEAL NO: SC/APPEAL/17/2015	Chrisani Suweenetha Mariel Lilian Karunaratne, No. 4, Victoria Gardens, Hokandara South, Hokandara. Plaintiff Vs. P.R. Kotalawela, No. 32-1/2 Castle Street, (Dudley Senanayake Mawatha), Colombo 8. Defendant AND BETWEEN Chrisani Suweenetha Mariel Lilian Karunaratne, No. 4, Victoria Gardens, Hokandara South, Hokandara. Plaintiff-Appellant Vs. P.R. Kotalawela, No. 32-1/2 Castle Street, (Dudley Senanayake Mawatha), Colombo 8. Defendant-Respondent AND NOW BETWEEN Chrisani Suweenetha Mariel Lilian Karunaratne, No. 4, Victoria Gardens, Hokandara South, Hokandara. Plaintiff-Appellant-Appellant Vs. P.R. Kotalawela, No. 32-1/2 Castle Street, (Dudley Senanayake Mawatha), Colombo 8. Defendant-Respondent-Respondent

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31/ 03/ 21	SC Appeal No. 127/2012.	1. Dawooduge Mohamed Abiyar 2. Dawooduge Sajahan 3. Dawooduge Mohamed Nizam. All Rambukkanthenne, Ridigama. PLAINTIFFS Vs. Haji Lebbai Mohamed Ismail alias Mohamed Lebbai of Wewagerara, Ridigama. DEFENDANT AND 1. Dawooduge Mohamed Abiyar 2. Dawooduge Sajahan 3. Dawooduge Mohamed Nizam. All Rambukkanthenne, Ridigama. PLAINTIFF–APPELLANTS Vs. Haji Lebbai Mohamed Ismail alias Mohamed Lebbai, of Wewagedare, Ridigama. DEFENDANT–RESPONDENT AND NOW. In the matter of an Application for Leave to Appeal in terms of section 5 (C) (1) of the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006 read together with Article 128 of the Constitution. Haji Lebbai Mohamed Ismail alias Mohamed Lebbai, of Wewagedara, Ridigama. DEFENDANT–RESPONDENT-PETITIONER. Vs. 1. Dawooduge Mohamed Abiyar 2. Dawooduge Sajahan 3. Dawooduge Mohamed Nizam. All Rambukkanthenne, Ridigama. PLAINTIFF-APPELLANT– RESPONDENTS.
31/ 03/ 21	SC /FR/ Application No. 591/2008	J. A. Saman Kumara, Kajugaha Koratuwa, Walgama North, Matara. Petitioner Vs, 1. General Manager, Sri Lanka Government Railways, Railway Headquarters, Colombo 10. 2. Secretary, Ministry of Transport, D.R. Wijewardena Mawatha, Colombo 10. 3. Operating Superintendent, Operating Superintendent Office, Sri Lanka Railways, Colombo 10. 4. Transportation Superintendent (Colombo) Transportation Superintendent's Office, Sri Lanka Government Railway, Colombo 10. 5. Ceylon Station Masters' Union, No. 01, Railway Passage, Sri Lanka Government Railway, Colombo 10. 6. Transportation Superintendent (Nawalapitiya) Divisional Transportation Superintendents' Office, Sri Lanka Government Railway, Nawalapitiya. 7. Secretary, National Salaries and Cadre Commission, Room No. 2G10, BMICH, Bauddaloka Mawatha, Colombo 07. 7A. Secretary, National Pay Commission, Room No. 2G10, BMICH, Bauddaloka Mawatha, Colombo 07. 7B. Secretary, National Salaries and Cadre Commission, Room No. 2G10, BMICH, Bauddaloka Mawatha, Colombo 07. 8. Secretary, Ministry of Finance, Colombo 01. 9. Hon. Attorney General Attorney General's Department, Colombo 12. Respondents

31/ 03/ 21	SC Appeal 163/2015	1. Amal I. Senevirathne No. 45, Sarvodaya Road, Gaminipura. 2. W. L. Gayana Sewwandi Mali Susiri Niwasa, Navimana South, Matara. 3. Shashini Tharanga Kariyawasam No. 30, Gangarama Road, Megalle, Galle. 4. B. V. Rasika Dilanthi Bolukandura No.72, Sri Rahula Mawatha, Maho. 5. Janaka Jayalath Munasinghe No.202/2, Ranasinghe goda, Katuwana. 6. W. A. U. Warunamala Wijesooriya No.229/2, Megoda Kalugamuwa, Peradeniya. 7. R. M. Sajith Niroshan V. Temple Road, Kahatawila, Pothuwatavana. 8. Sheik Abdul Cader Adil Ahamed No. 111/92, Abdul Hameed Street, Colombo 12. 9. G. A. Chamila Nilanthi Kumari No. 481, Siri Niwasa Mawatha, Mulleriyawa. 10. N. G. Ruvini Champika Weerasekara No. 110, Supermarket, Kandy Road, Kiribathgoda. 11. K. M. Inoka Nilmini Kulathunga No.310/C, Kandy Road, Kadawatha. 12. Chaminda Samarawickrama Lokuhetty No. 75/21, 1st Lane, Sirinanda Jothikarama Road, Lalalgoda, Pannipitiya. 13. K. A. Achala Dinashi No. 132/2A, Moragahalanda Road, Erawwala, Pannipitiya. 14. Isuru Madhushanka Ranagala B49 G2, N.H.S. Colombo 10. 15. K. M. Asanka Wijewardana No. 240, Kadurugahamaditthta, Ranjanagama, Kurunegala. 16. W. Joseph Tiroshan Sanjay de. Silva No. 95/3, New Galle Road, Moratuwa. 17. P. Rashmi Tharika Fernando No. 146, Pethiyagoda, Gampaha. 18. M. R. Dishanthi Maldeniya No. 155/B Ihalagama, Gampaha. 19. M. A. D. Ashani Koshila No. 978/7, Dawatagahawatta Road, Thalangama Road, Thalangama South, Baththaramulla. 20. Ashani Apeksha Aabeysekara, No. 3/8, Wekumagoda Road, Galle. 21. Sembu Kuttige Sanjeewa Sampath No. 143/A, Mahawatta, Batapola. 22. W. A. Nirosh Wasansa No. 103, Thissa Road, Ranna. 23. Abdul Ghany Muhhammed Naflan No. 719/5A, Galle Road, Kalutara South. 24. G. Kalpa Suresh Pathirana No. 13, Narangoda Road, Hedeniya, Werellagama. 25. Liyanage Leonard Amal Perera No. 274/3, Jayanthi Mawatha, Mulleriyawa New Town. 26. M. A. Mahesh Kumara Manthriathna No. 524, Punchi Mandawala, Mandawala. 27. Y. M. W. Sarath Samarakoon Bandara Sarasavi Uyana, Rassandeniya, Denuwara. 28. J. A. P. H. Sandaamil Jayawaedana “Samanala,” Ihala Barube, Nikadalupotha. 29. H. M. A. Samadhi Wanninayake Walpaluwatta, Ehatuwana. 30. Madhuri Chantha Withanagama No. 136/1/1, Bathalawaththa Road, Thalahena, Malabe. 31. D. Nipuni Devindi Peiris No. 289/B, Center Road, Aligomulla, Panadura. 32. I. M. Maheshwari Mithrapali Rathwita Pethangalla, Gokarella. Petitioners Vs. 1. The Incorporated Council of Legal Education No. 244. Hulftsdrop Street, Colombo 12 2. Dr. Jayatissa De Costa, Principal, Sri Lanka Law College, No. 244. Hulftsdrop Street, Colombo 12 3. Hon. Rauf Hakeem Minister of Justice, Ministry of Justice, Colombo 12. 4. The Commissioner General of Examinations Department of Examination, Isurupaya, Battaramulla. 5. Hon. Attorney General, Attorney General’s Department, Colombo 12. Respondents Now Between 1. Maduri Chaintha WIthanagama No. 136/1/1, Bathalawaththe Road, Thalahena, Malabe. 2. W. L. Gayana Sewwandi Mali Susiri Niwasa, Navimana South, Matara. 3. Shashini Tharanga Kariyawasam No. 30, Gangarama Road, Megalle, Galle. 4. B. V. Rasika Dilanthi Bolukandura No.72, Sri Rahula Mawatha, Maho. 5. Janaka Jayalath Munasinghe No.202/2, Ranasinghe goda, Katuwana. 6. W. A. U.

28/ 03/ 21	SC (FR) Application No: 180/2014	Ravivathani Thuraisingam 18, Mathvady Lane, Thirunelvely, Jaffna. Petitioner -VS- 1. University of Jaffna, Thirunelvely, Jaffna. 2. Prof. (Miss) V. Arasaratnam, Vice Chancellor. 3. Mr. K.K. Arulvel. 4. Prof. S.Sathiaseelan. 5. Prof. V.P. Sivanathan. 6. Dr. (Mrs.) S. Sichandran. 7. Dr. S. Balakumar. 8. Prof. T. Velnampy. 9. Dr. A. Pushpanathan. 10. Mr. S. Kuganesan. 11. Prof. S. Sirsatkunarajah. 12. Dr. A. Atputharajah. 13. Prof. R. Vigneswaran. 14. Dr. S. Sivanandarajah. 15. Rev. Fr. Dr. Justin B. Gnanapragasam. 16. Mr. M. Balasubramanium. 17. Mr. M. Sripathy. 18. Mr. P. Thiyagarajah. 19. Mr. T. Rajaratnam. 20. Prof. P. Balasundarampillai. 21. Eng. M. Ramathasan. 22. Mr. K. Theventhiran. 23. Mr. D. Rengan. 24. Ms. S. Sarangapani. 25. Mr. K.Kesavan. 26. Dr. S. Raviraj. 27. Mr. E. Annalingam. 28. Ms. Sherine Xavier All members of the Governing Council 29. Mr. V. Kandeepan, Registrar. 30. Mr. V.A. Subramaniam. 31. Mr. S. Balaputhiran All of, The University of Jaffna, Thirunelvely, Jaffna. 32. University Grants Commission -Sri Lanka, UGC Secretariat, 20, Ward, Place, Colombo 07. 33. Ms. Tharshiga Murugesu, Thiruppathy, Neervely North, Neervely, Jaffna. 34. Mrs. Thushyanthi Rajakumaran Amman Road, Thirunelvely, Jaffna. 35. Mrs. Sangeetha Mahinthan, 385/20, Mudamavady Junction, Temple Road, Jaffna. 36. Mrs. Sentheeswary Senuthuran, 214/12, Sir P. Ramanathan Road, Thirunelvely, Jaffna. 37. Ms. Hanitha Vijeyaratnam, Dutch Road Alavaddy West, Alavaddy. 38. Mr. k. Piratheepan, 241, Periyamathavady, Udduvil East, Chunnakam, Jaffna. 39. Mr. N. Sivathaasan, 74/12, Aththisoody Lane, Thirunelvely, Jaffna. 40. Hon. Attorney General, Attorney General's Department, Hulftsdorp, Colombo 12. Respondents
25/ 03/ 21	SC Appeal 2/2017	Ulviti Gamage Dhanapala, No.32, Galhena Road Gangodawila, Nugegoda. Plaintiff Vs The Attorney General Attorney General' s Department, Hulftsdorp, Colombo 12. Defendant AND THEN The Attorney General Attorney General's Department, Hulftsdorp, Co lombo 12. Defendant Appellant Vs Ulviti Gamage Dhanapala, No.32, Galhena Road Gangodawila, Nugegoda. Plaintiff-Respondent AND NOW The Attorney General Attorney General's Department, Hulftsd orp, Colombo 12. Defendant Appellant Petitioner Appellant Vs Ulviti Gamage Dhanapala, No.32, Galhena Road Gangodawila, Nugegoda. Plaintiff-Respondent- Respondent-Respondent
24/ 03/ 21	SC Appeal 87/2017	Naomi Leela Elizabeth Perera, No.17, Mendis Mawatha, Moratuwa. PLAINTIFF -Vs- J.W.C. Hemamali Botheju Vithanage, No.31, Kotuwegoda, Rajagiriya. DEFENDANT AND J.W.C. Hemamali Botheju Vithanage, No.31, Kotuwegoda, Rajagiriya. DEFENDANT-APPELLANT -Vs- Naomi Leela Elizabeth Perera, No.17, Mendis Mawatha, Moratuwa. PLAINTIFF-RESPONDENT AND NOW Naomi Leela Elizabeth Perera, No.17, Mendis Mawatha, Moratuwa. PLAINTIFF-RESPONDENT- PETITIONER-APPELLANT -Vs- J.W.C. Hemamali Botheju Vithanage, No.31, Kotuwegoda, Rajagiriya. Presently of No. 95/39, Donald Obeysekera Mawatha, Rajagiriya Road, Rajagitiya. DEFENDANT-APPELLANT- RESPONDENT-RESPONDENT

24/ 03/ 21	SC. Appeal No: 24/2015	Edirisinghe Arachchige Samantha Edirisinghe, No. 16, Makalana, Nittambuwa. Plaintiff -Vs- 1. Suduhakurulage Gayani Kaushalya Rasanjalee No. A-213, Ranwala Watte, Ambanpitiya. 2. Suduhakurulage Dias Shelton No. A-213, Ranwala Watte, Ambanpitiya. Defendants Between Edirisinghe Arachchige Samantha Edirisinghe, No. 16, Makalana, Nittambuwa. Plaintiff-Appellant -Vs- 1. Suduhakurulage Gayani Kaushalya Rasanjalee No. A-213, Ranwala Watte, Ambanpitiya. 2. Suduhakurulage Dias Shelton No. A-213, Ranwala Watte, Ambanpitiya. Defendants-Respondents And Between Edirisinghe Arachchige Samantha Edirisinghe, No. 16, Makalana, Nittambuwa. Plaintiff-Appellant-Petitioner -Vs- 1. Suduhakurulage Gayani Kaushalya Rasanjalee No. A-213, Ranwala Watte, Ambanpitiya. 2. Suduhakurulage Dias Shelton No. A-213, Ranwala Watte, Ambanpitiya. Defendants-Respondents AND NOW BETWEEN Edirisinghe Arachchige Samantha Edirisinghe, No. 16, Makalana, Nittambuwa. Plaintiff-Appellant- Petitioner-Appellant -Vs- 1. Suduhakurulage Gayani Kaushalya Rasanjalee No. A-213, Ranwala Watte, Ambanpitiya. 2. Suduhakurulage Dias Shelton No. A-213, Ranwala Watte, Ambanpitiya. Defendants-Respondents-Respondents-Respondents

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22/ 03/ 21	SC FR App lication No. 17/19	1. Walbothalage Sayuki Lyensa Fernando No. 74C, Malwatta Road, Asgiriya, Gampaha. 2. Walbothalage Saman Dharshana Fernando No. 74C, Malwatta Road, Asgiriya, Gampaha. Petitioners Vs. 1. S.A.S.U. Dissanayake No. 142, Lakshmi Road, Bendiyamulla, Gampaha. 2. S.T. Hettiarachchi No. 142/1, Lakshmi Road, Bendiyamulla, Gampaha. 3. S.P.S.M. Sudasinha No. 228/F, V ij aya rama Road, Gampaha. 4. S.A.L.N. Dissanayake No. 142, Lakshmi Road, Bendiyamulla, Gampaha. 5. I.P. Hettiarachchi No. 142/1, Lakshmi Road, Bendiyamulla, G ampaha. 6. S.P.T.P. Sudusinha No. 228/F, Wijerama Road, Gampaha. 7. H.M. Gayani Wathsala Principal and the Chairman of the Interview Board to admit students to Grade 1 of WP/Gam/ Yasodara Devi B alika Maha Vidyalaya, Yasodara Devi Balika Maha Vidyalaya, Vidyalaya Mawatha, Gampaha. 8. N.P.T.M. Rupasinha The Secretary of the Interview Board to admit students to Grade 1 of WP/Gam/ Yasodara Devi Balika Maha Vidyalaya, Yasodara Devi Balika Maha Vidyalaya, Vidyalaya Mawatha, Gampaha. 9. L.P.D. Perera Senior Teacher from the Primary Section and Member of the Interview Board to admit stu dents to Grade 1 of WP/Gam/ Yasodara Devi Balika Maha Vidyalaya, Yasodara Devi Balika Maha Vidyalaya, Vidyalaya Mawatha, Gampaha. 10. R.A.I.D. Ranaweera Member of the Interview Board to admit students to Grade 1 of WP/ Gam/ Yasodara Devi Balika Maha Vidyalaya, Yasodara Devi Balika Maha Vidyalaya, Vidyalaya Mawatha, Gampaha. 11. W.A.D. Udayangani Representative of the Old Girls' Association and Member of the Interview Board to admit students to Grade 1 of WP/Gam/ Yasodara Devi Balika Maha Vidyalaya, Yasodara Devi Balika Maha Vidyalaya, Vidyalaya Mawatha, Gampaha. 12. M.D.S. Jayalath The Principal, WP/Gam/ Kirindiwela Maha Vidyalaya, Gampaha. (Chairman of the Appeals and Objections Investigation Board to admit stu dents to Grade 1 of WP/Gam/ Yasodara Devi Balika Maha Vidyalaya) 13. P.N. Damayanthi The Secretary of the Appeals and Objections Investigation Board to admit students to Grade 1 of WP/Gam/ Yasodara Devi Balik a Maha Vidyalaya 14. J.A.N. Thushara Vice Principal Siddhartha Maha Vidyalaya, Gampaha. Member of the Appeals and Objections Investigation Board to admit students to Grade 1 of WP/Gam/ Yasodara Devi Balika Maha Vidyalaya 15. Thusitha Kottahachchi Representative of the School Development Society and Member of Appeals and Objections Investigation Board to admit students to Grade 1 of WP/Gam/ Yasodara Devi Balika Maha Vidyalaya 16. K.M.H.M.I. Kariyawasam Representative of the Old Girls Association and Member of Appeals and Objections Investigation Boar d to admit students to Grade 1 of WP/ Gam/ Yasodara Devi Balika Maha Vidyalaya 17. W. Mallika Director Office of Regional Education, Gampaha. 17(A). K.G. Sirima Director, Office of R egional Education, Gampaha. 18. Honourable Attorney General Attorney General's Department, Colombo 12. Respondents

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21/ 03/ 21	SC/ APPEAL/ 163/2019	1. Sirinivasam Prasanth, 2. Gayathiry Prasanth, Both of Ratnagara Place, Dehiwala. And presently of 289, Cossack Court, Mississauga, L5 B4 C2, Ontario, Canada. Acting through their Power of Attorney holder, Kanagasundram Sathiakantham of No.442, R.A. De Mel Mawatha, Kollupitiya, Colombo 3. Plaintiffs Vs. 1. Nadaraja Devarajan, 2. Sri Jayadevi Devarajan, Both of No. 541/4 – 1/2A, Galle Road, Wellawatta, Colombo 6. Defendants AND BETWEEN 1. Nadaraja Devarajan, 2. Sri Jayadevi Devarajan, Both of No. 541/4 – 1/2A, Galle Road, Wellawatta, Colombo 6. Defendant-Appellants Vs. 1. Sirinivasam Prasanth, 2. Gayathiry Prasanth, Both of Ratnagara Place, Dehiwala. And presently of 289, Cossack Court, Mississauga, L5 B4 C2, Ontario, Canada. Acting through their Power of Attorney holder, Kanagasundram Sathiakantham of No.442, R.A. De Mel Mawatha, Kollupitiya, Colombo 3. Plaintiff-Respondents AND NOW BETWEEN 1. Sirinivasam Prasanth, 2. Gayathiry Prasanth, Both of Ratnagara Place, Dehiwala. And presently of 289, Cossack Court, Mississauga, L5 B4 C2, Ontario, Canada. Acting through their Power of Attorney holder, Kanagasundram Sathiakantham of No.442, R.A. De Mel Mawatha, Kollupitiya, Colombo 3. Plaintiff-Respondent-Appellants Vs. 1. Nadaraja Devarajan, 2. Sri Jayadevi Devarajan, Both of No. 541/4 – 1/2A, Galle Road, Wellawatta, Colombo 6. Defendant-Appellant-Respondents
17/ 03/ 21	SC FR 132/2014 with SCFR 131/2014 & SCFR 133/2014	1. R.A.S.R. Kulathunga B 07 Police Flats, Thimbirigasyaya. Petitioner Vs. 1. Pujith Jayasundera, Inspector General of Police, Police Headquarters, Colombo 01. & 247 Other Respondents and R.A.R.D. Karunarathne, Uduwa, Kandy. Petitioner Vs. Pujith Jayasundera, Inspector General of Police, Police Headquarters, Colombo 01. And 247 others. Respondents(In SCFR 131/2014) and M.W.S.Uvindasiri, No. 40A, Thusaragira, Udaperadeniya, Peradeniya. Petitioner Vs. Pujith Jayasundera, Inspector General of Police, Police Headquarters, Colombo 01. And 247 others. Respondents (In SCFR 133/2014)

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17/ 03/ 21	SC FR 304/2016 with SC FR 204/2016 & SC FR 205/2016	1. Tissa Kumara Liyanage Accountant CL. 1 Special No. 50 Sir Chittampalam A. Gardiner Mawatha, Colombo 02. & 77 other Petitioners(SCFR 304/2016) Vs. 1. Hon. Ranjith Siyambalapitiya Minister of Power and Renewable Energy Ministry of Power and Renewable Energy No. 72, Ananda Coomaraswamy Mawatha, Colombo 07. and 14 other Respondents and 1. Singappulige Nihal Fernando No. 65K Sri Silwansa Nahimi Mawatha Suriya Paluwa, Aldeniya Kadawatha. 2. Jayasundera Mudiyanselage Dayananda Wijeweera No. 31/22, 1st Lane Temple Road, Maharagama 3. Tissa Kumara Liyanage No. 8, Isuru Uyana 11, Kalutara. Petitioners Vs. 1. Hon. Ranjith Siyambalapitiya Minister of Power and Renewable Energy Ministry of Power and Renewable Energy No. 72, Ananda Coomaraswamy Mawatha, Colombo 07. And 14 others. Respondents(In SCFR 204/2016) and 1. Dinesh Vidanapathirana Attorney-at-Law No. 166 ½, Hulftsdorp Street Colombo 12. Petitioner Vs. 01. Hon. Ranjith Siyambalapitiya Minister of Power and Renewable Energy Ministry of Power and Renewable Energy No. 72, Ananda Coomaraswamy Mawatha, Colombo 07. And 14 others. Respondents (SCFR 205/2016)
14/ 03/ 21	SC APPEAL NO. 145/2013	1. T.M. Dingiri Mahathmaya (Deceased) 1 (a). Piyaseeli Podimenike Tennakoon. 2. B.W. Jayawardena, Both of Sannasgama, Lellopitiya. Plaintiffs VS 1. H. Don Brampi Singho (deceased) 1(a). H. Dona Kamalawathie, Sannasgama, Lellopitiya. Defendant AND BETWEEN 1. T.M. Dingiri Mahathmaya (Deceased) 1 (a). Piyaseeli Podimenike Tennakoon. 2. B.W. Jayawardena, Both of Sannasgama, Lellopitiya. Plaintiffs-Appellants VS 2. H. Don Brampi Singho (deceased) 1(a). H. Dona Kamalawathie, Sannasgama, Lellopitiya. 1 (a) Substituted Defendant- Respondent AND NOW BETWEEN 1. H. Don Brampi Singho (deceased) 1(a). H. Dona Kamalawathie, Sannasgama, Lellopitiya. 1 (a) Substituted Defendant- Respondent- Appellant VS 1. T.M. Dingiri Mahathmaya (Deceased) 1 (a). Piyaseeli Podimenike Tennakoon. 2. B.W. Jayawardena, Both of Sannasgama, Lellopitiya. Plaintiffs-Appellants- Respondents

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11/ 03/ 21	SC FR Application 101/2014	1. Herath Mudiyanselage Ajith Rohitha Bandara Herath, Hewapola, Pilessa. 2. Weerasooriya Arachchilage Padmini Damayanthi Weerasoriya, Hewapola, Pilessa. 3. J.M.N. Bandara, No. 53, 'The Breeze', Kiriwawula, Thorayaya, Kurunegala. Petitioners -Vs- 1. K. Thawalingam, Former Surveyor General, Surveyor Department of Sri Lanka, No. 150, Kirula Road, Narahenpita, Colombo 5. 2. S.M.P.P. Sangakkara, Additional Surveyor General, (Title Registration), Surveyor Department of Sri Lanka, No. 150, Kirula Road, Narahenpita, Colombo 5. 2A. S.K.Wijesinghe, Additional Surveyor General (Title Registration), Surveyor Department of Sri Lanka, No. 150, Kirula Road, Narahenpita, Colombo 5. 2B. P. A. N. De Silva, Additional Surveyor General, (Title Registration) Surveyor Department of Sri Lanka, No. 150, Kirula Road, Narahenpita, Colombo 5. 3. R.T.P. Herath, Former Provincial Surveyor General, Provincial Surveyor Generals' Office, South Circular Road, Kurunegala. 3A. A.M.R.B.K Atapattu, Provincial Surveyor General, Provincial Surveyor Generals' Office, South Circular Road, Kurunegala. 4. E.M.D.M Ekanayake Former Senior Supritendent of Surveys, District Survey Office, South Circular Road, Kurunegala. 4A. E.M.P.U.K. Tennakoon, Senior Superintendent of Survey, District Survey Office, South Circular Road, Kurunegala. 5. H.P.S. Hettiarachchi, 'Kusumsiri', Wadakada Road, Pothuhera. 6. E.A.M. Perera, 74/30J, Rajamal Uyana, Colombo Road, Kurunegala. 7. B.D. Premaratne, No. 50, Rideegama Road, Mallawapitiya. 8. R.D.M.P.R. Rajapaksha, 19/3A, Mallawapitiya, Kurunegala. 9. S.M. Ariyadasa, Akkara Ata, Kalugamua. 10. A.S.K. Paranage, Temple Road, Hiripitiya, Nikadalupotha. 11. K.L.S. Rathnayaka, 'Sandalu', Daragala, Welimada. 12. P.A.N. Gunasiri, Hewanellagara, Nakkawatta. 13. E.M. Gunawathie, 128, Welangollawatta, Welagedara Uyana, Kurunegala. 14. P.P. Weerakkody, Kithulheragama, Nagallagamuwa. 15. M.V. Ariyaratne, Rideegama Road, Mallawapitiya, Kurunegala. 16. S.B. Abeykoon, Pannala-Kuliyapitiya Road, Kankaniyamulla, Walakumburumulla. 17. H.M.S. Priyadarshana, Muwanwellegedara, Awulegama. 18. K.A. Amarathunga, 567/4, Sewendana, Maharachchimulla. 19. W.M.P.B Wijekoon, 50/10, Negombo Road, Kottagas Junction, Uhumeeya. 20. A.P. Kumarasinghe, Dunukelanda, Welagane, Maspotha. 21. P.B. Dissanayaka, 234/10, Wilgoda Road, Kurunegala. 22. K.S. Dasanayaka, 13/12, Jaya Pathirana Mawatha, Bauddhaloka Road, Kurunegala. 23. R.M. Rathnapala, 'Prasansani', Bamunawala, Kurunegala. 24. L.W.I. Jayasekara, 2nd Land, Athuruwalawatta, Dambadeniya. 25. J.A.R. Jayalath, 1, Sri Indrajothi Mawatha, Udubaddawa. 26. J.A.S. Jayalath, 75, Kuliyapitiya Road, Udubaddawa. 27. R.M. Pushpadewa, Dangolla, Horombawa. 28. J.D. Hapuarachchi, Nugawela, Maharachchimulla. 29. L.G. Ranathunga, 111, Kandy Road, Kurunegala. 30. M.P.I.K. Pathirana, 272, Lake Road, Theliyagonna, Kurunegala. 31. H.V.A. Jayalath, 33, Thalgodapitiya Mawatha, Malkaduwawa, Kurunegala. 32. Attorney General, Attorney General's Department, Colombo 12. 33. Nihal Gunawardena, Former Surveyor General, Surveyor Department of Sri Lanka, No. 150, Kirula Road, Narahenpita, Colombo 5. 33A. P.M.P. Udayakantha, Surveyor General, Surveyor Department of Sri Lanka, No. 150, Kirula Road, Narahenpita, Colombo 5. Respondents

09/03/21	SC Appeal 212/2014	Kariyawasam Bendigodagamage Premawathi No. 83, Rajagiriya Road, Rajagiriya. Plaintiff Vs, Mahavithanage Dona Engalthinahamy (deceased) No. 100, Rajagiriya Road, Rajagiriya. Defendant And Kariyawasam Bendigodagamage Premawathi No. 83, Rajagiriya Road, Rajagiriya. Plaintiff-Appellant-Petitioner Vs. Paranavithanage Don Jayathilake Perera No. 100, Rajagiriya Road, Rajagiriya. Substituted Defendant- Respondent- Respondent And Now Between Kariyawasam Bendigodagamage Premawathi No. 83, Rajagiriya Road, Rajagiriya. Plaintiff-Appellant-Petitioner-Appellant Vs, Paranavithanage Don Jayathilake Perera (dead) No. 100, Rajagiriya Road, Rajagiriya. Paranavithanage Don Nishantha Kumara Perera No. 100, Rajagiriya Road, Rajagiriya. Substituted Defendant-Respondent-Respondent
02/03/21	SC/SPL/LA No.27/2012	Plexus Cotton Limited, 265/279, Martins Building, 4, Walter Street, Liverpool, England. Presently at; Cotton Place 2, Ivy Street, Britenhead,Wirrel, CH41 5EF Petitioner -VS- Dan Mukunthan, No.76, Davidson Road, Colombo 04. Presently at; No. 3, Charles Place, Colombo 3. Respondent AND Plexus Cotton Limited, 265/279, Martins Building, 4, Walter Street, Liverpool, England. Presently at; Cotton Place 2, Ivy Street, Britenhead,Wirrel, CH41 5EF Petitioner - Petitioner -VS- Dan Mukunthan, No.76, Davidson Road, Colombo 04. Presently at; No. 3, Charles Place, Colombo 3. Respondent – Respondent AND NOW BETWEEN Dan Mukunthan, No.76, Davidson Road, Colombo 04. Presently at; No. 3, Charles Place, Colombo 3. Respondent – Respondent – Petitioner -VS- Plexus Cotton Limited, 265/279, Martins Building, 4, Walter Street, Liverpool, England. Presently at; Cotton Place 2, Ivy Street, Britenhead, Wirrel, CH41 5EF Petitioner - Petitioner – Respondent
23/02/21	SC Appeal No. 193/2015	Merchant Bank of Sri Lanka PLC, No. 189, Galle Road, Colombo 03 and presently of No. 28, St. Michael's Road, Colombo 03. Plaintiff Vs 1. Kumarasinghe Ranjith Rajakaruna, No. 223, Rajamaha Vihara Road, Mirihana, Kotte. 2. Albert Nadaraja Manoharan, No. 27, Janadhipathi Vidyala Mawatha, Rajagiriya. Defendants An Application under Sec. 402 of the Civil Procedure Code. Kumarasinghe Ranjith Rajakaruna, No. 223, Rajamaha Vihara Road, Mirihana, Kotte. 1st Defendant-Petitioner Vs Merchant Bank of Sri Lanka PLC, No. 189, Galle Road, Colombo 03 and presently of No. 28, St. Michael's Road, Colombo 03. Plaintiff-Respondent-Respondent Albert Nadaraja Manoharan, No. 27, Janadhipathi Vidyala Mawatha, Rajagiriya. 2nd Defendant-Respondent AND NOW Kumarasinghe Ranjith Rajakaruna, No. 223, Rajamaha Vihara Road, Mirihana, Kotte. 1st Defendant-Petitioner-Appellant Vs Merchant Bank of Sri Lanka PLC, No. 189, Galle Road, Colombo 03 And presently of No. 28, St. Michael's Road, Colombo 03. Plaintiff-Respondent-Respondent Albert Nadaraja Manoharan, No. 27, Janadhipathi Vidyala Mawatha, Rajagiriya. 2nd Defendant-Respondent-Respondent

16/02/21	SC FR Application No. 556/2008, SC FR Application No. 557/2008	etitioners U. N. S. P. Kurukulasuriya, Convenor, Free Media Movement, 237/22, Vijaya Kumaratunga Mawatha, Colombo 05. (Petitioner SC FR Application No. 556/2008) J. K. W. Jayasekara, No. 58/10, Suhada Place, Thalapathpitiya, Nugegoda. (Petitioner SC FR Application No. 557/2008) Vs. Respondents 1. Sri Lanka Rupavahini Corporation Bauddhaloka Mawatha, Colombo 07. 2. Dr. Ariyaratne Athugala The Chairman & the Director-General, Sri Lanka Rupavahini Coporation, Bauddhaloka Mawatha, Colombo 07. 2(b-i). Ms. Enokaa Sathyangani The Chairperson Sri Lanka Rupavahini Coporation, Bauddhaloka Mawatha, Colombo 07. 2(c-i). Thusira Malawwethantri Director General Sri Lanka Rupavahini Coporation, Bauddhaloka Mawatha, Colombo 07. 3. Lakshman Muthuthantri, Programme Producer, Sri Lanka Rupavahini Corporation, Bauddhaloka Mawatha, Colombo 07. 4. Anura Priyadarshana Yapa, Hon. Minister of Mass Media and Information, 163, Kirulapone Avenue, Polhengoda, Colombo 05. 4(b). Mangala Samaraweera Hon. Minister of Finance and Mass Media Information, 163, Kirulapone Avenue, Polhengoda, Colombo 05. 5. Hon. Attorney General, Attorney-General's Department, Colombo 12. 6. Sarath Kongahage The Chairman & the Director-General, Sri Lanka Rupavahini Coporation, Bauddhaloka Mawatha, Colombo 07. 7. Keheliya Rambukwella Hon. Minister of Mass Media and Information, 163, Kirulapone Avenue, Polhengoda, Colombo 05. ADDED RESPONDENTS
12/02/21	SC. Appeal No.88/2011	Palani Muruganandan No.538/5, Aluthmawatha Road, Colombo 15. Plaintiff Vs. Inconvelt Ifisharans Lafabar No.560/1, Aluthmawatha Road, Colombo 15. (Presently Deceased) Liyana Mohottige Liyani Bernadeck Kabral Presently foreign by her lawful Attorney, Mervyn Joseph de Silva, Gongithota Road, Enderamulla and presently of, 560/1, Aluthmawatha Road, Colombo 15. Substituted Defendant AND BETWEEN Palani Muruganandan No.538/5, Aluthmawatha Road, Colombo 15. Plaintiff-Respondent-Petitioner Vs. Inconvelt Ifisharans Lafabar No.560/1, Aluthmawatha Road, Colombo 15. (Presently Deceased) Liyana Mohottige Liyani Bernadeck Kabral, Presently foreign by her lawful Attorney, Mervyn Joseph de Silva, Gongithota Road, Enderamulla, and presently of, 560/1, Aluthmawatha Road, Colombo 15. Substituted Defendant-Petitioner-Respondent AND NOW BETWEEN Inconvelt Ifisharans Lafabar No.560/1, Aluthmawatha Road, Colombo 15. (Presently Deceased) Liyana Mohottige Liyani Bernadeck Kabral, presently foreign by her lawful Attorney, Mervyn Joseph de Silva, Gongithota Road, Enderamulla, and presently of, 560/1, Aluthmawatha Road, Colombo 15. Substituted Defendant-Petitioner-Respondent Petitioner Vs. Palani Muruganandan No.538/5, Aluthmawatha Road, Colombo 15. Plaintiff-Respondent-Petitioner-Respondent

11/02/21	SC Appeal 36/2014	Kadireshan Kugabalan No.52, Main Street, Kandapola Plaintiff Vs Sooriya Mudiyanselage Ranaweera Gajabapura, Mahagastota, Nuwara Eliya. Defendant AND Sooriya Mudiyanselage Ranaweera Gajabapura, Mahagastota, Nuwara Eliya. Defendant Appellant Vs Kadireshan Kugabalan No.52, Main Street, Kandapola Plaintiff-Respondent AND NOW BETWEEN Kadireshan Kugabalan No.52, Main Street, Kandapola Plaintiff-Respondent- Petitioner-Appellant Vs Sooriya Mudiyanselage Ranaweera Gajabapura, Mahagastota, Nuwara Eliya. Defendant Appellant Respondent-Respondent Sooriya Mudiyanselage Kanthi Ranaweera No.32, Gajabapura, Mahagastota, Nuwara Eliya. Substituted Defendant Appellant Respondent-Respondent
11/02/21	SC Appeal 36/2014	Kadireshan Kugabalan No, 52, Main Street, Kandapola. Plaintiff. Vs- Sooriya Mudiyanselage Ranaweera, Gajabapura, Mahagastota, Nuwara Eliya. Defendant. AND Sooriya Mudiyanselage Ranaweera Gajabapura, Mahagastota, Nuwara Eliya. Defendant – Appellant. Vs- Kadireshan Kugabalan No, 52, Main Street, Kandapola. Plaintiff – Respondent. AND NOW BETWEEN Kadireshan Kugabalan No, 52, Main Street, Kandapola. Plaintiff – Respondent – Petitioner. Vs- Sooriya Mudiyanselage Ranaweera Gajabapura, Mahagastota, Nuwara Eliya. Defendant – Appellant – Respondent. Sooriya Mudiyanselage Kanthi Ranaweera No. 32, Gajabapura, Mahagastota, Nuwara Eliya. Substituted Defendant – Appellant Respondent.

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11/ 02/ 21	SC. FR Application No. 418/2015	D.B.D Rajapakshe “Prashakthi” Ratmalwala Petitioner Vs. 1. Mr. Y. Abdul Majeed The Director General of Irrigation. Department of Irrigation, No.230, Bauddhaloka Mawatha, Colombo 07. 1(a) Mr.S.S.L. Weerasinghe The Director General of Irrigation. Department of Irrigation, No.230, Bauddhaloka Mawatha, Colombo 07. 1(b) Mr. S. Mohanaraja The Director General of Irrigation. Department of Irrigation, No.230, Bauddhaloka Mawatha, Colombo 07. 1(c) Eng.K.D.N. Siriwardana The Director General of Irrigation. Department of Irrigation, No.230, Bauddhaloka Mawatha, Colombo 07. 2. The Secretary The Ministry of Irrigation and Water Resource Management, No. 500, T.B. Jayah Mawatha. Colombo10. 3. The Secretary The Ministry of Public Administration and Management, Independence Square, Colombo 07. 4. The Director Establishment The Ministry of Public Administration and Management, Independence Square. Colombo 07. 5. The Director General Department of Management Services, Ministry of Finance, Colombo 01. 6. Mr. Dharmasena Dissanayake The Chairman. 7. Mr. A. Salam Abdul Waid Member 8. Mr. D. Shirantha Wijayathilaka Member 9. Mr. Prathap Ramanujan Member 10. Mrs. Jegarasasingam Member 11. Mr. Santhi Nihal Senevirathne Member 12. Mr. S. Ranagge Member 13. Mr. D.L. Mendis Member 14. Mr. Sarath Jayathilaka Member 6th to 14th Respondents of Public Service Commission, No.177, Nawala Road, Narahenpita, Colombo 05. 15. Secretary, Public Service Commission, No.177, Nawala Road, Narahenpita, Colombo 05. 16. The Regional Director of Irrigation, The office of the Regional Director, Irrigation Department, P.O. Box 44, Kurunegala. 17. Honourable Attorney General Attorney General’s Department, Colombo 12. Respondents
11/ 02/ 21	SC Appeal 97/2015	Thammahetti Mudalige Don Nobert Peiris Mudukatuwa, Marawila. Plaintiff Vs 1. Kulasinghe Arachchige Emalka Melani 2. Warnakulasooriya Aloysius Perera Both of St. Bridget, Bolawatta Road, Dankotuwa. 3. Gearad Desmond Mudukatuwa, Marawila. Defendant s AND BETWEEN Thammahetti Mudalige Don Nobert Peiris Mudukatuwa, Marawila. Plaintiff-Appellant Vs 1. Kulasinghe Arachchige Emalka Melani 2. Warnakulasooriya Aloysius Perera Both of St. Bridget, Bolawatta Road, Dankotuwa 3. Gearad Desmond Mudukatuwa, Marawila. Defendant-Respondents AND NOW BE TWEEN 1. Kulasinghe Arachchige Emalka Melani (1A. Dissanayakage Aloysius Perera 2. Dissanayakage Aloysius Perera Both of St. Bridget, Bolawatta Road, Dankotuwa 1A & 2nd Defendant-Respondent- Appellants Vs Thammahetti Mudalige Don Nobert Peiris (Deceased) Mudukatuwa, Marawila. Plaintiff-Appellant-Respondent Herath Mudiyanselage Somawathi Mudukatuwa, Marawila (Substituted) Plaintiff-Appellant- Respondent Gearad Desmond Mudukatuwa, Marawila. 3rd Defendant-Respondent- Respondent
11/ 02/ 21	SC. Appeal No. 92/2017	

11/02/21	SC Appeal 15/2018	Honourable Attorney General Attorney General's Department, Colombo 12 Complainant V s 1. Anandappan Vishawanadan alias Alli 2. Rajarathnam Weeramani 3. Maadasamy Loganandan alias Ukkum 4. Muthumala Kanagaraj Accused AND 1. Anandappan Vishawanadan alias Alli 2. Rajarathnam Weeramani 3. Maadasamy Loganandan alias Ukkum 4. Muthumala Kanagaraj Accused Appellants Vs Honourable Attorney General Attorney General's Department, Colombo 12 Complainant-Respondent AND NOW BETWEEN 1. Anandappan Vishawanadan alias Alli 2. Rajarathnam Weeramani 3. Maadasamy Loganandan alias Ukkum Accused Appellant Petitioner Appellants Vs Honourable Attorney General Attorney General's Department, Colombo 12 Complainant-Respondent-Respondent-Respondent
11/02/21	Case no.SC/FR/97/2017	1. Hewa Maddumage Karunapala 2. Pallekkamkanamge Dona Kumudini 3. Child Petitioner (as he is a minor his name has been withheld) PETITIONER VS. 1. Jayantha Prema Kumara Siriwardhana, Teacher, Puhulwella Central College 2. M. Leelawathie, Puhulwella Central College, Puhulwella 3. W.R. Weerakoon, Zonal Director of Education, Zonal Education Office, Hakmana 4. Sunil Hettiarachchi, Secretary, Ministry of Education, Isurupaya, Pelawatta, Battaramulla 4A. Prof Kapila Perera, Secretary, Ministry of Education, Isurupaya, Pelawatta, Battaramulla 5. Hon. Akila Viraj Kariyawasam, MP, Ministry of Education, Isurupaya, Pelawatta, Battaramulla. 5A. Prof.G.L.Pieris, Hon. Minister of Education, Isurupaya, Pelawatta, Battaramulla. 6. Hon. The Attorney General, Attorney General's Department, Colombo 12. RESPONDENTS
10/02/21	SC Appeal No: 09/2010	David Micheal Joachim No. 27/6, Peters Lane, Colombo 06. APPLICANT -VS- Aitken Spence Travels Ltd. No. 305, Vauxhall Street, Colombo 02. RESPONDENT AND BETWEEN David Micheal Joachim No. 27/6, Peters Lane, Colombo 06. APPLICANT-APPELLANT -VS- Aitken Spence Travels Ltd. No. 305, Vauxhall Street, Colombo 02. RESPONDENT -RESPONDENT AND NOW BETWEEN David Micheal Joachim No. 27/6, Peters Lane, Colombo 06. APPLICANT-APPELLANT- APPELLANT -VS- Aitken Spence Travels Ltd. No. 305, Vauxhall Street, Colombo 02. RESPONDENT -RESPONDENT RESPONDENT
01/02/21	SC.Appeal No.33/2015	Duminda Munasinghe alias Kaluwa Presently at Bogambara Prison, Kandy. Accused-Appellant-Petitioner Vs. The Hon. Attorney General, Attorney General's Department, Colombo 12. Complainant-Respondent-Respondent
26/01/21	SC.Appeal No.61/2015	Padmika Mahanama Tilakarathne No.198, High Level Road, Homagama. Applicant-Appellant-Petitioner Vs. Maga Neguma Road Construction Equipment Company (Pvt) Ltd., No.50, Station Road, Angulana, Ratmalana. Respondent-Respondent-Respondent

24/ 01/ 21	SC/HC/LA No. 69/2018	Colombo Business School Limited, No. 282, Galle Road, Colombo 03. Claimant -VS- Sri Lanka Tea Board, No. 574, Galle Road, Colombo 03. Respondent AND Colombo Business School Limited, No. 282, Galle Road, Colombo 03. Claimant – Petitioner -VS- Sri Lanka Tea Board, No. 574, Galle Road, Colombo 03. Respondent – Respondent AND NOW BETWEEN Colombo Business School Limited, No. 282, Galle Road, Colombo 03. Claimant – Petitioner – Petitioner -VS- Sri Lanka Tea Board, No. 574, Galle Road, Colombo 03. Respondent – Respondent – Respondent Hon. Attorney General, Attorney Generals' Department, Colombo 12. 2nd Respondent
19/ 01/ 21	SC Appeal No. 187/2017	M Ganeshmoorthy No. 9/10 C New Stage Grayline Park Ekala Ja-Ela Applicant -VS- 1. John Keells Holdings PLC No. 117, Sir Chittampalam A. Gardiner Mawatha Colombo 2 2. Jaykay Marketing Services (Private) Limited No. 148, Vauxhall Street Colombo 2 3. Keells Food Products PLC No. 16 Minuwangoda Road Ekala Ja-Ela Respondents AND BETWEEN 1. John Keells Holdings PLC No. 117, Sir Chittampalam A. Gardiner Mawatha Colombo 2 2. Jaykay Marketing Services (Private) Limited No. 148, Vauxhall Street Colombo 2 3. Keells Food Products PLC No. 16 Minuwangoda Road Ekala Ja-Ela Respondent -Petitioners -VS- M Ganeshmoorthy No. 9/10 C New Stage Grayline Park Ekala Ja-Ela AND NOW BETWEEN 1. John Keells Holdings PLC No. 117, Sir Chittampalam A. Gardiner Mawatha Colombo 2. 2. Jaykay Marketing Services (Private) Limited No. 148, Vauxhall Street Colombo 2 3. Keells Food Products PLC No. 16 Minuwangoda Road Ekala Ja-Ela Respondents-Petitioners-Petitioners -VS- M Ganeshmoorthy No. 9/10 C New Stage Grayline Park Ekala Ja-Ela Applicant-Respondent-Respondent
19/ 01/ 21	SC FR Application No. 542/2009	M.T. Mallika, No 55, Jasmine Villa, Nittambuwa Road, Veyangoda PETITIONER -Vs- 1. Jeevan Kumaratunga, Hon. Minister of Land and Land Development, Govijana Mandiraya, 80/5, Rajamalwatte Avenue, Battaramulla 2. S.G. Wijayabandu, Attanagalle Divisional Secretary, Divisional Secretariat, Nittambuwa 3. Hon. Attorney General, Attorney General's Department, Colombo 12. RESPONDENTS 1A. John Amaratunga, Minister of Land, Ministry of Lands, 'Mihikatha Medura', Land Secretariat, No.1200/6, Rajamalwatte Road, Battaramulla. 1B. S.M. Chandrasena, Minister of Land, Ministry of Lands, 'Mihikatha Medura', Land Secretariat, No.1200/6, Rajamalwatte Road, Battaramulla. 2A. D. M. Rathnayake, Attanagalle Divisional Secretary,Divisional Secretariat, Nittambuwa. 2B. S. P. Gunawardhana, Attanagalle Divisional Secretary,Divisional Secretariat, Nittambuwa. SUBSTITUTED- RESPONDENTS

17/ 01/ 21	SC /FR/ Application No. 403/2016	Wickramage Stanley Perera, No. 111/7, Kurawalana, Kahataovita Petitioner Vs, 1. P. H. Manatunga The Chairman, 1A. K. W. E. Karalliyadda The Chairman, 2. S. T. Hettige, Member, 2A. Gamini Nawarathne Member 3. Savithri D. Wijesekera, Member, 4. B. A. Jayanathan Member, 4A. Ashoka Wijethilaka Member 5. Y. L. M. Zawahir, Member, 6. Tilak Collure, Member, 7. Frank de Silva, Member, 7A. G. Jayakumar Member 8. N. Ariyadasa Cooray, Secretary, 8A. Nishantha A. Weerasinghe Secretary All of the National Police Commission Block No. 09, BMICH Premises, Bauddhaloka Mawatha, Colombo 07. 9. Pujith Jayasundara The Inspector General of Police Police Headquarters Colombo 01 9A. C. D. Wickramaratne The Inspector General of Police (Acting) Police Headquarters Colombo 01 10. L. K. W. Kamal Silva Deputy Inspector General of Police Crimes and Traffic Division Police Headquarters Colombo 01 [Formerly, Senior Superintendent of Police Director, Police Narcotics Bureau 3rd Floor, New Secretariat Building Colombo 01 10A. M. R. Manjula Senarath Senior Superintendent of Police Director, Police Narcotics Bureau 3rd Floor, New Secretariat Building Colombo 01 11. D. K. C. Siyambalapitiya, Assistant Superintendent of Police Police Narcotics Bureau 3rd Floor, New Secretariat Building Colombo 01 11A. K. W. R. J. Rohana Assistant Superintendent of Police Administration Police Narcotics Bureau 3rd Floor, New Secretariat Building Colombo 01 12. T. Ludwaik Chief Inspector Officer in Charge Police Narcotics Bureau 3rd Floor, New Secretariat Building Colombo 01 12A. H. N. P. Ekanayaka Inspector, Officer in Charge (Acting) Police Narcotics Bureau 3rd Floor, New Secretariat Building Colombo 01 13. K. W. R. J. Rohana Assistant Superintendent of Police Operations Police Narcotics Bureau 3rd Floor, New Secretariat Building Colombo 01 14. Priyantha Liyanage Superintendent of Police Director, Organized Crimes Prevention Unit No. 09, Mihindu Mawatha Colombo 12. 15. Hon. Attorney General Attorney General’s Department, Colombo 12. Respondents
11/ 01/ 21	SC Rule No.1/2018	Ranawaka Sunil Perera 43/11 Walawwatta Road, Gangodawila, Nugegoda. Pe titioner Vs Sad da Vidda Rajapakse Palanga Pathira Ambakumarage Ranjan Leo Sylvester Alphonsu Alias Ranjan Ramanayaka No.A5, Member of Parliament’s Housing Scheme, M adiwela, S ri Jayawardenapura, Kotte. Respondent

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04/ 04/ 19	SC FR 265 - 274/ 2011 and 346-348/2 011	Petitioners H. M. M. Sampath Kumara, Mamunugama, Moragollagama. (Petitioner S.C. (F/R) Application No. 265/2011) A. Rohitha Amarasinghe, Aluth-Ala Road,Paluwa, Galgamuwa. (Petitioner S.C. (F/R) Application No. 266/2011) C. A. H. M. O. Buddhika Atapattu, 147/1, Mapitigama, Ambanpola. (Petitioner S.C. (F/R) Application No. 267/2011) R. R. M. Dhanushka Sanjeewa, 8/10, Amandoluwa, Seeduwa. (Petitioner S.C. (F/R) Application No. 268/2011) Anesh Imalka Fernando, Paalasola, Madurankuliya. (Petitioner S.C. (F/R) Application No. 269/2011) N. L. T. Iresha, 134/2, Japalawatte, Minuwangoda. (Petitioner S.C. (F/R) Application No. 270/2011) Nisshanka Wanigasekera, 13 Post, Bandaragama, Pemaduwa. (Petitioner S.C. (F/R) Application No. 271/2011) R. A. H. M. Jayatissa Rajakaruna, 230/4, Sarath Mawatha, Katunayake. (Petitioner S.C. (F/R) Application No. 272/2011) S. P. L. Ranjan Lasantha Perera, 19, St. Xavier Mawatha, Kimbulapitiya Road, Akkara 50. (Petitioner S.C. (F/R) Application No. 273/2011) H. M. Lalinda Herath, No 21/09, Yatiyana, Minuwangoda. (Petitioner S.C. (F/R) Application No. 274/2011) M. Pradeep Kumara Priyadarshana Jambolagahamulla, Dippitiya, Mahapallegama. (Petitioner S.C. (F/R) Application No. 346/2011) U. G. Nalin Sanjaya Jayatileke, 625/1, Aluthgama, Nabata, Malsiripura. (Petitioner S.C. (F/R) Application No. 347/2011) M. H. A. Sameera Sandaruwan Hettiarachchi, Welimada, Daragala, Dumkola Watta, Sameera-Sewana. (Petitioner S.C. (F/R) Application No. 348/2011) Vs. Respondents 1. Officer-in-Charge, Police Station, Katunayake. 2. Officer-in-Charge, Police Station, Seeduwa. 3. Deputy Inspector General of Police, Negombo DIG Office, Negombo. 4. Mahinda Balasooriya, Former Inspector General of Police, C/O Police Headquarters, Colombo 01. 5. N. K. Illangakoon, Former Inspector General of Police, Police Headquarters, Colombo 01. 5A. Pujith Jayasundara, Inspector General of Police, Police Headquarters, Colombo 01. 6. Board of Investment of Sri Lanka, West Tower-World Trade Centre, Echelon Square, Colombo 01. 7. Lt. Gen. Jagath Jayasooriya, Commander-Sri Lanka Army, Army Headquarters, Colombo 03. 8. Hon. Attorney General, Attorney General’s Department, Hulftsdorp, Colombo 12. (Respondents in all cases) 9. Gamini Lokuge MP Hon. Minister of Labour, Ministry of Labour & Labour Relations, Labour Secretariat, Narahenpita, Colombo 05. (8th Respondent in S.C. (F/R) Application No. 346/2011)

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

In the matter of an Appeal

Honourable Attorney General
Attorney General's Department,
Colombo 12

Complainant

SC Appeal 15/2018
SC/SPL 120/2017
CA Case No.59/2011
HC Rathnapura No.169/2017

Vs

1. Anandappan Vishawanadan alias Alli
2. Rajarathnam Weeramani
3. Maadasamy Loganandan alias Ukkum
4. Muthumala Kanagaraj

Accused

AND

1. Anandappan Vishawanadan alias Alli
2. Rajarathnam Weeramani
3. Maadasamy Loganandan alias Ukkum
4. Muthumala Kanagaraj

Accused Appellants

Vs

Honourable Attorney General
Attorney General's Department,

Colombo 12

Complainant-Respondent

AND NOW BETWEEN

1. Anandappan Vishawanadan alias Alli
2. Rajarathnam Weeramani
3. Maadasamy Loganandan alias Ukkum

Accused Appellant-Petitioner-Appellants

Vs

Honourable Attorney General
Attorney General's Department,
Colombo 12

Complainant-Respondent-Respondent-Respondent

Before: Sisira. J. de Abrew J
L.T.B. Dehideniya J
P.Padman Surasena J

Counsel: Darshan Kuruppu with Aruna Gamage for the
Accused Appellant-Petitioner-Appellants
DSG Dilan Ratnayake the Attorney General

Written submission
tendered on : 26.3. 2018by the Accused Appellant-Petitioner-Appellants
14.7.2017 by the Attorney General
Argued on : 30.7.2020

Decided on: 12.2.2021

Sisira. J. de Abrew, J
The Accused-Appellant-Petitioner-Appellants (hereinafter referred to as the Accused-Appellants) in this case were convicted for the murder of a man named

Madavan Sadanandan and were sentenced to death by the judgment of the High Court dated 24.1.2011. Being aggrieved by the said conviction and the sentence, the Accused-Appellants appealed to the Court of Appeal and the Court of Appeal by its judgment dated 7.4.2017 dismissed the appeal and affirmed the conviction and the sentence. Being aggrieved by the said judgment of the Court of Appeal, the Accused-Appellants have appealed to this court. The 4th accused, at the end of the trial, was acquitted by the learned High Court Judge. This court by its order dated 12.2.2018 granted leave to appeal on questions of law set out in paragraph 16(i) and 16(v) of the Petition of Appeal dated 16.5.2017 which are set out below.

1. Whether their Lordships of the Court of Appeal erred in failing to evaluate the evidence in the case in its totality and failed to appreciate the same on an impartial and objective evaluation of the evidence whether there was clearly, at the very least a reasonable doubt as to the participation of the 2nd and 3rd Petitioners to the alleged offences?

2. Have their Lordships of the Court of Appeal failed to apply the test of probability in evaluating the testimonial trustworthiness of PW2's evidence and thereby deprived the Petitioners the substance of a fair trial guaranteed under Article 13 of the Constitution?

3. Whether the learned High Court Judge erred in law on the principles relating to burden of proof on the defence of alibi.

The 3rd question of law which was raised by learned counsel for the Accused-Appellants was permitted by this court at the hearing of granting of leave to appeal on 12.2.2018.

Facts of this case may be briefly summarized as follows.

On the day of the incident (9.2.2003) when the deceased person Madavan Sadanandan and Murugasu Ravindran were going to cut firewood, they met the Accused-Appellants and the 4th Accused near the Kovil and they asked the deceased person whether he was a big person to which the deceased person replied that he was going to work. At this stage, there was an exchange of words between the deceased person and the accused persons. The accused persons then started attacking the deceased person. The 1st Accused-Appellant attacked the deceased person with a knife. The 2nd and the 3rd Accused-Appellants attacked the deceased person with two clubs. The 4th Accused attacked the deceased person with his hands. When the deceased person was being attacked, he ran away towards his house and all four accused chased after him. Murugase Ravindran who was watching the incident says in his evidence that the deceased person ran for about 20 feet. The 1st Accused-Appellant threatened Murugase Ravindran not to give evidence on the incident. Thereafter Murugase Ravindran went home. The above facts have been stated by Murugase Ravindran in his evidence. Later the people found that the deceased person lying fallen near the Kovil. According to the evidence of wife of the deceased person Weeranan Erulai, the distance between the Kovil and the place where the deceased person was lying fallen was 30 feet. But according to the evidence of the investigating officer, this distance was about 100 meters.

Learned counsel who appeared for the Accused-Appellants submitted that the incident described by witness Murugase Ravindran was an incident which had taken place prior to the main incident. But Murugase Ravindran, in his evidence, clearly says that when the deceased person was being attacked, he (the deceased person) ran away and the four accused persons chased after him (the deceased person). Thus, according to the evidence of Murugase Ravindran, this was the

main incident. There was no evidence led at the trial to establish that the deceased person was attacked at the place where he was lying fallen. For the above reasons, I am unable to agree with the above submission of learned counsel for the Accused-Appellants.

Learned counsel for the Accused-Appellants contended that no reliance can be placed on Murugase Ravindran's evidence as he has made a belated statement. I now advert to this contention. It is true that he has made a statement ten days after the incident. There were reasons for this delay. Murugase Ravindran who was only fifteen (15) years old at the time of the incident was threatened by the 1st Accused-Appellant not to give evidence in this case. According to the evidence of Murugase Ravindran, this was the reason for the delay in making the statement. When considering the contention whether the evidence of a belated witness can be accepted or not, I would like to consider certain judicial decisions.

In SumanasenaVs Attorney General[1999] 3 SLR 137 at page 140, His Lordship Justice Jayasuriya held as follows.

"just because the witness is a belated witness the Court ought not to reject his testimony on that score alone and that a Court must inquire into the reason for the delay and if the reason for the delay is plausible and justifiable the Court could act on the evidence of a belated witness.

In Ajith Samarakoon Vs the Republic [2004] 2 SLR 209 at page 220 His Lordship Justice Jayasuriya held as follows. His Lordship Justice Jayasuriya held as follows. *Just because the statement of a witness is belated the Court is not entitled to reject such testimony. In applying the Test of Spontaneity the Test of Contemporaneity and the Test of Promptness the Court ought to scrupulously proceed to examine the reasons for the delay. If the reasons for the delay adduced by the witness are*

justifiable and probable the trial Judge is entitled to act on the evidence of a witness who had made a belated statement.

Considering the above legal literature, I hold that court should not reject the evidence of a witness who has made a belated statement to the Police if the delay has been explained. In the present case the delay in making the statement to the Police has been explained. Thus the decision of the learned trial Judge to accept the evidence of witness Murugase Ravindran cannot be found fault with.

According to the evidence of Dr. Manjula who conducted the Post Mortem Examination, there were cut injuries, lacerations and a contusion on the body of the deceased person. Thus, it is seen that the evidence of Murugase Ravindran has been corroborated by medical evidence. When the above matters are considered, the evidence of Murugase Ravindran can be accepted beyond reasonable doubt. The learned trial Judge and the learned Judges of the Court of Appeal were, in my view, correct when they decided to act on the evidence of Murugase Ravindran. For the above reasons, I reject the above contention of learned counsel for the Accused-Appellant.

Prosecution has relied on a dying declaration made by the deceased person to his wife Weeranan Irulai. According to Weeranan Irulai, she, on hearing that her husband had been attacked, went to the place where the deceased person was lying fallen. On being questioned as to who cut him, he (the deceased person) replied that Alli cut him, Ukkun and Weeraman assaulted him with a club. She has identified Alli as the 1st Accused, Ukkun as the 3rd Accused and Weeraman as the 2nd Accused. Thereafter she has gone to the Police Station and made a statement. Question was raised as to why she did not take the deceased person to the hospital in the same van. It has to be noted here that she had had no control over the

vehicle. No one knows whether the van driver refused to take the injured person in the van to the hospital. However, what is important here is to consider whether the deceased person could have spoken when she spoke to him. Dr Manjula says in his evidence that the deceased person could have spoken for about one hour after receiving injuries and he had the capacity to move.

According to the evidence of Weeranan Irulai, the deceased person in his dying declaration had mentioned that all three Accused-Appellants had attacked him. Although the deceased person had referred to all three accused persons in his dying declaration, Weeranan Irulai, in her first statement made to the Police, has failed to mention the attack on the deceased person by the 2nd and 3rd Accused persons. She has mentioned this fact only in her 2nd statement made to the Police. According to Dr Manjula, the deceased person could have spoken for about one hour after receiving injuries. Further, according to the evidence of Dr. Manjula who conducted the Post Mortem Examination, there were cut injuries, lacerations and a contusion on the body of the deceased person. Thus, it is seen that the evidence of Weeranan Irulai is corroborated by the evidence of Dr Manjula. Weeranan Irulai has also said in her evidence that the 1st,2nd,3rd and 4th accused persons were ten feet away from place where the deceased person was lying fallen when she went to this place and the 1st accused person was having a knife. When I consider all the above matters, I am unable to find fault with the decisions of the learned trial Judge and the learned judges of the Court of Appeal in accepting the evidence of Weeranan Irulai.

The 2nd and the 3rd Accused-Appellants in their dock statements have taken up the position that they went to work in the morning and came back in evening. Thus, they have taken the defence of alibi. However, the learned Judge has placed a

burden on the accused persons to prove the defence of alibi. I will now consider whether the learned trial Judge was correct when he took the above decision. When an accused person takes up the defence an alibi, the burden is on the prosecution to establish that he was present at the place where the offence was committed. I would like to consider certain judicial decisions on this point. In Banda and Others Vs Attorney General [1999] 3 SLR 169 Justice FND Jayasuriya at page 170 held as follows.

> *"There is no burden whatsoever on an accused person who puts forward a plea of alibi and the burden is always on the prosecution to establish beyond reasonable doubt that the accused was not elsewhere but present at the time of the commission of the criminal offence."*

In Punchi Banda Vs The State 76 NLR 293 at page 308 His Lordship Justice GPA Silva held as follows.

> *"Where the defence was that of an alibi and an accused person had no burden as such of establishing any fact to any degree of probability."*

Considering the above matters, I hold that when an alibi is pleaded by an accused person, there is no burden on the accused person to prove it. Therefore, I hold that the learned trial Judge has committed misdirection in law when he placed a burden on the 2nd and 3rd Accused-Appellants to prove the defence of alibi.

Although the2nd and 3rd Accused-Appellants raised a defence of alibi in their dock statements, they failed to suggest this position to witness Murugase Ravindran.

In the case of Sarwan Singh Vs State of Punjab [2002] AIR SC (iii)3652 at 3656 the Indian Supreme Court held as follows. *"It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his*

case in cross examination it must follow that the evidence tendered on that issue ought to be accepted." This judgment was cited with approval in Bobby Mathew vs. State of Karnatake 2004 Cr. LJ Vol iii page 3003.

Applying the principles laid down in the above judicial decisions, I hold that failure on the part of the 2nd and 3rd Accused-Appellants to suggest to the prosecution witness Murugase Ravindran their position (defence of alibi) indicates that the defence of alibi is a false one.

Further I would like to consider the proviso to Section 334 of the Criminal Procedure Code which reads as follows. *"Provided that the court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."*

I have earlier pointed out that the learned trial Judge has committed misdirection in law when he placed a burden on the 2nd and 3rd Accused-Appellants to prove the defence of alibi. Although the learned trial Judge has committed the above misdirection in law, when the evidence led at the trial is considered, I hold that no substantial miscarriage of justice has actually occurred to the accused. In this connection I would like to consider the judgment of this court in the case of MHM Lafeer Vs The Queen 74 NLR 246 wherein this court at page 248 held as follows.

> *"There was thus both misdirection and non-direction on matters concerning the standard of proof. Nevertheless, we are of opinion having regard to the cogent and uncontradicted evidence that a jury properly directed could not have reasonably returned a more favourable verdict. We therefore affirm the conviction and sentence and dismiss the appeal."*

The next question that I would like to consider is whether the conviction of murder can be maintained. I now advert to this question. Witness Murugase Ravindran, in his evidence, stated the following matters.

1. There was an exchange of words between the deceased person and the accused persons.

2. The deceased person was using filthy language when both parties were exchanging words.

3. At the time of the attack on the deceased person, there was a fight between two parties. [pages 50 to 51].

When I consider the above evidence, I feel that the conviction of murder cannot be maintained and the Accused-Appellants should have been convicted on the offence of culpable homicide not amounting to murder which is an offence punishable under Section 297 of the Penal Code on the basis of sudden fight. For the above reasons, I set aside the conviction of murder and the sentence of death imposed on the Accused-Appellants and convict them for the offence of culpable homicide not amounting to murder on the basis of sudden fight which is an offence punishable under Section 297 of the Penal Code. I sentence each of the Accused-Appellants to a term of 16 (sixteen) years rigorous imprisonment. I further direct that this term of imprisonment should be implemented from the date of sentence of death (24.1.2011).

In view of the conclusion reached above, I answer the 1st and the 2nd questions of law in the negative. I answer the 3rd question of law as follows. The learned trial Judge (High Court Judge) erred in law on the principles relating to the burden of proof on the defence of alibi. The learned High Court Judge of Colombo is directed

to issue a fresh committal in accordance with the sentence imposed by this court. Subject to the above variation of the conviction and the sentence, the appeal of the Accused-Appellants is dismissed.

Appeal dismissed.

Judge of the Supreme Court.

L.T.B. Dehideniya J

I agree.

Judge of the Supreme Court.

P. Padman. Surasena J

I agree.

Judge of the Supreme Court.

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

In the matter of an application for Special Leave to Appeal against the order dated 20.10.2014 in the Court of Appeal of the Democratic Socialist republic of Sri Lanka in Case No: CA/831/99(F).

Case No: SC/APPEAL 44/15

SC/SPL/LA/235/14

CA Appeal No: 831/99/F

DC Avissawella Case No: 16127/P

1. Rupasinghe Arachchige Don Ananda,

Kumara Rupasinghe of Mawalgama, Waga.(Deceased)

1a. Welikala Lalitha

1b. Roshan Chinthala Rupasinghe

1c. Roshan Lakmal Rupasinghe all of

128/A, Miriyawatte, Mawalgama, Waga

2. Rupasinghe Arachchige Don Sarath Kumara Ruupasinghe of Mawalagama, Waga.

3. Rupasinghe Arachchige Don Esonsingho of Kudagama, Avissawella.

3a. Rupasinghe Arachchige Don Robert Rupasinghe.

PLAINTIFF

-VS-

1. Rupasinghe Arachchige Don Jayawardane Rupasinghe.

2. Rupasinghe Arachchige Don Albertsinghe of Mawalgama, Waga.

3. Rupasinghe Arachchige Dona Violet.

4. Hewawasam Puwakpitiyage don Karunarathne.

5. Rupasinghe Arachchige Don Leelarathene, and 15 others Defendants.

DEFENDANTS

1. RupasingheArachchige Don Ananda,

Kumara Rupasinghe of Mawalgama, Waga.(Deceased)

1a. WelikalaLalitha

1b. Roshan ChinthalaRupasinghe

1c. Roshan LakmalRupasinghe all of

128/A, Miriyawatte, Mawalgama, Waga

2. Rupasinghe Arachchige Don Sarath Kumara Ruupasinghe of Mawalagama, Waga.

3. Rupasinghe Arachchige Don Esonsingho of Kudagama, Avissawella.

3a. Rupasinghe Arachchige Don Robert Rupasinghe.

PLAINTIFF-RESPONDENTS

1. Rupasinghe Arachchige Don Jayawardane Rupasinghe.

2. Rupasinghe Arachchige Don Albertsinghe of Mawalgama, Waga.

3. Rupasinghe Arachchige Dona Violet.

4. Hewawasam Puwakpitiyage don Karunarathne.

5. Rupasinghe Arachchige Don Leelarathene

DEFENDANTS -RESPONDENTS

AND BETWEEN

B.A. Piyasena of Mawalagama ,

Waga

DEFENDANT-APPELLANT- PETITIONER

Vs.

Tharanga Sumuduni Rupasinghe of

'Thusitha',Mawalgama, Waga.

Disclosed Defendant Respondent Seeking to be substitution in place of the deceased

Rupasinghe Arachchige Don Jayawardena Rupasinghe (1st Defendant –Respondent) and 20 other Defendant Respondents as per the caption.

AND NOW IN SUPREME COURT BETWEEN

B.A. Piyasena of Mawalagama ,

Waga

9TH DEFENDANT-APPELLANT-PETITIONER-PETITIONER

Vs.

1. RupasingheArachchige Don Ananda,

Kumara Rupasinghe of Mawalgama, Waga.(Deceased)

1a. WelikalaLalitha

1b. Roshan ChinthalaRupasinghe

1c. Roshan LakmalRupasinghe all of

128/A, Miriyawatte, Mawalgama, Waga

2. Rupasinghe Arachchige Don Sarath Kumara Ruupasinghe of Mawalagama, Waga.

3. Rupasinghe Arachchige Don Esonsingho of Kudagama, Avissawella.

3a. Rupasinghe Arachchige Don Robert Rupasinghe.

PLAINTIFF-RESPONDENT-RESPONDENT-RESPONDENTS

1. Rupasinghe Arachchige Don Jayawardane Rupasinghe.

2. Rupasinghe Arachchige Don Albertsinghe of Mawalgama, Waga.

3. RupasingheArachchige Dona Violet.

4. HewawasamPuwakpitiyage don Karunarathne.

5. Rupasinghe Arachchige Don Leelarathene

6. Rupasinghe Arachchige Don Piyasasa Rupasinghe of Mabula, Waga (Deceased)

6a. Rupasinghe Arachchige JanakaRupasinghe of 15 Waga, Kahahena.

7. Keerthisena Jayasinghe of Mawalgama, Waga.

8. Don Thomas Rupasinghe of Mawalagama, Waga.

10. Rupasinghe Arachchige Dona Susilawathie Nee Bamunu Arachchige Thilakarathne of 30/3, Mawathagama, Homagama.

11. RupasingheArachchigeLilinona of School Lane, Galagedara, Padukka.

12. Rupasinghe Archchige Dona Kuralinenona of Ihala Kosgama, Kosgama.

13. Don Ernest Rupasinghe of Mawalgama,(Deceased)

13a. Rupasinghe Arachchige Don Hemachandra Rupasinghe of Mawalgama, Waga.

14. D.T. Rupasinghe

15. A.Robert

16. B.A.Piyasena

17. Keerthisena Jayasinghe of Kahahena, Waga

18. Welikanna Mohottige Jayawardhane of Kahahena, Waga.

19. Welikanna MohottigePiyadasa of Kahahena, Waga.

DEFENDANT-RESPONDENT-RESPONDENT-RESPONDENTS.

Before: Priyantha Jayawardena, PC, J.

L.T.B Dehideniya J.

M.N.B. Fernando, PC.J.

Counsel: Dharmasiri Karunarathne for the Defendant – Appellant - Petitioner

B.O.P. Jayawardena for the 1(a), 1(b), 1(c) and 2nd Plaintiff- Respondent-Respondent-Respondents.

S. Arachchige with G.R.D.Obeysekara for the 6A Defendant-Respondent-Respondent-Respondents.

Argued on: 07/09/2018

Decided on: 14/12/2021

L.T.B. Dehideniya, J.

The Defendant-Appellant-Petitioner-Petitioner (hereinafter some time called and referred to as the 'Appellant') is the 9th defendant in the Partition case No 16127/P in the District Court of Avissawella. The Appellant has presented a statement of claim seeking the prescriptive title of the house marked "B" and Lavatory Marked "A" in Lot 2 of the preliminary plan. After the trial Learned District Judge of Avissawella, by the judgement dated 24th September 1999, dismissed the petitioner's prescriptive claim and ordered a partition in accordance with

the pedigree, set out by the Plaintiff-Respondents- Respondents- Respondents (hereinafter sometimes referred to as the 'Respondents') and accepted by the other defendants.

Being aggrieved by the said judgement the Appellant had made an Appeal to the Court of Appeal. While this appeal was being heard, the Court was informed the death of the first Plaintiff-Respondent on 16th May 2011.On that occasion, however, the Appellant had taken six dates to correct the record by substituting on behalf of the deceased.

On 28th June 2013 it was brought to the notice of Court that the 1st Defendant – Respondent also dead. The case had been down for seven days for substitute since then.

28.06.2013 – 1st Defendant –Respondent died

30.08.2013- moves further date to take steps

30.09.2013- moved date to tender additional documents

08.11.2013- move for date to support

12.11.2013- moved further date for required documents

09.12.2013- moved date to support with certified copies

13.12.2013- Appeal is abated.

When the case was called on 13th December 2013 for the substitution, the Defendant-Appellant was absent and unrepresented and application for substitution was not supported. Therefore, the Court abetted the appeal.

Appellant had made an application to relist the appeal stating that, he was present in Court at the time and the Counsel for the Appellant was not available due to sickness. The Counsel arranged to appear was late. He further submits that the certified copies of the relevant documents had been tendered to Court by way of a motion prior to that date. His argument is that once the documents are tendered it need not be supported and the Court is duty bound to take necessary action to do the substitution. Therefore, the Appellant claims that the order to Abate was *per incuriam* and suffered him tremendous hardship and irreparable loss through no fault of his own.

The Court of Appeal promptly directed the registrar not to return the records to District Court. But after inquiry Court observed that there was no affidavit in support of the above position at least from the Appellant or from the Counsel, who was arranged to appear on that day. Therefore on 20.10.2014, the relisting application was rejected and the Court affirmed the abatement. The Appellant made an Appeal against the said order, which claimed to be *per incuriam.*

Court granted leave to appeal on the following questions of law.

1. Did the Court of Appeal err in law and in facts resulting in a serious miscarriage of justice when it held that it was justifiable and lawful to abate the Appeal under the circumstances of this case depriving the right of the appellant to get his Appeal heard and it is not *per incuriam* order to abate the Appeal?
2. Did the Court of Appeal err in law and in facts in applying Sec. 760 A of the Civil Procedure Code and its relevant provisions read with Supreme Court Rules and the case law relating to substitution?
3. Did the Court of Appeal err in law in facts by not recording a descriptive Journal Entry and by confining to a short and shrewd Journal entry like "Counsel Moves for a further date" when the evidence generated/ documents filed in the record and what really happened are totally different to what is stated by the Journal Entry?
4. Did the Court of Appeal err in law and in facts on 08.11.2013 by not issuing Notice to the Daughter to be substituted based on the documents already filed in the record and when the counsel supported the matter on that basis in accordance with the legal requirements?
5. Did the Court of Appeal err in law and in facts by maintaining 2 different standards variable according to the wish of the judge?

The first question of law is whether the Appellant's legal right to have his appeal heard is being disregarded by the said abate. The Appellant claimed that the Court of Appeals erred in dismissing the case when he had already submitted certified copies of all relevant documents relating to the substitute on behalf of the deceased 1st Defendant- Respondent.

Although an aggrieved party has the right of appeal, the Court of Appeal acted on Rule 13 of the Court of Appeal Rules 1990, In this case, the applicant had failed to prosecute the appeal with appropriate diligence.

"*13. It shall be the duty of the petitioner to take such steps as may be necessary to ensure the prompt service of notice, and prosecute his application with due diligence."*

The Appellant's duty and legal obligation is to support and move Court to obtain the remedies requested for in the written applications. It will not be absolved by just filling of papers or sending motions. If the application is not supported the Court may hold that the applicant is not prosecuting diligently and the Court had determined that the Appellant did not act with due diligence. The Appellant was not present and unrepresented on 13thDecember 2013. He acted in the same manner on multiple occasions, before the abatement. Despite the fact that the Appellant claims that another lawyer has been engaged to represent him, no affidavit from that lawyer has been submitted to the Court. The Appellant has not named the lawyer, who he claims has been arranged to represent him. The presumption raised in these circumstances is that the Appellant has not been truthful to the court.

Wood Renton CJ held as follows in ***Supramanium Vs Symons*** [18 NLR 229],

"People may do what they like with their disputes as long as they do not invoke the assistance of the Courts of Law. But whenever that step has been taken they are bound to proceed with all possible and reasonable expedition, and it is the duty of their legal advisors and of the Courts themselves to seek that this is done. The work of the Courts must be conducted on ordinary business principles, and no Judge is obliged, or is entitled to allow the accumulation upon is cause list of a mass of inanimate or semi animate actions."

Wood Renton CJ has clearly held in the above-mentioned Judgment that a party is obligated to take actions and proceed with all possible and reasonable dispatch to prosecute an action without allowing it to accrue the case list. Courts should not be overburdened with cases. Cases should be resolved as soon as possible. In this case, I am inclined to concur with the Court's decision to dismiss the matter.

On the other hand the grounds for relisting the appeal was that the order was *per incuriam,* which can be overturned by the same court. Concerning the meaning of the *per incuriam,* Wijetunga, J. observed in ***Gunasena v Bandaratillake*** [2000] 1 Sri LR 292 at page 302:

'The phrase per incuriam has been defined in Whertons' Law Lexicon. 13th edition at page 645, as thorough want of care. An order of the court obviously made through some mistake or under some misapprehension is said to be made per incurriam. Classen's Dictionary of Legal Words and Phrases, 1976 edition defines per incurriam at page 137 as by mistake or carelessness, therefore not purposely or intentionally."

Considering the above - mentioned definitions, and the fact that it has asserted *per incuriam* in instances that do not fall within this scenario. Even though the previous judgment contained a clear error, the Court of Appeal had inherent authority to correct it so that a party would not suffer as a result of a lapse on the part of the court. The Court of Appeal followed the method it deemed most suitable under the circumstances. As a result, the Court order to abate cannot be *per incuriam*. It was correct and lawful.

Another question of law arises in fact by not recording a descriptive Journal Entry and by confining to a short and shrewd journal entry. The Journal is the primary record of all acts and impotent events under Section 92 of the Civil Procedure Code.

"*92. With the institution of action a court shall commence a journal entitled as of the action, in which shall be minutes as they occur, all of the course of the action...*"

This section passes a burden on preceding judge to record all of the course of the action as occur. It is an official act that the judicial officer has to perform. Under Section 114 of the Evidence Ordinance the Journal Entry is presume to be correct. It has been held in ***Seebert Silva vs. Aronona Silva*** [60 NLR 272] that the Court is entitled to presume that the Journal Entries made in a case are in compliance with the requirements of Section 92 of the Civil Procedure Code. Further at Page 275 it has been held that,

"*A Journal has been maintain in this action and the Court is entitled to presume that it was regularly kept this presumption which arises under Section 114 of the evidence ordinance is based on the maxim 'Omnia praesumuntur rite et solemniter esse acta' this presumption is of course rebuttable but the respondents, of whom is the burden, have not placed before the court sufficient material to rebut it."*

In the present action though, the Counsel complained that the Judge had not entered the situation that had happened in the open Court correctly, the presumption of the correctness of the Journal Entry cannot be rebutted by just an allegation made from the bar table. It must be established - where the burden lies on the person who challenges the correctness of the Journal Entry - with proper evidence. In this case the Appellant has not tendered sufficient evidence to establish that Journal Entry is incorrect.

The other question of law concerns the applicability of Section 760 A of the Civil Procedure Code and its relevant provisions in conjunction with Supreme Court Rules and case law relating to substitution. Whether the court could request the original documents of the substitution without acting on photocopies.

Section 760A of the Civil Procedure Code provides that if, at any time during the pendency of an Appeal, one of the parties to the Appeal dies or changes his legal status, the Court before which the appeal is pending may determine, in the manner provided in the Supreme Court Rules.

> *"..... who, in the opinion of the court, is the proper person to be substituted or entered on the record in place of, or in addition to, the party who had died or undergone a change of status, and the name of such person shall thereupon be deemed to be substituted or entered on record as aforesaid." (Emphasis added)*

In accordance with Rule 38 of the Supreme Court Rules, that determination must be based on "sufficient material" submitted to the Court establishing that the person who seeks to be substituted is the "appropriate person."

Thus, it is demonstrated that applying Sec. 760 A of the Civil Procedure Code and its relevant provisions read with Supreme Court Rules and case law relating to substitution and issuing Notice to the legal hairs, is not an obligation of courts. It is the Appellant's responsibility to furnish all essential documentation with proper diligence.

The next legal question is maintaining two different standards that are variable according to the judge's wishes. In this case, it indicates that one judge allowed photocopies while the other did not.

It is common knowledge that original documents or a duly certified copy of the document (in the absence of the original) are normally presented before the Court. The phrase "duly certified copy" must imply that the authority responsible for its issue certified the copy submitted to Court as a copy duly obtained from the original. Only then Court can rely on and act on such a document. Because Courts make orders based on such documents can occasionally have serious consequences for people. People who are affected by a case are not always limited to the parties involved. If the Court issues such orders on a set of papers whose legitimacy is later called into question, severe consequences may result. It would be relevant at this stage to quote the following paragraph from the judgment of this Court in the case of ***Attorney General Vs Ranjith Weera Wickrema Charles Jayasinghe***. [CA (PHC) APN /74/2016] After considering the significance and underlying reasons for the demand on rigorous conformity, this Court said in that matter as follows:

> " ..... *Moreover, the above rule underlines the importance of the presence of an authoritative and responsible signatory certifying such copies taking their responsibility for the authenticity of such documents. Insisting on tendering to Court, such duly certified copies of relevant proceedings is not without any valid and logical reasons. Courts make orders relying on such documents. They may sometimes have serious effects on people. The persons who may be so affected might sometimes be not limited to parties of the case only. Drastic repercussions may ensue in case the Court makes such orders on some set of papers, authenticity of which would subsequently become questionable*."

So, if a judge is dissatisfied with the photo copies, he has the authority to request the original documents instead. The court gave the applicant four days to furnish the required documentation and to take steps to gain the Court authorization, but the applicant did not submit it until 13th December 2013, and was unrepresented in court. In such cases, the Court's only option is to decide whether and how much time should be provided for timely filing of papers or to dismiss the matter. The Court had taken the latter option. It is not *per incuriam*.

I answer the questions of law as followings,

1) No

2) No

3) No

4) No

5) No

I dismiss the appeal with the cost fixed at Rs. 25000.00

Judge of the Supreme Court

Priyantha Jayawardena, PC. J.

I agree.

Judge of the Supreme Court

M.N.B. Fernando, PC.J.

I agree

Judge of the Supreme Court

IN THE SUPREME COURT OF DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Application for Special Leave to Appeal against the Judgment of the High Court of Civil Appeal dated 25th August 2010.

Samuel Vivendra Eliyatambi
No 248, Whitehorse Road,
Corydon CRO 2 LB, Surrey
United Kingdom

Appearing by his Attorney
Reginald Perera Wickramarachchi
Saman Mawatha,
Nugegoda

SC/Appeal No. 120/2014 **Plaintiff**
HCCA Case No. WP/HCCA/Mt/22/02/F

DC Mt Lavinia Case No. 347/94/L **VS**

1. John Cyril Fernando (Now Deceased)
   No. 83, Gregory's Road,
   Colombo 07

2. Selwyn Danaraj Eliyatambi
   No. 1 & 1/1, Elibank Road,
   Colombo 05

3. Surangani Jayasekera
   No. 4 & 4 1/1, Elibank Road,
   Colombo 05

4. Marinie Samantha Jayasekera
   No. 4 & 4 1/1, Elibank Road,
   Colombo 05

Defendants

AND

1. John Cyril Fernando (Now Deceased)
   No. 83, Gregory's Road,
   Colombo 07

3. Surangani Jayasekera
   No. 4 & 4 1/1, Elibank Road,
   Colombo 05

4. Marinie Samantha Jayasekera
   No. 4 & 4 1/1, Elibank Road,
   Colombo 05

1st ,3rd and 4th Defendants – Appellants

VS

Samuel Vivendra Eliyatambi
No 248, Whitehorse Road,
Corydon CRO 2 LB, Surrey
United Kingdom

Appearing by his Attorney
Reginald Perera Wickhramarachchi
Saman Mawatha,
Nugegoda

Plaintiff – Respondent

2. Selwyn Danaraj Eliyatambi
   No. 1 & 1/1, Elibank Road,
   Colombo 05

2nd Defendant – Respondent

AND NOW BETWEEN

1. John Cyril Fernando (Now Deceased)
   No. 83, Gregory's Road,
   Colombo 07

1A. Surangani Jayasekera
   No. 4 & 4 1/1 Elibank Road,
   Colombo 05

1st Defendant – Appellant – Appellant

VS

Samuel Vivendra Eliyatambi
No 248, Whitehorse Road,
Corydon CRO 2 LB, Surrey
United Kingdom

Appearing by his Attorney
Reginald Perera Wickramarachchi
Saman Mawatha,
Nugegoda

Plaintiff – Respondent – Respondent

2. Selwyn Danaraj Eliyatambi
   No. 1 & 1/1, Elibank Road,
   Colombo 05

2nd Defendant – Respondent – Respondent

3. Surangani Jayasekera
   No. 4 & 4 1/1, Elibank Road,
   Colombo 05

4. Marinie Samantha Jayasekera
   No. 4 & 4 1/1, Elibank Road,
   Colombo 05

3rd and 4th Defendant – Appellant – Respondents

Before : Vijith K. Malalgoda, PC, J
S. Thurairaja, PC, J and
E.A.G.R. Amarasekara J.

Counsel : Anuruddha Dharmaratne with Indika Jayaweera for the 1st Defendant – Appellant – Appellant.
Ikram Mohamed PC with Roshan Hettiarachchi instructed by Mallawarachchi Associates for the Plaintiff – Respondent - Respondent.
Faisz Mustapha PC with Harsha Soza PC for the 3rd and 4th Defendant – Appellant – Respondents.

Argued on : 04/09/2019

Decided on : 20/05/2021

E. A. G. R. Amarasekara J

The Plaintiff- Respondent – Respondent above named (hereinafter sometimes referred to as the Plaintiff) through his power of attorney holder G.H.A. Watson, instituted an action in the District Court of Mount Lavinia on the 29th of December

1994, against the 1st defendant – Appellant - Petitioner (hereinafter referred to as the Petitioner or the 1st Defendant Appellant or the 1st Defendant) and the 3rd and 4th Defendants – Appellants – Respondents and the 2nd Defendant – Respondent – Respondent (hereinafter sometimes referred to as the 3rd , 4th and the 2nd defendants respectively) seeking inter-alia for a declaration of title for the premises no. 4 and 4 1/1 Elibank Road, Colombo – 05, ejectment of the Defendants from the said property and for the recovery of damages. It appears that the said Plaintiff had thereafter given a Power of Attorney to one Reginald Perera Wickramarachchi for the purposes of the said case filed in the District Court. As per the minute dated 10th March 2017, one Surangani Jayasekera has been substituted by this court in place of John Cyril Fernando, 1st Defendant Appellant as 1A Defendant Respondent Appellant.

As per the Plaint:

- The Plaintiff is resident in the United Kingdom since March 1980.
- On 27.02.1980 by Power of Attorney No 1482, attested by K. Sivanatham, Notary Public, the Plaintiff's father, the 2nd Defendant was appointed as his Attorney. (vide paragraphs 1- 4 of the Plaint).
- At the time of execution of the said Power of Attorney the Plaintiff was only 19 years of age. And the said Power of Attorney is of no force in law since the Plaintiff was a minor at the time it was executed.
- By virtue of Deed of Transfer No. 2085 dated 15.02.1985, the Plaintiff became the lawful owner of the premises Nos. 4 and 4 1/1, Elibank Road, Colombo 05. The 2nd Defendant wrongfully and illegally without the knowledge of the Plaintiff sold and transferred the said premises by Deed of Transfer No. 60 dated 12.09.1985 to one John Cyril Nirmal Fernando, 1st Defendant Appellant, for a sum of Rs. 800,000/-. (vide paragraphs 5 to 8 of the Plaint) and this was done owing to a debt owed to the 1st Defendant Appellant by the 2nd Defendant, who was the father of the Plaintiff and the power of attorney holder at that time for the Plaintiff.
- It is also stated that the Plaintiff became aware of the said transfer only in 1994 - (vide paragraph 13 of the Plaint). The premises in suit is a two storied house and was worth Rs. 7 million. Thus the 2nd Defendant has sold it way below the market value - (vide paragraph 17 of the Plaint).

- The 1st Defendant Appellant by Deed No. 73 dated 13.11.1987 has fraudulently and wrongfully transferred the said premises to his sister the 3rd Defendant. And the said 3rd Defendant by Deed of Transfer No. 31 dated 08.07.1988 has transferred the premises in question to her daughter the 4th Defendant - (vide paragraph 19 and 20 of the Plaint).
- The said 3 Deeds of Transfer (No. 60, 73 and 31) are void and do not convey title. Thus, the 1st, 3rd and 4th Defendants are in wrongful and unlawful possession of the premises in question.

As per the prayer to the plaint, what has been prayed for is a declaration of title to the land referred to in the schedule to the plaint. It was on the basis that the aforesaid deeds referred to in the body of the plaint and the Power of Attorney are void in law, but no relief has been prayed in the prayer to declare those deeds or the Power of Attorney are void in law.

1st and 3rd Defendants in their answer denied the allegations made and stated that;

- there is a misjoinder of Defendants,
- the Plaintiff cannot have and maintain this action as presently constituted and he cannot approbate and reprobate,
- the Plaintiff's action is prescribed in law,
- the plaint does not disclose a cause of action against the Defendants and the Plaintiff is not entitled to the reliefs prayed for in the Plaint.
- that the Plaintiff is estopped from claiming that the Power of Attorney was not valid in that he took no steps to revoke it and received benefits under the Power of Attorney.

Thus, the said Defendants prayed for dismissal of the action.

The 4th Defendant in her answer dated 17th March 1995, averred similarly and prayed for the dismissal of the action.

The 2nd Defendant, the father of the Plaintiff and the power of attorney holder of the Plaintiff at the relevant time of the alleged incidents, in his answer while admitting the main contentions in the plaint, had averred that he signed the deed No.60 in his personal capacity as a security in relation to a loan and he signed a blank deed and no consideration was given to him. However, it is not

clear, if he signed a blank deed, why he called it a deed signed in a personal capacity as a security in relation to a loan.

The learned District Judge on 23.08.2002 delivered her judgment in favour of the Plaintiff as prayed for in the Plaint and also setting aside the Deeds Nos. 60, 73 and 31, dated 17.09.1985, 17.11.1987 and 08.07.1988 respectively, even though there was no prayer for such relief.

Being aggrieved by the Judgment of the District Court, the 1st, 3rd and 4th Defendants preferred an appeal, which was heard in the High Court of Civil Appeal of the Western Province holden in Mount Lavinia.

On 25.08.2010 the High Court delivered its Judgment dismissing the appeal while affirming the Judgment of the District Court.

This Court, after considering the leave to appeal application, granted leave on the questions of law set out in paragraph 18(b), 18(c), 18(e), 18(f), 18(g), and 18(h) of the Petition of the 1st Defendant Appellant Petitioner dated 04.10.2010 – vide Journal Entry dated 17.07.2014. The said questions of law are reproduced at the later part of this judgment.

As this is an appeal filed against the aforesaid decision of the Civil Appeal High Court of the Western Province sitting in appeal, it is the task of this court to see whether the said High Court erred in law as aforesaid in coming to its decision in confirming the judgment of the District Court of Mount Lavinia. In this regard it is relevant to see whether the learned District Judge erred in law and whether the learned High Court Judges identified such errors, if any, before confirming the decision of the learned District Judge. In this sphere, it is pertinent to understand the nature of the action filed and maintained before the District Court.

As per the plaint as well as per the issues raised by the Plaintiff, he has never taken the position that the impugned deed of transfer No. 60 executed by the then power of attorney holder, the second defendant was done when he was a minor. In fact, it was executed in 1985 and according to the Plaintiff's stance he should have been a major by that time, even as per his age. Thus, he cannot challenge the validity of that transfer on the ground that it was a contract entered into by a minor. On the face of it, it has been done through his agent, then power

of attorney holder. Through the issues raised in the original court the Plaintiff challenged this deed on the following grounds;

- The Plaintiff was a minor when he executed the Power of Attorney and therefore, Power of Attorney is void and, thus the said deed no. 60 is not valid - vide issues nos.3,4,5 and 17.
- The consideration was not paid and thus, the transaction in deed no.60 is not valid- vide issues Nos.6 and 17.
- Power to sell was not given by the Power of Attorney and, thus the transaction in deed no. 60 was not valid- vide issues Nos. 7,8,17.
- The doctrine Laesio Enormis applies and, thus said deed is voidable – vide issues Nos. 10,11 and 12.

Thus, if the relevant Power of Attorney was valid and the power to sell immovable property was given to the power of attorney holder at the time of executing the deed, the said deed no. 60 cannot be challenged on the basis of said purported defects related to Power of Attorney. Since, this challenge to the Power of Attorney appears to be the main contention in this appeal I will advert to it first in this judgment.

At the commencement of the trial, parties have admitted the execution of the Power of Attorney no.1482 given to the 2nd Defendant, the father of the Plaintiff, and the execution of the aforementioned deeds nos. 60,73, and 31 by which deeds the title allegedly passed from the Plaintiff to the 4th Defendant. (However, it is observed that these documents have been challenged in the body of the plaint as void.) It is also admitted that 3rd Defendant is the sister of the 1st Defendant and the 4th Defendant is the daughter of the 3rd Defendant.

The learned District Judge had correctly found that that the main legal question to be answered was whether the Power of Attorney granted by the Plaintiff to the 2nd Defendant on 27.02.1980 was void. It appears that she had considered that the Plaintiff, as per his age, was a minor in terms of our law at the time the said Power of Attorney was given and when the transaction is not for the benefit of the minor, it is not valid against the minor, and as such the Power of Attorney and the transactions based on that Power of Attorney are void. The learned District Judge in coming to the said conclusion also had stated that the sale of the subject matter to the 1st Defendant was done without the knowledge of the Plaintiff, and

also not for the benefit of the Plaintiff. As per the answers given to the issues raised, the learned District Judge had come to the conclusion that the Plaintiff has not received any consideration on the said sale, and that the Plaintiff came to know in 1994 that his property had been transferred illegally. It appears that, in this regard, the learned District Judge believed the evidence given by the power of attorney holder appointed for the prosecution of his case by the Plaintiff, who stated in evidence that the 2nd Defendant owed a sum of money to the 1st Defendant Company and the land was transferred to the 1st Defendant in lieu of the said debt of the 2nd Defendant. Consequently, at the end, the learned District Judge held in favour of the Plaintiff. In the appeal preferred by the Defendant – Appellants to the High Court of Civil Appeal of the Western Province holden in Mount Lavinia, the learned High Court Judges identified what has to be decided by them as "…whether the power of Attorney No. 1482 and the Deed of Transfer No 60 is valid in law?" - vide page 7 of the High Court Judgment. In their Judgment of the High Court that dismissed the appeal of the 1st, 3rd and the 4th Defendants while affirming the Judgment of the District Court, the learned High Court Judges have indicated their reasons as follows;

a. Under the Age of Majority Ordinance Chapter 7a of Volume 4 of the Legislative Enactment Sri Lanka the age of majority at the relevant time (28/02/1980) was 21 years. And as at 28/02/1980 when the Power of Attorney was executed, the Plaintiff was only 19 years and 2 months old- vide page 7 of the High Court Judgment.

b. The Plaintiff was, at the time of execution of the said Power of Attorney, a citizen of Sri Lanka and is subject to the Sri Lankan law.

c. The alienation or sale or mortgage of immovable property by a minor to be valid it needs the sanction of the Court.

d. According to Section 24(1) of the Judicature Act No. 2 of 1978, the charge of the property of minors is vested in the District Court of family courts (Sic). Hence at the time executing the said Power of Attorney, the District Court of Mt. Lavinia should have granted consent as the upper guardian since the Plaintiff was a minor. This contract has been effected without the necessary court permission- vide page 9 of the High Court Judgment. The contract should be treated as an unassisted contract.

e. If a contract is void ab initio due to an illegality or is illegal at the time of formation it cannot become effective later by the removal of disability.

f. No permission of the court has been obtained at the time of transferring the property to the 1st Defendant. The said contract is illegal and if the illegality exists either at the time of the formation of the contract or at the time of performance, such contract is void as the said Power of Attorney was not legal from its inception, since the Power of Attorney No. 1482 is of no force or effect in law because the principal "the plaintiff" was a minor and had no capacity to execute the said Power of Attorney and/or to sell immovable property without the sanction of the court -vide pages 11 and 12 of the High Court Judgment. Thus, the Power of Attorney is illegal and all transactions arising out of an illegal act are considered to be null and void - vide page 12 of the High Court Judgment.

g. The Defendants have failed to lead any evidence to suggest that they were bona fides purchasers and had purchased the land for valuable consideration- vide page 12 of the High Court Judgment.

Nevertheless, it is clear from the judgments of the Courts below that the learned judges have failed to consider and evaluate the following aspects in coming to their conclusions, namely;

- That the witness Reginald Perera Wickramaarachchi was not a party or witness to the impugned Power of Attorney or to Deeds challenged by the Plaintiff and, as such, he may not have any personal knowledge on those transactions other than as hearsay. As such he is not a suitable witness to state that consideration was not passed when Deed No.60 was executed or to state that it was executed in relation to a loan of the 2nd Defendant or to state that conveyance of the property from 1st Defendant to the 4th Defendant are fraudulent. Similarly, that he is not a member of the Plaintiff's family and as such he is not a person who can identify the purported birth certificate of the plaintiff as plaintiff's other than on hearsay. Further, that, neither the Plaintiff nor the 2nd Defendant who must have firsthand knowledge had given evidence.
- Whether, as per the evidence, the Plaintiff could have been considered as a person who emancipated himself from the status of a minor as at the date of executing the impugned Power of Attorney and as such, whether

the said Power of Attorney was a contract of agency made between 2nd Defendant Father and the Plaintiff as an unassisted minor or not.

- Whether, as per the evidence and law, the Plaintiff had ratified the Power of Attorney after he reached the age of 21 prior to the sale by the 2nd Defendant, power of attorney holder.
- Whether a court can invalidate the Power of Attorney and the relevant deeds when there is no relief prayed for in that regard.
- That the Plaintiff was not a minor even by age at the time of the impugned deed no. 60 was executed. As such, if the Power of Attorney was valid at that time and there was no need for an approval from the court as it becomes a transaction of an adult through his agent, the power of attorney holder. Further, that the impugned Power of Attorney is only a document that grant certain powers or authority to the agent, namely the power of attorney holder named therein but not a document that convey any property of the Plaintiff to anyone.

As mentioned above, the main witness of the plaintiff was his power of attorney holder appointed for the prosecution of his case, namely Reginald Perera Wickramaarachchi. He, in his evidence at page 780 of the brief, states that he went to see the Plaintiff to Rathnapura Hospital when he was born. This answer was given when he was questioned about the age of the Plaintiff. However, as per the birth certificate marked as P3 at the trial, the Plaintiff was born in Colombo at Ratnam Hospital. This indicates that the witness does not have personal knowledge with regard to the birth certificate of the Plaintiff. Official witness who was summoned to prove the birth certificate can only say that it is a certified copy of the original in their register, but to say that it is Plaintiff's birth certificate either the Plaintiff or one who has personal knowledge as to that fact should have given evidence. Even objection to P3 had been reiterated at the closure of the Plaintiff's case. Even though, the learned judges of lower courts have relied on this document to decide that the Plaintiff was a minor at the time he executed the impugned Power of Attorney, they have not considered this aspect of the evidence. As decided in **Sheila Senavirathne v Shereen Dharmarathna (1997) 1 Sri L R 76**, a court cannot rely on hearsay evidence to prove facts of a case. Be

that as it may, as there is no question of law allowed on such ground, I am not inclined to decide whether the Plaintiff was a minor or not on that ground.

The main issue to be considered by this Court is whether the Power of Attorney (No 1482 dated 27.02.1980) which is in question was valid at the time of executing deed no. 60 by which the property in issue was sold to the 1st Defendant by the 2nd Defendant as the power of attorney holder, and in such circumstances, whether the agent has acted within the scope of the power and authority given to him. In this regard, this court has to contemplate whether the Plaintiff in fact was a minor as per our law, at the time he appointed his father, the 2nd Defendant as his power of attorney holder: If in fact , he was a minor whether it was an assisted contract or not on behalf of the minor; If it is an assisted contract whether the Plaintiff took steps to rescind it after attaining the age of majority before the prescriptive period lapsed; If it was an unassisted contract of the Plaintiff as a minor whether he ratified it after attaining the age of majority and in such circumstances whether the 2nd defendant had the authority to sell the impugned property; If the Plaintiff ratified the impugned power of attorney and used it for his benefit whether he is estopped from denying the validity of the said power of attorney.

It appears that the learned judges below in deciding whether the plaintiff was a minor at the time he executed the power of attorney has only concerned the statutory provision that existed at that time, namely the provisions in Age of Majority Ordinance as per which the age of majority was 21 years. It was only in 1989 it was amended and brought down to 18 years by the Majority (Amendment Act) No.17 of 1989. However, one must take into account that the statutory provisions that existed at the time of executing the impugned Power of Attorney, only set the age for attaining majority. However, our law recognized other circumstances where minority terminates and such circumstances can be defined as follows;

- Marriage before reaching 21 years
- Obtaining letters of *Vinia Aetatis*
- Express or Tacit Emancipation
- In the case of Muslims, by the attainment of Puberty- vide **The Law of Contracts – By C. G. Weeramantry – Volume I section 445, page 456**

The Plaintiff is not a Muslim and there was no evidence that he was married or had letters of *Vinia Aetatis* at the time he executed the impugned Power of Attorney. Further there was no evidence of express emancipation. As there were issues that, without referring or limiting the scope of the issues to his age, query whether he was a minor when he executed the impugned Power of Attorney, and as such, whether it was not valid, in my view it was within the scope of the action for the learned District Judge and the learned High Court Judges to evaluate evidence to find whether the Plaintiff was in fact emancipated from his status as a minor by his own conduct. In this regard I would like to quote from section 457 in pages 462 and 463 of the afore quoted monumental work by C.G. Weeramantry.

"*Tacit Emancipation. Tacit emancipation takes place when a minor with the consent of his parents or guardian carries on a trade or occupation on his own account. Tacit emancipation is a question of fact depending on the circumstances of each particular case. Emancipation must be clearly proved and this involves proof of liberty and independence, freedom from parental control and the carrying on by the minor of a business, profession, trade or occupation. Trading is not of itself sufficient to emancipate a filius familias so long as he lives under his father's roof or is supported by him." …….*

"The question to be decided is whether there has been in fact a separation of the minor from the control of the parent." …….

……. "But in fact, the minor has, to the knowledge of his parents or guardians, carried on some occupation on his own account for substantial period, he will be tacitly emancipated, as the South African case of a girl who earned her own livelihood as a servant for some years and retained her wages for herself even though she lived with her mother." …….

"*If a minor has engaged in trade at the time of contracting, he is liable on his contract, the law considering that if a man has understanding and experience enough for commerce, he may safely be left to his own protection in the ordinary concerns and dealings of life.*"

Even according to Wille's 'Principles of South African Law' 5th edition 85; A minor is tacitly emancipated, i.e., tacitly released from the tutelage of his legal guardians if, with their consent, which may be express or implied, he carries on a trade or occupation on his own account.

Even though the pleadings and issues raised by the Plaintiff attempt to create an impression that the Plaintiff signed the Power of Attorney as a minor and then left to United Kingdom in 1980, the evidence led through his main witness Reginald Perera Wickramaarachchi, power of attorney holder for the prosecution of the case, reveals that the Plaintiff went to the United Kingdom in 1972 and had come back to Sri Lanka in 1980 and wanted to give the Power of Attorney to the said witness, but, as he was a Government Servant and he did not want to involve in the matter, he asked to give the Power of Attorney to the father of the Plaintiff, the 2nd Defendant. The witness also had said that it was to clear goods from the harbour and relates to the business of export and import of the Plaintiff – vide evidence of the said witness at pages 757,774,779,780,781 and 782 of the brief. Even the contents of the impugned Power of Attorney indicate that it was given to his father, the 2nd Defendant to manage and transact the Plaintiff's business and affairs in Sri Lanka, which included vehicle clearance from the Port of Colombo. Thus, the evidence led indicates that the Plaintiff went abroad to the United Kingdom, a country that considered the age of majority as 18 years at that time, as a minor and stayed there and, by the time he executed the Power of Attorney, had started a business of his own in export and import of vehicles. There was no evidence to show that business was done under the control and guidance of his father.

Further, it should be noted that 2nd Defendant was the father of the Plaintiff and the natural guardian, if the plaintiff has to be considered as a minor at the time of giving the impugned Power of Attorney. Generally, the natural guardianship has been defined as that of parents over the person and property of their minor children and the power of parents consisted in Roman Dutch Law in a general supervision of the maintenance and education of their children and in administration of their property – vide **section 414 of afore quoted book by C. G. Weeramantry at page 418 and Gunasekara Hamini V Don Baron 5 N L R 273 at 279.** Thus, it appears, the task of the natural guardian is to take care of the person and property of the minor, but in the case at hand, it seems the purported minor has gained a position, other than doing his own business, to command or direct his purported natural guardian as his agent. In the backdrop of authorities cited about what else is needed to show that the Plaintiff had emancipated himself

from the status of a minor to a responsible businessman who can take his own commercial decisions independently.

The Plaintiff has argued that the question of emancipation is not pleaded and not put in issue as such should not be considered in the present appeal. Nevertheless, it should be noted that the issues Nos 3 and 4, raised before the learned District Judge, put in issue whether the Plaintiff was a minor at the time he gave the impugned Power of Attorney and, in that backdrop whether the said Power of Attorney is invalid and of no avail in law. The said issues, even though contemplate on the status of the Plaintiff as a minor, does not limit that status to the age of the Plaintiff or has no reference to his date of birth. Thus, in my view, when deciding whether the Plaintiff was a minor or not, the learned District Judge had no limitation to consider whether he was emancipated from that status at the time of the execution of the said Power of Attorney. Thus, there were evidence to say that even at the time of granting the Power of Attorney to his father, the 2nd Defendant, the plaintiff has the capacity to enter into contracts as a person who was emancipated from his status as a minor, and, as such, the power of attorney was valid from the beginning.

If for the sake of argument, one considers that the Plaintiff was a person who was not emancipated from his status as a minor since he was only 19 years of age and less than 21 years at the time he gave the impugned Power of Attorney to his father, the 2nd Defendant, the impugned Power of Attorney has to be considered as an unassisted contract of a minor, since it was not entered in to with the assistance of a guardian or with the sanction of the court, the upper guardian.

Siriwardene V Banda (1892) 2 C.L.Rep.99 at 101 and Selohamy v Raphiel (1889) 1 S C R 73 expressed the view that minor's conveyance was not *ipso facto* void but only voidable. However, our courts later on in some cases opined that such contracts were void and not voidable- See **Gunasekera Hamini V Don Baron (1902) 5 N L R 273, Andiris Appu V Abanchi Appu (1902) 3 Browne 12, Manuel Naide V Adrian Hamy (1909) 12 N L R 259. Saibo V Perera (1915) 4 Bal.N. 57**. Thereafter, in 1916 again the Supreme Court came to the conclusion that a contract with a minor is generally voidable and not void- vide **Fernando V Fernando (1916) 19 N L R 193 and Silva V Mohamadu (1916) 19 N L R 426**. The said case Silva V Mohamadu followed the ruling in the South African case of

Breytenbach V Frankel (1913) A. D. 390 which decided that a dealing by a minor with his property was not *ipso jure* void but only voidable at his instance. This view was followed later on by our courts- see **Wickremaratna V Josephine Silva (1959) 63 N L R 569. – (also see section 416 of the afore quoted book By C. G. Weeramantry at pages 422 and 423)**

However, it appears that jurists contend that the words 'void' and 'voidable' not bear the same meaning as understood in English law as far as the contract of a minor is concerned. Thus, in Roman Dutch Law a minor's contract is such that it does not bind the minor unless he ratifies it on attaining majority, while it binds the other party to it. It is therefore invalid so far as the minor's obligation is concerned until he ratifies it. But it is valid so far as the obligation on the part of the other party is concerned – **vide Fernando V Fernando (supra) and section 416 at page 423 of the afore quoted book by C. G. Weeramantry**. However same author points out that there are exceptions to the rule that the minor is not bound by his unassisted contracts, namely;

- Contracts which are ratified by the minor or his guardian
- Contracts which benefit the minor
- Contracts entered into in consequence of misrepresentation by the minor in regard to his age
- *Donationes mortis causa*
- Obligations incurred *quasi ex contractu* – **vide section 416 and page 426 of the aforesaid book.**

As per the case of **<u>Wickramasinghe V Corrine De Zoysa (2002) 1 SLR 33;</u>**

> *"(2) The Roman Dutch law relating to ratification is in force in Sri Lanka. The Roman Dutch Law permits ratification after majority, of an invalid contract of a minor and differs from the English Law…*
> *(3) In our law a contract upon ratification by a minor after attaining majority becomes as binding upon him as if it had been executed after his majority and it is effective from the time the contract was made.*
> *(4) Ratification <u>maybe express or implied from some act by the minor manifesting an intention to ratify</u>. For example, where a person with full knowledge of his legal rights continues after majority to use as his own the subject matter of a purchase made by him during minority, he must be*

taken to have ratified the contract." (underlined by me)– also see **section 418 at page 428 of the aforementioned book by C. G. Weeramantry**

In the case of **Ramen Chetty v. Silva 15 NLR 286** it was held;

"*the Roman Dutch Law of ratification of contracts by a minor is in force in Ceylon. Contracts which are neither certainly to a minor's prejudice nor necessarily for his benefit are neither void nor absolutely valid, but are voidable and capable of conformation after majority.*"

As per the case at hand, it is clear from the evidence that the Plaintiff after becoming a major entered into an Agreement to Purchase no.1976 dated 2nd may 1984 with the seller of the land in dispute through his power of attorney holder, the 2nd Defendant, using the same impugned Power of Attorney. It appears that the said agreement No.1976 has been marked as V1 at the trial without objection -vide page 791 of the brief, and, even though the power of attorney holder for the plaintiff for the purposes of the case at hand, who gave evidence for the plaintiff at the beginning, had said that he was not aware of such agreement, later has admitted that the Plaintiff used the impugned power of attorney to buy and sell the land in dispute - vide pages 794 and 811of the brief. No objection has been raised to this V 1 agreement at the closure of the Defendant's case -vide page 859 of the brief. Thus, it is clear, as per the evidence, the Plaintiff after becoming a major treated the impugned Power of Attorney as a valid one and used it to enter into agreements. Therefore, by his conduct as a major, he has ratified the impugned Power of Attorney and used it for his benefit. He cannot be allowed to approbate and reprobate to say that, in relation to deed no.60, it is not a valid Power of Attorney. As mentioned above, when he entered into the said agreement to purchase and the impugned sale of the land through his power of attorney holder, the 2nd Defendant, the Plaintiff was not a minor to say that agreements which are detriment to a minor are not valid against him.

Hence, even if one argues that the impugned Power of Attorney was not valid since the Plaintiff was a minor as at the date it was given to his father, the deed no 60 by which the Power of Attorney holder sold it to the 1st Defendant cannot be challenged on that ground since by the time Deed no.60 was executed, the impugned power of attorney was valid due to the subsequent ratification by his own conduct by the Plaintiff as a major. The

plaintiff executed the impugned Power of Attorney when he was 19 and for the benefit of his business in Sri Lanka. The existence of this power of attorney was within his knowledge when he reached the age of 21. Instead of taking steps to revoke it, he had used it for his benefit after attaining majority.

This court also observes that the Power of Attorney was a contract of agency which was entered into for the benefit of the Plaintiff to carry on his business in Sri Lanka, that is to say that it was for the improvement or maintenance of his business in Sri Lanka without rendering it to a worse position. Even though there is no evidence to show that it was used during his purported minority, it is clear it was used for his benefit in entering into the contract marked V1 after becoming a major.

Thus, even for the sake of argument if one considers that the Plaintiff was not emancipated from his position as a minor when he gave the impugned Power of Attorney to his father, the Power of Attorney was executed for his benefit and has been ratified by his own conduct after he became a major and the impugned deed no 60 was executed after such ratification.

However, it appears that on behalf of the Plaintiff there is an attempt to show that subsequent ratification was neither pleaded nor put in issue. This court observes that even though the word 'ratification' was not used, it is pleaded in the answer that the Plaintiff is estopped from claiming that the Power of Attorney was not valid in that he took no steps to revoke it and received benefits under the Power of Attorney. Issue No .25 had been raised accordingly. Even though, the word 'ratification' was not used, in fact this issue put in issue whether the Plaintiff is estopped from denying the validity of the Power of Attorney since he has gained benefit from the Power of Attorney. What this court find in the above analysis is that even after becoming a major, the Plaintiff has used the Power of Attorney for his benefit which amounts to ratification and in turn which estops him from denying the validity of the Power of Attorney.

Furthermore, that the Plaintiff's conduct, as a major, amounts to approbation and reprobation with regard to the validity of the power of attorney. As indicated above, after becoming a major, the Plaintiff used the Power of Attorney to enter into an agreement to buy the same property treating it as a valid document. If the Power of Attorney was detrimental to

him, he could have taken steps to revoke it after becoming a major, instead he used the same document for his benefit. Now he cannot be allowed to say that it is not valid when the same property was sold on the strength of the said Power of Attorney.

In the case of **Ceylon Plywoods Corporation V. Samastha Lanka G.N.S.M. and Rajya Sanstha Sevaka Sangamaya (1992) 1 SLR 157,** it was stated; "The doctrine of approbate and reprobate (quod approbo non reprobo) is based on the principle that no person can accept and reject the same instrument."

It is the contention of the Plaintiff that "The power of attorney bearing No. 1482 given to the 2nd Defendant was to empower the 2nd Defendant to act in special circumstances. Thus, it cannot be construed to have given any power or authority to the 2nd Defendant to sell or transfer the premises in suit to any person even if the general clauses were to authorize him to sell any property in general and, as such, the 1st Defendant did not get title to the premises…" (written submissions of the plaintiff on 18th Sep. 2019). By this the Plaintiff attempts to argue that power to sell the impugned property was not given by the impugned Power of Attorney and, thus the transaction in deed no. 60 was not valid and, as such, the deeds written on the strength of the said deed no. 60 also are not valid. In this regard the Plaintiff argues that even though the impugned Power of Attorney bearing No. 1482 appears to be a General Power of Attorney, it is given with reference to a particular purpose and, as such, it is a Power of Attorney given for special particular purpose and thus, the general clauses contained in the said power of attorney will become inoperative and will not authorize the holder of the power of attorney to do any act under the said general provisions. In this regard, the Court's attention is brought to the said purported special authority given to the 2nd Defendant, the power of attorney holder, which read as follows;

"*To apply to the Principal Collector of Customs for the purpose of clearing Motor Vehicle or Vehicle arriving at the port of Colombo and for that purpose to sign make and execute bonds declarations applications statements and all documents of whatsoever kind or nature under the law relating to Exchange Control Imports and Exports and Customs Ordinance in force in the said Republic of Sri Lanka,*

To apply for the policy of insurance to insure and keep the vehicle or vehicles insured in my name,

To apply for Revenue License and to pay all License fees in respect of Motor Vehicle or Vehicles and procure receipts,

To sell dispose of my Motor vehicles or vehicles for such consideration upon such terms and subject to such covenants as my said attorney may think fit or to enter into or agreement for any such sale disposal conveyance and exchange and to sign necessary documents for such purpose."

It is true that above is type written and inserted to the Power of Attorney form but nowhere in the Power of Attorney it is stated that the afore quoted clause is the special authority that was intended by the Plaintiff to be given to the 2nd Defendant. It is found among the other powers given by the same Power of Attorney which are mainly in printed form with certain blank parts filled by typing.

At the commencement of the Power of Attorney it is stated as follows;

'*As I am desirous of appointing some fit and proper person as my attorney to manage and transact all my business and affairs in the said Sri Lanka*'

Thus, it is clear that the intention of the Plaintiff was to appoint an Attorney to manage and transact all his business and affairs in this country and for that purpose he has appointed the 2nd Defendant his father in the following manner.

"*……. I the said Samuel Vivindra Eliathamby have made nominated and appointed and by these presents do make, nominate and appoint my father Selwin Danaraj Eliathamby also of No.1, Elibank Road, Colombo 5 true and lawful Attorney in the said Sri Lanka to act for me and on behalf and in the name of me and of my said firm or otherwise for all and each and every of any of the following purposes that is to say :-*"

Among the purposes so described in the impugned Power of Attorney, what was quoted above and relied by the Plaintiff, is the last one and what is quoted below is the 1st purpose.

"*To superintend, manage and control house, land, estates, other landed property as also the ships vessels and boats which I now or hereafter become entitled to*

possessed interested in and <u>to sell and dispose</u> of or to mortgage and hypothecate or to demise and lease or freight or charter or to convey by way of exchange the houses, land, estates and other landed property ships vessels and boats which I now or hereafter may become entitled to possessed of or interested in. …….."(underlined by me)

Among other purposes for which the 2nd Defendant as the Attorney of the Plaintiff had been empowered to do, what is quoted below is also included.

"To *purchase or take on lease for me any necessary lands tenements hereditaments as to my said Attorney shall seem proper.*

In the event of such purchase, <u>sale</u>, lease, exchange, mortgage and hypothecation, partition, freight, charter or for any other purpose whatsoever for me and in my name and as my act and deed <u>to sign execute and deliver all deeds</u> and other writings for giving effect and validity to the same respectively or to any contract, agreement or promise for effecting the same respectively." (underlined by me)

It must be noted that there is nothing in the document itself to show that the purpose relied upon by the Plaintiff in this case as quoted above was the special purpose to give this power of attorney to the 2nd Defendant. After setting out each and every purpose of giving the Power of Attorney the Plaintiff had given ancillary powers in the following manner;

"Generally, *to do execute and perform all such further and other acts, deeds matters and things whatsoever which my said attorney shall think necessary or proper to be done*……"

Thus, the purported purpose relied upon by the Plaintiff, as per the submissions made, stand *pari passu* with other purposes referred above and there is no special attention given to it through the words used in the document itself. It has been added to the items of purposes by typing it in the space provided for such additions. This does not indicate that it was the special purpose the Power of Attorney was given. Neither the Plaintiff nor the 2nd Defendant has given evidence to say that there was such special purpose. The power of attorney holder for the case, who was not a party to the impugned Power of Attorney, cannot give evidence to indicate that it was a Special Power of Attorney though it was written as a General Power of Attorney, other than on hearsay. The document marked as

the Power of Attorney given to the 2nd Defendant indicate that power to purchase and sell immovable property stand *pari passu* with the power to do the needful to clear vehicles from the port and matters related to such clearance, which is stressed as the special purpose for the Power of Attorney on behalf of the Plaintiff. On the other hand, a third party looking at the Power of Attorney cannot recognize such special purpose and power attached to such clearance of vehicles. Even if one argues that, as it is typewritten and inserted to the main body, it is the special purpose for giving the Power of Attorney to the 2nd Defendant, power to purchase and sell immovable property has been given expressly at least to serve the purported special purpose. As such a third party dealing with the power of attorney holder comprehend the document as one giving authority to sell the immovable property. Whether it is in relation to a special purpose or not is only within the knowledge of the Plaintiff or the power of attorney holder, the 2nd Defendant. If the power of attorney holder, the 2nd Defendant father had cheated or defrauded the Plaintiff, it is a matter between the principal and the agent for which the others cannot be held liable. Though the Plaintiff complained that there is collusive relationship among 1st,3rd and 4th defendants, this court observes that no substantial prayer is sought against the 2nd Defendant in this case and no evidence was led to show that the Plaintiff has taken sufficient steps against the 2nd Defendant, namely to prosecute the 2nd Defendant in a criminal action or to gain compensation in a civil action. This indicates that the collusion may lie somewhere else.

In the aforesaid backdrop I do not see that the Ratio decidendi in the case **Vijith Abraham De Silva V S P Claris De Silva S C Appeal No. 44/2012** relied by the Plaintiff, which says that 'the specific powers conferred by a power of attorney should be construed in the light of the intention of the principal who grants the power of attorney and that the general words couched into clauses in general power of attorney cannot in anyway be construed to disturb the specific clauses contained in the power of attorney and that the intention of the principal has to be gathered from the clauses in the power of attorney whether it is a special power of attorney or whether it is a general power of attorney', supports the case for the Plaintiff in this instant for the following reasons;

- It says that the clauses in a general power of attorney shall not be construed to disturb the specific clauses but it does not say that specific clauses nullify the general clauses totally.
- Here in the case at hand, as mentioned above power to sell the lands, houses and other landed property is given in *pari pass*u with the purported special clause relied by the Plaintiff in view of enabling the attorney to manage and transact all the businesses and affairs of the Plaintiff. Even if the purported clause relied by the Plaintiff is considered as a special clause for the sake of argument, power to sell the lands is given at least for the purposes covered by the purported special clause.
- The case cited above appears to be a case where a gift was made when the power to make such gift of lands was not given, but under the power given to manage and to sell and dispose property. In the case at hand power to sell lands was given not by implication but in black and white even if it is construed *per se* as contemplated in the case of **Adaicappa V Cook 31 N L R 385** or construed fairly and strictly as contemplated in **Marshall V Senaviratne 36 N L R 369 at 382.**
- Selling of lands is within the ostensible authority given by the impugned Power of Attorney and, as such a third party, namely the 1st Defendant buying through the Attorney cannot be found fault with.

Further the counsel for the Plaintiff through his submissions while referring to **Pillai Anna Fernando 54 N L R 113, Bowster on Agency 1st Edition Article 36 at page 59 and Harper V Godsell 1870 LR 5 QB 422 at 427** argues to indicate that general words do not confer general powers or unrestricted general effect but shall be construed as limited to the purpose which the authority is given. However, as indicated above, it is clear that the power to sell lands was given to the Attorney for the purpose of the business and affairs of the Plaintiff in this country.

For the foregoing reasons, it is my considered view that the argument on behalf of the Plaintiff that the impugned Power of Attorney has not in law granted any authority or power to sell the relevant premises cannot hold water.

In the said backdrop, this court has to answer the questions of law in favour of the 1st defendant Appellant.

However, since there were other grounds such as nonpayment of consideration, laesio enormis pleaded by the Plaintiff, it is necessary to see before setting aside the Judgment of the learned District Judge which was confirmed by the High Court whether the said judgment can stand intact on those grounds.

It must be noted neither the Plaintiff nor the 2nd defendant power of attorney holder for the impugned transaction has given evidence to say that consideration was not paid. One Reginald Perera Wickramarachchi, power of attorney holder of the Plaintiff for the case filed in the District Court and one Hewage Sirisena from the Central Registry who had come to give evidence with regard to the Birth certificate have given evidence for the Plaintiff. Neither of them was a party or a witness to the impugned deed no.60. Thus, they are not eligible witnesses to say anything about the consideration unless as hearsay that came to their knowledge from other sources. Furthermore, Hewage Sirisena has not uttered anything regarding the consideration in relation to deed no.60. In fact, when said Reginald Perera Wickramarachchi was questioned in this regard on 22/06/2000 at page 7 of that day's proceedings (page 759 of the brief) as to whether the father of the plaintiff (2nd Defendant) was given any money by the 1st defendant on this transaction and his answer had been that he did not know. Thus, there was no reliable evidence to show that no consideration was paid for the transaction contemplated in deed no.60. On the other hand, if he does not know how much was paid at the transaction how can he be a reliable witness to say that the amount paid was less than half of the value and thus, doctrine of laesio enormis applies. It is true that the consideration mentioned in deed no.60 (P5) is Rs. 800000.00 and this witness states in his evidence that the true value of the land in 1985 was Rs. 5000000.00 -vide page 760 of the brief, again at page 846 of the brief, he says that it was Rs.700000.00 or 800000.00 per perch in 1985, indicating that the value of the land was around Rs.9750000.00, but it is clear from the deed no. 2085 marked P4 that the Plaintiff bought the land for Rs. 800000.00 only few months prior to the sale by deed no.60. This witness has not shown any qualification in valuation and even his stance with regard to the value at 1985 is not constant as mentioned above. There is no proper explanation, how the value mentioned in P4 in February 1985 rose up to an amount that exceeds double of that amount or to amounts mentioned by him in evidence in September 1985, that is within 7 months period. He tried to explain this by saying that correct

amount is not mentioned in deeds when buying lands. Then, how can he say that, when the 2nd Defendant as the power of attorney holder sold the land, the correct amount was mentioned, when this witness was not a party or witness to the said transaction.

As decided in **Sheila Senavirathne v Shereen Dharmarathne (1997) 1 Sri L R 76**, a court cannot rely on hearsay evidence to prove facts of a case. The main witness as to the incident in question was merely an attorney appointed for the case and was not a party to or a witness to the impugned deed.

Hence, there was no reliable evidence to show that the first Defendant bought or the second Defendant sold the land less than half the value of the property to apply the doctrine of laesio enormis. On the other hand, doctrine of laesio enormis does not ipso facto make the deed void. It is used to rescind the contract. For that there is no prayer in the plaint to declare that deed no.60 is void. Thus, the claim of the Plaintiff that the deed no.60 was void on the grounds of not paying the consideration and laesio enormis should fail. It is questionable whether the plaintiff could on one hand saying that the consideration was not paid and on the other state that what was paid as consideration is less than half the value of the true value, since it amounts to approbation and reprobation. However, I need not go into that issue, since, it is clear those positions were not established factually. Even though, the learned District Judge had answered an issue to indicate that it was not proved that the consideration for P5, deed no. 60 was paid, as discussed above there was no acceptable evidence to come to that conclusion against what is mentioned in and evidenced by the deed itself. It is also observed that there was no evidence to establish that the 1st Defendant, 3rd Defendant and the 4th Defendant acted fraudulently.

As shown above other stances taken by the plaintiff cannot be considered proved as per the evidence led.

Further it was held that a Court has no jurisdiction to grant reliefs not prayed for. – Vide **Surangi V Rodrigo (2003) 3 SLR 35.** It is observed the learned District Judge has invalidated certain deeds without any prayer in that regard.

Afterall it is my view that the Power of Attorney given to the 2nd Defendant, father of the Plaintiff, was a valid one as the Plaintiff could have been considered as emancipated from his status of a minor at the time he executed the impugned

Power of Attorney. Further, even if he was a minor it was executed for his benefit and was ratified when he became a major and used to enter into agreements as a major prior to the impugned incident of selling the land in dispute. As such he is estopped from denying its validity. Power to sell immovable property was ostensibly given by the said Power of Attorney.

The answers to the questions of law allowed by this court are as follows;

18(b). Did the High Court of Civil Appeal of the Western Province err by failing to appreciate that at the time of executing the Power of Attorney the Plaintiff was not a minor, in that he has been "emancipated" in the light of the evidence adduced before the trial court to the effect that he has been living independently of his parents, conducting business independently, employed overseas etc.?

Answer: Yes

18(c). Did the High Court of Civil Appeal of the Western Province err by failing to appreciate that the Plaintiff has ratified the Power of Attorney in the light of the clear evidence that he has continued to act on the said Power of Attorney and had not taken any steps to revoke it, even after he has attained the age of majority?

Answer: Yes

18(e). Did the High Court of Civil Appeal of the Western Province fail to appreciate the true legal effect of a contract entered in to by a minor, in that, a contract by a minor is only voidable and not void, thus, the Power of Attorney remained valid until it is set aside and that subsequent setting aside of the Power of Attorney, will not affect the property rights acquired by the Petitioner as innocent third parties through the Power of Attorney?

Answer: Yes, the learned High Court judges erred in appreciating the true legal effect of a contract entered into by a minor. Even if an unassisted contract is void against the minor it can be ratified and make valid by the minor after becoming a major as happened in the case at hand. Once it is ratified and made valid and used for his benefit, he is estopped from stating that it is void ab initio.

18(f). Did the Court of Appeal (Sic) fall into substantial error by holding that "Defendants have failed to lead any evidence to suggest that they were bona fide

purchasers had purchased the land for valuable consideration" in the light of evidence placed before Court – [Deed of Transfer bearing No. 60, dated 17-09-1985 speaks for itself]?

Answer: Yes, the High Court of Civil Appeal fell into a substantial error in that regard. There is no acceptable evidence to disprove what is evidenced from the deed and to state that no valuable consideration was passed and the 1st, 3rd and 4th Defendants acted fraudulently.

18(g). Did the High Court of Civil Appeal of the Western Province err by failing to appreciate that the District Court had no jurisdiction to set aside the Power of Attorney and the Deeds Nos. 60[dated 17-09-1985], 73[dated 17-11-1987] & 31[dated 08-07-1988] since there was no prayer in the Plaint seeking the setting aside of the same?

Answer: Yes, the learned District Judge could have come to a finding whether the deeds were valid or not, but could have granted only the reliefs prayed for in the plaint. However, learned District Judge also erred in finding the deeds giving rights to the Defendants are invalid.

18(h). Did the High Court of Civil Appeal of the Western Province err by failing to appreciate that even if it is assumed [without in any manner conceding] that the District Court had the jurisdiction to set aside the Power of Attorney and the Deeds Nos. 60[dated 17-09-1985], 73[dated 17-11-1987] & 31[dated 08-07-1988] without a prayer to that effect in the Plaint, the Court in this instance could not have set aside them, since the action of the Plaintiff had prescribed, in terms of the provisions of section 10 of the Prescription Ordinance?

Answer: Yes, since instead of filing an action to revoke the impugned Power of Attorney within time, the Plaintiff had by his conduct ratified the Power of Attorney.

For the reasons demonstrated in the discussion above, I hold that the impugned Power of Attorney is valid in law and thus, impugned deeds are valid, and the appeal of the 1(a) Defendant should be allowed.

The Plaintiff argues that, since leave to appeal was refused in SC/HCCA/LA 313/2010, this court ought not make an order contrary to the said order. However, it appears that the Appellant of this matter was only a Respondent in

that application. In this matter 1st Defendant Appellant has satisfactorily supported his application to leave and this court has granted leave on several questions of laws. Thus, the decision of this application has to be based on such questions of law allowed and not on the outcome of an application made by another party who apparently had failed in satisfying this court to use its desecration in his favour.

Hence the appeal of the 1st Defendant Appellant is allowed and accordingly, the relevant judgment dated 25.08.2010 of the Civil Appellate High Court of the Western Province holden at Mount Lavinia and the judgment dated 23.08.2002 of the District Court of Mount Lavinia are set aside. Further, the learned District Judge of Mount Lavinia is directed to enter a decree dismissing the action filed by the Plaintiff Respondent.

1st Defendant Appellant is entitled to the costs of this appeal as well as to the costs in the lower courts.

.....

Judge of the Supreme Court.

V. 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 DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

1. Dawooduge Mohamed Abiyar
2. Dawooduge Sajahan
3. Dawooduge Mohamed Nizam.

All Rambukkanthenne, Ridigama.

PLAINTIFFS

Vs.

D.C. Kurunegala Case No. 3532/L

High Court (Civil) Kurunegala
Case No. NWP/HCCP/KUR/97/07(F)

SC Case No. SC/HCCA/LA 57/12
SC Appeal No. 127/2012.

Haji Lebbai Mohamed Ismail alias Mohamed Lebbai
of Wewagerara, Ridigama.

DEFENDANT

AND

1. Dawooduge Mohamed Abiyar
2. Dawooduge Sajahan
3. Dawooduge Mohamed Nizam.

All Rambukkanthenne, Ridigama.

PLAINTIFF–APPELLANTS

Vs.

Haji Lebbai Mohamed Ismail alias Mohamed Lebbai,
of Wewagedare, Ridigama.

DEFENDANT–RESPONDENT

AND NOW.

In the matter of an Application for Leave to Appeal in terms of section 5 (C) (1) of the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006 read together with Article 128 of the Constitution.

Haji Lebbai Mohamed Ismail alias
Mohamed Lebbai,
of Wewagedara, Ridigama.

DEFENDANT–RESPONDENT-PETITIONER.

Vs.

1. Dawooduge Mohamed Abiyar
2. Dawooduge Sajahan
3. Dawooduge Mohamed Nizam.
   All Rambukkanthenne, Ridigama.

PLAINTIFF-APPELLANT–RESPONDENTS.

Before : Priyantha Jayawardena, PC.J.
P. Padman Surasena, J &
E.A.G.R. Amarasekara, J.

Counsel : Rohan Sahabandu, PC with V. Puvitharan, PC and Ms. Hasitha Chaturika Elvitigala for the Defendant – Respondent-Appellant.
M.U.M. Ali Sabry, PC with Naamiq Nafath and Hassan Hammeed for the Plaintiff – Appellant- Respondents.

Argued On : 15/05/2020

Decided On : 01/04/2021

E. A. G. R. Amarasekara, J.

The Plaintiff – Appellant – Respondents (hereinafter referred to as the Plaintiffs) instituted proceedings against the Defendant –Respondent – Petitioner (hereinafter referred to as the Defendant) in the District Court of Kurunegala *inter alia* seeking for a declaration of title to the land more fully described in the 2nd schedule to the plaint which is a part of the land described in the 1st schedule and to have the Defendant evicted from the said land and for damages.

Plaintiffs in their Plaint stated *inter alia* that:

a) The original owner of the land in dispute was one Marimuttu and she gifted the land in the 1st Schedule to the Plaint to Rajendran, her son, by Deed No. 16102 dated 3rd July 1971, marked as P1 at the trial, and said Rajendran by Deed No.16699 dated 11.10.1982, marked as P2 at the trial, transferred the same to the Plaintiffs.
b) The said Marimuttu revoked P1 by Deed No. 1272 dated 11th October 1982, marked as P4 at the trial, and the said revocation was not lawful and further, aforesaid Marimuttu, Rajendran and the Defendant had collectively perpetrated a fraud on the Plaintiffs.
c) After the death of Marimuttu, four out of her five children, including aforesaid Rajendran, as the heirs of said Marimuttu, executed a Deed No.5222 dated 3rd October 1985, marked as P5 at the trial, conveying their rights to Rajapoobathy Samuel, the other sibling, while declaring that

Marimuttu did not deliver the aforesaid deed of gift(P1) and held the possession of the property in dispute.

d) No title passed from Marimuttu to her children including said Rajapoobathy Samuel.
e) Aforesaid Rajapoobathy Samuel subdivided the land in the First Schedule to the Plaint in the manner depicted in Plan No.1849 dated 16th February 1986, marked as P6 at the trial, and transferred Lot 7 of the same, which is more fully described in the second schedule to the plaint, to the Defendant by Deed No.2888 dated 20th February 1989, marked as P7 at the trial, by which the Defendant does not get any title.
f) The Defendant has been in unlawful occupation of the premises in suit since 2nd February 1989.

The Defendant in his amended answer admitted the paragraph 3 of the plaint which states that Marimuutu had conveyed (පවරා දී ඇත) the land in the 1st schedule to the plaint to said Rajendran by executing P1. However, the Defendant takes up the position that said Rajendran did not have lawful title to transfer the said land by P2, to the Plaintiffs. He further had stated that said Marimuttu lawfully and voluntarily cancelled the gift made by P1 and possessed the land till she died and four of her children transferred the land in the 1st schedule to the plaint to their sister, Rajapoobathy Samuel who subdivided the land into several lots as per plan P6 and transferred the said lots to tenants of the boutiques in those lots including the Defendant. Thus, the Defendant in his amended answer had claimed title to land in schedule 2 to the plaint on the strength of P7, a deed of transfer executed by said Rajapoobathy Samuel. Furthermore, the Defendant had claimed prescriptive title to the land in suit on the basis of long and continuous possession of the Defendant and his predecessors in title.

Even though the Defendant in paragraph 11 of his amended answer averred that the gift given by executing P1 by said Marimuttu had not been accepted by the Donee, Rajendran, and Marimuttu did not hand over the possession or the original deed to Rajendran, as such, said gift was not valid in law, no issue had been raised by the Defendant on such averments at the beginning or during the trial. Thus, it is apparent that the Defendant appeared to have waived contesting P1 on those grounds when raising issues. This waiver has to be considered in the light of the aforesaid admission of paragraph 3 of the plaint at the commencement of the trial. As indicated above, admission of paragraph 3 of the plaint is not limited to the

admission of the execution of the deed of gift marked P1 or the mere gifting of the relevant land, it also in a way admits the handing over of the relevant property in the 1st schedule (පලවන උප ලේඛනයේ දේපල පවරාදීම) to Rajendran. It must be noted similar terminology had been used by the Defendant in paragraph 8 of the amended answer to indicate that the property in the 2nd schedule became his property. On the other hand, even if one does not give such wider interpretation to the admission of paragraph 3 of the plaint and limit it to mean only the execution of deed of gift mentioned there, as explained above, the defendant appeared to have waived contesting the gift made by P1 on the ground of non-acceptance as averred in paragraph 11 of his amended answer with the raising of issues for the trial.

In fact, the first issue raised by the Plaintiffs at the trial refers to the 3rd paragraph of the plaint, which was admitted by the Defendant, and it queries whether Rajendran who gained rights and entitlements as per the said paragraph 3 of the plaint transferred them to the Plaintiffs. The Defendant neither has objected to this issue on the basis that the Plaintiffs had not gained any rights or entitlement as per paragraph 3 of the plaint, nor raised any counter issue on the premise that the Plaintiffs did not get any right or entitlement as per paragraph 3 of the plaint. The other issues raised by the Plaintiffs concentrate on to query whether the Defendant's predecessors in title had title to transfer their rights as well as whether the Defendant is in unlawful possession disputing plaintiffs' rights and also to query whether the Plaintiffs are entitled to the reliefs prayed for.

Issues no. 9 and no.10 raised at the trial were the first two issues raised by the Defendant and they query whether the gift given to Rajendran by Marimuttu by executing P1 was validly cancelled by said Marimuttu. Other issues raised by the Defendant focus on whether the sale by Rajendran to the Plaintiffs after the said cancellation was valid and whether the Defendant has legally acquired title to the property in issue through the Deed marked P7 and /or by prescription, and if so, his entitlements to the reliefs prayed for in the answer. Thus, the validity of the Deed of Gift given to Rajendran, marked P1, till it was purportedly cancelled by Marimuttu, was never at issue at the trial. As held in **Hanaffi Vs Nallamma (1998) 1 Sri L R 73,** once issues are framed, the case which the court has to hear and determine is crystallized in the issues, and the pleadings recede to the background. Hence, whether the gift given by P1 was accepted or not was not a matter in issue in the District Court for the parties to adduce evidence in that regard. (Also see

Kulatunga Vs Ranaweera (2005) 2 Sri L R 197, **Chandrasiri Fernando V Titus Wickramanayake 2012 BLR 344)**

The learned District Judge decided in favour of the Defendant but, in appeal, the learned High Court Judges of the Kurunegala Civil Appellate High Court decided the dispute in favour of the Plaintiffs.

As per the judgment of the District Court, the issue whether P1 was properly cancelled by Marimuttu had been identified by the Learned District Judge as the main issue to be solved – vide page 140 of the brief. Other than the claim of prescription by the Defendant, in terms of the issues raised at the trial, if the said revocation is invalid, the Plaintiffs get the paper title through Rajendran and the Defendant does not get paper title from the heirs of Marimuttu. Even the claim on prescription by the Defendant shall fail since he apparently had admitted that he was the tenant up to the time he bought the land with the execution of P7 in 1989, and further, as he cannot rely on the possession of purported predecessors, if the said deed, P7 is not valid.

However, the learned District Judge, without any averment or reference in the pleadings filed and the issues raised, had come to a finding that since the disputed land is within the Kurunegala District where Kandyan Law applies, donor could cancel the deed without giving any reason and as such the revocation was valid. Nevertheless, in appeal, learned High Court judges have correctly held that Kandyan Law is not a territorial law that applies to all the people resident in the Kandyan Province but a law personal to Kandyan Sinhalese and, admittedly Marimuttu being a Tamil, he was not governed by the Kandyan law, and as such, the learned District Judge erred in considering P1 as a Kandyan Gift that could be cancelled by the Donor himself. This part of the learned High Court Judges' judgment is not in dispute before this court. Even the Defendant admits the finding on non-applicability of Kandyan Law is correct - vide paragraph 26(i) of the Petition as well as at page 5 of his written submissions dated 06.06.2019. However, the learned High Court Judges came to the finding that there was a tacit acceptance of deed of gift marked P1 and, hence, allowing the appeal, held in favour of the Plaintiffs as mentioned above. When the leave to appeal application was supported by the aggrieved Defendant, on 17.07 2012 this court has granted leave on two questions of law which will be referred to later in this judgment.

As per **Public Trustee V Uduruwana 51 N L R 193,** a donation is a bilateral agreement to which there must be two consenting parties[1]; one person is called the "donor" who without being under any legal obligation so to do and without receiving or stipulating for anything in return gives or promises to give something to another, who is called the "donee"[2]. In **Abubucker Vs Fernando (1987) 2 Sri. L. R 225**, referring to page 285 of the 5th edition of Roman Dutch Law by Lee, it was held that under the Roman Dutch Law, a donation is regarded as a contract and no obligation arises until the acceptance by the donee and, a donation to be valid has to be perfected by acceptance. Further with reference to **Hendrick V Sudritaratne (1912) 3 CAC 80**, it was further mentioned that no particular form is required for the acceptance of the gift and that it is in every case a question of fact whether or not there are sufficient indications of the acceptance by the donee. In **Nagalingam V Thanabalasingham 50 N L R 97 at 98** Canekeratne J., pointed out that a donor makes a gift with the intention that the thing would become the property of the donee; the offer must be accepted by him to whom it is made, for the concurrence of the donor and donee must take place in order to render the donation perfect, the obligatory effect of the gift depends upon its acceptance. More than a century ago, a full bench decision of **D.C. Matara 20,862(1871), Vand.168** also had stated that a deed of gift have no force until it is accepted. Even though, it was held in **Siriwardene V Wirawanthan (2001) 2Sri L R 288** and in **Nonai V Appuhamy 21 N L R 165** that the effect of non-acceptance of a gift by the donee is to entitle the donor to revoke the gift and make any disposition of any kind, it appears from the decisions mentioned above that if the donation is not accepted the gift made is void indicating that executing a deed of revocation is not a must. Referring to **Fernando V Alwis 37 N L R 201** the Defendant in his written submissions dated 06.06 2019 argues that the effect of non-acceptance is that it renders the gift invalid and not merely voidable. Furthermore, citing **Bertie Fernando and Others V Missie Fernando and Others (1986) 1 S L R 211** in the said written submissions, the Defendant contends that non-acceptance vitiates a deed and there need not be any revocation even though there is a practice evolved to execute deed of revocation. Considering the ratio of aforementioned judgments this court is not hesitant to accept that a donation given by a deed is not valid, if the donation is not accepted by the donee, and a deed of revocation is not mandatory. This position can be further cemented since the right to challenge the validity of a gift for want of acceptance is not restricted to the donor- vide **Kanapathipillai V**

[1] Quoting from Welluppu V Mudalihamy (1903) 6 N L R 44

[2] Quoting from Voet XXXIX 5. 1.,3 Maasdorp (4th ed.) p.104, 2 Nathan (2nd ed.) p1155

Kasinather 39 N L R 544. However, what this court has to keep in mind in deciding the appeal at hand is that acceptance of a donation is a matter of fact and, as mentioned before, no particular form is required for the acceptance. As such it depends on the facts of each case.

In **Bindua V Untty 13 N L R 259** it was decided that acceptance may be manifested in any way in which assent may be given or indicated. The question of acceptance is a question of fact, and each case has to be determined according to its own circumstances.

Since, the acceptance of a gift is a question of fact, this court has to now consider whether the Defendant could have been allowed to argue in appeal before the High Court or whether the learned High Court Judges could have decided on a question of law that is mingled with such factual circumstances, where the Defendant failed or waived to put such factual circumstances in issue in the original court.

Somawathie V Wilmon (2010) 1 Sri L R 128 was a case where it was held that the High Court was wrong in law in considering the question of non-acceptance of the deed of gift since there was a failure to raise an issue on that ground in the District Court or lead any evidence to that effect. It was further held that a new ground cannot be considered for the first time in appeal, if the said new ground has not been raised at the trial under the issues so framed. However, the Appellate Court could consider a point raised for the first time in appeal if the following requirements are fulfilled;

a) The question raised for the first time in appeal, is a pure question of law and is not a mixed question of law and fact.
b) The question raised for the first time in appeal, is an issue put forward in the court below, under one of the issues raised, and
c) The court which hears the appeal has before it all the materials that require to decide the question.

It was also held in **Thalwatte V M. Somasundaram (1997) 2 Sri L R 109 at 111and 112** that a new contention involving question of mixed fact and law cannot be raised for the first time in an appeal.

Since whether a deed of gift was accepted or not is a question of fact, an issue of law based on such circumstances is not a pure question of law. As mentioned before, whether the gift made by P1 was accepted or not, was not a matter to be decided by the District Court as per the issues raised at the trial. In terms of the

issues raised at the original court what was to be decided was not the validity of the gift made by P1 or whether it was void but whether P1 was validly cancelled by Marimuttu and, if so, whether title goes to the Defendant as per the manner stated by the Defendant or by prescription or, if not, whether the Plaintiffs get title as per the manner claimed by them. On the other hand, when there was no issue challenging the acceptance of the gift which is a question of fact, a court sitting in appeal cannot come to a conclusion that all the materials that require to decide the question is before the court since in the original court the parties had to meet each party's case enunciated by issues raised before the original court. Further, as per Section 5 of the Evidence Ordinance, evidence can be led only on facts in issue and relevant facts. In this regard I would like to refer to the following decisions;

Chrishanthi Peiris Vs Matilda Fernando and 3 Others 2012 B L R 354- which held "*the purpose to raise issues and admissions in terms of the Civil Procedure Code is in one respect to identify each party's case before Court. Issues are generally raised from the pleadings and it is also permissible to raise issues when evidence transpire in court and based on evidence issues could be suggested*." **;….** It appears that this judgment upheld the position that the appellate court cannot consider new positions not urged before the trial judge. (In the matter at hand, as mentioned before, even though there was a pleading in the amended answer challenging the validity of P1 on the ground of non-acceptance, the Defendant did not raise an issue on that, and even when P1, the now impugned deed of gift and its purported revocation, P4 were marked and contents were transpired, no issue was raised as to the validity of the gift for want of acceptance indicating, more likely, a waiver of such position)

Pathmawathie Vs Jayasekare (1997) 1 Sri. L. R. 248- "*It must always be remembered by Judges that the system of civil law that prevails in our country is confrontational and therefore, the jurisdiction of the judge is circumscribed and limited to the dispute presented to him for adjudication by the contesting parties……*

……Our civil law does not in any way permit the adjudicator or the judge the freedom of the wild ass to go on a voyage of discovery and make a finding as he pleases may be on what he thinks is right or wrong, moral or immoral or what should be the correct situation. The adjudicator or the judge is duty bound to

determine the dispute presented to him and his jurisdiction is circumscribed by that dispute and no more."[3]

This court is mindful of the fact that there may be instances of factual situations where the record of the original court may speak for itself without the need of an opportunity for any party to lead evidence in that regard;(whether the judge acted in a prejudicial manner in relation to a party ; or where a transaction to be valid has to be executed in a particular form such as one that has to be attested by a Notary Public but the document marked is not so attested, can be taken as examples.) However, whether the acceptance of a gift took place or not is not a matter that can be decided by ancillary evidence that might have come up with the evidence that was intended to prove issues raised on other grounds.

Hence, as indicated by the aforesaid decisions, it can be said that whether the gift by P1 is valid or not, for the want of acceptance, was not a matter that could have been considered in appeal by the learned High Court Judges when it was not raised as an issue in the original court. In that sense, the learned High Court Judges have exceeded their jurisdiction in appeal when they opted to find the validity of P1 on the ground whether it was accepted or not. Thus, it appears, the learned High Court Judges took the dispute between the parties outside the scope of the dispute presented through the issues before the original court in deciding the appeal presented before them by considering whether the gift by P1 was accepted or not.

As mentioned before, the learned District Judge erred in applying Kandyan Law principles to one of the main issues to be solved but the learned High Court Judge correctly decided that the Kandyan Law has no relevance to the matter at hand. Nevertheless, it is worthwhile to see whether P1 is revocable under common law by the donor. As said before, if the gift was not accepted, it is not necessary to execute a deed of revocation though there is a practice of executing deeds of revocation. Such revocation has to be considered as mere declaration by the original donor as to nonexistence of a valid gift. If there is a dispute as to the acceptance it has to be resolved through a competent court of law, since it is a matter relating to the existence or nonexistence of a contract.

A donation by its nature is irrevocable subject to certain exceptions such as ingratitude, donor having children after a gift of great value, and being prejudicial

[3] With reference to the case in the matter of the Estate of Don Cornelis Warnasuriya 2 N L R 144

to the legitimate portion of the donor's children due to its magnitude etc.[4] However, when the donation is *mortis causa*, as it is termed, or under the apprehension of approaching death, it may at all times be reclaimed during the lifetime of the donor.[5] A duly constituted gift can never be revoked by the donor, unless the donee has turned out to be ungrateful ……[6] A donor may expressly reserve to himself the power to revoke a gift, and revocation in the exercise of such power is valid. If the reservation is to revoke in case of misconduct of the donee, such misconduct should be averred and proved to justify a revocation.[7] A gift that is subject to a limitation or a condition may be revoked if such condition attached to it has not been fulfilled.[8] The submissions made on behalf of the appellants in **Kanapatthipillai V Kannachi 13 N L R 166** , with reference to Voet 39, 5, 24-86, Sansoni V Foenander (1872) Ram.32, Government Agent, Western Province V Palaniappa Chetti (1908) 4 A.C.R.4, that a deed of gift is by nature irrevocable, and, unless a power of revocation be reserved, can only be set aside by proper judicial proceedings and that only the court could have set aside the deed of gift, appears to have been accepted in that case, since it was held that the first defendant in that case had no right, so long as the deed of gift was in force, to have either executed a deed of revocation, or following upon that, a deed of conveyance. Basnayake C J in his judgment in **Krishnasamy V Thillaiyampalam 59 N L R 265 at 267** referring to five causes of ingratitude stated "…….that gifts can be invalidated for these causes alone if they are proved in a court of law……."

In **Dona Podi Nona Ranaweera Menike V Rohini Senanayake (1992) 2 Sri L R 180 at 221** it was stated that revocation is not automatic and requires a decision of court and, as per the judgment, it appears the court was of the view that the gift relevant to that case was not a donation propter nuptias- vide at page 222. However, it appears that in **D.C. Mangalika and others V D. Sumanawathie and others C. A. 535/95** dated 30.07.2007, the Court of Appeal considered a revocation of a deed of gift by the donor himself as valid stating that the deed of gift considered in aforesaid **Dona Podi Nona V Ranaweera Menike v Rohini Senanayake** was a gift made in contemplation of a marriage, but, as said before, though it was a gift made in view of a marriage, the court found it was not a donation propter nuptias but a donation that can be revoked for ingratitude. It must be noted that after the decision of **D C Mangalika and Others Vs**

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[4] See Pererira, The Laws of Ceylon, 2nd Edition- page 610

[5] ibid

[6] See Pererira, The Laws of Ceylon, 2nd Edition – page 611

[7] Ibid, with reference to Govt. Agent V Palaniappa 11 N L R 151 and Carolis V Devith 11 N L R 17

[8] See Pererira, The Laws of Ceylon, 2nd Edition- page 602

Sumanawathie, the legislature had passed a statute, namely Revocation of Irrevocable Deeds of Gift on the Ground of Gross Ingratitude Act, No.5 of 2017 to provide that irrevocable deed of gift may be revoked on the ground of gross ingratitude only on an order made by a competent court, perhaps to rectify what seems to be a mistaken assertion made in that case and to state the law as it was.

In **Francklin Fernando V Anacletus Fernando (2015) 1 Sri L R 1,** the Court of Appeal held that 'Although ordinarily a deed of gift is irrevocable by the donor nevertheless it is competent for the donor to move court of competent jurisdiction to invalidate the donation by adducing proof that the donee has turned out to be an ingrate post execution of the donation.' In **Mahawewa V Mahawewa S C Appeal 64 /2008,** Tilakawardane J stated that "the law on donations and the revocation of gifts in Sri Lanka is governed by Roman Dutch Law, under which a gift once donated, can be revoked on grounds of gross ingratitude by the donee to the donor. The donor may initiate court proceedings to cancel the gift so donated." In **Ariyawathie Meemaduwa V Jeewani Budhika Meemaduwa (2011) 1 Sri L R 124** at 133, the Supreme Court held that "a deed of gift is absolute and irrevocable. That is the rule. However, the law has recognized certain exceptions to the rule of irrevocability. A party applying to court to invoke the exceptions in his favour has to satisfy court, by cogent evidence, that the court would be justified in invoking the exceptions in favour of the party applying for the same."

Thus, a revocation of a deed of gift on gross ingratitude can be done only on an order made by a competent court.

As far as P1 is concerned, the donor has not reserved his power to revoke it. Thus, Marimuttu had no power to revoke P1 on his own. The reasons given in P1 for the revocation appears to be non- acceptance of the gift and ingratitude. As said before if there was no acceptance, there need not be a deed of revocation but acceptance is a matter of fact and the court cannot rely on a donor's own judgment on the matter of whether there was no contract since there was no acceptance when there is a dispute as to the acceptance of the gift. It is a matter to be decided by a competent court. There was neither such decree of a court invalidating P1 prior to the execution of the revocation nor it was put in issue in the present case filed before the District Court to prove that there was no acceptance of the gift made by P1. Further, when P1 was marked, no objection was raised as per section 154 of the Civil Procedure Code. Thus, it appears that the said deed P1 was properly admitted in evidence. Along with the admission of paragraph 3 of the plaint and the deed of transfer marked P2, paper title goes to

the Plaintiffs. The Defendant's stance was that he was the tenant of the premises prior to the execution of the deed marked P7-(vide paragraph 11 of the amended answer and evidence given at page 109 of the brief). Since validity of P1 prior to the deed of revocation marked P4 was not in issue as well as the said revocation cannot be considered as a valid revocation, no title can be passed from Marimuttu to the Defendant through P7. None of the purported predecessors in title of the Defendant has given evidence to say that their possession was adverse to the that of Plaintiffs, if they had any possession. As such, the Defendant cannot claim the benefit of possession (if any) of his purported predecessors in title to his benefit. Furthermore, the Defendant's claim that he was a tenant until the execution of P7 refers to a tenancy under Marimuttu and Marimuttu's heirs which include Rajendran. Both of them being the predecessors in title of the Plaintiffs, Defendant's possession up to the refusal to pay rent to the Plaintiffs cannot be considered as adverse to the Plaintiffs' title since there was no evidence of an overt act up to such refusal. It appears that the refusal to pay rent happened only after P3 which is dated 11.09.1985. The Plaint dated 23.10.1989 was filed within 10 years from such refusal. Not that this court accepts the version of the Defendant but, for the sake of argument, if one considers Defendant's stance, according to it, the Plaintiffs' predecessor in title, Rajendran did not get title from P1 but he became a co-owner along with his siblings after the death of Marimuttu. By that time, he had sold it to the Plaintiffs. *Exceptio Rei Venditae et traditae* principle applies and accordingly, Rajendran's share should go to the Plaintiffs. It should be noted that priority of registration was not put in issue in relation to any conflicting deeds. Thus, the Defendant cannot get the share that Rajendran gets as per his story through P5 and P7. Thus, even for the sake of argument, if one considers the Defendant's story, the Plaintiffs should have become co-owners and the Defendant cannot get prescriptive title without proving an overt act and 10 years possession from thereon. As such, the Defendant's claim on prescription cannot be sustained.

As elaborated in the foregoing discussion, the final outcome of the decision of the learned High Court judges to allow the appeal made to the High Court while setting aside the judgment of the learned District Judge and to grant relief as prayed for in the plaint was correct in law even though they exceeded their jurisdiction and went on to decide whether P1 was properly accepted by the donee when there was no such issue raised in the original court.

Further to what is stated above and since, the first question of law allowed was on the finding of the learned High Court Judges that there was a tacit acceptance of the gift made by P1, this Court would place its observations in that regard as follows;

1. As elaborated above whether the gift made by P1 was accepted or not was not a matter that the High Court was required to make a finding within the scope of the appeal made to it, since the validity of P1 for want of acceptance was not put in issue in the original court. Thus, it was merely an additional finding without which the High Court could have disposed the appeal in favour of the Plaintiffs as elucidated above.
2. Though, it is true that there was no signature placed on P1 by Rajendran accepting the gift made by it, as explained above the law does not require a particular form or method to accept a gift. It is a matter to be decided on attending circumstances. Vide- **Lokuhamy V Juan D.C. Matara, 27805, Ram. (1872, '75 and '76)215,** which illustrates that acceptance may be fairly and reasonably presumed when there are circumstances to justify such a presumption; **Senanayeke V. Dissanayeke (1908) 12 N L R 1** and **Yapa V Dissanayake Sedara (1989) 1 Sri L R 361** also support the view that it is not essential that the acceptance of a deed of gift should appear on the face of it, but such acceptance may be inferred from circumstances. However, in the latter case it was stated that where there is no acceptance on the face of the deed and there was neither evidence of delivery of the deed nor of possession of the property, acceptance cannot be inferred. However, there appears to be no reason to limit proof of acceptance to those three factual situations enumerated above in that case, to every case, if other circumstances justify the presumption of acceptance.
3. The learned High Court Judges have relied on the decisions mentioned below and have held that there is tacit acceptance of P1;
    - **Joraliyathu Umma vs Mohamed (1986) 3 C.A.L.R. 215** where it was held that a gift which was not accepted by the donees at the time of execution could be validly accepted by the subsequent conduct of the donees such as the execution of a deed of gift by a donee.
    - **Wickremesinghe Vs. Wijetunga 16 N L R 413** – where it was held that the acceptance may be presumed either by the physical acceptance of the deed of donation or by the sale of the land donated by the donee. It further held that a donation may be accepted at any time during the

lifetime of the donor, and where as its fulfilment is postponed until after the donor's death, it may be accepted after the donor's death.

- **Senanayake Vs Dissanayeke 12 N L R 1** and **Bindua Vs Untty 13 N L R 259** mentioned above.

However, the Counsel for the Defendant attempts to distinguish above decisions from the circumstances of the case at hand pointing out to other circumstances involved in those cases. There may be other circumstances involved in those cases which supported the acceptance of the gift but, nonetheless, it appears from **Joraliyathu Umma Vs Mohomed,** a subsequent deed of gift by the donee was considered as a subsequent conduct of the donee that established the acceptance. In **Wickremesinghe Vs Wijetunga,** a sale of the land by the donee was expressly considered as a subsequent conduct that established the acceptance of the gift made to the donee. It appears that such expression was made by focusing on the act of sale by the donee and not on other grounds. On the other hand, one cannot gift or sell unless he considers himself as the owner. A donee can consider himself/herself as the owner only after he or she has accepted the gift. Thus, there is nothing wrong in considering the subsequent gift or sale of the land by the donee as an indication of accepting the gift made to him. Further, there were other grounds in the case at hand also. Rajendran, donee of P1 had written P3 asking the Defendant to pay rent to the Plaintiffs. No communication was marked to show that the Defendant refuted in reply that Rajendran, the predecessor of title of the Plaintiff was not the landlord. P3 also indicate that Rajendran considered himself as the owner that in turn can be considered supportive of the position that there was an acceptance of the deed of gift P1.

4. It appears that the learned High Court Judges considered that P2 was executed prior to the aforesaid purported deed of revocation by Marimuttu without sufficient evidence to that effect, but it does not matter, as explained before, Marimuttu has no power under the law to cancel a deed on her own. As such it has to be considered as a mere declaration made by her in that regard but not a valid revocation since there is no court decree revoking the deed of gift. Since there is no issue on acceptance of the gift made by P1, it cannot be considered as a declaration with any force. In **Kannapathipillai V Kannachi 13 N L R 166** a deed of revocation by the donor was considered as waste paper since there was no cancellation by a court and the gift remained in force. Before the purported conflicting deeds executed by the heirs of the donor, Marimuttu, the donee of P1, namely Rajendran, during the lifetime of Marimuttu, has expressed his acceptance of P1 by conduct, by selling the land to

the Plaintiffs and requesting the Defendant by P3 to accept the plaintiffs as the landlord thereafter.

5. The counsel for the Defendant has highlighted certain facts that could have been considered by the learned High Court Judges as vital in deciding whether the gift made by P1 was accepted. As elaborated above, since there was no issue on the acceptance of the gift, these facts have to be considered as facts came to light while leading evidence on the other issues but may not be considered as the complete or total revelation of facts on the question of said acceptance. If the acceptance of the gift was put in issue, the Plaintiffs might have placed more evidence to meet that stance. Further, the Defendant did not raise any issue even when these facts came to light during the trial challenging the acceptance of the gift, which might have been due to the admission already made in relation to paragraph 3 of the plaint. As said before, it was not proper for the Civil Appellate High Court to decide on an issue which was not raised in the original court and where total opportunity was not available to the parties to meet such an issue. However, for the completeness, the said facts highlighted by the Defendant and this court's observations in that regard are mentioned below.

1. The Defendant submits that the Plaintiffs had purchased the said property without the original deed of gift which remained with the donor. In fact, if the original deed of gift was handed over to the Plaintiffs it would have been an additional fact to establish that Rajendran who sold the property to the Plaintiffs accepted the gift with the delivery of the original deed of gift to him. As per the marked documents in the brief, it appears both parties have filed only certified copies of the impugned deed of gift. On the other hand, being Rajendran's mother, even Marimuttu could have kept the original deed with her even after she executed the deed of gift. As per **Wickremesinghe V Wijetunga(supra)** delivery of the deed is not essential for the validity, and acceptance may be presumed by the subsequent sale of the land by the donee, as happened in the case at hand.
2. It was further submitted that Rajendran did not sign the deed of gift to accept the same. This has been addressed above and it is only one way of accepting a gift and facts may establish the acceptance in any other manner.
3. The Defendant also points out that the Plaintiffs did not produce the original deed. However, the Plaintiffs have tendered to court certified copies of the deeds that they rely and had marked them as P1, P2, and no objection had been taken when they were produced and as per the explanation to the

Section 154 of the Civil Procedure Code, they become admissible evidence. - vide **Silva V Kindersley 18 NLR 85, Siyadoris V Danoris 42 N L R 311, Cinemas Ltd. V Sounderarajan (1998) 2 Sri L R 16**. Even the Defendant has marked another certified copy of P2 as V3. There was no dispute as to the facts that Marimuttu executed P1 and Rajendran executed P2. As per the issues, the challenge was only whether Rajendran could execute P2 since, as alleged by the Defendant, P1 was cancelled by Marimuttu. Thus, it was not necessary to produce the originals since certified copies were marked.

4. The Defendant submits that the Plaintiffs did not tender the land registry extracts but objected when the Defendant sought to tender them. Through registration one can only claim priority. Priority of a deed was never raised as an issue in the original court. As pointed out above, if there was a dispute as to the valid acceptance, cancellation has to be done or decided through a competent court order. Registration has no bearing on that and, since the revocation cannot be considered as valid there cannot be any competing interest created by the purported revocation. Rajendran, on a later occasion, joined with some of his siblings and executed a deed of gift (P5) to the purported predecessor in title to the Defendant, indicating that there was no acceptance of the gift made by P1 by him. However, he did this only after he sold the property to the Plaintiffs where by his conduct, he had shown that he accepted the gift and became the owner.
5. The Defendant also brings to the notice of court that the Plaintiffs were aware of the fact of revocation. However, the evidence does not reveal that they were aware of it prior to the sale of the same property to them by Rajendran on the same day. On the other hand, since the acceptance was not in dispute after raising the issues, such revocation has to be considered invalid or of no avail as right to revoke was not reserved in P1. Further, whether there was an acceptance or not is a factual situation that has to be adjudicated by a court and donor has no authority to revoke on his own, and mere knowledge of a declaration made to that effect by the donor cannot change the legal status of the parties involved. If P1 was challenged for want of acceptance, the Plaintiffs would have taken steps to bring necessary evidence to show that it was not so, and perhaps even to show that such acceptance occurred even prior to the purported revocation.
6. The Defendant also states in his written submissions that the Plaintiffs were aware that Marimuttu's children including Rajendran have executed a deed in favour of one of their siblings, Samuel Rajapoobathy and said Rajendran,

the predecessor in title to the Plaintiffs, was a signatory to that deed. This deed was written few years after Rajendran sold the land to the Plaintiffs as the owner of the land and indicating that he had already accepted the gift given by his mother Marimuttu. Plaintiffs have taken the stance that Rajendran acted fraudulently in executing the aforesaid deed along with his siblings.

7. The Defendant also argues that the Plaintiffs have not done a search at the land registry prior to buying the property and the folio where the deed of revocation is registered is different from the folio where the deed of transfer of the Plaintiff is registered. What is stated in relation to the different folios here has been said without an iota of acceptable evidence led in that regard. No folio has been marked at the trial. As said before, there was no issue raised with regard to the priority of registration of any of the deeds. The challenge to the Plaintiffs' title was made at the trial only on the ground that the deed of gift to Rajendran was duly cancelled by Marimuttu and nothing else, while acknowledging the conveyance of the land in dispute by P1.
8. The Defendant further argues that Rajendran had no possession and it was the defendant who had over 40 years of possession even at the time of the donation and there was no evidence regarding constructive delivery of possession to Rajendran. He also tries to indicate that it was he who paid the rates and taxes and no evidence was called to disprove the factors relied by the Defendant in relation to the non-acceptance of the gift by Rajendran. The possession of the Defendant can be understood, since he himself has taken up the stance that he was the tenant of the premises till the execution of P7. Being in possession he might have paid taxes and rates. P1 was not challenged for want of non-acceptance by raising issues. Under such circumstances, the Plaintiffs need not call evidence to prove or rebut ancillary evidence that may help to surmise on whether there was an acceptance or not, which evidence came to light while leading evidence on other issues. When a proper issue was not raised, a court sitting in appeal cannot decide that parties had the full opportunity to place evidence in that regard.
9. The Defendant points out in his submissions that Rajendran was not called to give evidence to defend the title of the Plaintiffs. Execution of P1 was not challenged and further the acceptance of the gift made by it was not challenged by raising an issue in that regard. Rajendran's title was challenged by raising issues only on the ground that the gift made by P1 was cancelled by Marimuttu, and the fact that Rajendran executed a deed of transfer to sell

the property to the Plaintiffs was also not in dispute. Plaintiffs' title was challenged on the ground that Rajendran did not have title to sell the land due to the cancellation. As such, Rajendran is not a necessary witness to prove the plaintiffs' case. On the other hand, even if he was called, he may not be a reliable witness, since he in one hand acted as the owner and sold the property to the Plaintiffs and later on the other hand, gifted it to one of his siblings indicating that he did not accept the gift made to him; Since he cannot vouch for the correctness of both acts, he may have to be untruthful with regard to one of his actions. Thus, the court has to look at the sequence of his acts. First, he had acted as the owner of the property by selling it and asking the tenant to pay the rent to the new owner which tacitly indicate that he by that time had accepted the gift made to him. Otherwise, he cannot consider himself as the owner. Only after some years from executing P2, he changed his stance and joined with his siblings to execute another deed of gift to another sibling. Once he accepted the gift which is a contract, he cannot renounce it, especially after he sold the subject matter relying on the contract he once entered.

As per the grounds elaborated above, questions of law are answered as follows;

Questions of law allowed by this Court:

1. In the absence of any acceptance on the face of the Deed of Gift No. 16102 marked P1, did the High Court fall into error in concluding that there was tacit acceptance by the donee Rajendran in all the circumstances of this case?

2. Did the High Court err in failing to take in to consideration the evidence relating to prescriptive possession on the part of the Petitioner from 3/6/1971?

Answers:

1. Learned High Court Judges erred in considering matters that fell outside the scope of the appeal. However, it does not make the final conclusion of the Learned High Court Judges erroneous since P1 was not validly revoked. Further, there were certain grounds that indicated tacit acceptance of the gift by the donee of P1 but acceptance of the gift was not a matter to be considered in appeal since it was not put in issue in the original court.
2. No. Since the Defendant was the tenant, no sufficient evidence to establish prescriptive possession of the Defendant was available to be considered.

However, for the reasons given above, learned High Court Judges' decision to allow the appeal and to enter a judgment in favour of the Plaintiffs is sustained.

Even though the Defendant had prayed in his answer to declare that he is the tenant in the event the case is decided in favour of the Plaintiffs, since he had challenged the title of the Plaintiffs, he cannot be allowed to be declared as the tenant of the Plaintiffs.

Hence, this appeal is dismissed with costs.

……

Judge of the Supreme Court

PRIYANTHA JAYAWARDENA, PC, J.

I Agree.

……

Judge of the Supreme Court

P. PADMAN SURASENA, J.

I Agree.

……

Judge of the Supreme Court.

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

In the matter of an Application for Leave to Appeal made in terms of Section 9 of the High Court of the Provinces [Special Provisions] Act No. 19 of 1990 and Section 34D of the Industrial Disputes Act (as amended).

SC Appeal No. 133/2016

SC/HC/LA 133/2013
HC Kurunegala Case No. 37/2012 LT
LT Kuliyapitiya Case No. 46/60/2010

Jathika Sevaka Sangamaya,
(On behalf of P. Titus Jayantha)
No. 416, Kotte Road,
Pitakotte.

APPLICANT

-VS-

Sri Lanka Transport Board,
No.200, Kirula Road,
Colombo 05.

RESPONDENT

AND

Sri Lanka Transport Board,
No.200, Kirula Road,
Colombo 05.

RESPONDENT- APPELLANT

-VS-

Jathika Sevaka Sangamaya,
(On behalf of P. Titus Jayantha)
No. 416, Kotte Road,
Pitakotte.
APPLICANT-RESPONDENT

AND NOW BETWEEN
P. Titus Jayantha.
Kudagammana,
Giriulla.
APPLICANT-RESPONDENT-APPELLANT

-VS-
Sri Lanka Transport Board,
No.200, Kirula Road,
Colombo 05.
RESPONDENT-APPELLANT-RESPONDENT

BEFORE : **S. THURAIRAJA, PC, J.**
A.H.M.D. NAWAZ, J.
MAHINDA SAMAYAWARDHENA, J.

COUNSEL : Chathura Galhena with Menuja Gunawardena for the Applicant-Respondent-Appellant.
Yuresha De Silva for the Respondent –Appellant- Respondent.

ARGUED ON : 28th April 2021.

WRITTEN SUBMISSIONS : Applicant-Respondent-Appellant on the 03rd of January 2017.
Respondent –Appellant- Respondent on the 30th of January 2017.

DECIDED ON : 9th July 2021.

S. THURAIRAJA, PC, J.

Background of this Appeal

This is an appeal filed against the judgment of the Provincial High Court dated 03/09/2013.

Jathika Sevaka Sangamaya i.e. Applicant-Respondent-Appellant (hereinafter sometimes referred to as Applicant) filed this action on behalf of P. Titus Jayantha (hereinafter sometimes referred to as Appellant) since he was a member of the said trade union instituted the above action bearing No. LT Kuliyapitiya 46/60/2010 by application dated 27/09/2004 under Section 34D of the Industrial Disputes Act (as amended) against the Respondent –Appellant- Respondent (hereinafter sometimes referred to as Respondent) praying for a judgment in favour of the Appellant against the termination of service of the Appellant on the alleged ground of vacation of post and claimed for re-instatement with back wages and/ or any other reliefs. The Respondent filed answer dated 17/01/2005 and admitted the termination and stated that the Appellant has vacated his post due to non-reporting to work from 17/08/2004 to the date of termination which was 27/08/2004.

The Appellant stated that, he joined the Sri Lanka Transport Board (Respondent) on 29/06/1991 as a bus conductor and on 01/09/2002 he was promoted to the post of depot route inspector- 4th Grade attached to the Giriulla Bus Depot. As per the evidence of the Appellant there was a General Election on 02/04/2004 and with the change in the ruling party certain members of the Giriulla Bus Depot have threatened the Appellant and his party members to not to report to work. Thereafter, the Appellant

has made a complaint to the Police on 09/04/2004 and the reference number was CIB (2) 137/85 (A3) and requested to allow him to report back to work. Further, the Appellant had lodged a complaint (A4) on 27/04/2004 to the Deputy Commissioner of Labour requesting him to allow, to report back to work and on the same day the Appellant has lodged another complaint to the Giriulla Police Station under the reference number. CIB (1) 243/572. Pursuant to the above complaints made by the Appellant, a settlement was entered between the parties and the officers of the Respondent and agreed to allow the Appellant to report back to work from 01/06/2004.

The Appellant was stabbed by a person with a sharp piece of glass on 20/06/2004 and he was admitted to Dambadeniya District Hospital where he was given in-house treatment for 11 days until 30/06/2004. The Appellant had tendered five medical reports of his illness including documents marked as A7, A8 and A9. 1st medical certificate (A7- vide page 173) was issued for a period of ten days from 20th to 30 June 2004. The 2nd medical certificate (A8-vide page 174) was issued till 14th July 2004 and 3rd medical certificate was issued for another two weeks up to 28th July 2004. Then 4th medical certificate (vide page 102) was issued from 29th to 31st July 2004. Finally, 5th medical certificate (vide page 103) was issued for 5th to 16th August 2004.

The Respondent admitted the receipt of the aforementioned medical certificates and granted leave accordingly. The Appellant was required to report to work on 17th August 2004 and he failed to do the same hence, the Respondent on 23rd August 2004 sent a telegram message to the Appellant informing him to report to work. The Appellant had failed to respond to the aforementioned telegram message and failed to tender any medical certificates. Then, a letter dated 27th August 2004 (A11) was sent to the Appellant by the Depot Manager of the Giriulla Depot informing that, to report to work within 7 days from the issuance of the letter 'A11' and if not, this will result in the Appellant to vacation of post, voluntarily. The Appellant did not inform his response to the Employer and the Respondent issued a notice of vacation of post on the Appellant by letter dated 6th September 2004 (A 12) upon the expiration

of 3 weeks from the failure to work by the Appellant. The Respondent pleaded for a dismissal of the action of the Appellant.

Decision of the Labour Tribunal

The main contention of the Respondent was that the Appellant did not obtain leave and hence as per disciplinary regulation he had vacated his post, voluntarily. But the Appellant stated that, he never had an intention to vacate his post and he tried to restore back to work from the very inception of the said political obstructions occurred soon after the elections in April 2004.

At the conclusion of the case, the learned President of the Labour Tribunal delivered his order on 31/05/2011 and decided the case in favour of the Appellant stating that there was a constructive termination of service of the Appellant by the Respondent by relying on the dissenting judicial pronouncement in **Nandasena v Uva Regional Transport Board (1993) 1 SLR 318** and awarded a sum of Rs. 221,250/- as compensation which is equal to 30 months of salary of the Appellant. The learned President stated in his order as follows.

> *"මෙම විනිශ්චය සභාවට ඉදිරිපත් වූ සාක්ෂි අනුව ඉල්ලුම්කරුට ස්ව කැමැත්තෙන් සේවය අතහැර යාමේ චේතනාවක් තිබුණ බවට කරුණු අනාවරණය නොවන අතර ඉල්ලුම්කරුට වගඋත්තරකාර ගිරිඋල්ල ඩිපෝවේ සේවකයෙකු විසින් සිදු කරන ලද ශාරීරික හානිය හේතු කොට ගෙන සේවයට වාර්තා කර රාජකාරී වල නිරත වීමේ නොහැකියාවක් උද්ගත වේ ඇති බව අනාවරණය වේ. මෙම තත්වය නන්දසේන එදිරිව ඌව ප්‍රාදේශීය ගමනාගමන මණ්ඩලය 1993 SLR 318 නඩුවේදී ගරු මාක් ප්‍රනාන්දු විනිසුරුතුමා ප්‍රකාශ කර ඇත්තේ තාවකාලික ලෙස සේවයට නොපැමිණීම සේවය අතහැර යාමක් නොවන බවයි. "*

The English translation of the above paragraph as follows;

> "*Evidence presented to the tribunal does not reveal that the applicant had any intention of leaving the service voluntarily and that the applicant was unable to report for duty and engage in duties due to the physical damage caused to him by an employee of the Giriulla Depot. In the case of Nandasena v. Uva Local*

Transport Board 1993 SLR 318, Hon. Mark Ferando J. has stated that temporary absenteeism is not a vacation from service."

Decision of the High Court

Being dissatisfied with the order of the Labour Tribunal, Respondent appealed to the Provincial High Court of Kurunegala. The Judge of the Provincial High Court of Kurunegala delivered his judgment on 03/09/2013, and allowed the appeal while setting-aside the order of the learned President of the Labour Tribunal on the basis that the Appellant had voluntarily vacated the post as pleaded by the Respondent.

The High Court relied and referred to the case of **Building Materials Corporation vs Jathika Sewaka Sangamaya (1993) 2 SLR 316** wherein Supreme Court held that, long absence without obtaining leave or authority is evidence of desertion or abandonment of service. Further, High Court has quoted from the assertion of Senanayake J, in **Jayawardane vs ANCL (CA 562/87)** which reads as follows.

"No employer could indefinitely, kept a post vacant without any information from the worker of his inability to come to work, especially. Where the employer has given an opportunity for the applicant to tender any explanation or inform the employer about his inability to report to work."

Case before this Court

Being aggrieved by the said judgment of the Provincial High Court of Kurunegala, the Appellant filed this case before this court and leave was granted on the following questions of law stated in paragraph 18 (i, iii, iv) of the petition dated 14/10/2013. Those are reproduced verbatim for easy reference;

i. Did the Provincial High Court misdirect itself on the proof and evidence regarding the vacation of post by the petitioner?

iii. Did the Provincial High Court misdirect itself by failing to consider the analysis of the learned President of the Labour Tribunal regarding the Petitioner's reasons for the absence of work?

iv. Did the Provincial High Court misdirect itself in applying the decided cases into the instant case?

Heard the submissions of both Counsel and perused the materials before this Court including the Judgments of the Labour Tribunal and the Civil Appellate High Court.

Vacation of Post

Having particular regard to the attendant circumstances of the instant application, this court is called upon to determine whether a voluntary and intentional vacation of post on the part of the Appellant has been established by the Respondent.

The Appellant was an employee attached to a government institution namely Sri Lanka Transport Board. The Appellant was employed for a long period of time and he was involved in trade union activities had adequate knowledge about the work environment, Law and rules & regulations. As per section 21 (1) of the Disciplinary Rules of Sri Lanka Transport Board, in the event of an employee of the Sri Lanka Transport Board fails to report to work for 3 days, steps should be taken to send a Telegram to the last known address, informing the employee to report to work or to inform reasons for the failure to report to work and in this matter, it is proved that the Respondent had complied with the said requirement on 23/08/2004 by sending a telegram message. Then, 'A11' letter was sent to the Appellant by the Depot Manager of the Giriulla Depot complying with the procedure stipulated in the Disciplinary Rules. Due to the failure on the part of the Applicant to respond the aforementioned notifications, the Notice of Vacation of Post had been sent by the Respondent on 06/09/2004.

The concept of vacation of post was examined by Justice Jayasuriya in the case of **Nelson de. Silva v Sri Lanka State Engineering Corporation (1996) 2 Sri LR 342 at 343** as follows;

> *"The concept of vacation of post involves two aspects; one is the mental element, that is intention to desert and abandon the employment and the more familiar element of the concept of vacation of post, which is the failure to report at the work place of the employee. To constitute the first element, it must be established that the Applicant is not reporting at the work place, was actuated by an intention to voluntarily vacate his employment."*

When discussing the above, Jayasuriya J was guided by the decision of the Supreme Court in **The Superintendent of Hewagama Estate v Lanka Eksath Workers Union SC 7-9/69 [S.C minutes 02.02.1970]** and referred to the said decision in his judgment as follows;

> *"The learned President of the Labour Tribunal hold on the facts that there was no abandonment of employment by the workman as the workman in question had no intention of abandoning his employment. The learned President correctly applying the legal principles observed that the physical absence and the mental element should co- exist for there to be a vacation of post in law. Besides, he held on this issue the Tribunal ought to be guided by the common law of the land which is the Roman Dutch Law and consequently the English doctrine of frustration, relied upon by the learned Counsel, has no application whatsoever to the situation under consideration. An appeal preferred by the employer against this order of the learned President of the Labour Tribunal was considered by the Supreme Court in* ***The Superintendent of Hewagama Estate Vs. Lanka Estate Workers Union*** *and the order of the learned President was affirmed in Appeal."*

Kulatunga J in **Wijenaike v Air Lanka Ltd. (1990) 1 Sri L.R. 293**, referred to the principle of Vacation of Post and emphasised that physical absence alone is

insufficient and that the party seeking to establish a vacation of post must prove that the physical absence co-existed with the mental intent.

As established above, the concept of vacation of post involves two aspects; Physical element and mental element. These elements must co-exist with each other for the employer to establish that there is vacation of post by the employee; **Kalamazoo Industries v Minister of Labour & Vocational Training (1998) 1 SLR 235.**

The physical element was proved with the absence to report to work but the Appellant denied the mental element. Hence the issue here is to identify what was the mental element of the Appellant (The Employee) and whom should be satisfied with the reasoning?

It has been an established principle in Industrial law that the right to Hire and fire an employee is vested with the Employer provided that the grounds on which an employee is fired is just and reasonable. Hence a reasonable person should take an objective view by considering the evidence that lies before him. In order to understand who a reasonable person should be, it is sufficient to equate him to the man on the Clapham bus-the proverbial reasonable man we often meet in law

It could be seen that in order for a reasonable person to uncover both the physical and mental element as to the Vacation of Post by the employee they need to be attributed with knowledge of all relevant background facts and information. Such facts in this case would be: 1) whether the employee obtained leave for the days he did not report to work? 2) whether he had communicated his reason for not reporting to work within a stipulated time period?

The learned President of the Labour Tribunal held that, no mental element established on the part of the Appellant in vacation of post. It is pertinent to note that the learned President of the Labour Tribunal relied on the dissenting judgment of Mark Fernando, J in **Nandasena v Uva Regional Transport Board** (supra) and stated that, though there is a physical element the mental element of the Appellant to vacate his post was not proved. The learned President of the Labour Tribunal without taking into

consideration of the information a reasonable person should have held that the mental element was not proved due to the surrounding circumstances and due to the threats of the Appellant's life he was compelled to keep out of work. The Learned President of the Labour Tribunal has arrived at this decision by considering the past hinderances that had caused the Appellant not to report to work. However, it should be taken into consideration that in those situations the Appellant had lodged complaints to the police and the Commissioner of Labour with regard to the hinderances caused by other employees, which clearly demonstrate the intention of the Appellant to continue his work at the Respondent Board. It should be noted that with regard to the present period of time in which the Appellant had not reported to work and for which the Appellant is now claiming that he did not report due to fear of life had not followed any of the previously followed procedure to bring it to the notice of any relevant authorities nor the employer. Further the learned President of the Labour Tribunal considered and decided that the application of Rule 21 of the Disciplinary Rules of Sri Lanka Transport Board into this situation is not just and equitable hence decided that the termination based on vacation of post was not justified.

The learned Judge of the Provincial High Court of Kurunegala did not agree with the order of the learned President of the Labour Tribunal and set aside the order of the learned President of the Labour Tribunal stating that, the Respondent had informed the Appellant to report to work by a telegram on 23/08/2004 and by a letter on 27/08/2004 within seven days but the Appellant did not respond to any of those messages and having received the letter for vacation of post-dated 06/09/2004, the Appellant filed this application before the Labour Tribunal, Kuliyapitiya.

The learned Judge of the Provincial High Court of Kurunegala relied on the dictum in **Nelson De Silva v Sri Lanka State Engineering Corporation** (supra) to identify the intention of the employee to not to abandon the employment. It was stated that *"a reasonable explanation may negative the intention of the employee to abandon his employment"*. It was observed by the learned Judge of the Provincial High Court of Kurunegala that the Appellant had not challenged the notice of vacation of

post issued on 06/09/2004 with bona fide, satisfactory explanation and the Appellant even after receiving the telegram message and a letter requesting him to return to work did not make any response to the Respondent. Hence, it was obvious that the Appellant had not shown his intention to return to work.

Given the importance of the case of **Nandasena v Uva Regional Transport Board** (supra) as the Learned President of the Labour Tribunal relied on the dissenting judgment pronounced by Justice Mark Fernando, it is pertinent to consider the said judgment in its entirety to see if the Learned President of the Labour Tribunal has been correctly influenced by the said judgments.

As per the facts of the case provided in the Sri Lanka Law Reports at pages 318 & 319, Nandasena was employed by the Uva Regional Transport Board as a bus conductor attached to the Embilipitiya Depot. On 3/4/1984 he was interdicted on two charges namely, assault and conspiracy to assault the Depot Manager on 26/3/1984. and failing to reveal to the respondent the correct facts relating to the incident of 26/3/84. After a domestic inquiry he was found guilty of the second charge of misleading the Board by concealing the truth and/or making a false statement relating to the incident of assault which took place on 26/3/1984. Consequently, he was held to be not a fit and proper person to hold employment under the Board. On 26/12/84 the Personnel Manager informed the appellant of the result of the domestic inquiry and indicated that the punishments meted out were disentitlement to salary during the period of interdiction and a disciplinary transfer to a new station of which he will be informed subsequently. On 31/12/84 he was informed that his new station was the Ratnapura Depot with effect from 1/1/1985.

On 2/1/1985 Nandasena wrote to the Personnel Manager asserting his innocence and that he was not at Embilipitiya on the day of the incident and stating that the unlawful deprivation of wages and transfer constituted a constructive termination of his services and he would be appealing against the order of 26/12/84. He asked for stay of the transfer pending the appeal. He called for a reply on or before 15/1/1985. On 11/1/85 the Personnel Manager replied that he had no power to stay

the transfer citing the Board's rule 14 which provided that upon an appeal being made a punishment transfer would not be stayed. Nandasena wrote again to the Personnel Manager on 21/1/1985 asking for a reconsideration and that pending the result of the appeal he be transferred to the Godakawela Depot as this was within the limit of his free travel pass whereas Ratnapura was not and would involve him in additional expenses. The Personnel Manager did not reply.

On 8/2/1985 the Depot Manager Ratnapura issued a vacation of post notice giving seven days to explain his absence. On 10/2/85 the Nandasena replied he was awaiting the Personnel Manager's final decision. On 22/2/85 the Depot Manager Ratnapura informed the Appellant that he was deemed to have vacated his post on 5/1/85 by failing to report for work on or after that date. On 28/2/85 Nandasena wrote to the Personnel Manager seeking reinstatement and a posting to either Kahawatta or Godakawela pending the result of his appeal. On 1/4/85 the Personnel Manager replied rejecting the appeal and reiterating the position set out in the letter of 11/1/1985. On 28/2/1985 the appellant made an application to the Labour Tribunal in respect of the termination of his services. The Board took up the position that Nandasena had been transferred to Ratnapura as a punishment upon being found guilty of serious misconduct. The transfer order continued to be operative despite Nandasena's appeal and upon his failing to report for work at the Ratnapura Depot he was properly deemed to have vacated his post. The notes of inquiry of the domestic hearing were not produced before the Labour Tribunal and the application by the appellant to have them so produced was objected by the Uva Regional Transport Board and disallowed by the Tribunal. Nandasena appealed to the Court of Appeal and Court of Appeal dismissed his appeal stressing that "the facts leading to the disciplinary transfer was not the issue to be determined by the Tribunal."

Mark Fernando J, in his dissenting judgment discussed about the question whether the appellant's failure to report for work amounted to a repudiation of the contract of employment; or whether it was a transgression only justifying disciplinary action short of dismissal; or whether it was a bona fide challenge to a disputed order;

or whether it was a justifiable or permissible response to a wrongful or unreasonable punishment. His Lordship identified that, "r*ecognition of an employee's right to refrain from complying with a transfer order would result in serious abuse, in that there would be non-compliance with every transfer order. It is contended in reply that non-recognition of a limited right of bona fide challenge of an improper transfer order would enable an employer to dismiss an employee for frivolous reasons, with impunity, by falsely finding him guilty of some trumped-up charge; and then, without imposing the desired punishment of dismissal, to subject him to a vexatious punishment transfer. The employee will then be in a dilemma: if he proceeds on transfer, he thereby acquiesces and accepts his guilt; if he does not, he will be deemed to have abandoned his post….".* Further, his Lordship identified that, there was a failure to address the issue of misconduct by the Labour Tribunal and Court of Appeal before giving their judgments because, the disciplinary inquiry notes and findings of the domestic inquiry was not produced before them or the witnesses who gave evidence at the disciplinary inquiry would not be called to testify before the Tribunal. (Ibid page 328). Hence, his Lordship arrived to a conclusion that,

> *''the punishment transfer was unjustified; the refusal to proceed on transfer was based both on a bona fide challenge of the transfer order as well as on circumstances which arguably supported a stay or a variation; that refusal was therefore at most a technical breach not motivated by an intention to repudiate the contract, or to abandon his post, or defy the employer; it did not warrant termination.''*

Goonewardena J, (with Wadugodapitiya J agreeing) in his majority judgment in the said case held that,

> *"There is no material to say that the disciplinary order of transfer was unjustified or constituted arbitrary punishment. Even assuming the transfer was invalid the employee must obey it. He could appeal against the order but he cannot refuse to carry it out. He must comply and complain. The failure to report at the Ratnapura Depot was a deliberate and calculated act of disobedience and a virtual*

repudiation of his contract. The appellant of his own volition secured his own discharge from employment under the Board by vacating his post."

The majority view in the **Nandasena** case has set out the dictum that an aggrieved employee as was in the above case should comply with the decision of the employer and then follow the necessary appeal procedures to contest such decision. This is because in appeal if the decision is held in favour of the employee, he would be entitled to reasonable compensation he has suffered during that time period but by not complying with the orders of the employer's he would cause irremediable losses to the employer. Further it could be seen that the Learned President of the Labour Tribunal has wrongfully relied on this case as the dissenting judgment of the Justice Mark Fernando is not the *ratio decidendi* in that case thereby not an opinion for the Labour Tribunal to follow.

It was further observed in the majority decision in **Nandasena v Uva Regional Transport Board** (Supra) that,

"I however incline to the view, one which learned Counsel for the respondent strenuously contended for, that rather than the respondent Board terminating his employment under it, the appellant of his own volition secured his own discharge from employment under the. Board by vacating his post, which according to the disciplinary rules binding on him had to be the result of his being absent from work without having obtained leave and failing to show justification for such absence. There is no doubt in my mind that the appellant conducted himself in a way which resulted in his discharge from employment, forcing upon the Board a step he compelled it-to take, leaving it no other choice."

The Indian Supreme Court in **Jeewanal Ltd v Their Workmen (1961) 1 L.L.J. 517 (SC)** observed the following:

"If an employee continues to be absent from duty without obtaining leave and in an unauthorised manner for such a long period of time .... an inference may

reasonably be drawn from such absence that due to his absence he has abandoned service"

This Court taking into consideration of the above observations of the Indian Supreme Court in the case of **Building Materials Corporation v Jathika Seveka Sangamaya (1993) 2 SLR 316**, held that long absence without obtaining leave or authority is evidence of desertion or abandonment of service. In that case also, the Applicant, employee had been absent for a long period from work. The Court held that the workman had failed to satisfy the employer that he was in fact ill and that he was not fit to report for work. The Supreme Court held that it was clear that the employee by his conduct had severed the contract of service.

This Court in the above-mentioned case observed the following:

"An intention to remain away permanently must necessarily be inferred from the Employee's conduct and I hold that long absence without obtaining leave or authority is evidence of desertion or abandonment of service.

As observed above where an employee endeavours to keep away from work or refuses or fails to report to work or duty without an acceptable excuse for a reasonable period of time such conduct would necessarily be a ground which justifies the employer to consider the employee as having vacated service. In the circumstances, I am of the view that the Respondent has in this case proved that the Appellant was absent without leave from 17/08/2004 for a period of approximately 21 days and that it is reasonable on the facts established in this case to draw the inference that the Appellant had no intention to report for work at the Giriulla depot. Further, there is no evidence produced before the Court to prove that the Appellant was subject to fear of life between the period from 17th August 2004 to the 06th September 2004 in which period he was absent for work.

If Appellant did have a fear of life, he could have complained to the Police, Higher authorities in the Sri Lanka Transport Board, Human Rights Commission, Ombudsman or Courts Etc. There is no evidence presented in this regard by the Appellant before the Labour Tribunal other than a mere statement. However, in regard

to the aforesaid mental element on the part of the Appellant to abandon his employment has not adequately considered by the learned President of the Labour Tribunal in his order and hence it is liable to be judicially reviewed before this Court. Hence, I am of the view that the Respondent has proved and submitted evidence regarding the vacation of post by the Appellant and the Appellant has failed to prove judicially acceptable reasons to his absence for report to work sufficiently.

In view of the facts and above-mentioned judicial pronouncements made in this regard, I am of the view that the learned Judge of the Provincial High Court had correctly arrived at the conclusion that the learned President of the Labour Tribunal had failed to consider the relevant material and had set aside the Order of the Labour Tribunal on the basis that the Appellant had not shown any intention to return to work. In the circumstances, I dismissed the appeal of the Appellant and uphold the judgment of the learned Judge of the Provincial High Court dated 03/09/2013.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

A.H.M.D. NAWAZ, J.

I agree.

JUDGE OF THE SUPREME COURT

MAHINDA SAMAYAWARDHENA, J.

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an Appeal to the Supreme Court of the Democratic Socialist Republic of Sri Lanka.

1. Gayani Manohari Balasuriya (Minor)
2. Hubert Balasuriya (Next Friend)
   Both of No. 52, Old Road,
   Veralupe, Ratnapura.

Plaintiffs

S.C. Appeal No. 181/2014
S.C./SPL/L.A. No. 295/2013
C.A. Appeal No. 109/2000 (F)
D.C. Ratnapura Case No. 6199/P

Vs.

1. Ramanayake Arachchilage Lakshman Ramanayake.
2. Ramanayake Sarathchandra Ramanayake.
3. Ramanayake Arachchilage Appuhamy.
   All of No. 329/1, Kalawana

Defendants

AND

1. Ramanayake Arachchilage Lakshman Ramanayake.
2. Ramanayake Sarathchandra Ramanayake.
3. Ramanayake Arachchilage Appuhamy.
   (Deceased)

3A. Ramanayake Arachchilage Lakshman Ramanayake.
3B. Ramanayake Sarathchandra Ramanayake
All of 329/1, Kalawana.

Defendant-Appellants

Vs.

1. Gayani Manohari Balasuriya (Minor)
2. Hubert Balasuriya (Next Friend)
Both of No. 52, Old Road,
Veralupe, Ratnapura.

Plaintiff-Respondents

AND NOW BETWEEN

1. Gayani Manohari Balasuriya (Deceased)
1(A). Wijesinhage Priyantha Anuradha Wijesinghe
1(B). Sanuka Damsath Wijesinghe
Both of 1/4/D/1, Kospelawinna Road,
Weraluppa, Ratnapura.

Plaintiff-Respondent-Appellants

Vs.

1. Ramanayake Arachchilage Lakshman Ramanayake.
2. Ramanayake Sarathchandra Ramanayake.
3. Ramanayake Arachchilage Appuhamy (Deceased)
3A. Ramanayake Arachchilage Lakshman Ramanayake.

3B. Ramanayake Sarathchandra Ramanayake
All of 329/1, Near Lecam Walawwa,
Ratnapura Road, Kalawana.

Defendants-Appellants-Respondents

Before: **Murdu N.B. Fernando, PC, J.**
A.L. Shiran Gooneratne, J.
Arjuna Obeyesekere, J.

Counsel: R.M.D. Bandara with Ms. Lilanthi de Silva **for the 1A and 1B Substituted Plaintiff-Respondent-Appellants.**

Anuruddha Dharmaratne with Indika Jayaweera **for the 1st, 2nd, 3A and 3B Defendant-Appellant-Respondents.**

Argued on: 20/07/2021

Decided on: **16/12/2021**

A.L. Shiran Gooneratne J.

This is an appeal filed against the Judgment dated 22/10/2013, delivered by the Court of Appeal, setting aside the Judgment of the District Court of Ratnapura, dated 22/02/2000.

The 1st Plaintiff-Respondent-Appellant, being a minor, instituted an action in the District Court of Ratnapura, through her next friend, the 2nd Plaintiff-Respondent Appellant, (hereinafter referred to as the Plaintiff-Appellants) against the 1st, 2nd and 3rd Defendant-Appellant-Respondents (hereinafter referred to as the Defendant-Respondents) seeking to partition the land called "*Gedaragawa Hena*".

By Plaint dated 12/10/1983, the Plaintiff-Appellants pleaded, *inter alia*, that;

1. by Deed No. 1792, dated 26/07/1956, Ratnayake Arachchilage Tillakaratne became the owner of the said land.
2. Ratnayake Arachchilage Tillakaratne who died intestate, had four children namely, Sumana Tillakaratne, Piyaratne Tillakaratne, Sujatha Tillakaratne and Padma Tillakaratne.
3. the said Sujatha Tillakaratne married under the Marriage Registration Ordinance during the life time of her father.
4. the 1st Plaintiff is the daughter of the said Sujatha Tillakaratne.
5. Sujatha Tillakaratne predeceased her father, intestate, leaving the 1st Plaintiff as the sole heir.
6. upon the death of Ratnayake Arachchilage Tillakaratne, the 1st Plaintiff, Sumana Tillakaratne, Piyaratne Tillakaratne and Padma Tillakaratne, each became entitled to an undivided 1/4th share of the land.
7. the said Sumana Tillakaratne, Piyaratne Tillakaratne and Padma Tillakaratne, soled their rights of the land to the 1st and 2nd Defendants.

Accordingly, prayed for a declaration that the 1st Plaintiff is entitled to an undivided 1/4th share of the corpus.

The Defendant-Respondents in their Statement of Claim dated 25/01/1994 pleaded, *inter alia*, that;

1 Ratnayake Arachchilage Tillakaratne died intestate and Sumana Tillakaratne, Piyaratne Tillakaratne and Padma Tillakaratne became entitled to their father's estate in its entirety.

2 Sujatha Tillakaratne having married in *diga* during the life time of her father forfeited her rights to paternal inheritance.

3 by Deed No. 275, dated 14/12/1981, the land in suit was transferred to the Defendant-Respondents who became entitled to the entire land in equal shares.

4 the said Defendant-Respondents have acquired prescriptive title to the said land.

The learned District Judge by Judgment dated 22/02/2000, *inter alia*, held that, the 1st Plaintiff-Appellant, as the heir of the deceased Sujatha Tillakaratne, is entitled to an undivided 1/4th share of the corpus and allotted shares accordingly.

The Court of Appeal having considered the submissions made by both parties held that, the said Sujatha Tillakaratne married in *diga* and had forfeited her rights to paternal inheritance and by her conduct could not regain such rights in view of the mandatory provisions contained in Section 9(1) of the Kandyan Law (Declaration and Amendment) Ordinance. (hereinafter sometimes referred to as the Kandyan Law Ordinance)

When this case was taken up for support, the Court decided to grant Special Leave to Appeal on the questions of law set out in paragraph 9(i) to (vii) of the Petition dated 28/11/2013. However, on the date of the hearing, parties agreed to confine the present appeal to the questions of law set out in paragraph 9(ii), 9(v) and 9(vii) of the Petition, which reads as follows;

Paragraph 9,

(ii) did the Court of Appeal err in law holding that the marriage of Sujatha Tillakaratne who married under the General Marriage Ordinance was a *diga* marriage and thereby forfeited her rights to paternal inheritance

(v) did the Court of Appeal err in not evaluating the evidence led before the District Court to determine whether the marriage is in *diga*

(vii) when a Kandyan woman Marries under the General Marriage Ordinance, will it raise a presumption that the marriage is a *diga* marriage as held in ***Lewis Singho vs. Kusumwathie and Another,*** C.A No. 390/91(F), (2003) 2 SLR 128, decided by the Court of Appeal

At the hearing of this case, both parties agreed that the main question to be determined by this Court is, whether the presumption set out in Section 28(1) of the Kandyan Marriage and Divorce Act, No. 44 of 1952, (hereinafter sometimes referred to as the 1952 Act) apply in equal force to a Kandyan woman who contracts a marriage under the Marriage Registration Ordinance.

Sujatha Tillakaratne is a Kandyan woman, married under the Marriage Registration Ordinance in the life time of her father. The register under the Marriage Registration Ordinance has not provided to record whether a marriage is in *diga* or in *binna*. The position of the Plaintiff-Appellant is that the Marriage Registration Ordinance does not recognize two different kinds of marriage as *diga* or Binna and therefore, Section 3(1)(a) of the 1952 Act, or the presumption set out in Section 28(1) of the said Act will not apply. The Plaintiff-Appellant also contends that, succession to property of a party married in terms of the Marriage Registration Ordinance is necessarily to be determined by the nature of the marriage from subsequent conduct of the parties in order to decide on paternal inheritance as recognized in ***Perera vs. Asilin Nona (1958) - 60 NLR 73***, ***and Samarakoon vs. Samarakoon (2003) 2 SLR 321***.

The Plaintiff-Appellant further contends that in the absence of a casus omissus clause in Section 66 of the Kandyan Marriage and Divorce Act, the Act applies only to marriages contracted under the said Act and not applicable to marriages solemnized and registered under the Marriage Registration Ordinance or any other Act.

It is also the position of the Plaintiff-Appellant, that the presumption under Section 28(1) of the Kandyan Marriage and Divorce Act would apply only in instances where a marriage registration takes place in terms of Section 23(3) of the said Act and which does not indicate whether the marriage was in *diga* or in *binna*. Therefore, the rebuttable presumption applies only to a Kandyan marriage registered under Section 23(3) of the Kandyan Marriage and Divorce Act. It is submitted that in Section 39 of Ordinance No. 3 of 1870, the words *'if it does not appear in the register whether the marriage was contracted in diga or in binna'* makes reference only to a marriage registration under

the said Ordinance and therefore, removed any possibility of applying the rebuttable presumption to a marriage contracted under the Marriage Registration Ordinance.

In terms of Section 23 (1)(a)(ii) of the Kandyan Marriage and Divorce Act, when the nature of the marriage (whether in *diga or in binna*) is entered in the registration of marriage, in terms of Section 9 of the Kandyan Law, --- ' *no change after any such marriage in the residence of either party to that marriage and no conduct after any such marriage of either party to that marriage or of any other person shall convert or deemed to convert a binna marriage into a diga marriage or a diga marriage into a binna marriage or cause or be deemed to cause a person married in diga.'*

The Defendant-Respondent's position is that under Section 3(1)(a) of the Kandyan Marriage and Divorce Act, when a registration of marriage between persons subject to the Kandyan law is solemnized and registered under the Marriage Registration Ordinance, it *'shall not affect the rights of such persons, or of other persons claiming title from or through such persons, to succeed to property under and in accordance with the Kandyan law',* and where it is not possible to record whether the marriage was in *diga* or in *binna*, in terms of Section 28(1) of the Kandyan Marriage and Divorce Act, it is presumed that the women married in *diga*, , until the contrary is proved. Therefore, it is contended that Sujatha Tillakaratne who was given away in *diga* marriage by her father is not entitled to a share of her family estate, until the presumption is rebutted.

The Counsel for the Defendant-Respondent, whilst placing reliance on the applicability of Section 28(1) of the Kandyan Marriage and Divorce Act and also Section 9(1) of the Kandyan Law Ordinance, questions the learned District Judge's failure to consider the applicability of the said laws.

Applicability of Section 28(1) of the Kandyan Marriage and Divorce Act, when a woman contracts a marriage under the Marriage Registration Ordinance.

The learned Counsel for the Plaintiff-Appellant submits that, a registration of marriage under the Marriage Registration Ordinance is not recognized as valid, under the Kandyan Marriage and Divorce Act and as such, the presumption contemplated under Section 28(1) of the said Act would not apply to Sujatha Tillakaratne.

It is apparent from the proceedings that, the parties to the action have accepted that they possess the required legal recognition and the capacity to contract a valid registration of marriage under the Marriage Registration Ordinance and that the parties are governed by the Kandyan Law. Moreover, both parties agree that the rights of succession claimed by the Plaintiff-Appellant depended on her marriage.

In 1859, Ordinance No.13 of 1859 titled, An Ordinance to amend the law of marriage in the Kandyan provinces was enacted. Accordingly, customary Kandyan marriages ceased to be valid after 1859. The intent of the said Ordinance was to require all marriages since Ordinance No. 13 of 1859 to be registered. In the year 1870 the law was again amended by Ordinance No. 3 of 1870. ---"A marriage between a Kandyan and a non-Kandyan cannot be registered under Ordinance No. 3 of 1870. Such a union should be registered under the Marriage Registration Ordinance No. 19 of 1907". ***(A.B. Collin De Soysa, Digest of Kandyan Law, at page 15)*** It was also "*the intention of the legislature that the special Kandyan Marriage Law and the general law of Ceylon should run concurrently and alternatively in the Kandyan Provinces".* ***(Sophia Hamine vs. Appuhamy. (1922) 23 NLR 353***

Marriages were also lawfully registered or solemnized according to the Marriage Registration Ordinance No. 19 of 1907. "*A marriage between Kandyans has been solemnized or registered under the said Ordinance of 1907, will not affect the rights of the parties, or the rights of persons claiming title from or through them to succeed to property according to the rules of the Kandyan law".* ***(Section 2 of Ordinance No. 14 of 1909).***

The Kandyan Marriage and Divorce Act repealed Ordinance No 3 of 1870. The said Act was enacted to '*amend and consolidate the law relating to Kandyan Marriages and Divorces, and to make provisions for matters connected therewith or incidental thereto'*.

Section 3(2) of the Kandyan Marriage and Divorce Act reads thus;

> *"the fact that a marriage, between persons subject to Kandyan law, is solemnized and registered under the Marriage Registration Ordinance shall not affect the rights of such persons, or of other persons claiming title from or through such persons, to succeed to property under and in accordance with the Kandyan law"*

Accordingly, the said Act amended and consolidated the law relating to Kandyan Marriage and Divorce between persons subject to Kandyan law or marriages solemnized and registered under the Marriage Registration Ordinance, claiming title under and in accordance with the Kandyan law.

In ***Piyadasa and Another Vs. Babanis and Another (2006) 2 SLR 17***, the Court of Appeal held,

> *"The fact that a marriage, between persons subject to Kandyan Law, is solemnized and registered under the Marriage Registration Ordinance shall not affect the rights of such persons, or the other persons claiming title from or through such persons, to succeed to property under and in accordance with the Kandyan Law."*

A similar conclusion was arrived in ***Lewis Singho Vs. Kusumawathie and Others (2003) 2 SLR 128,*** where the Court of Appeal held that,

> *"It is interesting to note that section 3(2) of the Marriage and Divorce (Kandyan) Act provides that a marriage between persons subject to Kandyan Law, solemnized and registered under the Marriage Registration Ordinance shall not affect the rights of such persons or of persons claiming rights through them to succeed to property under the Kandyan law".*

In the circumstances, there is no doubt that the intention of the legislature in enacting Section 3(2) of the said Act was not only to recognize a marriage registration entry made under section 23(3) of the Act, but also to recognize a marriage between persons solemnized and registered under the Marriage Registration Ordinance as a marriage recognized under the Kandyan law.

The Presumption in Section 28(1) of the Kandyan Marriage and Divorce Act

In terms of Section 28(1) of the Kandyan Marriage and Divorce Act, if there is no entry made in the marriage register to state that the marriage was in *diga* or in *binna*, it is presumed that such a marriage is in *diga*, until the contrary is proved.

As observed earlier, Sujatha Tillakaratne contracted a marriage under the Marriage Registration Ordinance and in the absence of an entry in the certificate of marriage with regard to its nature, in terms of the presumption recognized under Section 28(1), Sujatha's marriage is presumed to be a marriage in *diga*.

In terms of Section 3(2) of the Kandyan Marriage and Divorce Act, a marriage registered under the Marriage Registration Ordinance shall not affect the rights of such person claiming title to succeed to property under and in accord with the Kandyan Law.

The Court of Appeal having considered the submissions made by both parties, by Judgment dated 22/10/2013, held that,

> *"the said Sujatha Tillakaratne who had married in diga had forfeited her rights to the parental inheritance and hence by conduct she could not regain such rights in view of the mandatory provisions contained in section 9 (1) of the Kandyan Law Ordinance".*

Relying on Section 28(1) of the 1952 Act, the Court presumed that Sujatha Tillakaratne contracted a *diga* marriage and accordingly held that, the parties married after coming into operation of the Kandyan Law Ordinance, and therefore cannot regain *binna* rights or *diga* rights on account of their conduct, in terms of Section 9(1) of the said Ordinance.

The Court cited the case of ***Gunasena and others vs. Ukku Menika and others (1976)-78 NLR 529,*** where it was held that,

> *"No conduct after any such marriage of either party to that marriage or any other person shall cause or be deemed to cause a person married in diga to have the rights of succession of a person married in binna to have the rights of succession of a person married in diga."*

Gunasena and others vs. Ukku Menika and others (supra), considered the question, whether Ukku Menika 2nd Respondent, Kiri Menika 3rd Respondent, and Dingiri Menika 4th Respondent, the three daughters of the deceased Ranhoti Pedi Durayalage Sendiya of Galbodagama, each of whom had been married out in *diga* before Sendiya's death had reacquired *binna* rights. In the said action, it was not in issue as to whether the three daughters married in *diga* or in *binna*.

In the present case, the certificate of marriage did not say whether the marriage was in *diga* or in *binna*. The Court of Appeal presumed that the marriage was in *diga* and applied the ratio decidendi in ***Gunasena and others vs. Ukku Menika and others (supra)*** and held that the rights of succession of Sujatha Tillakaratne came under Section 9(1) of the Kandyan Law Ordinance.

Section 28(1) of the 1952 Act clearly contemplates a registration of marriage which does not indicate whether the marriage was contracted in *diga* or in *binna* as oppose to Section 9(1) of the Kandyan Law Ordinance which makes reference to *"A marriage contracted after the commencement of this Ordinance in binna or in diga"*---- *" and shall have full effect as such; and no change after any such marriage in the residence of either party to that marriage and no conduct after any such marriage of either party to that marriage shall convert or deemed to convert a binna marriage into a diga marriage or a diga marriage into a binna marriage ---"*

In terms of Section 9(1) of the Kandyan Law Ordinance, as long as the existence of the marriage, (until dissolved) it is not possible to change on account of their residence or

conduct, the nature of the marriage entered in the marriage register and shall have full effect of the marriage contracted.

The Court of Appeal applied the presumption under Section 28(1) of the 1952 Act, and having considered Section 9(1) of the Kandyan Law Ordinance, held that "the said Sujatha Tillakaratne who had married in *diga*, had forfeited her rights to the estate of her deceased father on the presumption that she had contracted a marriage in *diga*.

In the absence of form of marriage in the register, the Court of Appeal nor the trial court applied the best evidence rule to the necessary evidence led in proceedings to decide on the rights of inheritance and succession depended on the bond of matrimony, in order to consider the rebuttable presumption as recognized under Section 28(1) of the 1952 Act.

Section 28(1) of the said Act, reenacted the provisions of Section 39 of the 1870 Ordinance and retained the "best evidence" rule. (***Jayasinghe vs. Kiribindu and others (1997) 2 SLR 1***)

In terms of Section 39 of Ordinance No. 3 of 1870, the entry in the register of marriages is deemed to be the best evidence of the marriage contracted. If it does not appear in the register whether the marriage was contracted in *diga* or in *binna*, such marriage should be presumed to have been contracted in *diga* until the contrary is shown.

"The rights of inheritance and succession depend chiefly on the bond of matrimony, and wedlock, as sanctioned by the coventional or common law of this country, subsists in two deferent forms, the Deega and the Beena. When a woman is given away in marriage, and is, according to the terms of the contract, removed from her parent's abode, and is settled in the house of her husband, it is a conjugality in Deega. On the contrary, where the bride-groom is received into the house of the bride, and according to stipulation abides therein permanently, it is a marriage in Beena" ***(Niti Nighanduwa by J. Armour at page 10)***

The Supreme Court in ***Jayasinghe vs. Kiribindu and others (supra)***, having considered the question *"Was the marriage in diga or binna?"* held that, *"there is no definition of what these terms mean in the Ordinance, and therefore the matter must be decided by reference to the principles of Kandyan Law".*

The 'Best Evidence' rule

As noted earlier, the best evidence rule was introduced by Section 39 of Ordinance No. 3 of 1870 and was retained in the Kandyan Marriage and Divorce Act.

Section 28(1), states that the registration under the said Act of a Kandyan marriage shall be the best evidence before all courts and in all proceedings in which it may be necessary to give evidence of the marriage.

In ***Manipitiya vs. Wegodapola (1922) 24 NLR 129***, the Supreme Court having considered that the defendants were married on 3rd of June 1904, observed that the parties severally gave notice of marriage in which each declared that the marriage was to be in *diga*, and the register of marriages sets out that the marriage was in *diga*. Accordingly, the Court held,

> *"The Amended Kandyan Marriage Ordinance, 1870, made the validity of the marriage turn on the contract only, and section 39 by declaring that the entries in the register should be the " best evidence " of the marriage contracted, and of the other facts stated therein cannot mean that the entries should be conclusive in matters of fact not existing at the time of the entry. Now it has been held by De Sampayo J. in the case of* ***Menikhamy vs. Appuhamy****, that the forfeiture of the bride's rights in the paternal estate turns on the question of fact, whether the bride left the parental home in accordance with the contract. In the absence of evidence there would be a presumption that the terms of the contract relating to residence had been carried out, but I can see no good reason for excluding oral testimony relating to the carrying out of this term of the contract, which was not a matter of fact occurring at the time of the contract".*

The Supreme Court having concluded that the entry in the marriage register cannot be conclusive in matters of fact not existing at the time of entry, further held that *"In the absence of evidence, there would be a presumption that the terms of the contract relating to residence have been carried out"*, and stressed the importance of matters of fact to be considered to rebut the presumption recognized under Section 39 of the Ordinance.

In ***Jayasinghe vs. Kiribindu and others (supra),*** where the relevant entry in the certificate of marriage was written as *diga*, the Court held that *"the residence is only evidence of the character of the marriage. It is not conclusive evidence"*.

In ***Perera vs. Aselin Nona (1958) - 60 NLR 73***, Basnayake CJ held that,

> *"If the marriage had been registered under the Kandyan Marriage Ordinance the register would have indicated whether the marriage was in binna or diga. Such an entry though not conclusive proof of the fact that the marriage was in binna or diga would be an indication of the kind of marriage the contracting parties had in mind and is binding as far as they and their respective representatives in interest are concerne.*

In ***Samarakoon vs. Samarakoon and another (2003) 2 SLR 321***, the Court of Appeal considered that the marriage certificate being one under the Marriage Registration Ordinance and when there is no indication as to whether the marriage was in fact a *diga* or *binna*, taking into consideration the necessary evidence held, 'there is no cogent evidence of a severance with the mulgedera so essential to a *diga* marriage"

As already mentioned, the Plaintiff - Appellant contends that succession to property of a party married in terms of the Marriage Registration Ordinance is necessarily to be determined by the nature of the marriage from subsequent conduct of the parties in order to decide on paternal inheritance as recognized in ***Perera vs. Asilin Nona (1960) NLR 73*** and ***Samarakoon vs. Samarakoon (2003) 2 SLR 321***. On this issue, firstly, the

Defendant-Respondent contends that, both the above cases, dealt with marriages prior to the enactment of the Kandyan Marriage and Divorce Act, No. 44 of 1952, and secondly, that there was no presumption of marriage in *diga* similar to Section 28(1) of the 1952 Act, prior to 1952.

It is correct to state that both the above cited cases, ***Perera vs. Aselin Nona*** and ***Samarakoon vs. Samarakoon and another (supra)***, dealt with marriages contracted prior to the enactment of the Kandyan Marriage and Divorce Act. However, as observed earlier, the entry in the register of marriages and in the register of divorces being the best evidence of the marriage contracted or dissolved by the parties and of the other facts stated therein, was introduced by Section 39 of Ordinance No. 3 of 1870 and retained in the Kandyan Marriage and Divorce Act. Therefore, the contention, that the law as it stood prior to 1952, did not have a presumption of a *diga* marriage similar to Section 28(1) of the 1952 Act, is incorrect.

Therefore, it is clear that the Supreme Court in decisions prior to the 1952 Act, applied the best evidence rule in recognition of the presumption under Section 39 of the Ordinance No. 3 of 1870, when the register is silent as to the nature of marriage and also applied in matters relating to the character of marriage arising under Section 9(1) of the Kandyan Law Ordinance.

The Counsel for the Defendant-Respondent has placed much reliance on the Court of Appeal Judgment in ***Lewis Singho Vs. Kusumawathie and Others (2003) 2 SLR 128,*** where the question of law to be decided was whether the deceased Plaintiffs mother, Enso Nona who married in *diga* was entitled to succeed to her father's premises in suit. Enso Nona's marriage certificate was issued under the Marriage Registration Ordinance. The Court considered that, the certificate of marriage of Enso Nona is one issued under the Marriage Registration Ordinance, where an entry with regard to the nature of marriage is absent.

In ***Lewis Singho Vs. Kusumawathie and Others (supra),*** the Court, prior to arriving at its decision considered the principle set out by Fredric Austin Hayley in his book on *"Treaties on the Laws and Customs of the Sinhalese"* at page 195, where it is stated that *"in the absence of an entry in the register specifying its nature, the marriage is presumed to be a diga one, until the contrary is proved".*

And the Court held,

> *"where a party who is governed by the Marriage and Divorce (Kandyan) Act contracts a marriage under the Marriage Registration Ordinance, in the absence of an entry in the certificate of marriage with regard to the nature of the marriage contracted the presumption recognized under Section 28(1) of the Marriage and Divorce (Kandyan) Act would be applicable and such a marriage would be presumed to have been one of Diga until the contrary is proved."*

It is important to note that in the said case the Court considered the presumption recognized under Section 28(1) of the said Act, with the available evidence led in the proceedings of the District Court, and observed that *'there was no evidence led to the contrary'*. Therefore, it is clear that in ***Lewis Singho Vs. Kusumawathie and Others (supra),*** the Court prior to arriving at the said decision was mindful to consider matters relating to law, in accord with the available evidence.

In the case at hand, the Court of Appeal was correct in its recognition of Section 28(1) of the 1952 Act, however, in the circumstances where the parties did not precisely state the type of marriage intended by them, the Court considered the mandatory provisions contained in Section 9(1) of the Kandyan Law Ordinance, without due consideration to the necessary evidence led in proceedings to determine the nature of the marriage, in deciding whether Sujatha Tillakaratne forfeited her rights to paternal inheritance. Therefore, since the register of marriage is not conclusive of the intention in which the marriage was celebrated, in terms of Section 28(1), necessary evidence of the marriage should be taken into consideration applying the best evidence rule to decide whether

the marriage was contracted in *diga* or in *binna*, and until such time, the marriage shall be presumed to have been contracted in *diga*, according to law.

It is the contention of the Defendant-Respondent that Sujatha Tillakaratne who married in *diga* was given a dowry by her father at marriage and was therefore not entitled to succeed to her father's estate. Therefore, the onus is on the Plaintiff-Appellant to rebut the Section 28(1) presumption and establish that the said Sujatha Tillakaratne contracted a marriage in *binna* and therefore, succeeded to her father's estate and was not disinherited.

Prior to consideration of evidence led in proceedings, I am mindful of the observations made by Windham J., in ***King vs. Peter Nonis (1947) - 49 NLR 16,*** where a case is brought within the equitable exceptions of section 92 of the Evidence Ordinance, the Court was of the view that, "*It certainly does not, and never did, mean that no other direct evidence of the fact in dispute could be tendered. Its meaning is rather that the best evidence must be given of which the nature of the case permits."*

Both parties at the hearing and in their written submissions have drawn attention to the evidence to be considered when deciding on the nature of the marriage.

The Plaintiff-Appellant supports her claim to the property in question on the basis that a *diga* married women could later re-acquire the rights of a *binna* marriage on the following grounds,

1. Sujatha Tillakaratne after her marriage had lived in the mulgedara.
2. After her marriage her brother and sisters have acquiesced that she was entitled to paternal inheritance.

The learned Trial Judge, did not evaluated the evidence led before him in consideration of Section 28(1) of the 1952 Act, on the question whether Sujatha Tillakaratne married in *diga* or in *binna* or whether she inherited an undivided 1/4th share in the corpus from her deceased father.

"Daughters, before marriage, or returning from a deega marriage, have an equal claim for maintenance from the shares of all their brothers --- that is to say, all the shares into which their parents' estate may have been divided." (***Sawers' Digest of Kandyan Law at page 4***)

A *diga* married women could also establish the re-acquisition of *binna* rights, if the siblings of the women acquiesced in their right and permits her to possess the share of the land for a long period of time.

The first ground as stated above, is supported on the basis that it is established by evidence that Sujatha Tillakaratne after marriage lived in the mulgedara. The Plaintiff-Appellant relies on the electoral register to prove that she lived in her father's house after marriage. This is the only available evidence to be considered on re-acquisition of *binna* rights. The intention of the parties that the marriage was in *diga* or in *binna* or the necessary evidence required to establish that the father had intended a *binna* connection at the time of the registration of the marriage is not borne out in evidence. The position that Sujatha Tillakaratne after her marriage lived in the mulgedara for a period of time may be suggestive of the fact that she may have had a close link with the mulgedara, even after the marriage. But is that alone sufficient to establish *binna* rights?

In ***Jayasinghe Vs. Kiribindu and Others (1997) 2 SLR 1 at page 66***, Dr. Amerasinghe J. observed that *"Kiribindu's case is that she did not forfeit her rights because she never left the mulgethara. As we have seen, residence is only evidence of the character of the marriage. It is not conclusive evidence".* Whilst agreeing with counsel that, *"none of the sources of Kandyan Law classify married women as those who lived in the mulgedara as opposed to those who left the mulgedara in referring their rights to the paternal inheritance"* emphasized the fact that *"a diga married women who remained in her father's house to render a most valuable and praiseworthy service, but that alone would not convert her diga marriage into a binna marriage".*

In ***Wickramasinghe vs. Robert Banda and others (2006) 1 SLR 246,*** the Supreme Court observed that *"the legal position in regards to the property rights of a married daughter therefore it is quite clear and even if one were to consider the rights of a daughter who had returned from her diga husband's house, according to Hayley, such women does not ordinarily recover any right to inherit whether she returns before or after her father's death. The only exception to this position where she would be able to inherit, is that if she marries again in binna, with the consent of her parents."*

With reference to the dowry, he received upon marring the said Sujatha Tillakaratne, the 2nd Plaintiff-Appellant, the husband of Sujatha Tillakaratne, has given evidence in the following manner,

ප්‍ර - දැන් තමාගේ පදිංචිය කොහේද?

පි - සුජාතා තිලකරත්නට දෑවැද්දට දීපු ගෙදර.

ප්‍ර - ඒ ගෙදර තියෙන්නේ කොහේද?

පි - වෙරලුපෙ තැපැල් කන්තෝරුව ඉදිරිපිට.

ප්‍ර - තමා විවාහවෙන අවස්ථාවේදී තමාට දෑවැද්දක් දුන්නාද?

පි - දෑවැද්ද කියලා මම බැලුවේ නැහැ. ඔප්පුවක් දුන්නා එයාගේ නමට ගේ ලියලා තිබෙනවා කියලා.

ප්‍ර - තමන්ට තමුන්ගේ භාර්යාවට භාර්යාවගේ පියා විවාහ වෙන අවස්ථාවේදී දුන්නා වූ දෑවැද්ද එයයි?

පි - මම දැක්කේ නැහැ ඔප්පුව. ඔප්පුවක් දුන්නා. එය තමයි කියලා සිතුවා.

ප්‍ර - තමා පදිංචි වෙලා ඉන්න එක ඔප්පුවෙන් දුන්නා කියලා දන්නවාද?

පි - දෑවැද්දට ඉස්සෙල්ලා ලියලා තිබුණ එකක්. ඒ ස්ථානයේ තමයි දැන් පදිංචි වෙලා ඉන්නේ.

පි - ඔව්.

ප්‍ර - විවාහයට පෙර ද ඔප්පුව ලියලා තිබෙන්නේ?

පි - ඔව්. මම සිතන්නේ එහෙමයි. ගෙවල් සීමාවක් ආවා. ඉන්පසු වැඩි ඒවා දරුවන්ට ලිව්වා.

The above evidence will lay back any doubt, that Sujatha Tillakaratne was given a house as dowry by her father and as such having left the mulgedara, would have established a strong claim to reacquire her *binna* rights.

The learned District Judge relied on case No. 5770/P, an uncontested Partition action, which held that the deceased Tillakaratne's four children were entitled to 1/12 share each to the corpus of the said action.

In paragraph 13 of the plaint the two sisters and the brother of Sujatha Tillakaratne denied any entitlement to Sujatha Tillakaratne when they stated that they were entitled to 1/3rd of the corpus to be partitioned. However, the learned Trial Judge decreed that the deceased Sujatha Tillakaratne's daughter Gayani Balasuriya, sisters and brother were entitled to 1/12 share each.

It is observed that the Partition Case No. 5770/P was instituted in 12/10/1983 and the Judgment was entered on 25/09/1991. The Defendant-Respondents were not parties to the said action. The decree was entered without a contest. The learned Trial Judge in that case did not analyze or investigate the devolution of title as required by law. It is also to be noted that the Defendant-Respondents title Deed No. 275 was attested on 14/12/1981.

In the circumstances, relying exclusively on the devolution of title decreed in the said case, as evidence to decide on the waiver or forfeiture of her rights, in my view, cannot be considered as conclusive evidence.

Accordingly, I have no hesitation to hold that the said Sujatha Tillakaratne who is presumed to have married in *diga* has not rebutted the presumption created under Section 28(1) of the 1952 Act, and therefore her marriage is presumed to be in diga.

Therefore, the Court of Appeal was correct in relying on the presumption recognized under Section 28(1) of the 1952 Act, to hold that 'Sujatha Tillakaratne who married under the General Marriage Ordinance was married in *diga* and thereby, forfeited her rights to paternal inheritance'.

Accordingly, the question of law set out in paragraph 9(ii) is answered in the negative.

The question as set out in paragraph 9(v), is hinged to the question of law raised in paragraph 9(ii) above, which I have already answered.

Applying the best evidence rule, to the evidence led in proceedings, I have cited with approval the Judgment in ***Lewis Singho vs. Kusumawathi and another (2003) 2 SLR 128***, *inter alia*, on matters to be decided when a Kandyan women marries under the Marriage Registration Ordinance and the presumption it would create in terms of Section 28(1) of the 1952 Act, that the marriage is in *diga* until the contrary is proved. Accordingly, the question of law set out in paragraph 9(vii) is also decided in favor of the Defendant-Respondent.

Accordingly, this appeal is dismissed. I order no costs in the circumstances.

Judge of the Supreme Court

Murdu Fernando PC. J.
I agree

Judge of the Supreme Court

Arjuna Obeyesekere J.
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

Ulviti Gamage Dhanapala,
No.32, Galhena Road
Gangodawila,
Nugegoda.

Plaintiff

SC Appeal 2/2017
SC /HC/ CALA. No. 492/2014
Civil Appellate High Court Case No.
WP/HCCA/COL/134/2006 (F)
D.C. Colombo Case No.11619/MR

Vs-

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

Defendant

AND THEN

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

Defendant -Appellant

Vs

Ulviti Gamage Dhanapala,

No.32, Galhena Road

Gangodawila,

Nugegoda.

Plaintiff-Respondent

AND NOW

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

Defendant-Appellant-

Petitioner-Appellant

Vs

Ulviti Gamage Dhanapala,

No.32, Galhena Road

Gangodawila,

Nugegoda.

Plaintiff-Respondent-

Respondent-Respondent

Before: Sisira J. de Abrew J
Murdu N.B. Fernando PC J &
A.L.S. Gooneratne J

Counsel: Anusha Jayatilake Senior State Counsel for the Defendant-Appellant-Petitioner-Appellant

Respondent-Appellants

Gamini Prematilake with Udaya Bandara for the Plaintiff-Respondent-

Respondent-Respondent

Argued on : 10.3.2021

Decided on: 26.3.2021

Sisira J. de Abrew, J

In this case the judgment was given by the learned District Judge in favour the Plaintiff-Respondent-Respondent-Respondent (hereinafter referred to as the Plaintiff-Respondent). The judgment was delivered in open court on 28.4.2006. Being aggrieved by the said judgment of the learned District Judge, the Defendant-Appellant-Petitioner-Appellant (hereinafter referred to as the Defendant-Appellant) filed Notice of Appeal and Petition of Appeal in the District Court within time. At the hearing of the appeal before the Civil Appellate High Court, the Plaintiff-Respondent raised an objection that the Defendant-Appellant had not sent Notice of Appeal to the Plaintiff-Respondent or to the Registered Attorney-at-Law of the Plaintiff-Respondent in terms of Section 755(2) (b) of the Civil Procedure Code and moved to dismiss the appeal. Section 755(2) (b) of the Civil Procedure Code reads as follows.

> *The notice of appeal shall be accompanied by -*
>
> > *(b) proof of service, on the respondent or on his registered attorney, of a copy of the notice of appeal, in the form of a written acknowledgment of the receipt of such notice or the registered postal receipt in proof of such service.*

The learned Judges of the Civil Appellate High Court by their judgment dated 22.8.2014, upheld the objection and dismissed the appeal of the Defendant-Appellant. Being aggrieved by the said judgment of the Civil Appellate High Court, the Defendant-Appellant has appealed to this court. This court by its order dated 10.1.2017, granted leave to appeal on questions of law set out in paragraphs 14(a), (b),(c) and (d) of the Petition of Appeal dated 2.10.2014 which are set out below.

1. Have their Lordships of the Civil Appellate High Court in making the order failed to take into consideration the provisions contained in section 759 of the Civil Procedure Code?

2. Have their Lordships of the Civil Appellate High Court failed to consider that no prejudice had been caused to the Plaintiff by serving the notice of appeal to the former Registered Attorney?

3. Have their Lordships of the Civil Appellate High Court failed to consider the fact that the notice of appeal had been filed by the Defendant within 14 days from the date of judgment?

4. Have their Lordships of the Civil Appellate High Court, having concluded that no prejudice had been caused to Plaintiff-Respondent, unjustly dismissed the Appeal of the Defendant-Appellant?

In this case the former Registered Attorney-at-Law of the Plaintiff-Respondent in the District Court was Mrs. Gowri Sangari Thavarasa. She revoked her proxy on 22.7.1996. Pushpa Nanayakkara Attorney-at-Law filed new proxy on 24.7.1996. The judgment in the District Court was delivered on 28.4.2006. The learned Senior State Counsel admitted at the hearing before us that the Defendant-Appellant, by mistake, had sent the Notice of Appeal to the previous Registered Attorney-at-Law

of the Plaintiff-Respondent Mrs. Gowri Sangari Thavarasa. The learned Senior State Counsel however contended that no material prejudice has been caused to the Plaintiff-Respondent since it was within the knowledge of the Registered Attorney-at-Law of the Plaintiff-Respondent (Pushpa Nanayakkara) that a Petition of Appeal had been filed in the District Court. She therefore contended that under Section 759(2) of the Civil Procedure Code, the Petition of Appeal of the Defendant-Appellant should have been accepted by the Civil Appellate High Court and should have been proceeded to hear the main appeal. I now advert to this contention. Section 759(2) of the Civil Procedure Code reads as follows.

> *In the case of any mistake, omission or defect on the part of any appellant in complying with the provisions of the foregoing sections, the Court of Appeal may, if it should be of opinion that the respondent has not been materially prejudiced, grant relief on such terms as it may deem just.*

It is necessary to consider whether the Plaintiff-Respondent has been materially prejudiced by the mistake committed by the Defendant-Appellant (sending the Notice of Appeal to the previous Registered Attorney-at-Law of the Plaintiff-Respondent). It has to be noted here that after the judgment of the District Court was delivered in open court on 28.4.2006, the case was called in open court on 12.6.2006 in order to correct mistakes in the judgment. By this time the Petition of Appeal had been filed in the District Court. On 12.6.2006, the Registered Attorney-at-Law of the Plaintiff-Respondent was present in open court when the case was called and the learned District Judge, after correcting mistakes, made an order to send the case record to the Court of Appeal. This is evident by journal entry dated 12.6.2006. Thus when the learned District Judge made the above order, it was within the knowledge of the Registered Attorney-at-Law of the Plaintiff-Respondent (Pushpa Nanayakkara) that a Petition of Appeal had been filed. Thus,

can it be said that failure on the part of the Defendant-Appellant to send notice of appeal to the Registered Attorney-at-Law of the Plaintiff-Respondent has caused material prejudice to the Plaintiff-Respondent? Learned counsel for the Plaintiff-Respondent relied on the judgment of the Court of Appeal in the case of Sumanasekera Vs Yapa [2006] 3 SLR 183 at page 187 it was held as follows:

> *'The authorities make it mandatory that the Notice and Petition of Appeal have to be signed by the Registered Attorney, and actual notice sent to the registered Attorney, under section 755(2)(b). However the Appellant has not acted in conformity with section 755(2)(b) as the Actual Notice was sent to the counsel for the respondent and not on the Registered Attorney-at-Law. The Petitioner has not shown any good and sufficient ground in not complying with the provisions of section 755(2)(b) of the Civil Procedure Code, and as the Respondent has been materially prejudiced by such noncompliance, the Petitioner is not entitled to relief under section 759 of the Code.'*

But the Defendant-Appellant in the present case has admitted his mistake and took up the position that notice of appeal was sent to the previous Registered Attorney-at-Law of the Plaintiff-Respondent by mistake; and that it was within the knowledge of the Registered Attorney-at-Law of the Plaintiff-Respondent (Pushpa Nanayakkara) that a Petition of Appeal had been filed

In the case of Martin Vs Suduhamy [1991] 2 SLR279 at page 286 this court (His Lordship Justice Fernando) dealing with Section 759(2) of the Civil Procedure Code made the following observation.

> *"If the Court of Appeal is of opinion that the respondent has not been materially prejudiced, by non-compliance with relevant provisions, it has jurisdiction to grant relief. In the present case, the Court of Appeal was*

clearly in error in holding that "the very continuance of litigation would itself amount to material prejudice": if that be correct, that would be true of every case (including Sameen v. Abeyewickrema 64 NLR553) in which relief is sought under section 759(2), and every application for relief would have to be refused on that ground. Such an interpretation must be resisted, unless compelled by clear words. What is contemplated is prejudice caused by or in consequence of the non-compliance."

At page 287 His Lordship Justice Fernando further made the following observation.

"It then becomes necessary to consider whether the Court of Appeal ought to have exercised its discretion to grant relief. While relief will more readily be granted if the non-compliance is trivial, or where an excuse or explanation is offered, I am in respectful agreement with Lord Chancellor in Sameen v. Abeyewickrema that relief can be granted even in respect of total or substantial non-compliance, and even if no excuse is forthcoming. .... The discretion under section 759(3) is a judicial discretion; it was incumbent on the Appellant to place the necessary material before the Court and to invite the Court to exercise that discretion."

In the case of Nanayakkara Vs Warnakulasuriya [1993] 2 SLR 289 this court at page 290 held that 'the power of the Court to grant relief under s. 759 (2) of the Code is wide and discretionary and is subject to such terms as the Court may deem just. Relief may be granted even if no excuse for non-compliance is forthcoming. However, relief cannot be granted if the Court is of the opinion that the respondent has been materially prejudiced in which event the appeal has to be dismissed.'

The learned Judges of the Civil Appellate High Court have not considered Section 759(2) of the Civil Procedure Code.

The learned Judges of the Civil Appellate High Court have observed that there was no opportunity for the Plaintiff-Respondent to know that an appeal had been filed since the Plaintiff-Respondent or his Registered Attorney-at-Law had not received notice of appeal. Is this observation correct? The Registered Attorney-at-Law of the Plaintiff-Respondent who was present in court on 12.6.2006 should be aware that an appeal had been filed since the learned District Judge on 12.6.2006, made an order to send the case record to the Court of Appeal. Therefore, the above observation made by the learned Judges of the Civil Appellate High Court is not correct. Considering all the above matters, I hold that the noncompliance of Section 755(2)(b) of the Civil Procedure Code in the present case is trivial and it has not caused material prejudice to the Plaintiff-Respondent. In my view the learned Judges of the Civil Appellate High Court should have overruled the objection of the Plaintiff-Respondent and decided to hear the appeal of the Defendant-Appellant on its merit. Considering all the above matters, I hold that the learned Judges of the Civil Appellate High Court were in error when they dismissed the Petition of Appeal of the Defendant-Appellant. For the above reasons, I set aside the judgment of the learned Judges of the Civil Appellate High Court dated 22.8.2014 and direct them to hear the appeal of the Defendant-Appellant on its merit.

I would like to state here that this judgment is not a licence for appellants not to comply with Section 755(2)(b) of the Civil Procedure Code. Appellants should comply with Section 755(2)(b) of the Civil Procedure Code. But in a situation where the Appellant has failed to comply with Section 755(2)(b) of the Civil Procedure Code, the Appellate Court has, under Section 759(2) of the Civil

Procedure Code, the power to use its discretion to accept petition of appeal if no material prejudice has been caused to the Respondent as a result of any mistake, omission or defect on the part of the Appellant. An application to use the discretion of the Appellate Court under Section 759(2) of the Civil Procedure Code will be separately considered on the facts of each case.

In view of the conclusion reached above, I answer the 1st and 2nd questions of law in the affirmative. The 3rd question of law does not arise for consideration. I answer the 4th question of law as follows. The learned Judges of the Civil Appellate High Court were in error when they dismissed the appeal of the Defendant-Appellant.

Appeal allowed.

Judge of the Supreme Court.

Murdu N.B. Fernando PC J

I agree.

Judge of the Supreme Court.

A.L.S.Gooneratne J

I agree.

Judge of the Supreme Court.

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

1. Maligaspe Koralalage Arwin Peter Nanayakkara, (Deceased)

1A. Kariyawasam Hegoda Gamage Uma,
Both of
Panagamuwa,
Wanchawala.
Plaintiff

SC APPEAL NO: SC/APPEAL/2/2019
SC LA NO: SC/SPL/LA/193/2017
CA NO: CA/1391/99 (F)
DC GALLE NO: 9556/P

Vs.

1. Epage Dayananda,
2. Epage Jeedrick, (Deceased)

2A. Mandalawattage Alisnona,

3. Dolamulla Kankanamge Selenchihamy, (Deceased)

3A. Maligaspe Koralage Bartin Nanayakkara,

4. M.K. Bartin Nanayakkara,
Pinnaketiyawatta, Panagamuwa,
Wanchawala.

5. Thomas Udugampala,
   Panagamuwa,
   Wanchawala.
6. S.P. Gunawardena,
   Panagamuwa, Kalahe,
   Wanchawala.
7. M.K.A. Nanayakkara,
   Pinnaketiyawatta,
   Panagamuwa, Wanchawala.
8. D.L. Karunawathie,
   Panagamuwa,
   Wanchawala.
   Presently at,
   No. 39/3, Morris Road,
   Milidduwa, Galle.
   Defendants

AND BETWEEN

4. M.K. Bartin Nanayakkara,
   (Deceased)
   Pinnaketiyawatta, Panagamuwa,
   Wanchawala.

4A. Maligaspe Koralage Leelani
   Priyanthi,
   Kalahe, Wanchawala.

5. Thomas Udugampala,
   Panagamuwa,
   Wanchawala.

7. M.K.A. Nanayakkara,
Pinnaketiyawatta, Panagamuwa,
Wanchawala.
4th, 5th and 7th Defendant-Appellants

Vs.

1A. Kariyawasam Hegoda Gamage Uma,
Panagamuwa, Wanchawala.
Plaintiff-Respondent

1. Epage Dayananda,
2A. Mandalawattage Alisnona,
(Deceased)
2B. Epage Premadasa,
Panagamuwa, Kalahe,
Wanchawala.
3A. Maligaspe Koralage Bartin Nanayakkara,
6. S.P. Gunawardena, (Deceased)
Panagamuwa, Kalahe,
Wanchawala.
6A. Indika Panditha Gunawardena,
6B. Anushka Kumari Panditha Gunawardena,
Panagamuwa, Kalahe,
Wanchawala.

8. D.L. Karunawathie,
Panagamuwa,
Wanchawala.
Presently at,
No. 39/3, Morris Road,
Milidduwa, Galle.
Defendant-Respondents

AND NOW BETWEEN

4A. Maligaspe Koralage Leelani
Priyanthi,
Kalahe,
Wanchawala.
Defendant-Appellant-Appellant

Vs.

1A. Kariyawasam Hegoda Gamage
Uma,
Panagamuwa,
Wanchawala.
Plaintiff- Respondent-Respondent

1. Epage Dayananda,
2B. Epage Premadasa,
Panagamuwa, Kalahe,
Wanchawala.

3A. Maligaspe Koralage Bartin
Nanayakkara,
6A. Indika Panditha Gunawardena,
6B. Anushka Kumari Panditha
Gunawardena,
Panagamuwa,
Wanchawala.
8. D.L. Karunawathie,
Panagamuwa,
Wanchawala.
Presently at,
No. 39/3, Morris Road,
Milidduwa, Galle.
Defendant-Respondent-
Respondents

5. Thomas Udugampala,
Panagamuwa, Wanchawala.
7. M.K.A. Nanayakkara,
Pinnaketiyawatta,
Panagamuwa,
Wanchawala.
5th and 7th Defendant-Appellant-
Respondents

Before: S. Thurairaja, P.C., J.
Achala Wengappuli, J.
Mahinda Samayawardhena, J.

Counsel: Mahinda Nanayakkara with Aruna Jayathilaka for the 4A Defendant-Appellant-Appellant.
Priyantha Alagiyawanna with Isuru Weerasooriya for the Plaintiff-Respondent-Respondent.
Dilip Obeysekara for the 5th Defendant-Appellant-Respondent.

Argued on : 20.07.2021

Written submissions:

by the 4A Defendant-Appellant-Petitioner on 29.01.2019.

by the Plaintiff-Respondent-Respondent on 23.09.2019.

Decided on: 15.10.2021

Mahinda Samayawardhena, J.

The plaintiff filed this action in the District Court of Galle seeking to partition two contiguous allotments of land known as *Pinnaketiyawatta* and *Godaihalawatta* as one unit. The 4th, 5th and 7th defendants sought the dismissal of the partition action. After trial, the District Court entered judgment as prayed for by the plaintiff. The appeal filed by the 4th, 5th and 7th defendants against the judgment of the District Court was dismissed by the Court of Appeal. This appeal by the 4th defendant-appellant is from the judgment of the Court of Appeal.

This Court granted leave to appeal to the 4th defendant on the following question of law:

Has the Court of Appeal erred in law by not coming to a finding that the District Court of Galle has failed to investigate the title in terms of Partition Law No. 21 of 1977 in particular not considering the deeds marked 4V1 to 4V10?

As stated above, the 4th defendant does not seek to partition the land. He seeks the dismissal of the action. Hence his position before this Court that the District Court did not take into consideration his deeds marked 4VI to 4V10 in investigating the title is irreconcilable with the relief sought.

The position of the 4th defendant before the District Court as crystallised in the issues was not clear at all. His position before this Court is no better.

The Preliminary Plan depicted five lots marked A to E as the corpus. By way of issues 6 to 9, the 4th defendant took up the position that lots A to C in the Preliminary Plan is the land known as *Pinkatiyawatte Dakunukebella* alias *Pinketiyawatte Kosgahakebella*, lot D is *Godaihalawatta*, and lot E is part of *Welikandewatte*. It was not the position of the 4th defendant before the District Court that lots A to D comprise the land to be partitioned. Nor did the 4th defendant state that lots A to D are parts of different lands unrelated to the land to be partitioned. The 4th defendant did not take up a clear position in respect of these lots.

By way of issue 10, the 4th defendant first states that lots A to C are part of the corpus in another partition action No. P/9211 pending before the same District Court and therefore these lots

cannot be part of the corpus in the instant action. Thereafter, in the same breath, by way of issues 11 to 19, he unfolds a pedigree different from the plaintiff's in respect of lots A to C. These are contradictory positions.

By way of issues 20 to 23, the 4th defendant reveals another pedigree different from the plaintiff's for lot D.

Other issues raised pertain to lot E to which the 4th defendant has no claim.

By the last two issues 27 and 28, the 4th defendant seeks dismissal of the action in the event the aforesaid issues of the 4th defendant are answered in his favour.

Despite the 4th defendant seeking dismissal of the action, let me now consider whether the 4th defendant proved his pedigree in respect of lots A to D.

As seen from the proceedings dated 10.06.1997, it is correct that at the trial the 4th defendant commenced his evidence in chief and purported to mark the deeds 4V1 to 4V3 for the purpose of record although these deeds were not before Court. The trial was postponed in order for the 4th defendant to bring the deeds and continue with his evidence in chief. However the 4th defendant did not resume evidence on the next date and the 5th defendant gave evidence instead. It is through the 5th defendant that the deeds 4V1 to 4V10 were marked. In cross examination, the 5th defendant categorically stated that he has no right to lots A to D and his only claim is to lot E which is a minute portion of about one perch. The 4th defendant's purpose in marking the

deeds 4V1 to 4V10 through the 5th defendant is unclear as the 4th defendant did not specifically seek undivided rights to the land. The 5th defendant concluded his evidence in chief seeking dismissal of the plaintiff's action.

In the aforementioned circumstances, the learned District Judge cannot be found fault with when he stated in the judgment that the 4th defendant did not establish his rights to the land to be partitioned.

During the course of the argument before this Court, learned counsel for the 4th defendant was asked whether deeds 4V1 to 4V10 are relevant to the land to be partitioned but he did not give a straightforward answer. When asked what share of the land the 4th defendant claims on these deeds if they are relevant, there was no answer at all.

Learned counsel attempted to make submissions on the failure to identify the corpus on the strength of these deeds, stating that the plaintiff filed this action to partition several lands in violation of the partition law. However, as learned counsel for the plaintiff rightly pointed out, the Supreme Court did not grant leave to appeal on this question of law.

The only submission of learned counsel for the 4th defendant is that the plaintiff's action shall be dismissed as there was no proper investigation of title by the District Judge. He cites a series of authorities to emphasise that it is the bounden duty of the District Judge to independently investigate the title of each party irrespective of what the parties or their attorneys submit to Court.

It is true that under section 25(1) of the Partition Law, No. 21 of 1977, a special duty is cast upon the District Judge to investigate the title of each party to the land to be partitioned. But this does not mean that the District Judge shall go after the parties pleading with them for help in investigating their title to the land, more so when the parties are represented by attorneys.

An attorney is duty-bound to conduct the case so as to serve the best interests of his client. When he conducts a trial, he has a strategy in place, and rightly so. He raises points of contest, marshals evidence, cross examines witnesses etc. according to his plan. It is not proper for the Judge to sabotage this plan and forcibly take control of the trial in the guise of investigating the title to the land. Such conduct on the part of the Judge would violate the most rudimentary norms of justice. The role of a Judge hearing a partition case is no exception to this fundamental norm.

In *Thilagaratnam v. Athpuna [1996] 2 Sri LR 66 at 68* Anandacoomaraswamy J. stated:

> *The Learned Counsel for the Appellant cited several authorities Goonaratne v. Bishop of Colombo 32 NLR 337, Peris v. Perera 1 NLR 362, Neelakutty v. Alvar 20 NLR 372, Cooray v. Wijesuriya 62 NLR 158, Juliana Hamine v. Don Thomas 59 NLR 546 at 549 and Sheefa v. Colombo Municipal Council 36 NLR 38 and stated that it is the duty of the Court to examine and investigate title in a partition action, because the judgement is a judgement in rem. We are not unmindful of these authorities and the proposition*

> *that it is the duty of the Court to investigate title in a partition action, but the Court can do so only within the limits of pleadings, admissions, points of contest, evidence both documentary and oral. Court cannot go on a voyage of discovery tracing the title and finding the shares in the corpus for them, otherwise parties will tender their pleadings and expect the Court to do their work and their Attorneys-at-Law's work for them to get title to those shares in the corpus.*

A judgment entered in a partition action after following a long-drawn-out cumbersome procedure shall not be set aside with a stroke of the pen and retrial ordered causing enormous difficulties, under the popular banner "failure to investigate title", unless there is good cause for doing so.

In *Francis Wanigasekera v. Pathirana [1997] 3 Sri LR 231 at 234-235*, Weerasekera J. impressed upon the undesirability of the literal application of section 25(1) of the Partition Law:

> *Learned Counsel also urged that the learned District Judge failed to act in terms of section 25 of the Partition Act which requires Court to examine and hear and receive evidence of the title of each party as decided in the case of Sirimalie v. Punchi Ukku 60 NLR 448.*
>
> *I do agree that section 25 of the Partition Act requires the Court to examine and hear and receive evidence of the title and interest of each party. But it must be remembered that the literal application of the provisions of this section would*

> *lead to the most disturbing, hilarious and absurd result and no partition case could ever be finally concluded.*

John Singho v. Pedris Hamy (1947) 48 NLR 345 is a partition case where the dispute presented to the District Judge was whether Andiris Naide owned the land or whether Aberan owned the land. The District Judge found on a balance of evidence that Andiris Naide was the original owner. Having come to that finding next he took upon himself to decide whether some of the successors in title of Aberan had not acquired title by prescriptive possession against all the other parties. Despite this being a partition action, the Supreme Court decided that the District Judge overstepped his boundaries. Wijeyewardene J. held at 346:

> *This appears to have been a self-imposed task, considering that the parties had told him that the dispute between them was whether Andiris Naide or Aberan was the original owner. It cannot be said that the plaintiff has not been prejudiced by the action of the District Judge in deciding the question of prescriptive possession in these circumstances. A Judge may find it frequently very convenient to state, in the form of issues, the matters in dispute between the parties in a partition action. After satisfying himself that no person other than the parties to the action has interests in the property, he will in such a case decide the issues framed by him and enter a decree for partition or sale according to his finding on those issues. He should not in such circumstances consider, without giving due notice to the parties, any matters in dispute that may appear to him*

> *to arise between them in the course of the proceedings. The position, of course, will be different where the Judge does not set down, in the form of issues, the matters in dispute in a partition action. In such a case the parties will be presumed to have asked the Court to adjudicate on all the matters in dispute as disclosed by the pleadings.*

I do not say that a partition trial shall be conducted in the same manner as any other *inter partes* civil trial. Notwithstanding the system of justice which prevails in our country is adversarial as opposed to inquisitorial, the role of the Judge in a partition case is different and unique. The responsibility of the Judge in a partition case is much greater than in an ordinary civil trial, particularly because collusive actions deprive the rights of the true owners simply because partition actions are actions *in rem*. Collusion can take place not only when right parties are not before Court but also when they are before Court. The case of *Sirimalie v. Punchi Ukku (1958) 60 NLR 448* cited before Weerasekera J. in *Francis Wanigasekera's* case *(supra)* provides a typical example.

In *Sirimalie's* case, the plaintiff in her plaint set apart shares of the land to be partitioned to the 8th, 9th and 10th defendant-petitioners. The trial was taken up when the plaintiff and the 7th and 9th defendants were present. The only parties represented by attorneys at the trial or at any previous stage were the plaintiff and the 1st, 2nd and 3rd defendants. At the commencement of the trial, the Court was informed that there was no contest. When the evidence of the plaintiff's husband was led, he deviated from what had been pleaded in the plaint

and took up a new position which deprived the 8th, 9th and 10th defendant-petitioners of any share in the land.

The Supreme Court disapproved of the unsatisfactory manner in which the trial was conducted and, having stressed the duty of the District Judge in hearing a partition case, set aside the judgment and directed that the trial be commenced afresh. At page 450, Sansoni J. (later C.J.) stated:

> *I think the more serious objection to the manner in which this trial was conducted is the fact that the 9th defendant, who was present in Court, seems to have been totally ignored. She appeared even before summons was served on her. It is true that she filed no statement, but her presence at the trial surely indicated that she had come to watch her interests. She does not seem to have been asked whether she accepted the new position taken up by parties who had pleaded differently, nor whether she wished to give evidence, or even to cross-examine the plaintiff's husband whose evidence was directly against her interests.*

Obviously, the facts of *Sirimalie's* case cried aloud for the intervention of the Supreme Court to prevent what would otherwise have been a miscarriage of justice.

Conversely, the facts of the instant action are totally different. The 4th defendant was fully represented by an attorney throughout the trial and the District Court answered the issues with the available evidence.

If the 4th defendant later thinks his deeds marked 4V1 to 4V10 are relevant to the land to be partitioned, he can make an application before the District Court to secure his undivided rights from the share left unallotted by the District Judge in the judgment.

I answer the question of law in the negative and dismiss the appeal of the 4th defendant but without costs.

Judge of the Supreme Court

S. Thurairaja, P.C., J.
I agree.

Judge of the Supreme Court

Achala Wengappuli, J.
I agree.

Judge of the Supreme Court

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

SC Appeal 06/2014

SC/HCCA/LA No: 136/12

SP/HCCA/GA/ 0115/2004/F

DC Elpitiya Case No. 28/L

In the matter of an Application for leave to Appeal under and in terms of section 5C of the High Court of Provinces (Special Provisions) Act, No.19 of 1990 as amended by Act No. 54 of 2006

Jayasinghe Pathman

Godamuna Road, Hittahatiya,

Indipalegoda, Pitigagala

Plaintiff

Vs.

Korale Kandanamge Somapala

Naranowita, Porowagama

Defendant

Between

Korale Kandanamge Somapala

Naranowita, Porowagama

Defendant-Appellent

Vs.

Jayasinghe Pathman

Godamuna Road, Hittahatiya,

Indipalegoda, Pitigagala

Plaintiff-Respondent

Now

Jayasinghe Pathman

Godamuna Road, Hittahatiya,

Indipalegoda, Pitigagala

Plaintiff-Respondent- Petitioner

Vs.

Korale Kandanamge Somapala

Naranowita, Porowagama

Defendant-Appellant-Respondent

And Now

Jayasinghe Pathman

Godamuna Road, Hittahatiya,

Indipalegoda, Pitigagala

Plaintiff-Respondent-Petitioner

Vs.

Korale Kandanamge Somapala(deceased)

Naranowita, Porowagama

Defendant-Appellant Respondent

1. Korale Kankanamage Lal Pathmasiri
   Naranowita, Porowagama
2. Petikiri Koralalage Pemawathi
   Naranowita, Porowagama

(Substituted)Defendant-Appellant-Respondents

Before: B.P Aluwihare, PC, J.
L.T.B Dehideniya, J.
S. Thurairaja, PC, J.

Counsels: Lakshman Perera, PC, with Ms. Anjali Amarasinghe for the Plaintiff- Respondent-Appellant
Rohan Sahabandu, PC, with Ms. Hasitha Amarasinghe for Substituted Defendant-Appellant – Respondents

Argued on: 13.07.2020

Decided on:19.11.2021

L.T.B. Dehideniya, J.

Plaintiff – Respondent – Appellant (hereinafter sometime referred to as the Appellant) instituted an action by plaint dated 10th September 2001 seeking declaration of title and ejectment of the Defendant- Appellant – Respondent (hereinafter sometimes referred to as the Respondent) from the land called Kahamiyatota Addara Owita, morefully described in the schedule to the Plaint. The Appellant contested that the Respondent was in unlawful and forcible occupation in the said land. The Appellant produced proof of his title to the land in the form of the final decree in the District Court Balapitiya NP/3085 of 1979, whereby Korala Kankanamge Rosalin (Appellant's Mother) got title to lot 5 in plan No.1946/A. Rosalin thereafter transferred title to the Appellant by Deed No.5103. Respondent denied the rights of the Appellant and claimed prescriptive rights by long, uninterrupted and adverse possession over ten years. Respondent's position was that he is not a licensee, and that he had been living in the said land with his parents and even after he got married, he lived in the premises with his wife and specifically stated that he has been living in the premises for over 70 years. The District Court of Elpitiya delivered the judgement dated 09.12.2004 in favour of the Appellant holding that the action of Appellant being one of *rei vindicatio,* the Appellant having establish the paper title to the land, it is necessary to assess the rights claimed by the Respondent. Being dissatisfied by the said judgement the Respondent tendered an appeal there from to the High Court of Civil Appeal. Upon hearing the parties, the High Court of Civil Appeal delivered the judgement dated 28.02.2012 in favour of the Respondent, set aside the Judgement of District Court of Elpitiya and dismissed the action of the Appellant holding that the Respondent has proved the adverse possession to the land and established prescriptive rights against the Appellant. It is from the aforesaid judgement that this appeal is preferred.

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

1) Has the High Court of Civil Appeal failed to consider that once paper title became undisputed that the right to possess is presumed?
2) Has the High Court of Civil Appeal failed to distinguish between occupation and possession of the Defendant- Respondent?
3) Has the High Court of Civil Appeal misconstrued the principle laid down in [2002] 1 Sri L.R 148?

The Appellant's case is based on the ground that the Respondent was in occupation of the land in suit which the Appellant has the paper title, with the leave and licence given by the Appellant. In the original action, firstly the Learned District Judge examined the Appellant's title to the land and decided in respect of the evidence tendered by the parties that the Appellant has established the paper title to the land in suit. Appellant's mother 'Rosalin' acquired the title to the land on the final decree of the partition case in the District Court Balapitiya NP/3085 of 1979 marked as පැ.1. Accordingly, the said title rights have been conveyed to the Plaintiff by Deed No.5103 marked as පැ.2. Further, when the cross-examination was conducted Appellant's title to the land was admitted by the Respondent as well.

As per the aforesaid context, it is a settled law that in a *rei vindicatio* action, the defendant has no burden to prove anything until the plaintiff proves his title to the land. Once the paper title has proven, burden shifts to the defendant to prove that the defendant has obtain a title adverse and independent to the paper title of the plaintiff. The above legal principle has been discussed and accepted in a range of case law. As per the submissions of the Appellant, the learned High Court Judge has failed to consider the legal principal set out in ***Leisa v. Simon*** [2002] 1 Sri L.R 148

> ***Leisa v Simon*** [2002] 1 Sri L.R 148 at p. 151 per Wigneswaran J.
>
> *"Once the paper title became undisputed the burden shifted to the defendants to show that they had independent rights in the form of prescription as claimed by them. In fact,*

the following dictum of Gratian, J. in ***Pathirana v. Jayasundera*** *[58 NLR 169] at 177 became applicable"*

at p. 153

"Their possession was presumed on proving paper title. The burden was cast on the defendants to prove that by virtue of an adverse possession they had obtained a title adverse to and independent of the paper title of the plaintiffs"

A similar view was expressed in the case of ***D.A Wanigaratne Vs Juwanis Appuhamy*** 65 NLR 167

D.A Wanigaratne Vs Juwanis Appuhamy 65 NLR 167 at p.168 per Herat J.

"It has been laid down by this court that in an action rei vindicatio the plaintiff should set out his title on the basis on which he claims a declaration of title to the land and must, in Court prove that title against the Defendant in the action. The Defendant in a rei vindicatio action need not prove anything, still less his own title. The Plaintiff cannot ask for a declaration of title in his favour merely on the strength that the Defendant's title is poor or not established. The plaintiff must prove and establish his title."

In light of the above legal principle, when considering the legal context of the present application, it is clear that the Learned District Judge correctly decided that the Appellant has established the paper title to the land. Further, when examining the Respondent's evidence it appears that the Respondent has not claimed any title rights in the District Court Balapitiya partition action No. 3085, nor had he made any claim before the surveyor. The said evidence clearly demonstrates that the Respondent has accepted the Appellant's title and has failed to adduce any clear evidence in contending Appellant's title to the land.

The Respondent challenges the Appellant's paper title to the land and claimed prescriptive rights against the Appellant by long, uninterrupted and adverse possession. The Respondent's position is that as the Learned District Judge obsereved, the Appellant has failed to prove that the Respondent has reside in the said premises with the leave and license of the Appellant, in itself proves the uninterrupted, adverse possession. The Respondent contests that he had been living there with his parents, and even after he got married, he lived in the premises, with his wife and specifically stated that, he had been living in the premises for over 70 years and the premises has never been occupied by the Appellant and claimed all the improvements. The Respondent gave evidence himself and also produced the certified extracts of the electoral registers for the years from 1978.

The present law governing the term of prescription for immovable property is contained in Section 3 of the Prescription Ordinance No.22 of 1871. This provision declares the fundamental requirements of undisturbed, uninterrupted and adverse possession that must be met, where a party invokes the provision of Section 3 in order to defeat the title rights of the owner of the property.

Section 3

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

or other immovable property, or to prevent encroachment or usurpation thereof, or to establish his claim in any other manner to such land or other property, proof of such undisturbed and uninterrupted possession as herein before explained, by such plaintiff or intervenient, or by those under whom he claims, shall entitle such plaintiff or intervenient to a decree in his favour with costs.."

Accordingly, when considering whether the Respondent has proved the prescriptive rights against the paper title of the Appellant, the Respondent contends that when the Learned District Judge decided that the Respondent was not in possession as a licensee, that itself proves Respondent's adverse possession. The Learned High Court Judge agreed with the contention of the Respondent and held the same in the High Court Judgement dated 28.02.2012 marked as X-1. Nature of the essential qualification of adverse possession has been discussed in the case law jurisprudence. Thus, in the cases of ***Maduanwala Vs Ekneligoda*** (3 NLR 213) and ***Thillekaratne Vs Bastian*** (21 NLR 12) it has been held that for the purpose of these prescription cases the word " adverse " must, in its application to any particular case, be interpreted as occupation of land to which another person has title with the intention of possessing it as one's own.

Maduwanwala Vs Ekneligoda (3 NLR 213) at p. 213, Bonser CJ, *held that a person who is let into occupation of property as a tenant, or as a licensee, must be deemed to continue to occupy on the footing on which he was admitted, until by some overt act he manifests his intention of occupying in another capacity. No secret act will avail to change the nature of his occupation. Bonser CJ further stated: "Possession, as I understand it, is occupation either in person or by agent, with the intention of holding the land as the owner."*

Thillakeratne Vs Bastian (21 NLR 12) at p. 19-20 per Bertram CJ,

"..The effect of this principle is that, where any person's possession was originally not adverse, and he claims that it has become adverse, the onus is on him to prove it. And what must he prove? He must prove not only an intention on his part to possess adversely, but a manifestation of that intention to the true owner against whom he sets up his possession. The burden he must assume is, in fact, both definite and heavy, and the authorities have been accustomed to emphasize its severe nature."

In ***J.S.K Chelliah Vs M. Wijenathan*** (54 NLR 337) at p.342 per Gratien J,

"Where a party invokes the provisions of Section 3 of the Prescription Ordinance in order to defeat the ownership of an adverse claimant to immovable property, the burden of proof rests squarely and fairly on him to establish a starting point for his or her acquisition of prescriptive rights."

When observing the evidence in the present application, it clearly shows that Respondent and the Appellant's mother Rosalin was brother and sister and they were all living as one family in the said premises in the suit and the Respondent has continued possession merely as a family member, before and after the partition decree of 1979. The Respondent has tendered certified extracts from the electoral register from 1978 and called the retired Grama Niladhari to provide evidence to confirm that the Respondent has resided in the premises from 1963 to date, in order to prove his uninterrupted, undisturbed long possession for over 70 years. However, when carefully examining the aforesaid extracts from the electoral register, it appears that, the Respondent has become the "head of the household" in 1982, only after the death of his father, Korale Kankanmge Simon. Thus, it is clear to this court that, the Respondent is in an attempt to contend that, as the learned District Judge decided, the Appellant has failed to prove that the Respondent has reside in the said premises with the leave and license of the Appellant, in itself

proves the uninterrupted, adverse possession. However, when considering all the evidence presented in the case, it reveals that the premises in suit is the Respondent's ancestral home and he has been living in the said premises for over 70 years as a descendent**.**

A person who bases his title on adverse possession must show clear and incontrovertible evidence that his possession was hostile to the true owner of the property, where the property belongs to a family member, the presumption will be that it is ***"permissive possession"*** which is not in denial of the title of the family member who is the true owner of the property and is consequently not adverse to him/her. This presumption represents the interference that may be drawn in the context of the relationship of the parties. This principal of law is laid down in the case of ***de Silva Vs Commissioner General of Inland Revenue*** (1978) 80 NLR 292 In relation to the subject matter of the present application, it is clear to this court that Respondent's mere occupation of the ancestral home for decades as a descendent of the family does not prove adverse possession hostile to the true owner of the land in suit. Further, when considering the relationship between the parties, it appears that the Respondent being the brother of Rosalin, who was the original owner of the said property (Rosalin thereafter transferred title to the Appellant by Deed No.5103 and Respondent is the uncle of the Appellant) is in "permissive possession" which is not denial of the title of the sister and is not adverse to her.

> ***de Silva Vs Commissioner General of Inland Revenue*** (1978) 80 NLR 292 at p.295-296 per Sharvananda J.
>
> *"The principle of law is well established that a person who bases his title in adverse possession must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of his title to the property claimed. In order to constitute adverse possession, the possession must be in denial of the title of the true owner. The acts of the person in possession should be irreconcilable with the rights of the true owner; the person in possession must claim to be so as of right as against the*

true owner. Where there is no hostility to or denial of the title of the true owner, there can be no adverse possession. In deciding whether the alleged acts of the person constitute adverse possession, regard must be had to the animus of the person doing those acts, and this must be ascertained from the facts and circumstances of each case and the relationship of the parties. Possession which may be presumed to be adverse in the case of a stranger may not attract such a presumption, in the case of persons standing in certain social or legal relationships. The presumption represents the most likely inference that may be drawn in the context of the relationship of the parties. The Court will always attribute possession to a lawful title where that is possible. Where the possession may be either lawful or unlawful, it must be assumed, in the absence of evidence, that the possession is lawful. Thus, where property belonging to the mother is held by the son, the presumption will be that the enjoyment of the son was on behalf of and with the permission of the mother. Such permissive possession is not in denial of the title of the mother and is consequently not adverse to her."

In regard to the Respondent's claim of prescriptive rights, mode of entry of the Respondent's into the subject matter is quite clear. The Respondent has started residing in the said premises as a descendent of the family and with the consent of then owners and his sister (after getting title to lot 5 in plan No.1946/A in the final decree in the District Court Balapitiya NP/3085 of 1979). It is well established legal principal that when a person enters into occupation, he is precluded from setting up title by prescription without establishing a change of character in which he began his occupation and an overt act or something similar indicating the intention to possess adversely to the owner. This principle of law was laid down in the case of ***Naguda Marikkar Vs Mohammadu*** (7 NLR 91) and ***Orloff vs Grebe*** (10 NLR 183). The Respondent states that Rosalin, the sister moved out when she got married in 1963 and he has been in the occupation in the premises since then. However, it is clear to this court that, a sibling leaving the ancestral home based on the factor of marriage is not at all sufficient proof to establish a

change of character in which the Respondent began his occupation and an overt act or something similar indicating the intention of adverse possession.

With the perusal of the factual evidence and case laws pertaining to the present application, it is clear that, the Respondent has been residing in the premises as a mere occupant and a close relative of the Appellant. Law draws a distinction between possession and occupation. Mere occupation of another's property is not by itself construed as "possession" in the eyes of law. For an occupation of another's property to amount to possession in the eyes of law is occupation with the intention of holding the land as the owner. Therefore, the Respondent has not satisfied Court that he in fact had adverse possession in the land in suit.

In ***Sirajudeen and others Vs. Abbas*** [1994] 2 Sri L.R 365 at p.371 per G.P.S de Silva CJ,

"..Mr. Kanag-Isvaran for the plaintiff respondent relevantly cited the following passage from Walter Pereira's Laws of Ceylon, 2nd Edition, page 396. "As regards the mode of proof of prescriptive possession, mere general statements of witnesses that the plaintiff possessed the land in dispute for a number of years exceeding the prescriptive period are not evidence of the uninterrupted and adverse possession necessary to support a title by prescription. It is necessary that the witnesses should speak to specific facts, and the question of possession has to be decided thereupon by court."

In ***Hassan Vs. Romanishamy*** 66 C.L.W 112, it was held that;

"Mere statements of a witness, "I possessed the land" or "we possessed the land" and "I planted plantain bushes and also vegetable", are not sufficient to entitle him to a decree under Section 3 of the Prescription Ordinance, nor is the fact of payment of rates by itself proof of possession for the purpose of this section"

When considering whether the High Court of Civil Appeal failed to consider that once paper title became undisputed that the right to possess is presumed, it is clear to this court that as per the legal principles laid down by a range of case law jurisprudence, the Appellant's possession was presumed on proving his paper title. Consequently, the burden was cast on the Respondent to prove that by virtue of an adverse possession that the Respondent had obtained a title adverse to and independent of the paper title of the Appellant. However, when examining all the factual and legal evidence in the present application, it is quite clear that the Respondent has failed to prove his adverse possession hostile to the Appellant. Therefore, the Respondent's mere long possession and cultivation of Appellant's property has no legal validity upon claiming Prescriptive rights.

Further, the learned High Court judge's conclusion that, when the Learned District Court Judge decided that Respondent was not there as a licensee, that itself prove his adverse possession is questionable. As discussed earlier, when deciding one's Prescriptive rights against another's paper title the court must be aware of the distinction between 'Occupation' and 'Possession'. Mere occupation of a premises for a long time does not establish a true possession. Occupation with the intention of holding the property as owner is considered as true possession. In regarding to the present application, it is obvious that, the Respondent living in his ancestral home as a descendent of the family, with the consent of his sister for over 70 years does not make him the true owner of the property, but a *'Permissive Possessor'*. Thus, the Respondent is not entitled to claim possessory rights against the Appellant.

In my view in the present application, there is a significant absence in clear and specific evidence on such acts of possession as would entitle the Respondent to a decree in favour in terms of Section 3 of the Prescription Ordinance. The Learned district Judge has very clearly held in his judgement that mere long occupation and cultivation of the land does not establish Prescriptive title to the land in suit.

I answer the questions of law as follows;

1) Yes
2) Yes
3) Yes

I allow the Appeal and set aside the judgement of the High Court and affirm the Judgement of the District Court. The Appellant is entitled for costs of this court as well the courts below.

Judge of the Supreme Court

B.P Aluwihare, PC, J.

Judge of the Supreme Court

S. Thurairaja, PC, J.

Judge of the Supreme Court

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

In the matter of an Appeal to the Supreme Court from a judgment of the High Court of the Province holden in Colombo in terms of section 31DD of the Industrial Disputes Act (as amended).

SC Appeal No: 09/2010

SC (Spl) LA No. 209/2009
HC ALT No: 26/2008
LT Colombo No. 1/117/2001

David Micheal Joachim
No. 27/6, Peters Lane,
Colombo 06.

APPLICANT

-VS-

Aitken Spence Travels Ltd.
No. 305, Vauxhall Street,
Colombo 02.

RESPONDENT

AND BETWEEN

David Micheal Joachim
No. 27/6, Peters Lane,
Colombo 06.

APPLICANT-APPELLANT

-VS-

Aitken Spence Travels Ltd.

No. 305, Vauxhall Street,

Colombo 02.

RESPONDENT -RESPONDENT

AND NOW BETWEEN

David Micheal Joachim

No. 27/6, Peters Lane,

Colombo 06.

APPLICANT-APPELLANT-APPELLANT

-VS-

Aitken Spence Travels Ltd.

No. 305, Vauxhall Street,

Colombo 02.

RESPONDENT - RESPONDENT RESPONDENT

BEFORE : **L.T.B. DEHIDENIYA, J.**

S. THURAIRAJA, PC, J.

YASANTHA KODAGODA, PC, J.

COUNSEL : Harsha Fernando with Charith Senayake for Applicant-Appellant-Appellant.

Dulinda Weerasuriya, PC with Pasan Malinda for Respondent-Respondent – Respondent.

ARGUED ON: 3rd July 2020.

WRITTEN SUBMISSIONS: Applicant- Appellant-Appellant on 20th of January 2020.

Respondent – Respondent – Respondent on 14th January 2020.

DECIDED ON: 11th February 2021.

S. THURAIRAJA, PC, J.

This is an appeal arising from a judgment of the Provincial High Court of the Western Province holden in Colombo (High Court), delivered in an appeal from an order of the Labour Tribunal of Colombo.

It is pertinent to consider the facts of this matter since this court has to decide on the concept of proportionality, by weighing the incidents with the punishment imposed by the Respondent on the Appellant, namely that of termination of employment. In the circumstances, I would like to narrate facts which are as follows:

The Applicant-Appellant-Appellant (hereinafter sometimes referred to as Appellant) was an employee of the Respondent- Respondent- Respondent company (hereinafter sometimes referred to as the "Respondent") namely, Aitken Spence Travels Ltd, as a Senior Executive. The main business of the Respondent was the sale of Air Tickets and serving its customers regarding reservation of flights etc.

Appellant commenced his employment on a casual basis as a Trainee Executive with the Respondent with effect from the 1st March 1990. Sometime thereafter, the Appellant was confirmed in the said appointment as a Junior Executive with effect from 31st August 1991. By letter dated 1st April 1996, the Appellant was promoted to the position of a Senior Executive and was functioning as a Supervisor/ Senior Executive of the Ticketing Division of the Respondent company at all times material to this appeal. On the afternoon of 27th June 2000, the Appellant during the course of his functions, submitted a voucher and associated documentation without entering necessary details in a book named "Exchange Order Book". These documents were submitted to his superior officer- Manager Operations and Sales namely, Shane De Silva for his approval. Since the said 'Exchange Order Book' was not properly filled and submitted along with the voucher by the Appellant, said Shane De Silva had returned it to the Appellant with a note stating that, it has not been properly filled.

Over this, there had been a telephone conversation between the Appellant and the said Shane De Silva which the Appellant had originated, and Shane De Silva stated that in the said conversation between the two of them he was abused with the use of obscene language by the Appellant. Through an Inter- Office Memorandum dated 28th June 2000 addressed to a Director of the Respondent Company (marked as 'R1') Shane De Silva has promptly lodged a complaint regarding the incident with the senior management of the Respondent company. On this incident, explanations were called from the Appellant on 30th June 2000 (marked as 'R2'). As per 'R2', when the Sales Manager commented that the Appellant's excuse for incompletion of documents not acceptable and gave instructions on how it should be carried out the Appellant replied "*I will do what I want to, I was also waiting to see what you can do*" and had also asserted (referring to Shane De Silva) "*Bloody well do what you want*".

Following Shane De Silva's complaint, Directors of the Respondent company namely Keerthi Jayaweera and Ganeshan summoned the Appellant for a meeting and made inquiries, regarding the incident which occurred the previous day. The Appellant had provided an explanation and had asked the two Directors to take the matter up with the Board of Directors.

Appellant submitted his explanation on 01st July 2000 (marked as 'A2' and 'R6'). In his explanation the Appellant stated that, during the said telephone conversation in issue, Sales Manager Shane De Silva threatened him and it resulted in his (Appellant's) harsh retaliation without abuse. The Appellant categorically stated that he did use obscene language on the Sales Manager. Appellant's explanations were found unsatisfactory by the Respondent company and hence disciplinary action was initiated by a charge sheet being issued containing the following charges/ allegations:

1. Defying instructions given by the Manager.
2. Abusing the Manager and using obscene language over the telephone.
3. Belittling the authority of the Manager and the directors of the company, which tantamount to insubordination.

On 16.08.2000, a domestic inquiry into the incident was conducted by Mrs. S.N. Fernando who was also a senior officer of the Respondent company. At the said inquiry, Mr. Shane De Silva and Mr. Ganeshan gave evidence on behalf of the Respondent company, and the Appellant and two witnesses Miss. Natasha Happawana and Mr. Gayan Ondaatjie gave evidence on behalf of the Appellant. Following the conduct of the disciplinary inquiry, the Appellant had been found 'guilty' and thereafter, the Appellant's services were terminated by letter dated 03.11.2000. It states inter-alia as follows:

"Having carefully considered the evidence led at the aforesaid inquiry, we find that you have conducted yourself in an objectionable manner as set out in our show cause letter, and in the process undermined and belittled the authority and the position of the Manager to whom you report. After careful consideration, therefore it has been decided to terminate your services with immediate effect".

Thereby, the Appellant's services at the Respondent company were terminated. The Appellant filed an application bearing No. LT 1/117/01 before the Labour Tribunal- Colombo challenging the said termination on the basis that it was unjustified, and prayed for compensation in lieu of reinstatement. The Respondent filed answer denying the several averments in the application but admitting to the termination of employment. Evidence of two witnesses namely, Shane De Silva, (page 18-68 of the Brief) and Keerthi Jayaweera (page 69-120 of the Brief) and documents marked "R1 to R11" were led on behalf of the Respondent company (page 231-259 of the Brief). Only the Applicant gave evidence on his behalf (Pages 122-183) leading in evidence documents marked "A1-A5" (pages 125-134 of the Brief).

At the conclusion of the inquiry, on 11th March 2008 the President of the Labour Tribunal held that the termination of the Appellant's services was justified and dismissed the Appellant's application.

The Appellant not being satisfied by the order of the Labour Tribunal appealed against the order to the High Court on the following grounds:

(i) The order of the Labour Tribunal is wrongful and unlawful and is against the weight of evidence led at the trial and is unjust and inequitable in all the circumstance of the case.

(ii) The order of the learned President of the Labour Tribunal was seriously flawed in that he based his decisions on the evidence recorded by

another judge and consequently lacked all the obvious advantages of observing the demeanor and other indications of veracity whilst the witnesses were giving evidence.

(iii) The order of the Labour Tribunal was seriously flawed in that the President failed and neglected to consider the faulty procedure adopted by the Respondent- Respondent company that eventuated in the termination of the service of the Applicant- Appellant.

(iv) The order of the Labour Tribunal was in error when the President of the Labour Tribunal cast a burden of proof to establish his innocence on the Applicant- Appellant, thus resulting in an order which is not "just and equitable" as mandated by the Industrial Disputes Act.

The High Court after hearing both parties upheld the order of the President of the Labour Tribunal and dismissed the said appeal on 31/07/2009. The Applicant being aggrieved by the judgment of the High Court filed an Application seeking Special Leave to Appeal to this Court and prayed that the said judgment of the High Court be set aside. Leave was granted on the following questions of law in paragraph 37 (a), (b) (c) and (d) raised by the Appellant in his petition dated 10/09/2009.

a) Did the High Court fall into error by failing to consider that the Labour Tribunal has misdirected itself in the evaluation of the evidence?

b) Did the High Court err by failing to consider the total insufficiency of evidence and in particular independent evidence to establish that the Petitioner in fact had abused his superior officer with obscene language?

c) In any event did the High Court misdirect itself by failing to consider that there was no witness whatsoever to the telephone conversation in issue where it is unilaterally alleged that the Petitioner used obscene language to his superior?

d) Without prejudice to the foregoing, in any event did the High Court err by completely failing to consider the clear principles as supported by the judicial dicta, that suitable compensation can be granted in a fit case even if termination is deemed to be justified and/or if there is actual loss of confidence, without reviving the contract of employment?

I will first consider the questions of law contained in paragraph 37 (a), (b) and (c). In this appeal the main contention of the learned Counsel for the Appellant was that there were contradictions and/or omissions regarding the exact abusive words the Appellant had allegedly used over the telephone in the conversation, the Appellant had with Shane De Silva. Therefore, without any independent evidence to corroborate Shane De Silva's evidence regarding this telephone conversation and the abusive words, the Labour Tribunal and the High Court have misdirected themselves in evaluating the evidence regarding the above incident had thereafter accepting the evidence of Shane De Silva and coming to an incorrect conclusion that the Appellant had used abusive language on Shane De Silva during the telephone conversation.

It was argued on behalf of the Appellant that the words used by the Appellant do not amount to such abusive words that warrant a dismissal from employment. The Appellant throughout maintained that he did not use abusive language on the Manager, Shane De Silva. But to a question from the Labour Tribunal the Appellant admitted that he spoke "firmly" to the Manager. The Appellant stated that, the reason for the firm language which he used is a result of sequence of events that happened between the Manager and the Appellant. The Appellant contended that, he sent a set of vouchers, which were sufficiently complete as per the practice and norm of the Respondent company. Then, Shane De Silva sent it back because the vouchers were incomplete. Then, the Appellant completed it and sent it back to the Manager with an explanation as to why it was

incomplete on the first occasion. In spite of all that, Manager Shane De Silva, sent a second note, and that the Appellant had merely conveyed that it was an unnecessary note (using the phrase "bullshit").

In any event it was submitted on behalf of the Appellant that, assuming without conceding that the impugned sentences were uttered by the Appellant, there are no words that qualify as being "obscene". The position taken up on behalf of the Appellant was that the phrase "bullshit" is a phrase used in common parlance in today's context which is generally used to describe anything or a situation which has no or very little substance value. Learned Counsel for the Appellant urged that, the courts cannot simply overlook the common use of this phrase. In my view, the seriousness of these words should be considered, in the context they were used and on whom they were used. These words were used by a subordinate officer on his supervising officer during an official conversation in writing when the supervising officer pointed out a shortcoming of the subordinate officer. Furthermore, during the telephone conversation the Appellant had used the words "*I will do what I want to"* and "*Bloody well do what you want*".

Therefore, the fact that the Appellant in fact used words amounting to "obscene language" is apparent, and that the utterance of those words reflect insubordination is also evident.

It is next to be seen whether imposition of the punishment of dismissal from service is proportionate to the gravity of the imputed conduct. When obscene language is used by a subordinate against a superior, it must be understood in the environment in which that person is situated and the circumstances surrounding the event that led to the use of abusive language. No strait-jacket formula could be evolved in adjudging whether the obscene language in the given circumstances would warrant dismissal from service. Each case has to be considered on its own merits when the nature of the abusive language used by the appellant was not conclusively stated.

As per the evidence given by Shane De Silva before the Labour Tribunal, the Appellant phoned him and said "*you are a bloody fool, what this fool note that you are sending to me*". In response Shane De Silva had replied to the Appellant stating that the Appellant should follow his instructions and he would not tolerate the Appellant's behaviour, and that he will take necessary action if the Appellant does not adhere to his instructions. In reply to that, the Appellant stated that, *"I will do what I want to do. I was also waiting to see what you can do*".

In answering the Labour Tribunal, Shane De Silva stated that there have been such previous incidents as well, and he had advised him (the Appellant) personally, but had been of no avail. He further stated that, the Appellant has an aggressive nature and keeps shouting at others. Although the Appellant had been warned verbally, there had been no improvement in his attitude and behaviour. The complaint made by Shane De Silva stated that he has no personal animosity towards the Appellant. Keerthi Jayaweera too confirmed the said stance taken by Shane De Silva and stated that, the Appellant's service was very unsatisfactory in spite of many advices and warnings. In proof of that assertion, the performance appraisal of 1999 was submitted to the Labour Tribunal, inwhich the director who appraised the Appellant had stated that, "Employee has been spoken to in February, March 1999, October 1999, December 1999 and again today (27/01/1990). Have clearly explained what is required of him. If no improvement in 2-3 months, further action has to be taken". "At present does not meet the standard of a supervisor".

The Appellant takes up the position that he was not "instructed" by the manager but "orally threatened". He admits advise from the manager and categorically states that he did not "belittle the authority" of any manager. It is the Appellant's position that he was treated unfairly and in spite of being threatened by the manager, the director also merely accepted the version of the manager without giving the Appellant a fair hearing. At that stage the Appellant had no choice but to seek the protection of the authority above that of the Director.

Appellant submits that, both the manager and the director seem to have already made up their minds against the Appellant, he would like the matter to be referred to the Board of Directors being his appointing authority; he wanted natural justice; to be heard fairly. Further, learned Counsel for the Appellant submitted that Manager, Shane De Silva's evidence submitted before Labour Tribunal and statements given at the domestic inquiry were contradictory in nature.

It is the Appellant's position that Manager Shane De Silva spoke of the alleged "obscene language" for the first time when he gave evidence before the domestic inquiry on 16/08/2000, and that in his first complaint made on 30/06/2000 (letter marked "A1") the Manager does not state the words that were used nor classify the words used as "obscene". Additionally, it was submitted on behalf of the Appellant that there is no evidence to demonstrate that the management was made aware of the words that were used. Therefore, as to how the management issued the show cause letter "A1" in which use of "obscene language" is alleged, is not explained in evidence. In this regard, it is pertinent to note that in his complaint to Director Sasi Ganeshan submitted within 24 hours of the incident, Shane De Silva has submitted "*what happened after that was absolute insubordination and disrespect to me as his superior. His verbal abuse and aggression with regard to this subject, and even the nerve he had to challenge my action (if I did take any), was the last straw in my hat*". It would thus be seen that in his complaint to the senior management, Shane De Silva has captured the very essence of what happened. Unlike when making a complaint to the Police, in an internal complaint to the senior management one cannot reasonably expect a verbatim reproduction of what exactly happened.

As per the marked document "A1" which the Appellant relied upon, a letter was sent by the Director of the Respondent company to the Appellant calling for explanation regarding the alleged incident which occurred on 27/06/2000. As per paragraph 2 of the letter, Director alleged as follows;

"You had then kept back with you the incomplete vouchers and submitted another voucher for his signature. You had written back to the manager that the voucher which he had signed was in order. You had also given the excuse that the vouchers cannot be completed as the book was not available, half of the time in one place. When the manager commented that the excuse was not acceptable, you had telephoned him and used obscene words on him."

Further, by this letter marked "A1", the Director alleged that, the Appellant was orally warned on several previous occasions for defying the instructions given by the Manager, for poor productivity of the Appellant's job and repetitive actions done by the Appellant of such conduct demonstrated that he was not amenable to discipline.

After the alleged incident, as stated earlier Manager Shane De Silva sent a complaint explaining the situation which occurred between him and the Appellant. This letter was marked as "R1" and this was the first complaint done by the Manager Shane De Silva. In the said complaint, Shane De Silva also states the following:

"Sir, as I have very clearly stated above, this is not the first time that I had to face Mr. Joachim's attitude which I now believe should be addressed very severely. I do not think that he would change though we have given him ample chances. In light of the progress of the OTSD and its junior staff, Mr. Joachim could very easily be a stumbling block who I am not prepared to have in my team or work with anymore.

……Mr. Joachim has proved beyond any shadow of doubt that he is not willing to support and respect his superiors".

It is thus evident that quite independent of the incident that occurred on 27th June 1990, the Appellant's conduct had been questionable over a period of time. That he displayed unsatisfactory conduct is so very evident. At this stage, as per the

decided authorities, I am of the view that the allegations of this nature (misconduct in employment settings) should be proved on a balance of probability and not beyond reasonable doubt as in criminal cases as held in the **Caledonian (Ceylon) Tea and Rubber Estates Ltd vs. S. Hillman** [79 NLR 421]. Chief Justice Sharvananda has held as follows:

> *"An allegation of misconduct in proceedings before a Labour Tribunal has to be decided on a balance of probabilities, and it is not necessary to call for proof beyond reasonable doubt as in a criminal case. In the present case, however, the fact that the tribunal adopted the standard of proof beyond reasonable doubt has not led to a miscarriage of justice as, even on the application of the standard of a balance of probabilities the case against the applicant had not been established*."

As evident by the judgment of the Labour Tribunal as well as the High Court, it is clear that the Labour Tribunal and the High Court have considered the question of law of credibility, acceptability and sufficiency of the evidence of Shane De Silva and the circumstances under which the telephone conversation in issue had taken place, have come to a conclusion that the Appellant had abused and used obscene language on Shane De Silva in the said telephone conversation. It is evident that there has been a proper evaluation of the evidence of the contents of this telephone conversation and the associated incident by the Labour Tribunal as well as the High Court. The order of the learned President of the Labour Tribunal states as follows;

> *"ඉල්ලුම්කරු විශමාචාර ලෙස කටයුතු කර ඇති ලෙසට වගඋත්තරකරු විසින් ශකඡතා සමබරතාව මත ඔප්පු කර ඇති ලෙසට සැලකිය හැකිය. ඒ අනුව එකී චෝදනා මත වගඋත්තරකරු විසින් ඉල්ලුම්කරුගේ සේවය අවසන් කර තිබීම සාධාරණ සහ යුක්ති සහගත ලෙසට මම නිගමනය කරමි. ඒ අනුව ඉල්ලුම්කරු මෙම ඉල්ලුම් පතුයෙන් ඉල්ලා ඇති සහන සඳහා හිමිකම් නොමැති ලෙසට සලකා ඉල්ලුම්කරුට හිමි වෙනත් වඡවස්ථාපිත හිමිකම් වෙතොත් ඒවාට යටත්ව මෙම ඉල්ලුම් පතුය නිෂ්ප්‍රභා කරමින් නියෝගය නිකුත් කරමි."*

"It can be considered that the Respondent has proved on a balance of probability that the applicant has engaged in misconduct. Accordingly, I am of the opinion that terminating the service of the Applicant by the Respondent is fair and justifiable based on the aforesaid allegations. Accordingly, having considered that the applicant is not entitled to the reliefs prayed by this application, I do hereby dismiss this application subject to statutory entitlements due to the Applicant, if any."

The Learned High Court Judge has quite rightly identified that he has to consider the order of the Labour Tribunal and decide whether termination of services is proportionate to the charges proven in evidence. At one point of his order, he says,

"එම නිසා එම අවස්ථාවේදී ශේන් ද සිල්වා අභියාවක හට බැන වැදීම මත අභියාවකටද තදින් කතා කිරීමට සිදු වූ බවට දෙන ලද සාක්ෂිය විය හැකි භාවයේ පරීක්ෂණයට ලක් කරන විටකදී වුවද පිලිගත නොහැක. අභියාවක වෙනුවෙන් ශේන් ද සිල්වා විසින් සමාගම වෙත ඉදිරිපත් කරන ලද සන්දේශයෙහි අසභ්‍ය වචන පිලිබඳව සඳහනක් නොමැති බවට කරුනු දක්වන ලද නමුත්, එම වචන ඒ ආකාරයෙන් ම සටහන් කර නොමැති වුවද, අසභ්‍ය වචනයෙන් බැන වැදුන බවට ඔහු පැමිනිලි කර ඇත... උගත් කම්කරු විනිශ්චය සභාපතිතුමා විසින් ශේන් ද සිල්වා විසින් දෙන ලද සාක්ෂිය වැඩිබර සකච්ඡා පරීක්ෂණය අනුව පිලිගත හැකි අතර, ඔහු විසින් දක්වා ඇති කරුණු අනුව එම නිගමනය වෙනස් කිරීමට ප්‍රබල කරුණු අභියාවක විසින් තහවුරු කර නොමැති හෙයින්, මෙම අභියාචනය ගාස්තු රහිතව නිශ්ප්‍රභා කරමි."

"Therefore, the evidence which says that the appellant had to speak severely as Shane De Siva had scolded the Appellant on that occasion cannot be accepted even when it subjected to the test of probability. Even though it is stated that nothing is mentioned regarding the indecent words in the letter presented to the company by Shane De Silva, he has complained regarding the scolding using indecent words although the said words are not noted in the same manner... the

evidence given by Shane De Silva before the learned President of the Labour Tribunal can be accepted on the balance of probability and as per the facts mentioned by him, the Appellant has not confirmed vital facts to change that decision, and therefore this appeal is dismissed without costs."

This is substantiated by many cases as in, **The Electricity Equipment & Construction Company Vs Cooray** [1962, 63 NLR 164], and **Reckit & Colman Ltd. Vs Peris** [1979, 2 NLR 229], it was held that, as a general rule, refusal to obey reasonable orders justifies dismissal from service. Accordingly, it is obvious that the President of the Labour Tribunal has considered the question of proportionality in the first instance. In **Ceylon Estate Staffs' Union vs. The Superintendent, Meddecombra Estate, Watagoda** [73 NLR 297] Justice Weeramantry held that,

"In 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 and the wider interest of the country, for the object of social legislation is to have not only contended employees but also contented employers".

As highlighted by me above, the learned President of the Labour Tribunal had identified the question of proportionality. It is in that light that he has considered the cumulative effect of the Appellant's conduct at the work place and after consideration of the factors before him; he had determined finally that termination of the Appellant is just and reasonable.

Relying on the leading treatise of "Law of Dismissal" (3rd edition) by S.R. De Silva, at page 74, he states that, abuse of a superior officer justifies termination, even though the employee has legitimate grounds of protest. In the case of **Lanka Synthetic Fibre Company Ltd. vs. Perera** [1998 3 SLR 191] the Supreme Court held that the use of abusive language towards superiors amounted to serious

misconduct. The Court cited with approval the following paragraph of B. R. Ghaiye in "Misconduct in Employment" (page 560);

> *"The use of abusive language towards a superior is a misconduct because it creates such a situation in which it becomes impossible to maintain proper discipline in an establishment . . . Whatever may be the reason of the use of abusive words, it is a recognised misconduct and unlike use of defamatory words it has no exceptions. It means that the use of abusive language will be misconduct irrespective of the circumstances in which it has been uttered."*

In view of the foregoing, I find that the learned President of the Labour Tribunal had considered all evidence submitted before it with reference to the charges against the Appellant. The High Court has reconsidered the assessment of evidence. The High Court Judge had evaluated the evidence judicially. In any event, the Supreme Court will not arrive at findings contrary to the findings of the original court or tribunal before which the evidence was presented, unless the findings are perverse. In this instance I see no pervasive conclusion either by the learned President of the Labour Tribunal or by the Learned High Court Judge.

Hence, I answer the questions of law contained in paragraphs 37 (a), (b) and (c) in the negative.

I will then consider the 37 (d) question of law that, suitable compensation can be granted in a fit case even if termination is deemed to be justified and/or if there is actual loss of confidence without reviving the contract of employment.

In the present case the complaint against the Appellant is that he used obscene words and abused a manager of the company who was his immediate superior. In **K.B.D. Somawathie vs. Baksons Textiles Industries Ltd** [79 NLR 204] Justice Rajaratnam held that,

"I entirely agree with learned counsel for the respondent employer that compensation awarded either in lieu of reinstatement or under S. 33(1)(d) should be compensation for some loss suffered by the employee at the hands of the employer. Mr. advocate however placed his argument very high and submitted that it should be a loss as a result of some wrong done to the workman and in this case as there was no wrong done by the employer, there could be no order for compensation. In my view an order for compensation could be made even where the workman loses her job because the employer in the interest of his business quite rightly had to discontinue her services, but the cause for termination was not such a serious act of misconduct. "

It is settled law that no compensation can be awarded in a situation where a justified termination occurred in the consequence of a wrongful act or misconduct of the employee, particularly when termination of employment is found to have been a proportionate and lawful response to the impugned conduct of the employee. Compensation will only be awarded to compensate a person for a loss he sustained and in my view such loss must be the result of a wrongful act on the part of the employer. In this instance, I do not find any wrongful conduct on the proof of the Respondent company being the employer. I am in agreement with the Labour Tribunal and the High Court regarding the finding that the termination of the services of the Appellant is justified. Hence, the question of reinstatement does not arise and therefore the question of compensation in lieu of reinstatement does not arise. Hence, I answer the question of law contained in paragraph 37(d) in the negative.

I have considered all the submissions made on behalf of the Appellant as well as those on behalf the Respondent in this case. I answer the question of law raised at the commencement of this judgment in the negative to the effect that both the Labour Tribunal and the High Court have considered the evidence and

arrived at a correct and lawful conclusion regarding the disputed facts and regarding the doctrine of proportionality in entering this decision to terminate the services of the Appellant by the Respondent company. Accordingly, I hold that there are no grounds to disturb the judgment of the High Court. In these circumstances, the Appeal is dismissed without costs.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

YASANTHA KODAGODA, PC, J.

Justice S. Thurairaja, PC, was pleased to share his draft judgment with me. I have considered it. I respectfully express my agreement with Justice Thurairaja's judgment regarding (i) the summation and analysis of the evidence led before the Labour Tribunal on behalf of both parties, (ii) the conclusions reached regarding the truth pertaining to the impugned conduct of the Appellant, and (iii) the conclusions reached pertaining to the first three questions of law in respect of which the Supreme Court has granted Leave to Appeal. I am also in agreement with his Lordship's view that, this Appeal should be dismissed.

However, in view of my respectful disagreement with Justice Thurairaja's finding pertaining to the fourth question of law in respect of which this Court had granted leave, I wish to present my own consideration of the fourth question of law and pronounce my findings thereon.

As Justice S. Thurairaja, has dealt with the evidence of this matter at length, assessment of credibility of witnesses and conclusions reached with regard to disputed areas of evidence, and since I totally agree with the analysis of the evidence and conclusions reached, I will in this judgment refrain from engaging in a detailed analysis of the evidence. In any event, doing so would not be necessary, as an Appeal to the High Court established in terms of Article 154P of the Constitution from an order pronounced by a Labour Tribunal, should in terms of section 31C(3) of the Industrial Disputes Act be only on a question of law. Similarly, an appeal from the ensuing judgment of the High Court to the Supreme Court in terms of section 31DD of the Industrial Disputes Act, should also only be with leave first obtained and **only on a question of law**.

Nevertheless, I shall very briefly set out and refer to the factual position pertaining to the incident in issue which resulted in the termination of the employment of the Appellant, and I do so, as the facts pertaining to the incident have some relevance to my finding.

The Respondent company is a private sector organisation colloquially referred to as a 'travel agency'. At the time in issue, the Respondent company was engaged in serving its customers by making on their behalf flight reservations and selling airline flight tickets to them. The Appellant having joined the Respondent company in March 1990 as a Trainee Executive, had received two promotions, and since April 1996 was serving as a 'Senior Executive'. In his position as 'Senior Executive 'he functioned *inter-alia* as a 'supervisor 'of several subordinate employees. His immediate superior was one Shane de Silva, who was Manager Sales & Operations. The incident in issue relates to a verbal and written interaction between the Appellant and Shane de Silva.

On 27th June 2000, while making arrangements pertaining to a flight reservation of a particular customer, the Appellant submitted to Shane de Silva the relevant documentation for ratification of the proposed transaction by him. The Appellant did so without submitting a particular book referred to as the *Exchange Orders/Vouchers Book*. In terms of relevant rules of procedure of the Respondent company, it was necessary to perfect and submit the *Exchange Orders/Vouchers Book* along with the other documentation. According to the Appellant, the reason for not complying with this requirement was that, at the time in issue, the relevant book was not available with the Appellant, as the company had only one such book, and several other personnel of the company were also using it. In response, without ratifying the particular transaction, Shane de Silva returned the documentation back to the Appellant, with a comment written on a *post it slip*, stating that he was not ratifying the documentation, as the documentation was incomplete sans perfected entries in the *Exchange Orders/Vouchers Book*. In his note, he instructed the Appellant to duly perfect the book and submit. Instead of complying with the directive of Shane de Silva, the Appellant had presented the same documentation to another senior officer named Rajanan Dharmasena and obtained ratification of the proposed transaction, and proceeded with the matter. The Appellant had thereafter responded in writing to Shane de Silva, stating that the documentation was complete, as he had got space reserved in the book to enter details of the relevant voucher through the officer who had the *Exchange Orders/Vouchers Book* at the relevant time. The Appellant had subsequently submitted the duly completed book along with the documents ratified by Rajanan Dharmasena to Shane de Silva. In response, Shane de Silva once again has written to the Appellant stating that the reasons given by the Appellant were 'unacceptable'.

Afterwards, the Appellant phoned Shane de Silva relating to the preceding sequence of events, and had stated that, he (the Appellant) *"would do what I want to"* and had also told Shane de Silva that he can "*bloody well do what you want.*"

Following this telephone conversation, the following day, Shane de Silva complained to the senior management regarding what he referred to as *"absolute insubordination and disrespect"* to him as the Appellant's superior. On receiving the complaint, Directors of the Respondent company Sasi Ganeshan and Keerthi Jayaweera called up the Appellant and inquired from him about the incident. The Appellant denied having abused Shane de Silva, and told the two Directors to *"take the matter up with the Board of Management"*.

By letter dated 30th June 2000, the Appellant was asked to show cause as to why he should not be dealt with for having (a) defied instructions given by the manager Shane de Silva, (b) abused manager Shane de Silva by using obscene words, and (c) belittling the authority of Manager Shane de Silva and the Directors, which tantamount to insubordination. By letter dated 1st July 2000, the Appellant responded denying the allegations against him. Following an internal determination that the explanation provided by the Appellant was unacceptable, disciplinary action was taken against him through a domestic disciplinary inquiry conducted by a senior officer of the Respondent company. The charges levelled against the Appellant were based on the same allegations contained in the afore-stated *show cause letter*. Following the conduct of the disciplinary inquiry, the officer who conducted the inquiry arrived at a finding that the Appellant was *guilty* of all three charges. Consequently, the Respondent company dismissed the Appellant, thereby terminating his services.

It is this termination of employment that led to the Appellant filing an Application in the Labour Tribunal of Colombo complaining of unjustifiable termination of employment. He prayed for compensation in lieu of reinstatement. He did not pray for reinstatement. After inquiry, the learned President of the Labour Tribunal concluded that, the termination of the employment of the Appellant was justified. He therefore, dismissed the Application. Against that order, the Appellant

appealed to the High Court of the Western Province holden in Colombo. Following the hearing of the appeal, the learned Judge of the High Court dismissed the Appeal. This Appeal of the Appellant is against that judgment of the High Court of the Western Province.

As stated at the commencement of this judgment, following a consideration of an Application seeking Special Leave to Appeal, this Court was pleased to grant leave to appeal in respect of four questions of law. Justice S. Thurairaja has extensively dealt with the first three questions of law, and as stated above, I respectfully agree with his reasoning and findings thereon.

The Fourth question in respect of which leave has been granted, is as follows:

Without prejudice to the foregoing, in any event, did the High Court err by completely failing to consider the clear principles as supported by the judicial dicta, that suitable compensation can be granted in a fit case even if termination is deemed to be justified and/or if there is actual loss of confidence, without reviving the contract of employment?"

The Respondents did not present their case on the footing that the services of the Appellant were terminated on the premise that the Respondent had *lost confidence* in the Appellant as a result of his conduct. The position of the Respondent company was that the services of the Appellant were terminated since he had engaged in misconduct and was found *guilty* at the domestic disciplinary inquiry pertaining to the allegation that he had engaged in misconduct. Furthermore, in his Application to the Labour Tribunal, the Appellant did not seek re-instatement. Therefore, the issue of re-activating the employment contract by ordering reinstatement, did not arise for consideration by the Labour Tribunal.

Therefore, in the factual context of this Appeal, the afore-stated question of law can be re-framed in the following manner:

Even if the termination of employment of the Appellant is justified, did the Labour Tribunal / High Court err in not having considered and ordered the payment of compensation to the Appellant?

Thus, we arrive at a crucial matter in the adjudication of industrial disputes in terms of the Industrial Disputes Act. What needs to be considered and determined is twofold.

> *Firstly, with regard to an application presented under the Industrial Disputes Act by a workman or by a trade union on behalf of a workman, alleging termination of services by an employer, following the conduct of an inquiry and hearing of evidence, if the Labour Tribunal determines that the termination of services of the workman had been both lawful and justifiable, would it be lawful for the Labour Tribunal, to order the employer to pay compensation to the workman?*
>
> *Secondly, if the answer to the afore-stated question is in the affirmative, in the instant matter, did the Labour Tribunal err in not considering whether the Appellant should be awarded compensation?*

The positions taken up with regards to these two questions of law by the learned counsel for the Appellant and the learned President's Counsel for the Respondent is diametrically opposed.

Before dealing directly with the afore-stated questions of law in which leave has been granted, it is necessary to commence the consideration of this matter by

making certain preliminary observations. Doing so is necessary in view of certain submissions made by learned Counsel during the hearing, relating to certain associated matters.

As stated in its preamble, the Industrial Disputes Act No. 43 of 1950 (hereinafter referred to 'the Act'), has been enacted to provide for the prevention, investigation and settlement of industrial disputes. Without leaving it at the hands of the common law on employer – employee relations including the common law principles on the law of contract, to deal with industrial disputes, the Industrial Disputes Act and parallel legislation relating to employer - employee relations (generally referred to as *labour legislation*') were enacted approximately half a century ago, *inter-alia,* to remedy social injustice peculiar to a vulnerable and particularly weak and at times an oppressed group of persons, namely employees (workers). Thus, the interpretation and application of provisions of the Industrial Disputes Act must necessarily be founded upon the mischief sought to have been remedied by the enactment of such *labour legislation*, such as the Industrial Disputes Act. The intention of Parliament must necessarily reign. As observed by Justice A.R.B. Amerasinghe in ***S.B. Perera v. Standard Chartered Bank and Others*** [(1995) 1 Sri L.R. 73], *The meaning of the legislation is clear. However, it would be of interest, perhaps, to remind ourselves of the background, for the words of a statute, if there is any doubt, as to their meaning, should be understood in the sense in which they best harmonise with the subject of the enactment and the object which the legislature has in view."*

Indeed, the duty of Labour Tribunals and Courts should be to necessarily recognise and give effect to the provisions and the spirit of labour legislation. However, the Court cannot be blind to certain changes that have taken place since the enactment of such legislation, which are inherent to employer – employee relations and the evolution of certain environmental conditions relating to employer

– employee relations, employment environments, the rights and entitlements conferred by law on workers and those being now enjoyed by workmen and by trade unions, and to national and public interests, which includes the status of the national economy. In that regard, it is necessary to bear in mind the national need to generate employment opportunities. The judiciary must in public interest desist from contributing towards creating certain conditions that may inhibit generation of employment, occasioned by causes that may dissuade investors and entrepreneurs from commencing and engaging in business activities that would generate employment opportunities. It is the duty of Judges to give effect to the intention of Parliament and to legislative policy embedded in legislation. However, when exercising judicial discretion, Judges must bear in mind ground realities such as those referred to above, and apply the law in a manner that meets the recognition of individual rights and entitlements and the needs of the public at large, and the country as a whole. That is how just and equitable orders should be arrived at.

The Industrial Disputes Act in its original form contemplated the use of multiple mechanisms for the settlement of industrial disputes, namely settlement, negotiation including collective bargaining, conciliation, and arbitration. The original Act did not provide for Labour Tribunals as a means of settling industrial disputes. These tribunals were established in terms of Part IVA of the Act, which was introduced by Industrial Disputes (Amendment) Act, No. 62 of 1957 for the settlement of industrial disputes through **adjudication** and by arbitration. Thus, it should be noted that the purpose for which Labour Tribunals were established and its mandate is understandably not properly reflected in the preamble to the Act. Ending over a decade of confusion, with the promulgation of the 1st Republican Constitution of 1972, it has not become settled law that, Labour Tribunals are conferred with judicial power, when exercising adjudicatory functions. Accordingly, Presidents of Labour Tribunals are recognised as judicial officers. This position is reflected in Article 111M read with Articles 4(c), 105(1)(c), 105(2) and 111H(1)(b) of

the 2nd Republican Constitution (Constitution of the Democratic Socialist Republic of Sri Lanka, 1978). Labour Tribunals are recognised as judicial tribunals, primarily because of the nature of the mandate conferred on Labour Tribunals, that being *inter-alia* to adjudicate industrial / labour disputes presented to it in terms of section 31B(1) of the Act, due to the powers and functions of Labour Tribunals and the consequential legal impact of orders made by Labour Tribunals. Additionally, industrial disputes may be referred to Labour Tribunals for settlement through arbitration. In such instances, Labour Tribunals do not exercise judicial functions. Adjudication of industrial disputes by Labour Tribunals is facilitated by *litigation* initiated by the presentation of an application to the tribunal.

Section 31B of the Act entitles a workman or a trade union acting on behalf of a workman who is a member of such trade union, to present an application to a Labour Tribunal seeking **relief or redress** in respect of several matters. In terms of section 31B(1)(a) of the Act, one such matter is the **termination of the workman's services by his employer**.

When an application is made to a Labour Tribunal in terms of section 31B(1) of the Act, section 31C(1) of the Act confers a statutory duty on such Labour Tribunal *to make all such inquiries into that application and hear all such evidence as the tribunal may consider necessary"*. The use of the term *inquiries"* in section 31C(1) of the Act postulates a deviation from the traditional adversarial approach and trial procedure which are cornerstones of Sri Lanka's contemporary justice system applied by courts of first instance. The adversarial system of justice is founded upon the common law tradition, which is the primary source of the procedural laws of Sri Lanka relating to the conduct of civil and criminal trials in courts of first instance. In view of this difference, the President of the tribunal is not supposed to adopt a passive approach, by presiding over the proceedings like an *umpire*, and merely receive and consider evidence presented by the adversarial parties (in this instance

the workman or his trade union on the one part and the employer on the other part). In terms of section 31C (1) of the Act, in his quest to determine the truth pertaining to the dispute placed before the Labour Tribunal for adjudication, the President of the tribunal is required in terms of the Industrial Disputes Act to **make all such inquiries into the application** and **hear all such evidence as the tribunal may consider necessary**. Therefore, the President of the tribunal is required to adopt an **inquisitorial approach** and **participate actively by conducting the inquiry and receiving of evidence**. Unlike when proceedings are conducted in consonance with the *adversarial trial system*, the adoption of the *inquisitorial system* confers on the President of the Labour Tribunal an enhanced duty to search for the truth by making necessary inquiries and receive evidence, enabling him to arrive at a correct determination on whether or not the termination of services was lawful and justifiable, and pronounce a just and equitable order. There is support to this view in ***Merril J. Fernando & Co. v. Deimon Singho*** [(1988) 2 Sri L.R. 242] where Justice Wijetunga has held that *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."*

It is pertinent to note that, section 31C (2) of the Act provides that a Labour Tribunal conducting an inquiry shall observe the procedure prescribed under section 31A, in respect of the conduct of proceedings before the tribunal. Section 31A(2)(b) provides that, the Minister in charge of the subject of Justice may, with the concurrence of the Minister in charge of the subject of Labour, make regulations, prescribing *inter-alia* the procedure to be observed by a Labour

Tribunal in any proceedings before Labour Tribunals under Part IVA of the Act. The promulgation of such regulations and adherence to them would ensure formal recognition of the inquisitorial approach to be adopted by Labour Tribunals, and uniformity of proceedings amongst different Labour Tribunals. It is a matter of regret that, regulations have not been made to-date in terms of section 31A(2)(b). The Industrial Disputes (Hearing and Determination of Proceedings) (Special Provisions) Act, No. 13 of 2003, also does not contain the procedures to be followed upon the commencement of proceedings under Part IVA of the Industrial Disputes Act.

Following the completion of the inquiry, according to section 31C (1), the President may make such order as may appear to the tribunal to be **just and equitable**. When making such order, section 31B (4) of the Act provides that, the tribunal **may grant any relief or redress to the workman**, notwithstanding anything to the contrary in any contract of service between such workman and his employer. Section 33(1)(d) of the Act provides that, the order which the tribunal shall make, **may include** an order for the **payment of compensation** to the workman by the employer. When an application is presented to a Labour Tribunal by a workman / trade union alleging termination of services by the employer, and the ensuing inquiry is concluded, the tribunal must, prior to deciding whether any relief or redress to the workman should be ordered, decide on two preliminary issues. That is, whether in fact the services of the workman had been terminated by the employer, and if so, whether such termination is **lawful and justifiable**. It is also necessary for the President of the tribunal to determine the circumstances attendant to the termination of employment. It is only thereafter, that the President should determine whether any relief or redress should be granted to the workman. By the use of the term ***may*** in section 31B (4), it is evident that the legislature has conferred discretionary authority on the President of the Labour Tribunal to grant relief or redress to the applicant (workman). The President may make an order

granting relief or redress to the workman, **only if he deems the grant of such relief or redress to be appropriate** in the circumstances of the respective case. In any event, according to section 31C (1) of the Act, the order which the President makes should necessarily be just and equitable. Thus, if the President determines that in view of the facts and circumstances of the case, relief or redress should be granted, the Act requires such order to be **just and equitable**. Therefore, a workman who presents an application to a Labour Tribunal in terms of section 31B(1) complaining of the termination of his services, is not *ipse dixit* entitled for relief or redress.

If following inquiry, the tribunal determines that the termination of services had been either **unlawful** or **unjustifiable**, then undoubtedly the President may make a **just and equitable order** and thereby confer on the workman **relief and redress**. His powers with regard to the determination of the nature of such relief and redress are circumscribed by section 33(1) of the Act. The relief and redress that he orders may include reinstatement with back wages, reinstatement without back wages, compensation in lieu of reinstatement, compensation, arrears of salary, or an alternative order of reinstatement or compensation.

The issue that arises for consideration in this case, relates to the converse situation. If the President determines that the termination of services was both lawful and justifiable, notwithstanding such determination (which determination would obviously be favourable to the interests of the employer), can the President order relief and redress in the nature of compensation? Would doing so be 'just and equitable'? It is necessary to be conscious of the fact that, the Industrial Disputes Act **does not impose a condition or limitation** on a President of a Labour Tribunal to the effect that, relief or redress may be granted to a workman only if the President determines that the termination of employment was either unlawful or unjustifiable. Thus, *ex-facie* it appears that, a President of a Labour Tribunal **has not been**

specifically and statutorily precluded from ordering relief and redress even in instances where he has determined that the termination of services had been both lawful and justifiable. Thus, the jurisdiction conferred on Labour Tribunals to order just and equitable relief and redress is quite wide. Provided however, the President of the tribunal must ensure that, if he chooses to award relief and redress, such relief or redress must necessarily be **just and equitable** having regard to the evidence and circumstances of the case, including circumstances attended with the termination of employment and antecedents. In arriving at this determination, the President should exercise judicial discretion. He must through the order he makes, deliver justice based on equitable grounds. It is important to bear in mind that justice must be delivered not only to the workman. Particularly in instances where the termination of services is determined by the President to have been both lawful and justifiable, the final order that he makes must ensure that justice is delivered to the employer as well.

In ***Manager, Nakiadeniya Group v. The Lanka Estate Workers Union*** [11CLW 52] Justice de Kretser has observed that *in 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".* As aptly put by Justice Weeramantry in ***Ceylon Estate Staffs Union v. The Superintendent, Meddecombra Estate, Watagoda*** [73 NLR 278], *in making of a just and equitable order, one must consider not only the interest of the employees, but also the interest of the employers and the wider interests of the country, for the object of social legislation is to have not only contended employees, but also contended employers".*

Further, as observed by Justice Rajaratnam in ***K.B.D. Somawathie v. Baksons Textile Industries Ltd.*** [79(1) NLR 204], the order that a President of a Labour Tribunal is required to make should be just and equitable in relation to both the employer and employee and the employer-employee relationship, following

due consideration to the discipline and resources of the employer, and should even be in the interests of the public.

In my view, it is necessary to keep in mind the view expressed by Justice T.S. Fernando in ***Richard Pieris & Co. Ltd. v. D.J. Wijesiriwardena*** [62 NLR 233] that *in regard to the power of the Tribunal to make such order as may appear to it to be just and equitable there is a 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*".

On the specific issue of whether the Labour Tribunal / High Court should have considered the payment of compensation to the Appellant by the Respondent, in the backdrop of the President having determined that the termination of employment was both lawful and justifiable, I wish to first refer to the submissions made by learned Counsel for the Appellant and the Respondent.

The submission of Mr. Fernando, the learned Counsel for the Appellant, was that the High Court had fallen into substantial error by failing to even consider, in terms of the required law, the entitlement of the appellant to compensation as an alternative relief, in all the circumstances of the case and in accordance with the governing principles of justice and equity. In his written submissions, learned counsel for the Appellant submitted that in terms of the established rules of law, it is vital that the entitlement of a person to compensation is considered, separate from the issue of termination. He submitted that the when considering the entitlement of an employee to compensation, the tribunal is under a duty to take into account the length of service, the service record and other attendant circumstances. He further submitted that, in terms of the established principles of law, a workman is entitled to compensation even in instances where the termination of his services are considered to be lawful and just. In support of his submission,

Mr. Fernando drew the attention of Court to ***Somawathie v. Baksons Textile Industries*** [79(1) NLR 204].

In response, Mr. Weerasuriya, the learned President's Counsel for the Respondent submitted that, there is no authority or judicial dicta which supports the position that, compensation can be considered even in a fit case if the termination is justified. In his written submissions, Mr. Weerasuriya submitted that, there are judicial authorities which support the contention that, where the services of a person in the nature of personal secretary, domestic servant, etc. are terminated on the ground that the employer had lost faith or confidence in the workman, if the termination is unjustified, compensation in lieu of reinstatement can be considered. He submitted that the services of the Applicant did not fall into such category, and hence, he was not entitled for compensation. He also submitted that in any event, as the issue of reinstatement does not arise, compensation in lieu of reinstatement also does not arise.

I propose to now examine relevant pronouncements contained in certain judgments delivered in the past.

In ***Shell Company of Ceylon Ltd. v. D.C. Pathirana*** [64 NLR 71] Justice Abeyesundere has observed that, there is no limit imposed by the legislature in regard to the power to grant relief under section 31B of the Industrial Disputes Act that would in effect prevent the grant of relief in instances where the termination of services is both lawful and justified. The only limit placed on the power to grant relief under section 31B is that contained in sub-section (1) of section 31C of the Industrial Disputes Act, which requires the order granting relief to be just and equitable. Justice Abeyesundere has further held that, the power to grant relief under section 31B is wide in view of the fact that sub-section (4) of that section enables relief to be granted notwithstanding anything to the contrary in any

contract of service between the workman and the employer. The views expressed by Justice Abeysundere have been cited with approval in the majority judgment of the Privy Council in ***The United Engineering Workers Union v. K.W. Devanayagam (President, Eastern Province Agricultural Co-operative Union Ltd.)*** [69 NLR 289]. The Privy Council has observed that the absence of the term 'wrongful 'in section 31B (1) of the Act is significant. The section does not provide that, a workman can apply for relief in respect of 'wrongful termination 'of his services. It merely says that a workman can apply in respect of 'termination 'of his services.

The Highland Tea Company of Ceylon Ltd. and Another v. The National Union of Workers [70 NLR 161] is a case where the services of an estate labourer named Iruthayam to whom Estate Labour (Indian) Ordinance applied had been terminated. The President of the Labour Tribunal had held that, the dismissal was wrongful, but in view of certain circumstances associated with her husband's services also having been terminated, did not order reinstatement. Instead, taking into consideration the period of service of Iruthayam, directed the employer to pay compensation. In appeal against that order to the Supreme Court, Justice Alles held that, the termination of services of Iruthayam was not wrongful or unlawful. However, he held that the President of the Labour Tribunal had not erred in law in making the order for compensation, as it was an order that he was entitled to make in terms of the Industrial Disputes Act.

In ***Wataraka Multi-Purpose Co-operative Society Ltd. v. W. Wickremachandra*** [70 NLR 239] Justice Victor Tennakoon dealing with a matter where the services of a workman (respondent) had been terminated due to inefficiency, has held that, if the respondent was in fact inefficient and there was neither illegality nor any finding that termination of services for inefficiency was an

unfair labour practice, it is an error of law to award any compensation under section 33(1)(d) of the Act.

The Group Superintendent, Dalma Group Halgranoya and Others v. The Ceylon Estates Staffs Union [73 NLR 574], is a case where the President of the Labour Tribunal had held that the termination of the services of the workman had been made for *bona fide* reasons and that the termination of employment was lawful. Nevertheless, the President concluded that he thinks that some consideration was due to the applicant in view of his enforced retirement, and made order that the respondent pay *ex gratia* a sum of Rs. 4,000 as compensation for loss of career of the workman. In appeal, Justice Alles held that, compensation is payable only when a wrong has been done. In the case in issue, no wrong had been done. In the circumstances, it is not possible to state that the termination of the workman's services was either unlawful or contrary to accepted standards of fair labour practice. In the circumstances, the Supreme Court set aside the order made by the President of the Labour Tribunal for the payment of compensation.

In ***K.B.D. Somawathie v. Baksons Textile Industries Ltd.*** [79(1) NLR 204], Justice Rajaratnam held that, even following the President of the Labour Tribunal concluding that the termination of services was both lawful and justifiable, as he is required to make a just and equitable order, he should address his mind to whether the applicant (workman) deserves redress or relief, and if so, what should such relief of redress be. He has observed that, in some cases, the failure of the President to direct his mind specifically to these questions may not lead to a legally defective order, but in other cases and in his Lordship's view in that particular case, such failure had led to a legal defective order.

The Caledonian (Ceylon) Tea and Rubber Estates Ltd. v. J.S. Hillman [79(1) NLR 421] is a case decided by two Justices of the then Supreme Court, unlike

the judgments cited above, which were heard and decided by a single Justice of the then Supreme Court, excluding the case of ***The United Engineering Workers Union v. K.W. Devanayagam*** which was heard by five justices of the Privy Council and decided by a majority of the said justices. In this case, then Chief Justice S. Sharvananda observed that, the proposition 'if the termination is held to have been justified, an order for reinstatement would not arise and no order for compensation can be made 'will hold good if the termination is justified on the ground of misconduct of the employee and such termination is by way of disciplinary measure. If it was the employee's conduct that had induced the termination, he cannot, in justice and equity have a just claim to compensation for loss of employment. Justice Sharvananda proceeded to hold that, on the other hand, where an employee is in no way responsible for the termination of his services and the termination was consequent on the lawful exercise of the proprietary rights of the employer, as in the case where the employer closes down the business and that renders the employment of the worker purposeless, the afore-stated proposition is not tenable. Where the termination has been caused solely by the act and will of the employer in the exercise of his managerial discretion to organize and arrange his business, a tribunal, exercising just and equitable jurisdiction, uninhibited by limitations of law, but actuated by postulates of justice, is well entitled to grant relief in the nature of compensation to the discharged employee, even though, in law, the employer was justified in discharging him from service on account of surplusage.

In ***Premadasa Rodrigo v. Ceylon Petroleum Corporation*** [(1991) 2 Sri L.R. 382] decided by three judges of the present Supreme Court, Justice Dr. A.R.B. Amerasinghe has cited with approval Justice Sharvananda's view in ***Caledonian (Ceylon) Tea and Rubber Estates Ltd. v. J.S. Hillman*** (supra) that, *if the employee s conduct had influenced the termination, he cannot in justice and equity have a just claim to compensation for loss of career, as he has only himself to blame for the predicament in which he finds himself*".

In ***Saleem v. Hatton National Bank Ltd.*** [(1994) 3 Sri L.R. 409] an appeal heard by three Justices of the present Supreme Court, Justice K.M.M.B. Kulatunga having considered a string of judgments in which different opinions on this matter have been expressed, has held that, a Labour Tribunal may order compensation upon a termination of services even when such termination is justified and correct; and no distinction as to whether such termination was upon a closure of an industry or for misconduct as a disciplinary measure can be imposed in considering a claim for compensation. He has further held that, whether the appellant deserves compensation, is dependent upon the special circumstances which would make it just and equitable to order such relief.

In ***The Board of Governors for Zahira College v. Naina Mahamed alias Naina Lebbe*** [(1999) 2 Sri L.R. 309] the then Chief Justice G.P.S. De Silva, considered whether a school teacher whose services had been terminated by the employer on grounds of indiscipline and or misconduct, and the Labour Tribunal having dismissed his application on the ground that the charge of misconduct had been proved, was entitled to compensation. Referring to the Judgment of Justice Kulatunga in *Saleem v. Hatton National Bank Ltd.* (in the backdrop of His Lordship the former Chief Justice having been on the bench that decided that case), held that, *in awarding compensation, Kulatunga, J. took into account the special and exceptional circumstances of the case*".

In ***Kotagala Plantations Ltd. and Another v. Ceylon Planters Society*** [(2010) 2 Sri L.R. 299], Chief Justice J.A.N. De Silva has held that, if the conduct of the workman had induced the termination, he cannot in justice and equity claim compensation for loss of career. On the other hand, if the termination was not within the control of a workman but solely by the act and will of an employer, a Tribunal exercising just and equitable jurisdiction is well entitled to

grant relief in the nature of compensation to a discharged workman. Former Chief Justice has further held that, no workman should be permitted to suffer for no fault of his, but an unwanted, dishonest, troublesome workman may be discharged without compensation for loss of his employment. The workman in those circumstances has to blame himself for the unpleasant and embarrassing situation in which he finds himself.

The Superintendent, Belmont Tea Factory and Namunukula Plantations PLC v. Ceylon Estate Staffs Union [SC Appeal 59/2016 – SC Minutes of 31.03.2017) decided by Anil Gooneratne, J. is a case where the services of a *Factory Tea Officer* had been terminated on grounds of having been responsible for a shortage of 791kg of tea which was in his custody. The position of the employer was that, the employee had been negligent, he had not acted in a manner as required by an experienced officer and the incident had resulted in a substantial loss to the employer. This had resulted in loss of confidence. The Labour Tribunal, the High Court and the Supreme Court held that in the circumstances, the termination of services was justified. However, Justice Goonaratne affirmed the view that, nevertheless, compensation should be awarded. However, he directed a reduction of the amount of compensation ordered by the High Court.

In ***Ranjith Palipana v. Etisalat Lanka (Pvt.) Ltd.*** (SC Appeal 161/2012, SC Minutes of 20th June 2017) Justice Eva Wanasundera having cited some of the judgments that I have enumerated above, held that, *the law in regard to termination of services is very much in favour of the employee, and a workman can be granted relief even though the termination of services of an employee is held to be justified"*.

The above enumeration points to divergent views having been expressed by the Supreme Court on this matter.

On a careful consideration of the provisions of the Industrial Disputes Act, general principles of law, the spirit of the law relating to labour legislation, and the principles of law contained in the judgments referred to above, I hold that, in instances where a workman has presented an application to a Labour Tribunal in terms of section 31B(1)(a) of the Industrial Disputes Act in respect of the termination of his services by his employer, and following an inquiry into such application and hearing of all such evidence as the tribunal may consider necessary in terms of section 31C of the Act, if the President of the tribunal has concluded that (a) **termination of services had in fact taken place**, and that (b) such **termination of services was lawful and justified**, the President of the Labour Tribunal should be guided by the following **principles**:

1. The law confers wide **discretion** on the President of the tribunal to make **any just and equitable order**, which is circumscribed by section 33(1) of the Act, and such discretion shall be exercised by the President of the Labour Tribunal **judicially**.

2. The power conferred by law on the labour tribunal requires the President of the tribunal to make a **just and equitable order**, and he is **not precluded** by law from making an order for the payment of **compensation** to the applicant, **if the circumstances justify** the making of such an order.

3. An applicant (workman) whose services the Labour Tribunal has determined has been terminated lawfully and for justifiable reasons, **cannot as of right claim compensation**.

4. The ordering of compensation to the applicant **should be considered favourably**, if attendant circumstances justifies the making of an order for compensation, and particularly when termination of services though

determined by the tribunal to have been both lawful and justifiable, **was not occasioned** due to any wrongdoing / misconduct committed by the applicant (employee).

5. In situations where termination of services was due to misconduct by the applicant / workman and such termination is held by the tribunal to have been just and equitable, an order for compensation would be just and equitable, **only if** there are **special or exceptional circumstances**, that warrant the making of such an order for payment of compensation.

6. When the order of the President of the tribunal reflects the absence of consideration by him whether or not compensation should be ordered, whether such failure on the part of the President of the tribunal would make such order legally defective, has to be determined **based on the individual facts and circumstances of such case**.

In view of the foregoing, I answer the first question of law formulated by me above, in the following manner:

With regard to an application presented under the Industrial Disputes Act by a workman or by a trade union on behalf of a workman alleging termination of services by an employer, following the conduct of an inquiry and hearing of evidence, even if the Labour Tribunal determines that the termination of services of the workman had been both lawful and justifiable, it would nevertheless be lawful and necessary for the Labour Tribunal to order the employer to pay compensation to the workman, provided such order is compatible with the principles referred to in paragraphs (i) to (iv), above.

I will now answer the second question of law formulated by me, on whether in the instant case, the Labour Tribunal and the High Court had erred in not considering whether the Appellant should be awarded compensation.

A consideration of both the order delivered by the learned President of the Labour Tribunal and the Judgment delivered by the learned Judge of the High Court reveals that, both of them have not considered the question of compensation following the determination that the termination of services of the Appellant was lawful and justifiable. A consideration of both the said order and the judgment gives the impression that, both the learned President of the Labour Tribunal and the learned High Court Judge had entertained the erroneous view that, once the tribunal determines that the termination of services is lawful and justifiable, it is not necessary in law to consider whether the tribunal should proceed to make an order awarding just and equitable relief or redress to the applicant, in the nature of compensation.

Thus, I conclude that both the Labour Tribunal and the High Court had erred in not considering whether any compensation should be awarded to the Appellant.

In view of the foregoing, I answer <u>both questions of law</u> formulated by me in place of the <u>fourth question of law</u> in respect of which the leave to appeal had been granted, in favour of the Appellant.

However, on a consideration of (a) the nature of the proven misconduct on the part of the Appellant including the fact that he had infringed rules of procedure of the company, (b) the Appellant having showed insubordination towards his superior officer, (c) the Appellant having uttered obscene words at his superior officer, (d) the Appellant having conducted himself in a manner unbecoming of a supervising officer, (e) the Appellant's conduct being a bad example to his subordinate officers, and (f) the Appellant's unsatisfactory work performance during

the period immediately preceding his termination of employment, and the absence of any exceptional or special circumstances that warrant an order being made for the payment of compensation to the Applicant - Appellant, **I am of the view that, no order for compensation should have been made by the Labour Tribunal in favour of the Appellant**. The making of such an order for payment of compensation, in the circumstances of this case, would not have been just and equitable. **Therefore, I hold that the final order made by the learned President of the Labour Tribunal and the Judgment delivered by the learned High Court Judge should not be interfered with.**

In this regard, I wish to observe that, Justice Sisira de Abrew has held in ***Peoples' Bank v. Lanka Banku Sevaka Sangamaya*** [SC Appeal 106/2012, SC Minutes of 9th June 2015] that, when compensation is awarded in favour of a person whose services have been terminated by the employer on the ground of misconduct stemming from dishonesty, and the Labour Tribunal has correctly held that the termination of services had been just and equitable, the award of compensation may be construed as an encouragement to commit misconduct. Thus, Justice Sisira de Abrew has expressed the view that, compensation should not be awarded.

Further, I respectfully note that, Chief Justice Sarath N. Silva in ***Alexander v. Gnanam and Others*** [(2002) 1 Sri L.R. 274] has held that, when the conduct of an employee is contemptuous and falls short of expected standards, an order for the payment of compensation is not warranted.

Finally, I wish to observe that Labour Tribunals and Courts should pay due regard to the justifiable policy and expectation of most employers, that workplace discipline and integrity of employees are of fundamental importance to any organisation, and hence should be strictly enforced. Those who act in breach of such standards and in infringement of core values of an organisation which are not

only lawful and in the interests of the organisation, but also in public and national interests as well, have to necessarily be dealt with firmly and in terms of fair disciplinary procedures. Doing so in my view is extremely important towards maintaining efficiency and productivity of organisations, as well as in the best interests of organisational integrity and sustainable development, which are prerequisites of national economic development.

In the totality of the afore-stated circumstances, I respectfully agree with Justice Thurairaja's finding that this Appeal should be dismissed.

Accordingly, I dismiss this Appeal. In the circumstances of this matter, I make no order as regards costs.

JUDGE OF THE SUPREME COURT

L.T.B. DEHIDENIYA, J.

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an appeal from the Judgement of the High Court of Civil Appeal of the Western Province holden in Gampaha.

Pannala Appuhamilage Kosala Surin Wickramasinghe
Appearing by his next friend Panapola Kankanamlage Seetha Kumarihamy of Nawathalwatte, Thalwatte.

Plaintiff

Vs

SC Appeal: 11/2013
SC/HCCA/LA: 213/2012
WP/HCCA/GPH/32/2008
DC Gampaha: 40625/P

1. Pannala Appuhamilage Sumanaweera Wickramasinghe
2. Pannala Appuhamilage Karunaratne Wickramasinghe
3. Pannala Appuhamilage Subadra Wickramasinghe
4. Pannala Appuhamilage Vinusha Lakmal Wickramasinghe
5. Samarasinghe Arachchige Somadasa
6. H.P. Rathnawathi
7. Praveen Wickramasinghe
   All of Thalangama, Ambepussa.

Defendants

AND

Samarasinghe Arachchige Somadasa
Thalangama, Ambepussa.

5th Defendant-Appellant

Vs

Pannala Appuhamilage Kosala Surin Wickramasinghe
Appearing by his next friend Panapola Kankanamlage Seetha Kumarihamy of Nawathalwatte, Thalwatte.

Plaintiff-Respondent

1. Pannala Appuhamilage Sumanaweera Wickramasinghe
2. Pannala Appuhamilage Karunaratne Wickramasinghe
3. Pannala Appuhamilage Subadra Wickramasinghe
4. Pannala Appuhamilage Vinusha Lakmal Wickramasinghe
6. H.P. Rathnawathi
7. Praveen Wickramasinghe

   All of Thalangama, Ambepussa.

Defendants-Respondents

AND NOW BETWEEN

Samarasinghe Arachchige Somadasa
Thalangama, Ambepussa.

5th Defendant-Appellant-Petitioner/ Appellant

Vs

Pannala Appuhamilage Kosala Surin Wickramasinghe

Appearing by his next friend Panapola Kankanamlage Seetha Kumarihamy of Nawathalwatte, Thalwatte.

Plaintiff-Respondent-Respondent

1. Pannala Appuhamilage Sumanaweera Wickramasinghe (deceased)

1(a) Gamaralage Sumanawathie

1(b) Kapila Rathnaweera

1(c) Thamara Kumari Rathnaweera

2. Pannala Appuhamilage Karunaratne Wickramasinghe (deceased)

2(a) Anoj Indika Wickramasinghe

3. Pannala Appuhamilage Subadra Wickramasinghe

4. Pannala Appuhamilage Vinusha Lakmal Wickramasinghe

6. H.P. Rathnawathi

8. Praveen Wickramasinghe

All of Thalangama, Ambepussa.

Defendants-Respondents-Respondents

Before: Buwaneka Aluwihare, PC. J.,
Murdu N.B.Fernando, PC. J. and
Yasantha Kodagoda, PC. J.

Counsel: S.N. Vijithsingh for the 5th Defendant-Appeallant-Appellant.
Dr. Sunil Cooray for Plaintiff-Respondent-Respondent and 1st and 4th Defendant-Respondents-Respondents.

Argued on: 10-03-2020

Decided on: 17.12.2021

Murdu N.B. Fernando, PC. J.,

The 5th Defendant-Appellant-Petitioner/Appellant ("the 5th defendant/appellant") came before this Court, being aggrieved by the judgement of the Civil Appellate High Court of the Western Province, holden in Gampaha ("the High Court") dated 17th February, 2012.

By the said judgement, the High Court affirmed the judgement of the District Court of Gampaha dated 03rd March, 2008 permitting the partitioning of the corpus and dismissed the appeal of the 5th defendant.

To state the facts of this appeal in brief, the Plaintiff-Respondent-Respondent ("the plaintiff") filed action in the District Court, to partition a land called and known as Beligahawatta in an extent of about 3 acres in the following manner:

The land	-	plaintiff	- 24/32 shares
	-	4th defendant	- 15 perches
	-	7th defendant	- 8/32 shares less 15 perches
The house	-	plaintiff	- 5/9 shares
	-	1st,2nd,3rd and 7th defendants	- 1/9 share each

The plaintiff pleaded that he was a minor, represented by his next friend, his mother and that the aforesaid rights and interests to the land and the house standing thereon, devolved on him primarily from his father Awin Wickramasinghe, by virtue of a deed bearing No 975 dated 15-05-1995 (P6).

The plaintiff also pleaded that the said Awin Wickramasinghe (plaintiff's predecessor in title) obtained title to the said land and the tiled house on the said land from Sediris Appuhamy, Awin Wickramasinghe's father, on two deeds executed in 1964 and in the manner described therein. The plaintiff named the 1st, 2nd, 3rd, 4th and 7th defendants as persons who have rights and interests in the said land and house as aforesaid.

The plaintiff further pleaded that the 5th defendant and the 6th defendant- respondent-respondent (spouse of 5th defendant) were made parties to this action, as the said two defendants who had no interest in the corpus were in illegal possession of the house standing on the said land.

The 5th defendant in the statement of claim filed before the District Court, took up the position that he was in lawful occupation, having obtained title to the house standing on the corpus, from the very same Awin Wickramasinghe by deed bearing No 8527 dated 27-11-1995 (P8) and moved for his rights under the said deed. However, in the said statement of claim the 5th defendant did not specify the exact interest he is said to have acquired on the house, upon the said deed bearing No. 8527.

In an amended statement of claim filed, the 5th defendant changed his assertion to prescriptive rights to the house and the appurtenant land and moved for dismissal of the plaint upon the basis that the corpus was not properly depicted in the preliminary plan and was not identified. The 5th defendant by taking up the new position abandoned his claim to the house based upon the deed bearing No 8527 dated 27-11-1995 (P8).

At the trial the 5th defendant raised issues only with regard to the identity of the land to be partitioned. Hence, the 5th defendant did not pursue the claim of prescriptive possession upon the house and the appurtenant land, the new ground taken up in its amended statement of claim.

The District Court permitted the partitioning of the land and the house standing thereon and gave judgement, upon analyzing the evidence led before court and on being satisfied of the identity of the corpus and the chain of title of the parties to the land and the house to be partitioned.

The claim of the 5th defendant was also dismissed by the district judge. The judgement referred to the many contentions taken up by the 5th defendant, especially the admission to court that he is a trespasser and walked into an abandoned house. Thus, the district judge cast doubts with regard to the evidence given by the 5th defendant, considered him as an untrustworthy witness and rejected the evidence and dismissed the 5th defendant's case.

Being aggrieved by the said judgement, the 5th defendant appealed to the High Court. The High Court dismissed the appeal and upheld the judgement of the District Court.

The 5th defendant thereafter, invoked the jurisdiction of this Court and obtained Leave to Appeal, on three Questions of Law referred to in paragraph 12 (v), (vi) and (vii) of the Petition.

The said Questions of Law are as follows: -

(v) Whether the predecessor in title of the petitioner was left with any rights (1/9) in the house and soil covered by the said house, after transferring his rights by deed bearing No 975 dated 15-05-1995?

(vi) Whether the said (1/9) rights to the house and the soil covered by the said house was transferred to the petitioner by deed bearing No 8527 dated 27-11-1995?

(vii) Whether the Honorable Judges of the High Court of Civil Appeal have erred in law as well as in facts in their failure to take into consideration of the fact that the trial judge had failed to investigate title of the parties which had resulted a miscarriage of justice?

From the foregoing Questions of Law, it is observed that the 5th defendant is traversing new terrain. He has abandoned the claim on prescription and the challenge to the identity of the corpus, the basis or the grounds taken up in the amended statement of claim filed and at the trial court to move for dismissal of the partition action and is now presenting an entirely a new case.

The 5th defendant pivots this appeal upon **deed bearing No 8527 dated 27-11-1995 (P8)**, an assertion which he did not rely upon or pursue before the trial court [though in his initial statement of claim, a passing reference was made to the said deed]. Having abandoned the claim on prescriptive rights to the house the 5th defendant is founding this appeal on the rights he claims from Awin Wickramasinghe. However, it is observed that the 5th defendant is only claiming **1/9th right to the house and the soil covered by the said house.** Thus, the 5th defendant has *abandoned his initial claim to the entire house and the appurtenant land of the house* and confines it only to 1/9th right to the house and the soil covered by the said house, an entirely a new ground not adverted to before the District Court.

This Court has time and again held, that a party cannot be permitted to present in appeal a case different from that presented before the trial court, where matters of fact are involved which were not in issue at the trial.

In **Candappa nee Bastian v. Ponnambalampillai [1993] 1 Sri LR 184** at page 189 this Court observed,

> *"…….. the position taken up in appeal for the first time was not in accord with the case as presented by the defendant in the District Court. It is well to bear in mind the provisions of explanation 2 to Section 150 of the Civil Procedure Code. It reads thus,*

> **The case enunciated must reasonably accord with the party's pleading. i.e. plaint or answer, as the case may be and no party can be allowed to make at the trial a case materially different from that which he has placed on record and which his opponent is prepared to meet.**
>
> *A fortiori, a party cannot be permitted to present in appeal a case different from the case presented before the trial court, except in accordance with the principles laid down by the House of Lords in Tasmania [(1890) 15 App. Cases 233] and followed by Dias, J. in Setha v. Weerakoon 49 NLR 225 at pages 228 and 229..." (emphasis added)*

Thus, G.P.S. de Silva, J., (as he then was) in the afore said case emphatically observed, that in appeal an entirely a new case cannot be presented. I fully concur with the above observations.

Hence, in my view the 5th defendant who abandoned his initial challenge to the partition action based upon the deed bearing No 8527 dated 27-11-1995 (P8) and relied upon a new ground, a new arena, i.e., of prescriptive rights to the entire house and to the appurtenant land therein, should not be allowed or permitted to resurrect the deed P8 and present a new case before this Court.

Moreover, it is observed that the 5th defendant not only resurrected the deed P8, but varied its stance and contention, from the right to use and posses the entire house and the appurtenant land therein, to one of **1/9th share of the house and the soil covered by the said house**, as enunciated in the questions of law raised before this Court.

The instant appeal in my view, should be evaluated by this Court, not upon the new contention put forward by the 5th defendant but on the evidence presented before the District Court, in order to ascertain whether the trial judge misdirected himself when investigating title. This Court should also consider whether the analysis of the trial judge pertaining to investigation of title resulted in a *miscarriage of justice* as averred to by the 5th defendant or whether the trial judge has full filled his obligations and arrived at a correct decision, as contemplated by Section 25 (1) of the Partition Law No 21 of 1977 as amended ("the Partition Act").

Section 25(1) of the Partition Act reads as follows: -

> *"…. the court shall examine the title of each party and shall hear and receive evidence in support thereof and shall try and determine*

all questions of law and fact arising in that action in regard to the right, share or interest of each party to, of, or in the land to which the action relates…"

The aforesaid provision and the similar provisions in the earlier enactments i.e. the Partition Act of 1951 and the Partition Ordinance, have been analyzed by this Court, extensively and the duty of the trial court to examine and investigate title, has been time and again greatly emphasized [see **Juliana Hamine v. Don Thomas (1957) 59 NLR 546; Cooray v. Wijesuriya (1958) 62 NLR 158; Jane Nona v. Dingiri Mahathmaya (1968) 74 NLR 105]**

Nevertheless, our Courts have also held that in investigating title, balance of probability is the standard of proof and no higher level of proof is required than in any other civil suit. The ratio of the decisions of the Appellate Courts have been, that a trial court could investigate title, only within the limits of pleadings, admissions and issues and evidence led before court and the courts should not go on a voyage of discovery [see **Cynthia de Alwis v. Marjorie de Alwis and others (1997) 3 Sri LR 113; Karunaratne v. Sirimalie (1951) 53 NLR 444; Thilagaratnam v. Athpunathan and others (1996) 2 Sri LR 66**]**.**

Thus, an appeal pertaining to a partition matter ought to be considered upon the four corners of the afore mentioned legal principles to ascertain whether justice has been meted out or whether a miscarriage of justice has taken place *viz-a-viz* the parties to the partition application.

However, I do not have to delve into the aforesaid legal provisions or the change of stance, of the 5th defendant or even the legality or validity of presenting a materially different case in this appeal, in view of the three questions of law already formulated. Hence, I would limit the scope of this appeal to the questions of law raised before this Court and would proceed to answer the said questions only.

The 1st question of law refers to the **deed bearing No 975 dated 15-05-1995 (P6)**. This is the deed by which the *plaintiff claims rights and interests to the land and the house standing thereon,* from his father Awin Wickramasinghe.

The 5th defendant did not challenge the said deed or the rights and interests emanating from the said deed, which devolved on the plaintiff in respect of ***the land*** *to be partitioned.* The 5th defendant's challenge or grievance is only in respect of ***the house standing on the said land*****.**

In a nutshell, the 5th defendant's contention is that while the land to be partitioned was transferred to the plaintiff by Awin Wickramasinghe i.e., plaintiff's father and predecessor in title,

that 1/9th share of the house standing on the said land was retained by Awin Wickramasinghe and transferred to the 5th defendant thereafter.

The 5th defendant also contends that the said transfer was by a deed executed subsequent to the afore said deed (P6) referred to in the 1st question of law, i.e., the deed bearing **No 8527 dated 27-11-1995 (P8)** by which 1/9th right to the house and the soil covered by the said house was conveyed to the 5th defendant. The 2nd question of law raised before this Court pertains to the said assertion.

The 3rd question of law posed to this Court is the correctness of the district judge's finding, with regard to investigation of title in the first instance and whether on the evidence led and the material before court, a miscarriage of justice has taken place viz-a-viz the 5th defendant.

In order to answer the aforesaid questions and to ascertain whether a miscarriage of justice has taken place or not, the primary factor to be examined, in my view is what exactly was transferred by Awin Wickramasinghe by the said two deeds P6 and P8. Undoubtedly, it is his rights and interests pertaining to the land and the house standing thereon.

Thus, I would examine Awin Wickramasinghe's title to the land and the house standing thereon in the first instance.

In the year 1964, Awin Wickramasinghe received title to the said land and the house standing thereon, from his father Sediris Appuhamy on two deeds bearing No 3926(P1) and 3927(P2). Whilst Awin Wickramasinghe, obtained title to 3/4th share of the corpus from the deed bearing No 3926 (P1), Awin Wickramasinghe together with his nine siblings received title to the house standing thereon, from their father, upon deed bearing No.3927 (P2). This factor is further evidenced by the schedule to the two deeds. It is observed that the schedule to deed bearing No. 3926 (P1) denotes, that it is the '*land only excluding the tiled house'* that was transferred to Awin Wickramasinghe whereas the schedule to deed bearing No 3927 (P2) refers to the '*tiled house'* being bestowed upon Awin Wickramasinghe and his nine siblings by their father, Sediris Appuhamy.

Thus, it is apparent that the house standing upon the corpus is co-owned by the nine siblings, each sibling being entitled to 1/9th share, including Awin Wickramasinghe.

Therefore, I see no ambiguity with regard to the undivided property that devolved on Awin Wickramasinghe in 1964, upon the two deeds, *viz* 3/4th share of the land and 1/9th share of the tiled house standing on the said land.

As discussed earlier, the 5th defendant does not dispute the plaintiff's predecessors title to the land and to the house nor dispute plaintiff's right to the land either.

The matter in issue or the bone of contention in this appeal, is the rights and interests pertaining to the house standing on the said land. Did Awin Wickrmasinghe transfer his **interests in the house together with the land to the plaintiff by deed P6** or **did he retain the rights to the house and transfer it subsequently by deed P8 to the 5th defendant?**

In other words, was it only the **land excluding the house** that was gifted to the plaintiff by Awin Wickrmasinghe by P6 or was it the **land together with the house** that was gifted to the plaintiff by P6?

To ascertain an answer to the said question, I wish to look at the 'property' transferred, as referred to in the deeds and defined and reflected more fully in the schedule of the deeds, marked and produced before the trial court.

In the year 1985, [10 years prior to the execution of the deed bearing No 975 dated 15-05-1995 (P6)] Awin Wickrmasinghe *transferred the very same corpus to the plaintiff, subject to his life interest*, by a deed bearing No 5978 (P4) dated 12-02-1985. The schedule to the said deed (P4) refers to the property transferred to the plaintiff, as **'the land and everything standing thereon'.** Thus, it is observed, in 1985, Awin Wickrmasinghe transferred *his rights and interests in the land and everything standing thereon*, to the plaintiff, subject to his life interest. i.e., 3/4th share of the land and 1/9th share of the titled house standing thereon.

Awin Wickrmasinghe revoked the above referred deed of gift (P4) on 15-05-1995 [by deed of revocation bearing No 974 (P5)] and executed the aforesaid (P6) deed bearing No 975 on the same date i.e. 15-05-1995 and transferred the property *free of all encumberances* to the plaintiff. In the deed of revocation (P5) and in the new deed of gift (P6) executed on 15-05-1995, the schedules refer to the property transferred as '**land, plantation and everything standing thereon**.'

Thus, it is observed, Awin Wickrmasinghe who in the year 1985 transferred *the land and everything standing thereon* to the plaintiff, subject to his life interest, transferred the very same property i.e. *the land, plantation and everything standing thereon* to the plaintiff, (without holding on to his life interest) free of all encumbrances in the year 1995.

Hence, the contention of the plaintiff before this Court was that in 1995 Awin Wickrmasinghe transferred the *land together with the plantation and everything standing thereon*

which included his rights and interests to the house standing on the said land to the plaintiff vide deed (P6) bearing No 975 executed on 15-05-1995. Conversely, the contention of the 5th defendant was that **only the land** was transferred to the plaintiff by the said deed P6 and not the rights to the house standing thereon.

Upon a plain reading of the deed P6, it is very clear and in my view there is no ambiguity that when Awin Wickramasinghe conveyed his undivided rights and interests to the land, plantation and everything standing thereon to the plaintiff, his intention was to transfer his 1/9th share of the tiled house (standing on the land) together with the 3/4th share of the land, to the plaintiff, his son. Hence, I see merit in the aforesaid assertion of the Counsel for the plaintiff.

The said position is also supported by case law of this Court.

In **Kanagasabai v. Mylwaganam (1976) 78 NLR 280 at page 288** Shravananda, J. (as he then was) observed as follows: -

> "Our law does not recognize ownership of a house or building apart from the land on which it stands. The building loses its independent existence and becomes part of the land on which it is constructed. The principle of accession in the case of buildings is embodied in the maxims, '*Omne quad inaedifacatur solo cedet'* (All that is built on the soil belongs thereto) and *'Superficies solo cedet'* (Things attached to the earth go with the immovable property). **Thus, land, in its signification means not only the surface of the ground, but also everything built on it.** *Cujus est solum ejus est usque ad caelum* (He who possesses land possesses also that which is above it). **On a conveyance of land, all buildings erected thereon pass with the land, even though there is no specific mention of such buildings in the deed of transfer.** Thus, 'land' in our law, includes houses and buildings, and when the legislature employs the term 'land' in any statute, the word is presumed to include 'house and buildings', unless there are words to exclude 'houses and buildings'." (emphasis added)

From the foregoing passage, it could undoubtedly be stated, that **on a conveyance of land, all buildings erected thereon pass with the land**, unless it is specifically excluded.

As we are very much aware, the general principles governing the interpretation of a deed is that the deed must be considered as a whole and effect given to the intention of the parties. [see **Mohammed v. Mohamad 30 NLR 225**; **Jayasundera v. Wijetilake and others [2006] 3 Sri LR 401**].

Hence, it is apparent that the contention of the plaintiff as discussed, is in line with and supported by the ratio of a multitude of cases of this Court as well.

Contrary to the aforesaid contention of the plaintiff, the assertion of the Counsel for the 5th defendant before us, was that by deed bearing No 8527 dated 27-11-1995 (P8) [which was executed subsequent to P6] Awin Wickramasinghe transferred *his parental inheritance interests on the house standing on the defined land* to the 5th defendant. Thus, I wish to consider the said proposition now.

It is observed that the ***schedule*** to the said deed (P8) only refers to Awin Wickramasinghe's ***parental inheritance rights to the house***. It does not refer to 1/9th share of the house being his right and interest to the house, as referred to in the questions of law raised before this Court. Moreover, it does not refer to the house being co-owned [by Awin Wickrmasinghe with nine others] or that Awin Wickramasinghe's parental inheritance rights and interest to the property is only for an undivided portion or 1/9th share of the house standing on the land described therein.

This deed (P8) in the ***recital*** **and the** ***habendum*** too, refers to *parental inheritance only* and does not refer to the manner and mode in which Awin Wickramasinghe received title to the said house. It does not refer to the deed P2 i.e., the 1964 deed bearing No. 3927 by which Awin Wickramasinghe received titled to the said house from his father together with his nine siblings. It does not refer to the property transferred, as a ***co-owned property*** (with nine others who are his siblings and who have equal rights to the house) or that his rights and interests in the house is only a 1/9th share, as referred to in the questions of law.

Further, it is observed that the deed P8, by which the 5th defendant claims title from Awin Wickramasinghe is an instrument with bare facts and minimal details, unlike P6 executed six months earlier also by Awin Wickramasinghe from whom the plaintiff claims title. As discussed earlier, P6 specifically refers to the manner and mode in which Awin Wickramasinghe obtained title to the 'land, plantation and everything thereon' whereas P8, is silent of such fact and only refers to 'parental inheritance rights to the house'.

It is also a matter of interest, that by another deed bearing No 7753 dated 07-10-1995 (P3), four of Awin Wickrmasinghe's siblings transferred their rights and interests [i.e.1/9 x 4= 4/9] to the

plaintiff. This deed was executed after P6 and prior to P8. In the aforesaid deed (P3), the schedule specifically refers to the property transferred to the plaintiff being **4/9th share of the tiled house standing on the said land**.

Hence, it is observed, that consequent to Awin Wickramasinghe transferring his rights to the land, plantation and everything standing thereon (by P6) to the plaintiff, that four of Awin Wickramasinghe's siblings (by P3) transferred their share, i.e., 4/9th rights and interests to the tiled house standing on the defined land to the plaintiff which entitled the plaintiff to 5/9th share of the house, viz 1/9th share upon P6 and 4/9th share upon P3.

As stated earlier, the 5th defendant did not challenge any of the deeds marked in evidence and specifically the deed P6 executed in May 1995 as well as P3 executed in October 1995. His contention before this Court was consequent to P6 and P3, he received title to *Awin Wickrmasinghe's parental inheritance to the tiled house standing on the land defined in the said deed* by P8 executed in November 1995.

I do not see merit in the said contention of the 5th defendant that he is entitled to 1/9th share of the house in issue in this appeal, for the below mentioned reasons.

Firstly, the deed bearing No 8527 (P8) does not refer to Awin Wickramasinghe's rights and interests pertaining to the house or him being a co-owner of the said house together with his nine siblings or that Awin Wickramasinghe received co-owned title to the said house in the year 1964, from his father Sediris Appuhamy upon deed bearing No 3927 (P2).

Secondly, the said deed P8 only refers to *parental inheritance to the tiled house* whereas, from the afore discussed facts it is amply clear that Awin Wickramasinghe and his siblings received title to the said house not upon parental inheritance but from their father and that too, upon a notarially executed deed (P2) in the year 1964.

Thirdly, the deeds P4, P5 and P6 [i.e., the initial transfer of the land and the house standing thereon to plaintiff by Awin Wickramasinghe subject to his life interest in 1985, revocation of the said deed in 1995, and the subsequent transfer without any reservations and free of any encumbrances in 1995] amply demonstrate that the rights and title to the land together with the house standing thereon clearly passed to the plaintiff from his predecessor in title on 15th May, 1995.

Hence, when Awin Wickramasinghe is said to have transferred his *parental inheritance to the 5th defendant* (by P8) in November 1995, Awin Wickramasinghe was not entitled to any rights

or interests to the land or the house standing thereon, as he had already denuded himself of all rights and interest to the corpus.

Thus, my considered view is that Awin Wickramasinghe did not convey any right or interest to the 5th defendant by P8 i.e., deed bearing No 8527 executed on 27-11-1995, since on such date, Awin Wickramasinghe did not posses or have any right or interest to the tiled house standing on the corpus in issue in this appeal.

Therefore, upon the material presented before the District Court especially, the deeds P3, P4, P5, P6 and P8, I see no merit in the assertion of the 5th defendant that the trial judge misdirected himself when investigating title of the parties before Court or that a miscarriage of justice took place as contended by the 5th defendant.

Let me now consider this appeal from another perspective i.e., **soil rights**.

Based upon P8, another contention put forward by the 5th defendant before this Court was in addition to his 1/9th share of the house that he was entitled to his acquired rights to the corpus or in other words his entitlement to *soil rights or soil covered by the house standing on the defined land.* He relied upon two judgements of this Court to substantiate his argument, namely, the case of **Vincent and others v. James and others [1982] 1 Sri LR 332** and the case of **Ranasinghe v. Ariyaratne Epa and others (1969) 74 NLR 153.**

The aforesaid argument with regard to *soil rights* in my view, has no bearing on the instant appeal for two reasons.

Firstly, as discussed in this judgement, no right flows or devolves upon the 5th defendant on the deed bearing No 8527(P8).

Secondly, the said **Vincent's case** has no relevance to the instant appeal and can be distinguished as it refers to a praedial servitude and a right of way. Servitude is a different legal regime and cannot be equated to an absolute or full transfer of property as contemplated by the deed P8.

Similarly, **Ranasinghe's case** also can be distinguished from the instant appeal and has no bearing to the matter before us since, the said case refers to a person knowingly erecting a building on another's land, intending it to become a permanent structure on the said land. In the aforesaid situation this Court held that the building becomes annexed to the land and accedes to the soil.

Hence the ratio of the said two cases in my view, will not assist the 5th defendant to establish his contention before this Court pertaining to his entitlement to the *soil rights* that is said to flow

from the deed P8. If I may say in simpler terms, the 5th defendant is claiming a right to the soil based upon the [1/9th] right which the 5th defendant claims he has on the house.

The Counsel for the plaintiff totally denying the said assertion drew our attention to the converse of the 5th defendant's contention, and specifically to the observations of Gratien A.C.J. in the case of **Suwaris and others v. Samarajeeva (1954) 55 NLR 387**.

The said **Suwaris's case**, pertains to a declaration of title and ejectment by a subsequent owner against persons who were in possession of certain buildings standing on a land. In the said case it was observed that a subsequent grant of soil rights would vest the ownership of a building on the land upon such person, in accordance with the maxim *omne quod inaedificatur solo cedit, i.e.,* everything that is erected on the soil goes with it. Gratien A.C.J. at page 389, also quoted and referred to the **Digest,** *wherein it is decreed that if in a conveyance of land, the alienor purports to convey the soil apart from the surface, it does not prevent the surface passing with the soil, for by its nature it is one with it.'*

In the said case, the precise nature of the servitude *habitatio* was discussed as explained by Voet and it was further observed, that if an owner of immovable property conveys it to A, but **in the same instrument** purports to grant to B the buildings standing on it, then the logical reconciliation of the two inconsistent grants would be for the ownership of the land and buildings to be with A, subject only to a personal servitude of *habitatio* in favour of B.

Hence, it is amply clear, as discussed by Gratien A.C.J. in the case above and Sharvananda J. in **Kanagasabai's case** (supra), a building erected on the soil goes with the soil and not vice versa, as contended by the 5th defendant. In any event what the 5th defendant claims is not a servitude but an outright transfer upon deed P8 executed six months after the deed P6. Thus, the issue of servitude or grating two rights in one and the same instrument does not arise in this appeal.

The contention of the plaintiff before this Court was that even if this Court holds that the 5th defendant is entitled to 1/9th right to the house, that the 5th defendant cannot prefer a claim to the soil rights or the soil covered by the house standing thereon. Nevertheless, Dr. Cooray, for the plaintiff vehemently contended that together with the alienation of the land, *ipse dixit* the rights to the house standing thereon was conveyed to the plaintiff by Awin Wickramasinghe by the deed P6 and there were no rights or interests remaining for Awin Wickramasinghe to convey subsequently to 5th defendant by the deed P8.

In the aforesaid circumstances, I do not see merit whatsoever in the argument put forward by the 5th defendant pertaining to soil rights.

At this Juncture, I wish to refer to another legal maxim, *cujus est solum ejus usque ad coelom et ad inferos* quoted by Sharvananda J. in **Kanagasabai's case** referred to earlier i.e., **whoever's is the soil, it is theirs all the way to Heaven and all the way to Hades** which speaks of a property holder's right not only to the plot of land itself, but also to the air above and the ground below.

Blackstone's Commentaries, Book 2, Chapter 2 page 18 too, refers to the above phrase and defines 'land', to include not only the face of the earth, but everything under it, or over it and goes on to state if a man grants all his lands, he grants there by all his mines of metal and other fossils, his woods, his waters, and his houses, as well as his fields and meadows.

The above referred 13th century legal maxim is accepted even in the present day context and modern law and followed subject to certain variations, with regard to '*air and space'* and also *'sub-surface rights'*. However, there is no dispute or variation pertaining to *'**surface rights**'* and in *a conveyance of land, surface and everything erected thereon passes with the soil, because by nature it is one and the same.* [see also **Tissera v. Tissera (1940) 42 NLR 60, Jayasundere v. Wijetilake and others (2006)3 SLR 401**]

From the foregoing discussion it is apparent, that upon execution of P6 in the instant appeal, the 'land' was conveyed and the title to the 'land' passed onto the plaintiff.

The 5th defendant did not challenge P6 or have any qualms or issues with regard to the deed P6 or conveyance of the 'land' to the plaintiff by Awin Wickramasinghe.

In my view, by P6, not only the land, but the surface of the land and everything standing thereon, which included Awin Wickramasinghe's rights to the co-owned house, was conveyed to the plaintiff. Thus, the 5th defendant's contention or his claim for Awin Wickramasinghe's rights to '*the house and the soil covered by the house,*' is legally flawed and should be rejected. Moreover, it does not stand to rhyme or reason either.

In any event, I am of the opinion that the conveyance which the 5th defendant is relying upon, i.e. the deed bearing No 8527 dated 27-11-1995 (P8), does not convey any right or interest to the 5th defendant, as Awin Wickramasinghe had already denuded and disposed of his rights to the house, when he transferred the corpus together with the **land, plantations and everything standing thereon** to the plaintiff, by deed bearing No 975 on 15-05-1995 (P6).

In the aforesaid circumstances, my considered view is that the 5th defendant cannot claim any right to the corpus. Hence, I answer the 1st and 2nd questions of law raised before this Court in the negative and in favour of the plaintiff.

Further, I hold that the High Court judges have correctly evaluated the judgement of the District Court with regard to the District Judge's finding in respect of the investigation of title and specifically, the rights of the 5th defendant and thus no miscarriage of justice has taken place, in the instant partition application and for the said reason, I answer the 3rd question of law raised before this Court also in favour of the plaintiff.

In the foregoing and for reasons morefully adumbrated in this judgement, the appeal of the 5th Defendant -Appellant- Appellant is dismissed with costs.

The judgement of the Civil Appellate High Court of Gampaha dated 17th February 2012 is upheld and the judgement of the District Court of Gampaha dated 03rd March, 2008 permitting the partitioning of the corpus in the manner stated therein, is also affirmed.

This Court further holds that the Plaintiff - Respondent- Respondent is entitled to a sum of Rs. 50,000 payable by the 5th Defendant- Appellant- Appellant. This sum is payable to the Plaintiff- Respondent- Respondent in addition to the costs of the courts below.

Appeal is dismissed with costs.

Judge of the Supreme Court

Buwaneka Aluwihare, 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

Chrisani Suweenetha Mariel
Lilian Karunaratne,
No. 4, Victoria Gardens,
Hokandara South,
Hokandara.
Plaintiff

SC APPEAL NO: SC/APPEAL/17/2015
SC LA NO: SC/HCCA/LA/463/2013
HCCA COLOMBO NO: WP/HCCA/COL/257/2008/F
DC COLOMBO CASE NO: 9643/RE

Vs.

P.R. Kotalawela,
No. 32-1/2 Castle Street,
(Dudley Senanayake Mawatha),
Colombo 8.
Defendant

AND BETWEEN

Chrisani Suweenetha Mariel
Lilian Karunaratne,
No. 4, Victoria Gardens,
Hokandara South,
Hokandara.
Plaintiff-Appellant

Vs.

P.R. Kotalawela,
No. 32-1/2 Castle Street,
(Dudley Senanayake Mawatha),
Colombo 8.
Defendant-Respondent

AND NOW BETWEEN

Chrisani Suweenetha Mariel
Lilian
Karunaratne,
No. 4, Victoria Gardens,
Hokandara South,
Hokandara.
Plaintiff-Appellant-Appellant

Vs.

P.R. Kotalawela,
No. 32-1/2 Castle Street,
(Dudley Senanayake Mawatha),
Colombo 8.
Defendant-Respondent-Respondent

Before: P. Padman Surasena, J.
Achala Wengappuli, J.
Mahinda Samayawardhena, J.

Counsel: Romesh de Silva, P.C., with Palitha Kumarasinghe, P.C., for the Plaintiff-Appellant-Appellant.
Maura Gunawansha, P.C., with Madhawa Wijayasiriwardena for the Defendant-Respondent-Respondent.

Argued on: 25.03.2021

Decided on: 30.04.2021

Mahinda Samayawardhena, J.

The Plaintiff filed this action seeking ejectment of the Defendant, whom the Plaintiff said was her tenant, from the premises in suit in terms of section 22(2)(bb)(ii) read with section 22(6) of the Rent Act, No.7 of 1972, as amended. The Plaintiff also claims damages from the Defendant from the date of termination of the tenancy until she is quieted in possession.

The said section of the Rent Act permits a landlord, who is the owner of not more than one residential premises, to seek ejectment of the tenant of any residential premises the standard rent of which for a month exceeds one hundred rupees, upon depositing with the Commissioner of National Housing a sum equivalent to five years' rent payable to the tenant, and with six months' notice in writing of the termination of the tenancy being given to the tenant.

The Defendant filed answer categorically stating that he was not the tenant of the Plaintiff and that he did not attorn to the Plaintiff upon the death of his previous landlord, i.e. the

father of the Plaintiff. The Defendant refused to attorn to the Plaintiff and pay rent to her despite repeated requests made in writing to do so. Instead, the Defendant deposited rent at the Rent Department of the Colombo Municipal Council in the name of the deceased landlord or his estate. He continued to do so even after the institution of the action whereby the Plaintiff clearly pleaded her title to the premises, which was accepted by the District Court in its Judgment. There is no necessity to go into detail on these matters as the Defendant admits that he is not the tenant of the Plaintiff and that he did not pay rent to the Plaintiff.

It is correct to say that the Defendant rests his case entirely on what he refers to as the statutory bar contained in section 22(7) of the Rent Act. He sought dismissal of the Plaintiff's action *in limine* on this basis. According to section 22(7)(b)(ii), no action can be instituted under section 22(2)(bb)(ii) if the ownership of such premises was acquired by the landlord on a date subsequent to the specified date by purchase, inheritance or gift other than inheritance or gift from a parent or spouse who had acquired ownership of such premises on a date prior or subsequent to the specified date by inheritance or gift from a parent or spouse. It is the position of the Defendant that the averments in the plaint itself demonstrate that the Plaintiff's mother, who alienated the premises to the Plaintiff, acquired title to the premises not from her parents or spouse but from her son and therefore the Plaintiff is statutorily barred from instituting this action.

The trial commenced with the raising of issues. After the issues of the Defendant, the Plaintiff raised a consequential issue, i.e. issue No.19, to say that in view of the fact that the

Defendant in his answer disputes the Plaintiff's ownership of the premises (and thereby denies tenancy), the Defendant is disentitled to the protection of the Rent Act. This is the crucial issue in this case. The Defendant's reliance on the aforesaid statutory bar becomes relevant only if this issue is answered against the Plaintiff.

The learned District Judge in his Judgment answered this issue against the Plaintiff. As seen from pages 15 and 16 of the Judgment, the learned District Judge did so on the ground that the protection of the Rent Act is attached to the premises and not to the tenancy. On this basis, he applied the statutory bar contained in section 22(7) of the Rent Act to dismiss the action of the Plaintiff. This is the fundamental mistake committed by the learned District Judge.

It is settled law that the entire protection of the Rent Act is attached to the contract of tenancy and not to the premises in suit despite the premises being technically governed by the Rent Act. If there is admittedly no valid contract of tenancy between the Plaintiff and the Defendant, the Defendant cannot shelter behind the protection of the Rent Act. This is what the Divisional Bench of the Supreme Court authoritatively held in *Imbuldeniya v. De Silva [1987] 1 Sri LR 367*, which has been followed by subsequent Supreme Court decisions including *Weerasena v. Perera [1991] 1 Sri LR 121*.

The Plaintiff thereafter appealed against the Judgment of the District Court. The Judgment of the High Court of Civil Appeal running into 66 pages is confusing. It is a reproduction of the extensive written submissions filed by both parties without any analysis. The learned High Court Judge first says the Defendant, having denied tenancy, is

disentitled to the protection of the Rent Act and therefore the District Judge was wrong to have answered issue No.19 against the Plaintiff (pages 60 and 61 of the Judgment), but thereafter says the Defendant is entitled to the benefit of section 22(7) of the Rent Act, and therefore the District Judge was right in dismissing the Plaintiff's action (page 65 of the Judgment). These two findings upon which the Judgment rests are clearly contradictory and irreconcilable. If the Defendant is disentitled to the protection of the Rent Act, how can he be granted the protection contained in section 22(7) of the Act? As I will explain below, section 22(7) has been enacted to protect "the tenant". If the Defendant himself declares he is not the tenant, how can he claim the advantage of section 22(7)? Ultimately, the High Court of Civil Appeal affirmed the Judgment of the District Court and dismissed the Plaintiff's appeal with costs.

This Court granted leave to appeal to the Plaintiff predominantly on the question whether the High Court of Civil Appeal erred in law when it dismissed the appeal of the Plaintiff despite having determined that the Defendant is not entitled to the protection of the Rent Act. I have already answered this question in favour of the Plaintiff.

When the Defendant expressly states in his answer or in his evidence that there is no tenancy agreement between him and the Plaintiff, he disqualifies himself from seeking relief under the Rent Act. In such circumstances, the Rent Act is wholly inapplicable and the Court is absolved from applying any of the fetters enumerated in section 22, which have been introduced to protect tenants and not mere occupants or trespassers of rent-controlled premises. The Rent Act

becomes applicable if and only if there is a contract of tenancy between the Plaintiff and the Defendant. In the absence of such an agreement, the Court has no right, either legitimate or moral, to impose tenancy on the Defendant to the detriment of the Plaintiff who is almost always the owner of the premises.

The High Court, having first correctly decided that the Defendant is disentitled to the protection of the Rent Act due to the denial of tenancy, was in error when it ultimately held that the Defendant was entitled to the protection afforded to a tenant under section 22(7) of the Rent Act.

A Divisional Bench of the Supreme Court presided over by Sharvananda C.J. in *Ranasinghe v. Premadharma [1985] 1 Sri LR 63 at 70* (with Wanasundera J. dissenting) held:

> *When the Defendant disclaims the tenancy pleaded by the Plaintiff he states definitely and unequivocally that there is no relationship of landlord and tenant between the Plaintiff and him to be protected by the Rent Act.*
>
> *The rationale of the above principle appears to be that a Defendant cannot approbate and reprobate. In cases where the doctrine of approbation and reprobation applies, the person concerned has a choice of two rights, either of which he is at liberty to adopt, but not both. Where the doctrine does apply, if the person to whom the choice belongs irrevocably and with full knowledge accepts one, he cannot afterwards assert the other; he cannot affirm and disaffirm. Hence a Defendant who denies tenancy cannot consistently claim the benefit of the tenancy which the Rent Act provides. For the*

> *protection of the Rent Act to be invoked the relationship of landlord and tenant, between the Plaintiff and him which is governed by the Rent Act should not be disputed by the Defendant.*

In the instant case the District Court held that the Plaintiff is the owner of the premises. The Defendant does not dispute this finding. Nor does the Defendant claim to be the tenant of the Plaintiff. The Plaintiff as the owner is entitled in law to occupy the premises. The burden of proof is then on the Defendant to show that he is in lawful possession. (*Beedi Johara v. Warusavithana [1998] 3 Sri LR 227, Gunasekera v. Latiff [1999] 1 Sri LR 365 at 370*) The Defendant attempted to justify his possession through the application of section 22(7) of the Rent Act whilst at the same time denying any contract of tenancy with the Plaintiff, which the law does not allow him to do.

Learned President's Counsel for the Defendant strenuously submits that the Plaintiff had two choices in seeking to eject the Defendant, one under common law and the other under the Rent Act, and having selected the latter, the Plaintiff cannot now abandon that course of action and seek to eject the Defendant under common law. This was raised as a question of law to be decided by this Court.

In my judgment, based on the facts and circumstances of this case, this question shall be answered against the Defendant.

It is true that the Plaintiff came before the District Court seeking ejectment of the Defendant under the Rent Act. But by his own conduct the Defendant ruled out the application

of the Rent Act. The Defendant has only himself to blame for his predicament.

I would have agreed with the learned President's Counsel in this regard if the Plaintiff had on her own attempted to present at the trial a case materially different from that pleaded in the plaint and which the Defendant was prepared to meet. That is not permissible.

It is settled law that no party can be allowed to make at the trial a case materially different from what he has placed on record. (*Hildon v. Munaweera [1997] 3 Sri LR 220, YMBA v. Abdul Azeez [1997] BLR 7, Gnananathan v. Premaardane [1999] 3 Sri LR 301, Ranasinghe v. Somawathie [2004] 2 Sri LR 154*) Explanation 2 to section 150 of the Civil Procedure Code reads:

> *The case enunciated must reasonably accord with the party's pleading, i.e., plaint or answer, as the case may be. And no party can be allowed to make at the trial a case materially different from that which he has placed on record, and which his opponent is prepared to meet. And the facts proposed to be established must in the whole amount to so much of the material part of his case as is not admitted in his opponent's pleadings.*

I must add that this principle is applicable not only at trial but also on appeal. An Appellant cannot present on appeal a case materially different to what was presented before the trial Court, unless the appeal is based on a pure question of law and not on a question of fact or mixed question of fact and law. (*Candappa nee Bastian v. Ponnambalampillai [1993] 1 Sri LR* 184, *Talwatte v. Somasunderam [1996] BLR 14,*

Janashakthi Insurance Co. Ltd. v. Umbichy Ltd. [2007] 2 Sri LR 39) Questions of fact or mixed questions of fact and law cannot be taken up for the first time on appeal. (*Hameed alias Abdul Rahman v. Weerasinghe [1989] 1 Sri LR 217, Simon Fernando v. Bernadette Fernando [2003] 2 Sri LR 158, Piyadasa v. Babanis [2006] 2 Sri LR 17 at 24, Leslin Jayasinghe v. Illangaratne [2006] 2 Sri LR 39 at 47*)

If I may recap, what happened in the instant case was when the Plaintiff sued the Defendant under the Rent Act on the basis that the Defendant was her tenant, the Defendant in his answer denied tenancy thereby eliminating the application of the Rent Act. It is against this backdrop that the Plaintiff was constrained to raise a consequential issue seeking the same relief, i.e. ejectment and damages, under common law. The Defendant did not object to it at that time. In any event, the Defendant could not have objected to it because the Plaintiff is entitled to raise consequential issues arising out of the Defendant's issues. What the Plaintiff did was not unusual. There are ample authorities to support the course of action adopted by the Plaintiff. However, learned President's Counsel submits that in those cases, unlike in the instant case, the Plaintiffs had come to Court seeking ejectment not under the Rent Act but under common law by way of *rei vindicatio* actions. I am unable to agree. Let me refer to a few of these cases.

In *Gunapala v. Babynona [1986] 2 Sri LR 374*, the Plaintiff filed a rent and ejectment action seeking ejectment of the Defendant on the basis that after the death of the original landlord, the Defendant having attorned to the Plaintiff refused to pay rent. The Defendant in the answer denied

tenancy between herself and the Plaintiff and further pleaded that the Plaintiff did not call on her to attorn. Both the District Court and the Court of Appeal dismissed the Plaintiff's action on the ground that the Defendant had not been made aware of the existence of the Deed by which the Plaintiff claimed the premises and hence was not bound to attorn to the Plaintiff. The Supreme Court allowed the appeal and in the course of the Judgment Sharvananda C.J. stated as follows at page 376:

> *It is true that the Plaintiff had framed this action on the basis that the Defendant attorned to him and had thereby become his tenant. But significantly the issues framed by him in this case departed from his pleadings and converted the action into a rei vindicatio action. The issues were raised by the Plaintiff on the basis that he claimed to be a co-owner of the premises and on the cessation of Simon's life-interest, the Defendant's possession was wrongful possession of the premises. The Defendant did not object to the issues framed by the Plaintiff. The case must be decided on the issues raised in the action.*

The Divisional Bench decision of the Supreme Court in *Ranasinghe v. Premadharma (supra)* is also a rent and ejectment case in which the Plaintiff filed action to eject the Defendants from premises admittedly governed by the Rent Act on the ground of arrears of rent. The Defendants in their answer denied tenancy as well as the receipt and validity of the notice to quit pleaded by the Plaintiff. After trial, the District Court held that the Defendants were in arrears of rent and entered Judgment for the Plaintiff. The District

Court further held that as the Defendants disclaimed tenancy under the Plaintiff it was not necessary in law for the Plaintiff to have given notice of termination of tenancy. The Court of Appeal set aside the order of ejectment of the Defendants and allowed the appeal. The decision of the Court of Appeal was founded on the ground that since the Defendant was a tenant under the Plaintiff in a rent-controlled premises, the Plaintiff could succeed in obtaining a decree for ejectment on the ground of arrears of rent, only if she established the requirements of sections 22(3) and 22(6) of the Rent Act, and since the Plaintiff had failed to establish that she had given three months' notice of the termination of the tenancy to the Defendants, the Court had no jurisdiction to grant the relief of ejectment notwithstanding the tenant had repudiated the contract of tenancy and did not claim the benefit of the Rent Act.

The Supreme Court set aside the Judgment of the Court of Appeal and restored the Judgment of the District Court and held:

> *The tenant is not entitled to notice because he had repudiated his tenancy. In such a case the landlord need not establish any one or more of the grounds of ejectment stipulated in section 22 of the Rent Act No. 7 of 1972 for success in his suit for ejectment.*

The same conclusion was arrived at in the Supreme Court case of *Kanthasamy v. Gnanasekeram [1983] 2 Sri LR 1*, which was relied upon by Sharvananda C.J. in *Ranasinghe v. Premadharma (supra).* In *Kanthasamy*'s case the Plaintiff sued the Defendant for ejectment under the Rent Act on the ground of reasonable requirement. The Defendant in the

answer denied tenancy. The Plaintiff then raised an issue whether a writ of ejectment could be granted against the Defendant upon the Defendant's denial of tenancy. The District Judge held that the Defendant was a tenant under the Plaintiff but, in view of the repudiation of tenancy, the Defendant was liable to be ejected. The Court of Appeal and the Supreme Court affirmed this decision.

In the instant case, the learned District Judge held that the Defendant is a tenant under the Plaintiff and the Plaintiff is entitled to seek ejectment of the Defendant in terms of section 22(2)(bb)(ii) of the Rent Act. However the learned District Judge refused to enter Judgment for the Plaintiff by application of section 22(7) of the Rent Act despite the Defendant's denial of tenancy. This is erroneous. Sharvananda C.J. in *Ranasinghe v. Premadharma (supra)* at page 71 elaborated:

> *Where the Defendant by his conduct or pleading makes it manifest that he does not regard that there exists the relationship of landlord and tenant between the Plaintiff and him, it will not be reasonable to include him in the concept of "tenant" envisaged by section 22 of the Rent Act although the court may determine, on the evidence before it, that he is in fact the tenant of the Plaintiff. Since such a person had by his words or conduct disclaimed the tenancy which entitles him to the protection of the Rent Act, it will be anomalous to grant him the protection of a tenancy, which, according to him, does not exist.*

The tenant cannot question the landlord's ownership of the premises; he has no right to do so. (Section 116 of the

Evidence Ordinance, *Pathirana v. Jayasundara (1955) 58 NLR 169 at 173*) In the instant case, the Defendant, by paragraphs 7, 8 and 12 of the answer, admits that: (a) the Plaintiff's father was his landlord; (b) upon the death of the Plaintiff's father, testamentary proceedings were instituted; and (c) he received P9 (by which the executor through an Attorney-at-Law informed him that the Plaintiff is the new owner of the premises and directed him to attorn to her). The content of P9 was repeated in several letters including P10 and P14. Hence the Defendant has no right to insist on copies of deeds to prove the Plaintiff's ownership of the premises and on that basis to refuse attornment and refuse payment of rent to the Plaintiff. If he does so, he becomes a trespasser. The Defendant is a trespasser from the time he refused to attorn to the Plaintiff.

In the plaint, the Plaintiff sought damages at the rate of Rs. 25,000 *per mensem* from the date of termination of the tenancy. The premises are situated at Castle Street, Colombo 8. The Defendant made a bare denial of this averment in the answer. The Defendant elected not to give evidence at the trial. The Plaintiff also gave specific evidence on this relief in her testimony, which was not challenged by the Defendant at all. Hence the Court can safely accept this uncontroverted evidence to hold that the said matter has been proved before Court. (*Edrick de Silva v. Chandradasa de Silva 1967) 70 NLR 169 at 174, Sudu Banda v. The Attorney-General [1998] 3 Sri LR 375 at 378-379*) The learned District Judge has not drawn any attention to this in the Judgment, although he perfunctorily answered issue No.8 against the Plaintiff presumably because of the misapplication of section 22(7) of the Rent Act.

The Judgment of the District Court insofar as it decided to dismiss the Plaintiff's action by application of section 22(7) of the Rent Act, and the Judgment of the High Court of Civil Appeal which affirmed the same are set aside and the appeal of the Plaintiff is allowed. The District Judge is directed to enter Judgment as prayed for in paragraphs (a)-(c) of the prayer to the plaint. The Plaintiff is entitled to costs in all three Courts.

Judge of the Supreme Court

P. Padman Surasena, J.
I agree.

Judge of the Supreme Court

Achala Wengappuli, J.
I 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 and/or special leave to appeal from the judgment of the High Court of the North Western Province, Holden in Chilaw, under and in terms of section 31DD of the Industrial Disputes Act No. 43 of 1950 (as amended).

SC Appeal:19/2015

SC No: SCHCLA10/14

High Court No: HCALT 01/2012

Labour Tribunal Application No.28/1421/ Chilaw

Dehiwattage Rukman Dinesh Fernando,

No. 552/A, Dandugama Road, Ja-Ela.

Applicant

Vs.

Union Apparel (Pvt) Ltd,

No. 184/01, Negombo Road,

Mudukatuwa, Marawila.

Respondent

AND BETWEEN

Union Apparel (Pvt) Ltd,

No. 184/01, Negombo Road,

Mudukatuwa, Marawila.

Respondent-Appellant

Vs.

Dehiwattage Rukman Dinesh Fernando,

No. 552/A, Dandugama Road, Ja-Ela.

Applicant

AND NOW BETWEEN

Union Apparel (Pvt) Ltd,

No. 184/01, Negombo Road,

Mudukatuwa, Marawila.

Respondent-Appellant-Appellant

Vs.

Dehiwattage Rukman Dinesh Fernando,

No. 552/A, Dandugama Road, Ja-Ela.

Applicant-Respondent-Respondent

Before: Buwaneka Aluwihare PC, J.
P. Padman Surasena J.
E. A. G. R. Amarasekera J.

Counsel: Dhanya Gunawardena for the Respondent-Appellant-Appellant.

G. R. D. Obeysekara with Lal Perera instructed by Unica Fonseka for the Applicant-Respondent-Respondent.

Argued on: 23. 10. 2019

Decided on: 28. 10. 2021

JUDGEMENT

Aluwihare PC, J.,

The present appeal seeks to challenge the judgment of the High Court by which, the learned High Court Judge had affirmed the Labour Tribunal's findings that the termination of services of the Applicant-Respondent-Respondent (hereinafter referred to as the 'Applicant') was unjust and therefore the Applicant was entitled to compensation.

The Applicant, in his application made to the Labour Tribunal had averred that he had been employed as the 'Manager-Packing' of the Respondent-Appellant-Petitioner Company (hereinafter sometimes referred to as the 'Appellant-Company') since 25th March 2003 and had alleged that when he reported to work on 3rd April 2008, he was served with a letter of suspension from service ('අ2'). He had been told that a domestic inquiry would be held on 8th April 2008 regarding

the same. A domestic inquiry, however, had not been held as intimated, and the Applicant's services had been terminated by letter dated 22nd April 2008 ('අ3'). The reason given for the dismissal of the Applicant had been, his failure to ensure that the polybags used for packing the garments ordered by an international buyer, 'Next' were in compliance with the specifications and other requirements stipulated by the said international buyer ['Next'] and another buyer 'Regatta' and that the Applicant failed to carry out his duties up to their expectations. The Applicant on the other hand claimed, that the termination of his services without holding a domestic inquiry amounts to unjust and unfair termination of services.

The Appellant-Company in its answer to the Labour Tribunal stated *inter alia* that the Applicant as the 'Manager-Packing', was entrusted with the vital responsibility of packing finished garments according to the buyer's specifications ensuring the degree of quality required. Their position was that, if the 'Manager-Packing' fails to carry out the packing as required, it would result in a loss of business, financial loss and loss of valuable clients and / or buyers in the context of the highly competitive garment manufacturing industry, in addition to the risk of the buyers rejecting the said orders and possible discontinuation of procuring garments from the Appellant-Company.

The Appellant-Company had called as witnesses the Human Resources Manager G. G. Samarasekera and Packing Officer K. N. Wijeratne of the factory. In the course of their evidence, they had mainly explained the adverse consequences of the Packing Manager failing to meet the specifications of the buyer. The documents marked 'අ4' and 'අ5' had been submitted to demonstrate that two international buyers, 'Regatta' and 'Next' had complained about the deviation from the procedures of loading the cartons of finished garments into the containers. The Applicant had been warned previously by 'අ1' (dated 29th September 2009), not to deviate from the rules and procedures that are required to be adhered to, when packing the relevant orders.

The Labour Tribunal had held that the termination of the Applicant was wrongful and ordered the Appellant-Company to pay Rs.420,000/- as compensation, to the Applicant (at page 181-187 of the Appeal brief). On appeal to the Provincial High Court by the Appellant-Company, the Learned High Court Judge had affirmed the award of the Labour Tribunal, by its judgment dated 12th December 2013 ('P1').

The Appellant-Company sought Leave to Appeal, and this Court granted leave on the following questions of law, referred to in sub-paragraphs (a), (c) and (i) of paragraph 10 of the Petition of the Appellant;

> *(a) Did the High Court misinterpret and misapply the established legal principles and/or decided case law submitted on behalf of the Petitioner in arriving at the Conclusion of 'P1'* [judgement of the High Court]*?*
>
> *(c)) Did the High Court fail to evaluate the evidence establishing the grave negligence of the Respondent and that the Respondent had been previously warned as to his negligence pertaining to the packing function?*
>
> *(i) Did the High Court err by holding that a domestic inquiry is mandatory under the established legal principles of Sri Lanka?*

Order of the Labour Tribunal

The Labour Tribunal had decided that the termination was unjust, based on several factors. Witness K. Wijeratne, Packing Officer, had stated that the responsibility of ensuring that the packing was done to meet the buyer's specifications rested entirely with the Manager-Packing, i. e. the Applicant, and that a loss would result to the Company if the Manager-packing failed to carry out the packing according to the given specifications. The witness had admitted that the Applicant held a position senior to him in the company hierarchy. The President of the Labour Tribunal, having considered the testimony of this witness, had been of the opinion that his evidence had no direct connection to the main issues of the case i.e. proving

the allegation against the Applicant, as the witness had given evidence only relating to the possible consequences of the Manager-Packing failing to meet a buyer's specifications. G. G. Samarasekera, the other witness who testified on behalf of the Appellant-Company, had been employed by the company about one and half years after the Applicant's services had been terminated and it had transpired in the course of his evidence that, he had had no personal knowledge of the orders in question. Furthermore, the learned President of the Labour Tribunal had observed that the witness had admitted that a domestic inquiry had not been held, although it was stated in 'එ2' that a disciplinary inquiry would be held regarding the Applicant on 08th April 2008.

The two emails, on the strength of the contents of which the Applicant's services had been terminated, purported to have been sent by 'Next' and 'Regatta' had been submitted by the witness as evidence subject to proof, on 16th October 2009 ('එ4' and 'එ5'). The learned President of the Labour Tribunal, however, had observed that even after a lapse of ten months, the Appellant-Company had failed to call Jude Virajith, the Manager of the Appellant-Company as a witness, who is said to have received the two emails from the buyers. This court is mindful of the fact that the provisions of the Evidence Ordinance have no application to proceedings before the Labour Tribunal. In the instant case, however, there was a duty on the Appellant-Company to establish a nexus between the impugned emails and the incident over which the services of the Applicant were terminated. As such this court cannot find fault with the learned President of the Labour Tribunal when he held that the Appellant-Company had failed to establish their position sufficiently with evidence

The Applicant, in his evidence, had accepted that the 'polybags' they manufactured had been longer than what was specified by 'Next'. However, he had maintained that the sample of the bags sent to 'Next' had been approved and the emails with the specifications sent by 'Next' had been submitted marked 'A4'. The Applicant had also maintained that the measurements of the bags would be checked by the

Quality Controller of the Stores Section and after packing would also be checked by the ordering agency before being shipped. The learned President of the Labour Tribunal had been of the opinion that this evidence given by the Applicant had neither been challenged nor contradicted by the Appellant-Company, thereby failing to justify the allegations on which the Applicant's services had been terminated.

The learned President of the Labour Tribunal had deemed it fit that the Applicant be paid compensation in terms of Sections 33(5) and 33(6) of the Industrial Disputes Act in lieu of reinstatement. Following **Associated Newspapers of Ceylon Ltd. v. Jayasinghe** 1982 2 SLR 595 where it was held that "*the essential question, in the determination of compensation for unfair dismissal is- what is the actual financial loss caused by the unfair dismissal, for compensation is an 'indemnity for loss'.* In the present case the President of the Labour Tribunal had been of the view that the Applicant should be paid the equivalent of 3 months' salary for each year of service with the Petitioner company.

Judgment of the Provincial High Court

The Learned Judge of the Provincial High Court has stated that the Appellant-Company had not demonstrated to court whether the international buyer, 'Next' rejected the garments or refused payment for the garments, and the amount of the loss, if any, caused to the Appellant-Company. The Learned Judge had made the same observations made by the learned President of the Labour Tribunal that the Human Resource Manager called as a witness had no knowledge about the incident as he had joined the Company after the Applicant's services had been terminated, that the other witness held a position junior to that of the Applicant and had not given evidence of any value, and that the Manager, Jude Virajith, had not been called as a witness regarding the emails ('එ4' and 'එ5') received by him from the international buyers.

Furthermore, the Learned High Court Judge had noted that the evidence given by the Applicant reveals that the Appellant-Company had taken on the particular order in issue, although it did not have the necessary equipment to pack the garments according to the buyer's specifications at their Factory in Marawila. When the Applicant and the Quality Manager had informed the management of the Appellant-Company that the required quality could not be achieved at their Factory, they had been directed to stitch the garments at the Marawila factory and to get them packed at the Avissawella Factory, as this was a special order which they could not afford to lose. The samples that were packed in Avissawella had been submitted to the Central Quality Controlling Institute for 'Next' and the approval obtained to proceed with manufacturing the order. After the order had been shipped, however, the Applicant had been informed by the Audit Officer that 'Next' had complained that the polybags used were too long. Thereafter the Applicant's services had been terminated.

The evidence given by the Applicant regarding the order, alleging that the Appellant-Company had taken on an order that they were ill equipped to produce and relied on the Applicant to somehow ensure that the order was produced, had not been challenged by the Appellant-Company. The Learned High Court Judge had formed the view that the Applicant had been made the 'scapegoat' for the decision of the higher management of the Appellant-Company in accepting an order that they were ill equipped to manufacture.

Referring to the principles of natural justice, the Learned High Court Judge had further deemed the conduct of the Appellant-Company, in informing the Applicant that a disciplinary inquiry would be held and then dismissing him without holding the said inquiry, was contrary to the principle that "no one should be condemned unheard."

Although the Learned High Court Judge was in agreement with the Appellant-Company's submission that the provisions of the Evidence Ordinance are not

applicable to industrial disputes before a Labour Tribunal, she had held that whereas '෎4' and '෎5' had been submitted subject to proof, evidence should have been adduced to prove the same. The Appellant-Company's submission that the compensation due to the Applicant had not been calculated correctly was dismissed on the basis that there was no need for such a calculation as evidence had been led on the loss that was caused to the Applicant by the termination of his services and that it had not been challenged.

Questions of Law

Question (a) : Misinterpretation and misapplication of established legal principles

I shall deal with the above question under 2 sub-headings; (a)(i) and (a)(ii).

(a) i. Computation of compensation

Whether the compensation was granted in the accepted manner and whether the standard of proof adopted by the High Court was correct are the main questions that have to be answered in making a finding in relation to the first question of law on which leave to appeal was granted, i.e. whether the High Court misinterpreted and misapplied the established legal principles and / or decided case law, submitted on behalf of the Appellant-Company.

The Appellant-Company in its written submissions has taken up the position that the Labour Tribunal has made no reference to the manner in which the compensation was calculated. The High Court on the other hand had been of the opinion that it was not so and had upheld the amount of compensation that had been awarded by the Labour Tribunal.

In **Jayasuriya v. Sri Lanka State Plantations Corporation** 1995 2 SLR 379, the very case relied on by the Learned President of the Labour Tribunal to state that it is the 'actual financial loss' that should be considered, Justice A. R. B. Amerasinghe has commented at length on the manner in which the amount of compensation should

be calculated. *"In determining compensation what is expected is that after a weighing together of the evidence and probabilities in the case,* ***the Tribunal must form an opinion of the nature and extent of the loss, arriving in the end at an amount that a sensible person would not regard as mean or extravagant but would rather consider to be just and equitable in all the circumstances of the case****. There must eventually be an even balance of which the scales of justice are meant to remind us.*

While the expressed loss, in global terms of years of salary may in certain cases coincide with losses reckoned and counted and settled by reference to the relevant heads and principles of determining compensation, it is preferable to have a computation which is expressly shown to relate to ***specific heads*** *and* ***items of loss****. It is not satisfactory to simply say that a certain amount is just and equitable.* ***There must be a stated basis for the computation taking the award beyond the realm of mere assurance of fairness.*** *For a just and equitable verdict the reasons must be set out in order to enable the parties to appreciate how just and equitable the verdict is.* ***Where no basis for the compensation awarded is given, the order is liable to be set aside."*** (emphasis added)

In short, the court had been of the opinion that the Labour Tribunal must evaluate the evidence before it, to form an opinion as to the amount that could be said to be *just and equitable compensation* and the award is to be computed on the basis of specific heads or items of loss so that the order would not be open to challenge on the ground that it is arbitrary or without a sound rationale.

With due deference, when considering the award of the Labour Tribunal, it has to be noted that, although it was stated that the actual financial loss should be considered when awarding compensation, the Learned President of the Labour Tribunal has not elaborated **how** the actual loss was computed in this case. The Learned High Court Judge, at page 12 of the judgment, had expressed the view that, as evidence of the Applicant had been led regarding the loss that was caused

to him due to the loss of employment, there was no necessity to calculate the loss caused separately. However, that does not seem to be a sound view, as formulas and guidelines for computing the losses of a wrongfully terminated employee has been set by numerous judicial precedents in an attempt to introduce some degree of uniformity into the process. A plethora of factors such as whether the applicant obtained fresh employment, the period for which the applicant remained unemployed, the loss of retirement benefits has to be considered depending on the particular circumstances of each case. Furthermore, not only should those factors be relied on, but they should be explicitly stated in the judgment as having been relied upon in forming the judgment.

Observing that the Legislature has left in the hands of the Labour Tribunal, the discretion of determining the quantum of compensation on the basis of facts and circumstances of each case, Wijetunga J. in **Up Country Distributors (Pvt) Ltd., v. Subasinghe** [1996] 2 SLR 330 (at page 335) observed that *"…some degree of flexibility in that regard is both desirable and necessary if a tribunal is to make a just and equitable order.*" The case involved a situation where a workman prayed for reinstatement with back wages or compensation in lieu of reinstatement, and compensation was ordered taking into consideration, in particular, the workman's period of unemployment, his age at termination and the period of his service. In the case referred to, the High Court had been of the opinion that the Labour Tribunal had given due consideration to the authorities cited and the Supreme Court held that therefore it would be idle to contend that the basis for the award of compensation was not given. The Supreme Court however, emphasized that "*the tribunal should have dealt with the* ***criteria relevant to the computation of compensation in more explicit terms****, thus "taking the award beyond the realm of mere assurance of fairness" -per Amerasinghe, J. in Jayasuriya's case (supra).*" (emphasis added).

It has been submitted on behalf of the Appellant-Company that although compensation has been ordered by the learned President of the Labour Tribunal on

the concept of 'immediate loss' it ought to have been decided upon two questions, namely, 1. Did the worker obtain employment after the unjust termination, 2. How many months was the worker out of employment? (mitigation of losses). On the other hand, it was submitted on behalf of the Applicant that, as upheld in **Coats Thread Lanka (Pvt) Ltd. v. Samarasundara** 2010 (2) SLR 1 (at page 11) that if a workman is suspended pending a domestic inquiry he is entitled to his monthly salary, and that the workman has earned an income otherwise, does not vitiate the entitlement to receive the salary from the employer who has suspended his services. In the present case a domestic inquiry has not been held although the Applicant was informed that a domestic inquiry would be held.

Further, on behalf of the Appellant-Company it has been pointed out that the facts necessary for computing the compensation due to the Applicant were not submitted to the Labour Tribunal by the Applicant. The case of **The Ceylon Transport Board v. Wijeratne** 77 NLR 481 was referred to, where a comprehensive list of factors that the Labour Tribunal may consider in awarding compensation were recognized by the court; "*In making an order for the payment of compensation to a workman in lieu of an order for reinstatement under section 33 (5) of the Industrial Disputes Act, a Labour Tribunal should take into account such circumstances as the nature of the employer's business and his capacity to pay, the employee's age, the nature of his employment, length of service, seniority, present salary, future prospects, opportunities for obtaining similar alternative employment, his past conduct, the circumstances and the manner of the dismissal including the nature of the charge levelled against the workman, the extent to which the employee's actions were blameworthy and the effect of the dismissal on future pension rights. Account should also be taken of any sums paid or actually earned or which should also have been earned since the dismissal took place.*"

As cited with approval in **The Ceylon Transport Board v. Wijeratne** 77 NLR 481, Weeramantry J. in the case **The Ceylon Transport Board v. Gunasinghe** 72 NLR 76 at page 83 has emphasized the importance of true facts in making a just and

equitable order as to compensation; "*Proper findings of fact are a necessary basis for the exercise by Labour Tribunals of that wide jurisdiction given to them by statute of making such orders as they consider to be just and equitable. Where there is no such proper finding of fact the order that ensues would not be one which is just and equitable upon the evidence placed before the Tribunal, for justice and equity cannot be administered in a particular case apart from its own particular facts.*"

Apart from the evidence of the Applicant led at the Labour Tribunal where the Applicant stated his period of employment with the Appellant-Company, his salary and age and that he has one daughter, that she was due to be born at the time his services were terminated, that she is two and half years at the time of giving evidence, and that his wife is unemployed (pages 98-99 of the Appeal brief) no other facts were adduced to aid the Labour Tribunal in making a decision as to compensation. In **Jayasuriya** (*supra*) the Supreme Court stipulated that "*The burden is on the employee to adduce sufficient evidence to enable the Tribunal to decide the loss.*"

The courts have upheld the expectation that a tribunal would specify in detail, to the extent possible, the specific heads on which the compensation was computed and, that the burden of adducing evidence to enable the court to compute the loss in such a meticulous manner is with the employee whose services have been terminated. As the employee in this case has starved the Labour Tribunal of the information necessary to make a well laid out computation, the Tribunal cannot be faulted for failing to set out the specificities. Furthermore, based on the details provided to the Labour Tribunal, it cannot be said that the computation of compensation is totally disproportionate to the alleged loss, and we do not wish to disturb the order of the Labour Tribunal as to the amount of compensation.

(a) ii. The applicable burden of proof and standard of proof

The Industrial Disputes Act does not state on whom the burden of proof should lie in a labour matter before the labour tribunals or courts. The Appellant-Company argued that the burden of proof applicable here is the burden referred to in Section 101 of the Evidence Ordinance, i.e. a party must bear the burden of establishing the facts on which he relies for the remedy he seeks. Thus, the Appellant-company argues that the burden of proving that the Applicant was wrongfully terminated would be recumbent on the Applicant himself.

Regarding the standard of proof in labour matters, courts have taken the stance that the balance of probability is the standard commensurate with ensuring that labour relations are not sabotaged by the adjudication. In **Piyasena Silva v. Ceylon Fisheries Corporation** (1994) 2 Sri LR 292 it was recognized that the standard of proof in labour matters is the balance of probability. In **Associated Battery Manufacturers (Ceylon) Ltd.** 77 NLR 541 the reason for adopting a balance of probability was explained (at page 553) "*The whole object of labour adjudication is that of balancing the several interests involved, that of the worker in job security, since loss of his job may mean loss of his and his family's livelihood; that of the employer in retaining authority over matters affecting the efficient operations of the undertaking; that of the community in maintaining peaceful labour relations and avoiding unnecessary dislocations due either to unemployment or unproductive economic units. Each is equally important.* ***None of these objectives can be achieved by the adoption of the standard of proof required in criminal cases*** *in the determination of the facts which have to be established before a Labour Tribunal before it can exercise its jurisdiction to make an order which in all the circumstances of the case is just and equitable.*" (emphasis added). A similar view was expressed in **The Batticaloa Multi-Purpose Cooperative Societies Union Ltd. v. Velupillai** 71 NLR 60 "*in proceedings before labour tribunals the strict degree of proof as in a Court of law is not required...*".

The law relating to the burden of proof in labour matters has developed by way of judicial precedent which has stated that; "*The* ***burden is on the employer to justify the termination*** *on the principle that 'he who alters the status quo and not he who demands its restoration, must explain the reasons for such alteration.*" (*Vide* S. R. De Silva, The Legal Framework of Industrial Relations in Ceylon, at page 570-571). The case of **Gunasekara v. Latiff** [1999] 1 SLR 365 where it was held by the Court of Appeal that "*While S. 101 Evidence Ordinance is concerned with the duty to prove a case as a whole, viz the overall burden of proof S. 103 regulates the burden of proof as to a particular fact, however the devolution of the overall burden is governed by S. 102 which declares that* ***the burden of proof lies on that person who would fail if no such evidence at all were given on either side.***" was quoted in support of this stance. The case of **Gunasekara v. Latiff** involved a Declaration of Title, where the questions of who should begin the case, and on whom the burden of proof lies was commented on. However, before the Labour Tribunal, the Appellant-Company has argued that the provisions of the Evidence Ordinance do not apply to cases at the Labour Tribunal, a view which was endorsed by the High Court as well. It seems to be a contradictory position adopted by the Appellant.

In the written submissions filed before the Labour Tribunal on behalf of the Applicant, it has been argued that per Section 5(c) of the Evidence Special Provisions Act No. 14 of 1995 and Section 104 of the Evidence Ordinance, the burden of proving the emails is on the Appellant-Company. On the other hand, in the written submissions on behalf of the Appellant-company, it has been submitted that as the Applicant has admitted the fact, that he received the email 'එ5' sent by Kelum Warnapatabendi, Senior Product Technologist for 'Next' in Sri Lanka (at page 11 in the evidence given on 9th February 2011) there is no necessity for it to be proved by the Appellant-Company. Nevertheless, the opinion of the Learned High Court judge in this regard, that if the emails 'එ4' and 'එ5' were submitted

subject to proof then evidence should be called to prove the same, is the sound approach.

The High Court had been of the opinion that the evidence given by witness K. N. Wijeratne cannot be attached any value in deciding whether the Applicant was in fact guilty of the conduct which led to his termination. This was due to the concern that the witness held a position subordinate to the Applicant and would not be sufficiently knowledgeable about the job duties of the Applicant to be in a position to comment on the Applicant's performance in meeting the responsibilities of the Applicant's position as Packing Manager. However, it is more probable that the witness as a Packing Officer with many years of experience would have come to know the job duties of a Packing Manager from working with and under the instructions of the Packing Manager.

Considering the above I am of the opinion that the High Court has neither misinterpreted nor misapplied established legal principles or decided case law and thus answer the Question of law referred to in subparagraph (a) in the negative.

Question (i)

Now I turn to Question *(i) "Did the High Court err by holding that a domestic inquiry is mandatory under the established legal principles of Sri Lanka?"* and then to Question *(c) Did the High Court fail to evaluate the evidence establishing negligence on the part of the Applicant*, as some factual observations are common to both.

In the Sri Lankan Labour Law regime, there is no statutory requirement to conduct a domestic inquiry prior to the termination of a workman. Where there is no collective agreement or a clause in the contract of employment that a domestic inquiry should be held in the event of termination, it is not mandatory to hold a

domestic inquiry. However, it has come to be recognized that holding a domestic inquiry could be beneficial to both the employer and the employee.

There may be instances where it is plain that the employee in question is guilty of a conduct that warrants termination and could be dismissed without any need for further investigations. Therefore, it would be an additional burden to require employers to hold domestic inquiries by default in all instances.

Holding a domestic inquiry is however a salutary practice. S. R. De Silva in 'Law of Dismissal' [The Employers' Federation of Ceylon, Monograph No. 8, Revised Edition 2004] commenting on the desirability of holding domestic inquiries states "*Punishment of an employee, whether by dismissal or otherwise, without following a disciplinary procedure which involves the giving of an opportunity to an accused employee to exculpate himself is, prima facie, arbitrary. Many labour courts today may view disciplinary action without a show cause letter followed by an inquiry, where necessary, as being arbitrary, since such action must be assumed to be taken without the employer having satisfied himself about the guilt or otherwise of the accused employee."* Listing several reasons for the desirability of holding a domestic inquiry, S. R. De Silva has advanced the view that even where guilt can be established without a domestic inquiry, holding a domestic inquiry could be beneficial (*vide* paragraph 41).

In **All Ceylon Commercial and Industrial Workers' Union v. Weerakoon Bros Ltd**. [Sri Lanka Gazette No. 90 of 14. 12. 73] the court accepted that the dismissal of employees without holding a domestic inquiry could be reviewed for correctness as it was against the principles of natural justice. As there were no allegations of mala fide against the employer, in **All Ceylon National Milk Board Trade Union v. The Board of Directors, CWE** [Gazette No. 261/10 of 07. 09. 1983] the absence of a domestic inquiry was not considered to be an issue regarding the justification of the dismissal. However, in **St. Andrews Hotel v. Ceylon Mercantile Union** CA

138/85 decided on 01.04.1993 it was recognized that a dismissal cannot be set aside as wrongful solely on the basis that no domestic inquiry was held.

Therefore, it appears that while a domestic inquiry is desirable, in certain cases, due to the nature of the circumstances a domestic inquiry could be dispensed with.

The emails marked 'ඵ4' and 'ඵ5' point to the faults/negligence of the Applicant in carrying out his duties, but shortcomings by other quarters too are mentioned in the emails. In 'ඵ4' sent by Sampath Erahapola the local agent for Regatta, several shortcomings are listed out; that there were broken stitches in many of the garments, that the workers were on continuous night shifts thereby affecting their productivity, that there was no management level involvement even after re-screening, that internal audits were failing to correct the defects in the order prior to shipping, and that there was no assurance of quality from the Quality Assurance Department. The only shortcomings that can be directly connected to the Applicant were, that there was a delay in starting the packing despite being advised to commence the packing in good time, and that the Packing Manager was not present in the Factory while the work was going on. In 'ඵ5' sent by Kelum Warnapatabendi, the Senior Product Technologist for 'Next' in Sri Lanka it has been stated that "*I have given you an approved sample for packing/presentation. All your seniors (specially Packing Manager) are well aware with the requirements.*" Loading the goods to the container without pre-final approvals and ignoring Quality Assurance comments of unloading the goods for inspection had been pointed out as shortcomings.

From the above comments in the emails, it can be seen that there were several shortcomings regarding the Regatta order for which the Applicant cannot be held to be singularly liable. It should be noted that the senior management was aware of the shortcomings but had made no meaningful involvement in remedying them. The evidence led at the Labour Tribunal fails to conclusively shed light on whether the length of the polybags was not as required due to the negligence of the

Applicant or the Quality Assurance Department or due to circumstances beyond their control, such as directions from the higher management concerned with cost cutting.

If the emails were the reason for dispensing with the requirement of holding a domestic inquiry, the contents of the two emails themselves bear evidence that there were several shortcomings in the production process of the Appellant's Factory for which the Applicant could not be held solely responsible. What is more, it could have been that the issues in the production process themselves could have affected the quality of the Applicant's performance. For instance, the Applicant's evidence led before the Labour Tribunal (page 91) has shown that the Applicant was saddled with the extra duty of attempting to procure certain machines that were required for the process of manufacturing the 'Next' order. Applicant had said that he made an unsuccessful attempt to get the required machinery from one of their establishments in Pita-Kotte and failing that they obtained the machinery from their Marawila Factory and found the machines mechanically defective and finally had to go to a Factory in Avissawella to perfect the order (page 153). The evidence of the Applicant to this effect was not contested by the Appellant-Company. In this backdrop the observation made by the High Court that the Applicant has been made a 'scapegoat' for the issues caused by the misguided decisions of the higher level of management in accepting an order that the Petitioner Factory was ill equipped to manufacture, seems justified.

What the High court has endeavoured to do, is to point out the dictates of natural justice that require a domestic inquiry in the circumstances of the present case, where there has not been conclusive evidence that the conduct of the Applicant was so serious as to justify termination. Further the High Court has noted that the conduct of the Appellant-Company in informing the Applicant that a domestic inquiry would be held and then postponing the inquiry to a later date and thereafter handing over a letter of termination on the day the Applicant went to the factory to face the domestic inquiry has unjustly prevented the Applicant from

presenting his side of the story *vis a vis* the alleged shortcoming on his part. Where the two emails themselves are insufficient to provide clout to the decision to terminate the Applicant, and in fact point to larger issues that have negatively affected the performance of the factory, the High Court cannot be faulted for holding that the lack of a domestic inquiry, especially where one had originally been scheduled, takes away from the justification of the termination of the Applicant's services.

Although as a matter of 'law' the High Court holding that the termination of the services of the Applicant without a domestic inquiry is both unjust and unreasonable is a misdirection on its part, this court is of the view that this was a classic case that cried for holding of a domestic inquiry before termination.

Although I answer the question of law referred to in subparagraph (i) of Paragraph 10 of the petition in the affirmative, I hold that the misdirection on the part of the learned High court is not grave enough to set aside the judgment of the learned High Court Judge.

Question (c)

Now I shall consider whether the High Court failed to evaluate the evidence establishing the grave negligence of the Applicant. The gravamen of the Appellant-Company's submissions to the Labour Tribunal was that loss would be caused to the company due to the negligence of the Applicant. However, that a loss was in fact caused, and if so, the amount of such loss was not submitted nor proved by the Appellant-Company. The two emails marked '෴4' and '෴5' said to be sent by the local agents for the international buyers 'Next' and 'Regatta' have not been proved by calling Jude Virajith, the Manager of the Appellant-Company who had received and forwarded the e-mails, to give evidence, thus, diminishing the probative evidentiary value of the contents of those e-mails.

The written submissions on behalf of the Applicant were that the Appellant-Company failed to lead direct evidence and prove before the Labour Tribunal the charge against the Applicant in compliance with the Evidence Ordinance. In the written submissions **Rodrigo v. Central Engineering Consultation Bureau** 2009 (1) SLR 248 was cited to point out that it is the Appellant-Company that should adduce evidence to prove the serious allegations against the Respondent. "*In Labour Tribunal proceedings where the termination of services of a workman is admitted by the respondent,* ***the onus is on the latter to justify termination by showing that there were just grounds for doing so and that the punishment imposed was not disproportionate to the misconduct*** *of the workman. The burden of proof lies on him who affirms, and not upon him who denies as expressed in the maxim* ei incimbit probatio, qui dicit, non quinegat."

An act of misconduct was defined in the Indian case **Shalimar Rope Works Mazdoor Union v. Shalimar Rope Works Ltd** 1953 (2) LLJ 876 thus; "*An act should be regarded as an act of* ***misconduct*** *if it is inconsistent with the fulfillment of express or implied conditions of service or if it has a material bearing on the smooth and efficient working of the concern.*" Justice Priyasath Dep PC, as he then was, in **Gamage v. M. D. Gunasena** (2013) SLR 143 was of the opinion that "*The implied conditions of service include conduct such as obedience, honesty, diligence, good behavior, punctuality, due care. Therefore, acts such as disobedience, insubordination, dishonesty,* ***negligence****, absenteeism and late attendance, assault are treated as acts of misconduct which are inconsistent with the implied conditions of service".* The degree of misconduct which justifies termination necessarily depends on the "*nature of the business and the position held by the employee*" **Jupiter General Insurance Co. Ltd. v. Shroff** (1973) 3 AEHR 67 as quoted in **H. G. Jayasekera v. The Ceylon Transport Board** CGG 14, 359 of 26.03.65 at para 24.

The Applicant has accepted that as Packing Manager he is the officer entrusted with the final responsibility of packing. However, giving evidence before the

Labour Tribunal (at pages 85-90) the Applicant's uncontested stance was that two meetings were held with the participation of the higher management of the factory, the Quality Assurance Manager and the Applicant himself, before commencing the production of the 'Next' order where he and the Quality Assurance Manager had raised the concern that the Appellant-Company's factory was not equipped to produce the order to the standard of quality expected by the international buyer.

Furthermore, regarding the length of the polybags being in excess of the specifications, the High court has questioned whether the quality controller of the factory has no responsibility for preventing the shipment of the goods that do not meet quality standards, and what the job duties of the Packing Manager were. These are valid concerns as they play an imperative role in identifying whether the Applicant was singularly responsible for the polybags being longer than as specified and therefore liable for any damage caused, thereby justifying his termination. Facts adequate to conclusively answer these questions have not been adduced.

The second limb of Question (c) is whether the High Court failed to evaluate the evidence that the Applicant had been previously warned as to his negligence pertaining to the packing function. Neither the Labour Tribunal nor the High Court in its judgment has referred to the previous warning given to the Applicant by letter dated 29th September 2007 marked 'වි1'. The Applicant had loaded cartons of clothing of a Regatta order into the container without the prior approval or permission of the Regatta representative one Sampath, and he had been warned not to deviate from the proper rules and procedures and that if such an incident is reported in the future, action would be taken against him as it is a serious offence.

However, the present allegation is not relating to the loading of finished goods but an allegation totally unconnected. In the present case, whether the Applicant was negligent, has not been established by the Appellant-Company to the degree of

proof required. The inevitable inference that can be drawn from this is that there was no justifiable basis for the termination of the Applicant. On a side note, had a disciplinary inquiry been held, this question of the bona fides of the Appellant-Company and the dearth of evidence before the Labour Tribunal could have been avoided.

Thus, I answer the questions of law (a) and (c) in the negative. The question of law (i) is answered in the affirmative, however due to the reasons delineated in this judgement, I hold that no substantial prejudice has been caused to the Appellant.

Accordingly, I dismiss the appeal subject to costs.

Appeal dismissed.

Judge of the Supreme Court

P. 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

Commercial Leasing and Finance PLC,
(Formerly known and named as
Commercial Leasing and Finance
Limited)
No. 68, Bauddhaloka Mawatha,
Colombo 04.
Plaintiff

SC APPEAL NO: SC/APPEAL/23/2021
SC LA NO: SC/CHC/LA/85/2020
CHC CASE NO: HC/CIVIL/175/2013/MR

Vs.

Niranjan Canagasooriyam,
No. 12, Palm Grove,
Colombo 03.
Defendant

AND NOW BETWEEN

Niranjan Canagasooriyam,
No. 12, Palm Grove,
Colombo 03.
Defendant-Appellant

Vs.

Commercial Leasing and Finance PLC,
(Formerly known and named as
Commercial Leasing and Finance
Limited)
No. 68,
Bauddhaloka Mawatha,
Colombo 04.
Plaintiff-Respondent

Before: Murdu N.B. Fernando, P.C., J.
A.H.M.D. Nawaz, J.
Mahinda Samayawardhena, J.

Counsel: Neomal Pelpola for the Defendant-Appellant.
Hiran De Alwis with Medani Navoda for the Plaintiff-Respondent.

Argued on : 15.07.2021

Written submissions:

by the Defendant-Appellant on 03.03.2021.

by the Plaintiff-Respondent on 04.03.2021.

Further written submissions:

by the Defendant-Appellant on 06.08.2021.

by the Plaintiff-Respondent on 20.08.2021.

Decided on: 15.10.2021

Mahinda Samayawardhena, J.

The plaintiff instituted this action against the defendant in the Commercial High Court to recover a sum of Rs. 130,819,394.78 with interest on "*the guarantee and/or indemnity and/or agreement dated 30.12.2010*" marked B with the plaint. When this document was sought to be marked in evidence as P2, the defendant objected to it on the basis that it is a bond which has not been duly stamped and therefore cannot be admitted in evidence. The Commercial High Court made a vague order when it held on the one hand that it need not be stamped as it is not a bond, but on the other hand allowed the plaintiff to rectify the stamp deficiency, if any. Being aggrieved by this order, the defendant filed this appeal with leave obtained on the following two questions of law:

1. *Whether the indemnity furnished to secure a factoring agreement marked as P2 in the brief is subject to stamp fees?*
2. *If the aforementioned question of law is answered in the affirmative, what is the stamp duty that needs to be paid in respect of the said indemnity?*

Section 33(1) of the Stamp Duty Act, No. 43 of 1982, reads as follows:

> *No instrument chargeable with stamp duty shall be received or admitted in evidence by any person having by law or consent of parties authority to receive evidence or registered or authenticated or acted upon by any person or by any officer in a public office or corporation or bank or approved credit agency unless such instrument is duly stamped:*
>
> *Provided that any such instrument may—*

(a) be admitted in evidence by any person having by law or consent of parties authority to receive evidence; or

(b) if the stamp duty chargeable on such instrument is one thousand five hundred rupees or less, be acted upon by the Registrar-General,

upon payment of the proper duty with which it is chargeable or the amount required to make up the same and a penalty not exceeding three times the proper duty.

The Stamp Duty (Special Provisions) Act, No. 12 of 2006, did not repeal the Stamp Duty Act, No. 43 of 1982. In terms of section 13 of the Stamp Duty (Special Provisions) Act quoted below, both Acts operate in parallel. If there is any inconsistency between the two with regard to the imposition or exemption of stamp duty or any other matter, the Stamp Duty (Special Provisions) Act prevails.

From and after the date of the coming into operation of this Act, the provisions of the Stamp Duty Act, No. 43 of 1982, relating to the Imposition of Stamp Duty (other than any instrument relating to the transfer of immovable property, the transfer of motor vehicles or documents filed in Court), Exemptions and any other provision in the aforesaid Act, shall, in so far as the same are inconsistent with the provisions of this Act, have no operation and the provisions of this Act shall prevail.

Learned counsel for the plaintiff admits that in terms of section 4(g) of the Stamp Duty (Special Provisions) Act, "*a bond or mortgage for any definite and certain sum of money and affecting any property*" is a "*specified instrument*" which needs to be stamped. But his argument is that P2 is not a "*bond*" but an indemnity; and also that it is not "*for any definite and certain sum of money and affecting any property*".

There are various kinds of bonds—guarantee bonds, indemnity bonds, performance bonds, bail bonds etc. The Stamp Duty (Special Provisions) Act does not refer to these species, but the Stamp Duty Act does to some extent. The Stamp Duty (Special Provisions) Act uses the word "bond" in a generic sense. Section 5(6) of the Stamp Duty Act makes only a "*bond of indemnity given to a public officer in the execution of his duty*" exempt from stamp duty, not all bonds of indemnity. This goes to prove that the Stamp Duty Act recognises an indemnity as (i) a bond (ii) liable to stamp duty (iii) subject to one exemption. This is not superseded by the Stamp Duty (Special Provisions) Act because there is no conflict or inconsistency between the two Acts on this point. Hence I take the view that P2 is a bond—a bond of indemnity.

P2 is admittedly based on a Factoring Agreement. The defendant tendered this Factoring Agreement marked X1 to the Commercial High Court with his answer. In essence, by X1, EPSI Computer (Pvt) Ltd, where the defendant is a director, agreed to sell "*all debts incurred or to be incurred by any debtor of the class or description contemplated in this Agreement which shall be in existence at the commencement or which shall come into existence at any time thereafter before termination of this Agreement*" to the plaintiff and the plaintiff agreed to purchase the same subject to the conditions stated in X1. According to P2, X1 was executed in consideration of the defendant entering into P2 whereby the defendant *inter alia* agreed that he would be liable in all respects as the principal debtor.

All bonds are not liable to stamp duty. In terms of section 4(g) of the Stamp Duty (Special Provisions) Act, for a bond to be subject to stamp duty, two requirements shall co-exist: it shall be "*for any definite and*

certain sum of money and affecting any property". P2 does not satisfy these two requirements.

There is no definite sum of money ascertainable in P2. This is because there is no definite sum of money ascertainable in X1. I accept the submission made on behalf of the plaintiff that "*It is a rolling amount and depends on the debt payable*."

Nor does P2 or X1 affect any property. X1 is based on debts and P2 is based on X1. A debt is a sum of money due by contract. According to the Stamp Duty Act, "money" does not fall within the definition of "property". They are two different concepts. Section 71 of the Stamp Duty Act defines "money" as follows: "*money includes all sums, whether expressed in Sri Lanka or foreign currency*"; it defines "property" as follows: "*property means movable as well as immovable property; and includes a right to or any interest in property*".

There are three well-known decisions of this Court in relation to the payment of stamp duty on bonds. One is *Ceylease Financial Services Limited v. Sriyalatha [2006] 2 Sri LR 169*. Another is *Seylan Bank Ltd v. Samdo Macky Sportswear (Pvt) Ltd [2008] 1 Sri LR 96*. The more recent one is *People's Bank v. Ocean Queen Marine (Pvt) Ltd [2016] 1 Sri LR 141*. With the exception of the *Seylan Bank* case, this Court held in the other two cases that the bond in question was liable to be stamped. In those two cases, it was held that the bond was for a definite sum of money and affecting property. In the *Ceylease* case and the *People's Bank* case the property was a "vehicle" and "trawler boat" respectively. But in the *Seylan Bank* case this Court at page 100 held that the bond was not liable to be stamped *inter alia* because the money was not secured by and correlated to property:

> *Clearly the 'Bond' contemplated by the language above has to be one where the money obtained is secured by, and correlated to property. Document P9 [the bond] did not, at the time of the creation of the principal covenant, seek to secure or refer to any property in other words it was not a bond that bound property for the payment of the money.*

In *Ameen v. Malship (Ceylon) Ltd [1982] 2 Sri LR 483*, this Court held "*The levy of stamp duty is governed by the letter of the law and not by its spirit.*" All fiscal legislation is subject to strict interpretation. The Court will look squarely at the statute without reading in or implying anything. There is no room for intendment, presumption or assumption. Consideration of the principles of equity, morality, ethics, logic, injustice etc. are irrelevant. Any ambiguity or uncertainty must be resolved in favour of the tax payer, not the tax collector. *(Vide Maxwell on The Interpretation of Statutes, 12th edition, p. 256, N.S. Bindra's Interpretation of Statues, 9th Edition, p.1036, The Manager, Bank of Ceylon, Hatton v. The Secretary, Hatton Dickoya Urban Council [2005] 3 Sri LR 1, Sohli Eduljee Captain (Secco Brushes Corporation) v. Commissioner General of Inland Revenue (1974) 77 NLR 350, Perera & Silva Ltd. v. Commissioner General of Inland Revenue (1978) 79(II) NLR 164 at 167-168)*

In my view, P2 is not liable to stamp duty.

I answer the two questions of law as follows:

1. No.
2. Does not arise.

I set aside the impugned order of the Commercial High Court dated 10.09.2020 insofar as it is in conflict with this judgment, and dismiss the appeal.

Judge of the Supreme Court

Murdu N.B. Fernando, P.C., J.
I agree.

Judge of the Supreme Court

A.H.M.D. Nawaz, J.
I agree.

Judge of the Supreme Court

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

In the matter of an Appeal against the Judgment of the Provincial High Court of the Western Province dated 19.11.2013 in Case No: WP/HCCA/GPH 72/2009 (F), D.C. Attanagalla Case No. 55/SPL.

Edirisinghe Arachchige Samantha Edirisinghe,

No. 16, Makalana, Nittambuwa.

Plaintiff

SC. Appeal No: 24/2015

SC/HCCA/LA: 523/2013

WP/HCCA/GPH: 72/2009

DC Attanagalla No: 55/SPL

-Vs-

1. Suduhakurulage Gayani

   Kaushalya Rasanjalee

   No. A-213, Ranwala Watte, Ambanpitiya.

2. Suduhakurulage Dias Shelton

   No. A-213, Ranwala Watte, Ambanpitiya.

Defendants

Between

Edirisinghe Arachchige Samantha Edirisinghe,

No. 16, Makalana, Nittambuwa.

Plaintiff-Appellant

-Vs-

1. Suduhakurulage Gayani

   Kaushalya Rasanjalee

   No. A-213, Ranwala Watte, Ambanpitiya.

2. Suduhakurulage Dias Shelton

   No. A-213, Ranwala Watte, Ambanpitiya.

Defendants-Respondents

And Between

Edirisinghe Arachchige Samantha Edirisinghe,

No. 16, Makalana, Nittambuwa.

Plaintiff-Appellant-Petitioner

-Vs-

1. Suduhakurulage Gayani

   Kaushalya Rasanjalee

   No. A-213, Ranwala Watte, Ambanpitiya.

2. Suduhakurulage Dias Shelton

   No. A-213, Ranwala Watte, Ambanpitiya.

Defendants-Respondents

AND NOW BETWEEN

Edirisinghe Arachchige Samantha Edirisinghe,

No. 16, Makalana, Nittambuwa.

Plaintiff-Appellant-

Petitioner-Appellant

-Vs-

1. Suduhakurulage Gayani

   Kaushalya Rasanjalee

   No. A-213, Ranwala Watte, Ambanpitiya.

2. Suduhakurulage Dias Shelton

   No. A-213, Ranwala Watte, Ambanpitiya.

Defendants-Respondents-Respondents-Respondents

Before: Sisira J. de Abrew J
Kumudini Wickramasinghe J &
Achala Wengappuli J

Counsel: Dr. Sunil Cooray with Sudarshni Cooray and Heshan Pietersz for the Plaintiff- Appellant-Petitioner-Appellant

Ashiq Hassim for the 1st Defendant-Respondent-Respondent- Respondent

Argued on : 9.3.2021

Decided on: 25.3.2021

Sisira J. de Abrew J

This is an appeal against the judgment Civil Appellate High Court dated 19.11.2013.

Plaintiff- Appellant-Petitioner-Appellant (hereinafter referred to as the Plaintiff-Appellant) filed action in the District Court of Attanagalla against the 1st Defendant-Respondent-Respondent-Respondent (hereinafter referred to as the1st Defendant-Respondent) seeking a declaration that the marriage between the Plaintiff-Appellant and the 1st Defendant-Respondent is a nullity. The 1st Defendant-Respondent in her answer dated 27.8.2008 also sought a declaration that her marriage between her and the Plaintiff-Appellant is a nullity. The 1st Defendant-Respondent in her answer made a cross-claim for Rs.One Million from the Plaintiff-Appellant as damages for seduction committed by the Plaintiff-Appellant. The Plaintiff-Appellant filed a replication dated 18.11.2008 seeking a dismissal of the cross-claim of the 1st Defendant-Respondent. At the trial an admission was recorded to the effect that the marriage between the Plaintiff-Appellant and the 1st Defendant-Respondent is a nullity. Thereafter the learned District Judge permitted the 1st Defendant-Respondent to begin the case to prove her claim of damages for the seduction committed by the Plaintiff-Appellant. The learned District Judge by his judgment dated 15.6.2009 granted Rs.One Million as damages for the seduction committed by the Plaintiff-Appellant on the 1st Defendant-Respondent. Being aggrieved by the said judgment of the learned District Judge, the Plaintiff-Appellant appealed to the Civil Appellate High Court and the learned Judges of the Civil Appellate High Court by their judgment dated 19.11.2013, dismissed the appeal. Being aggrieved by the said judgment of the Civil Appellate High Court, the Plaintiff-

Appellant has appealed to this court and this court by its order dated 27.1.2015 granted leave to appeal on questions of law set out in paragraphs 12(iii), (vii) and (viii) of the Petition of Appeal dated 17.12.2013 which are set out below.

1. Did the High Court err in rejecting the plea of prescription when Section 9 of the Prescription Ordinance specifically lays down the criteria for prescription for damages under the written contract?
2. Did the High Court err in holding that the Plaintiff is liable to pay the Defendant Rs. One Million?
3. Did the High Court err in holding that the Plaintiff has not proved his case when his evidence was uncontradicted?

When the 1st Defendant-Respondent was giving evidence, the Plaintiff-Appellant, on the strength of the evidence of the 1st Defendant-Respondent, sought permission of court to raise an issue whether the claim of the 1st Defendant-Respondent for damages of Rs. One Million for seduction committed by the Plaintiff-Appellant was prescribed. However, the learned District Judge by his order dated 11.5.2009 disallowed this application. Therefore, the issue relating to prescription was not raised. It is interesting to find out whether the said claim of the 1st Defendant-Respondent is prescribed or not. In order to consider this question, it is necessary to consider section 9 of the Prescription Ordinance. It reads as follows.

> *No action shall be maintainable for any loss, injury, or damage, unless the same shall be commenced within two years from the time when the cause of action, shall have arisen.*

The claim of the 1st Defendant-Respondent for damages for Rs. One Million is for the seduction committed by the Plaintiff-Appellant on her. In view of section 9 of the Prescription Ordinance, the said claim should have been made to court within a period of two years from the date of seduction. The marriage between the Plaintiff-Appellant and the 1st Defendant-Respondent took place on 24.8.2006. But before the marriage the Plaintiff-Appellant has seduced 1st Defendant-Respondent on 25.6.2006. She has stated in her answer and her evidence in court that she and the Plaintiff-Appellant, prior to the marriage, on 25.6.2006, had sexual intercourse and thereby the Plaintiff-Appellant seduced her. Thus, seduction on the 1st Defendant-Respondent has taken place on 25.6.2006 (before the marriage). The claim for damages for seduction was made by her answer dated 27.8.2008. Thus, the claim for damages for seduction was made two years after the seduction. Therefore, I hold that the claim of the 1st Defendant-Respondent for damages for her seduction has been prescribed when it was made to the District Court. On this ground alone the claim of the 1st Defendant-Respondent for damages for her seduction should be rejected and the appeal of the Plaintiff-Appellant to set aside judgments of both courts relating to granting of compensation for the seduction should be allowed.

The application to record an issue whether the claim of the 1st Defendant-Respondent was prescribed was refused by the learned District Judge on the ground that that it had not been stated in the pleadings. The learned District Judge observed that such an issue cannot be permitted by using the evidence since it had not been stated in the pleadings. Reasoning of the learned District Judge appears to be that although it was revealed in evidence that the claim is prescribed, an issue relating to prescription could not be permitted since it is not found in the pleadings. Is this conclusion of the learned District Judge correct?

In this connection, I would like to state here the duty of court in hearing a case is to arrive at the correct decision. This view is supported by the judicial decision in the case of Bank of Ceylon Jaffna Vs Chelliahpillai 64 NLR 25 wherein Privy Council at page27 held that the case must be tried upon the 'issues on which the right decision of the case appears to the court to depend'. Therefore, the court should allow the parties to frame issues to arrive at the correct conclusion on the evidence led before court even though the parties have failed to state facts relating to such an issue in the pleadings. Even if parties do not raise correct issues, court, on its own motion, should frame issues. Section 149 of the Civil Procedure Code reads as follows.

> *The court may, at any time before passing a decree, amend the issues or frame additional issues on such terms as it thinks fit.*

In this connection I would like to consider certain judicial decisions. In Silva Vs Obeysekera 24 NLR 97 at page 107 Bertram CJ made the following observation:

> *"Counsel for the plaintiff raised the objection that these issues did not arise on the pleadings, and that defendant should have got his answer amended so as to raise these issues. On this objection being taken the learned District Judge disallowed the issues. Here the learned Judge was certainly led into a mistake. No doubt it is a matter within the discretion of the Judge whether he will allow fresh issues to be formulated after the case has commenced, but he should do so when such a course appears to be in the interests of justice, and it is certainly not a valid objection to such a course being taken that they do not arise on the pleadings."*

In Hameed Vs Cassim [1996] 2 SLR 30 Court of Appeal at page 33 held as follows:

> *It is not necessary that the new issue should arise on the pleadings. A new issue could be framed on the evidence led by the parties orally or in the form of documents. The only restriction is that the Judge in framing a new issue should act in the interests of justice, which is primarily to ensure the correct decision is given in the case.*

In Bank of Ceylon Jaffna Vs Chelliahpillai 64 NLR 25 Privy Council at page 27 held that 'it is well settled that framing of issues is not restricted by pleadings'

Considering all the above matters, I hold that new issues can be framed at a trial on the evidence led at the trial although facts relating to the new issues do not arise on the pleadings. The trial Judge, if he wants to raise new issues, should bear in mind that he frames new issues on the evidence already led in order to arrive at the right decision.

I have earlier pointed out that the claim for damages for the seduction of the 1st Defendant-Respondent had ben prescribed when it was made in her answer. But the learned trial Judge did not allow the issue on prescription to be raised since it is not found in the pleadings. When I consider the above legal literature, I hold that the above conclusion of the learned District Judge was clearly wrong and the learned Judges of the Civil Appellate High Court were wrong when they affirmed the above portion of the judgment. On this ground itself the above conclusions reached by the learned District Judge and the learned Judges of the Civil Appellate High Court should be set aside.

The learned District Judge in his judgment has also observed that the defence of prescription could not be considered because the 1st Defendant-Respondent was a minor at the time of the act of seduction. Is this observation correct? I now advert to this contention. The fact that the 1st Defendant-Respondent was a minor is not a disqualification to institute action because the law provides for the appointment of a Guardian. If the law permits a minor to file a case through his Guardian, restriction in the law relating to prescription should also apply to the case. In this regard I would like to consider the following situation. If a minor and/or his parents meet with an accident and suffer injuries due to the negligence of the person who drove the vehicle, a cause of action would arise for the minor to file a case for damages against the person who drove the vehicle. But his minority would not act as an exception to the prescription period of two years. Even though he is a minor, case for damages should be filed within a period of two years from the date of the accident. Thus, the above observation of the learned District Judge is not correct.

For the above reasons, I hold that the learned District Judge was in error when he did not permit and consider the issue on prescription; that the learned Judges of the Civil Appellate High Court too were in error when they rejected the plea of prescription; and that they were in error when they affirmed the judgment of the learned District Judge.

The learned District Judge, by his order dated on 11.5.2009, disallowed the application to frame an issue whether claim of the 1st Defendant-Respondent is prescribed. But the Plaintiff-Appellant did not make an appeal against the said order. Can the legality of the said order be raised in the final appeal? When considering this question, I would like to consider the judicial decision in the

case of Mudiyanse Vs Punchi Banda Ranaweera 77 NLR 501 wherein this court held that 'a party aggrieved by an order made in the course of the action, though such order goes to the root of the case, has two courses of action open to him, namely (a) to file an interlocutory appeal or (b) to stay his hand and file his appeal at the end of the case even on the very same ground only on which he could have filed his interlocutory appeal. If he adopts the latter course, he cannot be shut out on the ground that his appeal being against the incidental order is out of time.'

In my view legality of an order made in the course of a trial can be raised at the final appeal. I have earlier held that in the present case, the claim of the 1st Defendant-Respondent for damages for her seduction had been prescribed when she made the claim to the District Court. Thus, the court cannot grant damages for the seduction of the1st Defendant-Respondent.

For the above reasons, I set aside the portion of the judgment of the learned District Judge granting damages of Rs.1.0 Million to the 1st Defendant-Respondent for seduction but affirm the portion of the judgment of the learned District Judge declaring that the marriage between the Plaintiff-Appellant and the 1st Defendant-Respondent is a nullity. I set aside the portion of the judgment of the learned Judges of the Civil Appellate High Court which affirmed the portion of the judgment of the learned District Judge granting damages of Rs.1.0 Million to the 1st Defendant-Respondent for seduction but I affirm the portion of the judgment of the learned Judges of the Civil Appellate High Court which affirmed the portion of the judgment of the learned District Judge declaring that the marriage between the Plaintiff-Appellant and the 1st Defendant-Respondent is a nullity. For the purpose of clarity, I state here that judgments relating to the

damages of Rs. One Million are set aside and the judgments relating to the declaration that the marriage between the Plaintiff-Appellant and the 1st Defendant-Respondent a nullity are affirmed.

In view of the conclusion reached above, I answer the 1st question of law as follows. "The learned Judges of the Civil Appellate High Court erred in rejecting the plea of prescription."

I answer the 2nd question of law in the affirmative. The 3rd question of law does not arise for consideration.

The learned District Judge is directed to enter decree in accordance with this judgment.

Judge of the Supreme Court.

Kumudini Wickramasinghe J

I agree.

Judge of the Supreme Court.

Achala Wengappuli J

I agree.

Judge of the Supreme Court.

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

In the matter of an Application for Leave to Appeal Under Article 128 of the Constitution read with Section 5(C) of the High Court of the Provinces (Special Provisions) Act No.19 of 1990 as amended by Act No. 54 of 2006.

Bastian Koralalage Kingsley Rodrigo,
No. 616/D, Karaththawela,
Nugape,
Bopitiya.

Plaintiff

SC Appeal No. 24/2020
SC/HCCA/LA/No. 434/2018
WP/HCCA/NEG/LA/No. 23/2018
DC Negombo Case No. 7143/L

Vs.

1. Bastian Koralalage Camillus Sunny Rodrigo,
   No. 616/B, Karaththawela,
   Nugape,
   Bopitiya.

2. W.D. Sumudu Madhuwantha,
   No. 685, Nugape,
   Bopitiya.

3. J. Edward Perera,
   Nugape, Bopitiya,
   Pamunugama.

Defendants

NOW BETWEEN

1. Bastian Koralalage Camillus Sunny Rodrigo,
   No. 616/B, Karaththawela,
   Nugape,
   Bopitiya.

1st Defendant-Petitioner

Vs.

Bastian Koralalage Kingsley Rodrigo,
No. 616/D, Karaththawela,
Nugape,
Bopitiya.

Plaintiff-Respondent

2. W.D. Sumudu Madhuwantha,
   No. 685, Nugape,
   Bopitiya.

3. J. Edward Perera,
   Nugape, Bopitiya,
   Pamunugama.

Defendant-Respondents

AND NOW BETWEEN

1. Bastian Koralalage Camillus Sunny Rodrigo,
   No. 616/B, Karaththawela,
   Nugape,
   Bopitiya.

1st Defendant-Petitioner-Petitioner

Vs.

Bastian Koralalage Kingsley Rodrigo,
No. 616/D, Karaththawela,
Nugape,
Bopitiya.

Plaintiff-Respondent-Respondent

2. W.D. Sumudu Madhuwantha,
   No. 685, Nugape,
   Bopitiya.

3. J. Edward Perera,
   Nugape, Bopitiya,
   Pamunugama.

Defendant-Respondent-Respondents

Before: **Justice Vijith K. Malalgoda, PC**

Justice A.L. Shiran Gooneratne

Justice Mahinda Samayawardhena

Counsel: Dr. Sunil Cooray **for the 1st Defendant-Petitioner-Petitioner.**

S.N. Vijithsingh with Anuruddha Weerakkody **for the Plaintiff-Respondent-Respondent.**

Argued on: 18/03/2021

Decided on: **08/11/2021**

A.L. Shiran Gooneratne J.

The Plaintiff-Respondent-Respondent (hereinafter referred to as the Plaintiff) instituted this action in the District Court of Negombo against the Defendant-Petitioner-Petitioner (hereinafter referred to as the Defendant) and prayed, *inter-alia*, to grant a declaration that the Plaintiff is the owner of the land more fully described in the 1st schedule to the Plaint, to grant an order declaring that the Plaintiff has acquired a prescriptive right to dispose water accumulating in his land, across the land more fully described in the 2nd schedule to flow down to Muthurajawela, to grant an enjoining order and an interim injunction preventing the Defendant filling soil in the land described in the 2nd schedule.

The Defendants position is that he cultivates "Gotu Kola" for export and therefore, a top layer of soil was necessary to be added for cultivation purposes.

The learned District Judge by order dated 03/02/2009, issued an interim order preventing the Defendant from filling soil on the land until the final determination of this action.

The Plaintiff has obtained several Commissions to survey the land in question and the resultant plans and commission reports tendered to Court are filed of record. On 20/10/2009, the Plaintiff made an application to amend the plaint. However, having obtained a final date to tender an Amended Plaint, the Plaintiff failed to do so.

Thereafter, the Plaintiff by Petition dated 04/05/2010, made an application in terms of Section 18 of the Civil Procedure Code to add parties named as 1st to 8th Respondents to the Plaint. Accordingly, the learned District Judge by order dated 24/09/2012, permitted the Plaintiff to add the 3rd and 5th Respondents to the said application, who are now sought to be added as 2nd and 3rd Defendants. Thereafter, the case was called on 20/01/2015, and was fixed for trial on 30/04/2015, against the 1st Defendant and ex-parte trial against the 2nd and 3rd Defendants.

On the date first fixed for trial, ie. 30/04/2015, on an application made by the Plaintiff, the case was taken out of the trial roll and listed to be called to accommodate parties to take steps.

On 21/02/2018, the Plaintiff filed an amended Plaint consisting amendments to the original Plaint dated 05/11/2008. The Defendant objected to the Amended Plaint and accordingly, the matter was fixed for inquiry.

After considering the written submissions tendered by both parties, the learned District Judge by his order dated 05/10/2018, permitted certain amendments proposed by the Plaintiff's amended plaint dated 21/02/2018. (The order dated 05/10/2018 is at p.386 marked 'X8')

Being aggrieved by the order of the learned District Judge permitting the Plaintiff to amend the Plaint, the Defendant appealed to the Provincial High Court of Negombo.

When the case came up for support on 21/11/2018, the Plaintiff was absent and unrepresented. The Court, having observed that the notices were dispatched, permitted the Counsel for the Defendant to support the application ex-parte. Having heard the Defendant, the Court by Order dated 21/11/2018, refused the said application. Being aggrieved by the said Order of the Provincial High Court, the Defendant-Petitioner-Appellant is before this Court to set aside the original order dated 05/10/2018 and the order given by the Court sitting in appeal dated 21/11/2018.

This Court by its order dated 13/02/2020, granted leave to appeal on questions of law set out in paragraph 19 (v), (vi), (vii), (xi) and (xv) of the Petition of Appeal dated 17/12/2018 which are set out below.

I. *The learned District Court Judge and the learned High Court Judges have failed to consider that this case has been first fixed for trial on 30.04.2015 and therefore Section 93(2) of the Civil Procedure Code should apply in this case, and accordingly the requirements of Section 93(2) had to be satisfied before the amendment of plaint could be allowed;*

II. *The learned District Judge and the learned High Court Judges failed to consider that the Plaintiff was guilty of laches within the meaning of Section 93(2) and therefore the amendment of the plaint should have been refused;*

III. *The learned High Court judges failed to consider the time (nearly 10 years) taken by the Plaintiff to amend the plaint;*

IV. *The learned High Court Judges erred by failing to consider that the provisions of Section 21 of the Civil procedure Code cannot be read in isolation and that the same has to be read along with the provisions of Sections 93(1) and 93(2) which deal with amendment of pleadings including amendment of the plaint, as has been held in Colombo Shipping Co., Ltd. V. Chirayu Clothing (Pvt) Ltd, (1995) 2 SLR 97.*

In the written submissions filed of record, the learned Counsel for the Plaintiff refers to the following consequential issue of law which is purported to have been raised on the said date, ie,

> *"Whether the first date of trial can be considered as 30/04/2015, when the learned District Judge has taken this case out of the trial roll for further steps without any objections by the Petitioner".*

When this matter was taken up for argument, both parties were in agreement that the main issue of contention between the parties was,

> *"whether the provisions of Section 93(1) or 93(2) of the Civil Procedure Code would apply to the said application for amendment of Plaint."*

The Defendant submits that the learned Judge sitting in appeal erred by failing to consider that the provisions of Section 21 of the Civil Procedure Code cannot be read in isolation but has to be read along with the provisions of Section 93(1) and 93(2) of the said Code. It is to be noted that prior to the impugned order which permitted the amendment of Plaint, the Plaintiff sought permission of Court to amend the plaint but failed to take necessary steps to that effect.

The position of the Defendant is that in the circumstances of this case, both the learned Trial Judge and the learned High Court Judge erred by applying Section 93(1) of the Civil Procedure Code. The Defendant contends that both courts have failed to appreciate the grounds to be considered as provided, before a Court makes an order in terms of Section 93(2). The Defendant argues that the original Plaint was filed in 2008 and the application for an Amended Plaint made almost 10 years later with no reasons given, has not been considered by Court and questions the Plaintiff's failure to give reasons to satisfy Court to permit the amendment, which in effect was not considered by Court. The Defendant also submits that both the Trial Judge and the learned Judge sitting in appeal failed to consider that the Plaintiff was guilty of laches within the meaning of Section 93(2) of the Code of Civil Procedure.

The Plaintiff's position is that in terms of Section 93(1), the date first fixed for trial is not necessarily the first date on which the case is first fixed for trial but would include any date to which the trial is postponed and therefore, the Trial Judge is given a wide discretion to allow amendments made prior to the first date of trial.

To strengthen this position, the Plaintiff relies on the Judgment delivered by the Court of Appeal in the case of ***Karunaratne vs. Alwis (2007) 1 SLR 214*** and a similar view taken in the case of ***Sri Lanka Savings Bank vs. Global Tea Lanka (Pvt) Ltd and others SC/Appeal/ 171/2015, decided on 12/06/2019***.

Accordingly, it is submitted that 30/04/2015 was not the date the case was first fixed for trial within the meaning of Section 93(2) of the Civil Procedure Code. The Plaintiff further states that since the case was fixed for pre-trial steps on 27/02/2018, the said date should be considered as the date first fixed for trial and not 30/04/2015.

It is also contended that since Section 93(1) of the Civil Procedure Code applies to the amendment of pleadings sought by the Plaintiff, it is not necessary to satisfy the requirements in Section 93(2) of the Civil Procedure Code as wide discretion is given to the learned District Judge to permit amendments which come under Section 93(1). It is

further contended that the question of laches would not come into consideration since the laps of time was due to numerous steps taken and applications made by both parties. It is also noted by the Plaintiff that the Defendant did not object to the case been taken off the trial roll on 30/04/2015.

Section 93(1) and (2) of the Civil Procedure Code, as amended, reads thus: -

> *"93 (1). Upon application made to it before the day first fixed for trial of the action, in the presence of, or after reasonable notice to all the parties to the action, the Court shall have full power of amending in its discretion, all pleadings in the action, by way of addition, or alteration, or of omission.*
>
> *93 (2). On or after the day first fixed for trial of the action and before the final judgment, no application for the amendments of any pleadings shall be allowed unless the Court is satisfied, for reasons to be recorded by the Court that grave and irremediable injustice will be caused if such amendment is not permitted, and on no other ground, and that the party so applying has not been guilty of laches."*

As observed before, this case was first fixed for trial on 30/04/2015 and thereafter, the case was mentioned for steps in order to facilitate a commission to issue at the instance of the Plaintiff. After several dates of court sittings, the learned Trial Judge fixed the case for pre-trial hearing on 27/02/2018.

However, on 21/02/2018, the Plaintiff moved to amend the plaint at which point the Defendant objected. The amended Plaint dated 21/02/2018, seeks to add the 2nd and 3rd Defendants who were permitted to be added by order dated 24/09/2012, which is over five years from the date of the said order. It also seeks to amend paragraph 7 and 8 of the Plaint to include the 3rd and the 4th schedule, to describe the lands, over which the Plaintiff claims a servitude right to dispose water from his land to Muthurajawala.

It is noted that in paragraph 8 of the original plaint the Plaintiff describes that the flow of water from the land described in the 1st schedule over the land described in the 2nd schedule of the plaint to have prevailed for the past forty years.

Section 93 of the Civil Procedure Code was amended by Act No. 9 of 1991, and the rationale underlying the amendment introduced by the said Act was recognized by G. P. S. De Silva C.J. in the case of ***Kuruppuarachchi vs. Andreas (1996) 2 SLR 11***, in the following manner;

> *"The amendment introduced by Act No. 9 of 1991 was clearly intended to prevent the undue postponement of trials by placing a significant restriction on the power of the court to permit amendment of pleadings on or after the day first fixed for the trial of the action. An amendment of pleadings on the date of trial, more often than not, results in the postponement of the trial. In this connection it would not be inappropriate to refer to the observations of Sansoni, J. (as he then was) in* ***Daryanani vs. Eastern Silk Emporium Ltd****., I have also always understood the rule to be that an amendment should be applied for as early as possible and as soon as it becomes apparent that it would be necessary".*

It was further observed that;

> *"While the Court earlier discouraged amendment of pleadings on the date of trial. Now the court is precluded from allowing such amendments save on the ground postulated in the subsection."*

In this background it would be pertinent to discuss as to what constitutes the first date fixed for trial within the meaning of Section 93(2) of the Civil Procedure Code.

The 1st question of law is structured on the basis that, 30/04/2015 can be considered as the first date fixed for trial and therefore Section 93(2) of the Civil Procedure Code should apply.

In ***Ceylon Insurance Co. Ltd vs. Nanayakkara and Another (1999) 3 SLR 50***, Weerasuriya J., *inter alia*, dealt with what constitutes the first date fixed of trial, when he observed;

> *"that section 80 of the Civil Procedure Code provides for fixing the date of trial and such date constitutes, the day first fixed for trial. Section 48 of the Judicature Act*

provides for continuation of a trial before the Judge who succeeds the Judge before whom trial commenced. The discretion vested in that succeeding Judge either to continue with the trial or to commence proceedings afresh does not affect the nature of the order made in terms of section 80 of the Civil Procedure Code relating to the fixing of the first trial date. Thus, the order made fixing the date of trial in terms of section 80, becomes the "day first fixed for trial" within the meaning of section 93 (2) of the Civil Procedure Code."

The same rational was echoed in the case of ***Maseena vs. Sahud and Another (2003) 3 SLR 109*** where it was held that,

"Section 80 of the Civil Procedure Code provides for fixing the date of trial and such date constitutes the day first fixed for trial."

The Plaintiff contended that the day first fixed for trial is not necessarily the first date on which the case is first fixed for trail but would include any date to which the trial is postponed and when an application for amendment of pleadings is made, the Judge is granted a discretion to permit amendments made prior to the first date of trial under Section 93(1) of the Civil Procedure Code.

The plaintiff relied on ***Karunaratne vs. Alwis (2007) 1 SLR 214***, where Eric Basnayake J. took a wide approach following the ratio-decidendi in ***Siripura Hewavasam Pushpa vs. Leelawathie Bandaranayake and three others – (2004) 3 Sri LR 162),*** where S.N. Silva C.J. referring to the day first fixed for trial said thus:

"it is clear that the date of trial is not necessarily the first date on which the case is fixed for trial, but would also include any date to which the trial is postponed".

Thus, Eric Basnayake J. held:

"Therefore, the day first fixed for trial could mean the day the trial actually began. Any amendment made prior to the date the trial was begun therefore comes under section 93 (1) empowering the Judge granting wide discretion in allowing amendments."

However, in ***Kanagaraj vs. Alankara (2010) 1 SLR 185***, Eric Basnayake J. commenting on *"the initial date that was fixed for the trial"*, stated that:

> *"the fact that the trial did not commence has no bearing. What is important is the date, first fixed for trial."*

The Plaintiff also relied in the unreported case of ***Sri Lanka Savings Bank Ltd Vs. Global Tea Lanka (Pvt) Ltd & Others, SC/App./171/2015,*** where the Supreme Court discussed the *"date of trial first fixed"* or *"first date of trial"* and *"the date fixed for the trial of an action"* in the context where the Court had struck out the date from the trial roll scheduled for the date appointed for the trial, as such, the facts of the said case can be clearly distinguished from the instant application.

Section 80 of the Civil Procedure Code stipulates an appointed date for the trial of the action. Journal entry dated 20/01/2015, makes it abundantly clear that the appointed date for the trial of the action was 30/04/2015. In an action, the appointed date for the trial of the action and/or the first date fixed for trial can be one and the same.

As observed in ***Ceylon Insurance Co. Ltd vs. Nanayakkara and Another (1999) 3 SLR 50 (supra)***:

> *"the order made fixing the date of trial in terms of section 80, becomes the "day first fixed for trial" within the meaning of section 93 (2) of the Civil Procedure Code"*.

In this case, the amendments sought to be made are moved after the day first fixed for trial and therefore, for the reasons set out above, it is imperative that Section 93(2) should apply.

Application of ***Section 93(2)*** was discussed by Ranaraja J. in ***Gunasekera and another Vs. Abdul Latiff (1995) 1 SLR 225*** at 232, where he stated thus: -

> *"The amendments to pleadings on or after the first date of trial can now be allowed only in very limited circumstances. It prohibits court from allowing an application for amendment at this stage unless (1) it is satisfied that grave and irremediable injustice*

will be caused if the amendment is not permitted, and (2) the party applying has not been guilty of laches. On no other ground can court allow an application for an amendment of pleadings. Furthermore, court is obliged to record reasons for concluding that the two conditions referred to have been satisfied."

In the impugned judgment, the learned Trial Judge noted the laxity on the part of the Plaintiff to follow the appropriate procedure to add the 2nd and the 3rd Defendants in keeping with the order dated 24/09/2012.

The Court further observed that in view of the orders made on 24/09/2012 and 17/01/2013, the Plaintiff failed to amend the Plaint to disclose a cause of action and also the relief sought against the Defendants to be added. The learned Trail Judge permitted the Plaint to be amended on the basis that the amendments would not change the scope of the action or cause any prejudice to the Defendant already made known. The Court, having noted that this action was instituted in 2008, observed that the Plaintiff did not act promptly according to procedure prescribed by law to tender the proposed amendments. However, subject to costs the Plaintiff was permitted to amend the Plaint.

The lower Court in its order emphasized the fact that, subsequent to an addition of a party, it is mandatory that the Plaint is amended in terms of Section 21 of the Civil Procedure Code. The learned President's Counsel for the Defendant argued that Section 21 cannot be considered in isolation and cited the case ***Colombo Shipping Co vs. Chirayu Clothing (1995) 2 SLR 97***, where Ranaraja J. dealing with the said issue extensively, held that,

"Since the amendment by Act, No. 9 of 1991, if an application is made to add a party as a defendant after the first date of trial, Sections 18, 21 and 93(2) of the Code have to be read together, in allowing or refusing such an application".

The learned Judges sitting in appeal too, observed that an application was not filed to add the 2nd and 3rd Defendants, even though the Court permitted the said parties to be added by order dated, 24/09/2012. The Court also observed the long delay on the part of the

Plaintiff to amend the Plaint, however, the Court did not make any finding on the party applying, of being guilty of lashes.

Even though the trial court and the Court sitting in appeal recognized the delay on the party applying for an amended plaint, failed to make a finding that a legal right or claim will not be enforced or allowed if a long delay in asserting the right or claim has prejudiced the adverse party.

The doctrine of laches is based on the maxim that *"equity aids the vigilant and not those who slumber on their rights."* (Black's Law Dictionary). The outcome is that a legal right or claim will not be enforced or allowed if a long delay in asserting the right or claim has prejudiced the adverse party.

In ***Paramalingam vs. Sirisena and Another (2001) 2 SLR 239,*** Wigneswaran J. drew a distinction between *"before the day first fixed for trial"* and *"on or after the day first fixed for the trial."* Where it was held that:

> *"The Court's discretion was unfettered with regard to amendments before the first date of trial subject to an application having to be made to do it with notice to all other parties. But its powers on or after the first date of trial were severely curtailed. The present Section 93 has come through many vicissitudes".*

and further observed that;

> *"Laches means negligence or unreasonable delay in asserting or enforcing a right. There are two equitable principles which come into play when a statute refers to a party being guilty of laches. The first doctrine is that delay defeats equities. The second is that equity aids the vigilant and not the indolent. Lord Camden said "Nothing can call forth this Court into activity but conscience, good faith and reasonable diligence"*

Similar conclusions were made in ***Nimalraj vs. Thamarajah and others (2005) 3 SLR 309; Rushantha Perera vs. Wijesekara (2005) 3 SLR 105; Gunasekera vs. Abdul Latiff, (1995), 1 SLR 225; Ceylon Insurance Co. Ltd vs. Nanayakkara (1999) 3 SLR 50;***

Colombo Shipping Co. Ltd. vs. Chirayu Clothing (Pvt) Ltd. (supra); Avudiappan vs. Indian Overseas Bank, (1995) 2 SLR 131; Kuruppuarachchi vs. Andreas (supra); Paramalingam vs. Sirisen and Another (supra); Ranaweera vs. Jinadasa (2001)2 SLR 239.

Therefore, it is well founded and prudent to pose the question as to whether the long delay on the part of the Plaintiff in asserting his right or claim has prejudiced the interest of the Defendant.

The delay of over 10 years on the part of the Plaintiff to move for an amendment of the Plaint was observed by both courts, however, there was no order made or reasons given by the Court to absolve the Plaintiff of such delay. The delay on the part of the Plaintiff is not reasonably explained.

The cause of action which is alleged to have accrued against the 2nd and the 3rd Defendants arise as a result of the right to dispose of rain water from the Plaintiff's land to Muturajawela. In paragraph 8 of the original Plaint, the Plaintiff states that for the last 40 years the water collected in the Plaintiff's land (described in the 1st schedule) flowed across the 1st Defendant's land (described in the 2nd schedule) to Muturajawela. The Defendant was made a party to this case on the basis that he obstructed the flow of rain water by unlawfully filling gravel in the land described in the 2nd schedule, which was brought to the attention of the relevant authorities. Having heard both parties the District Court issued an injunctive order preventing the Defendant from filling soil in the said land.

In ***Ranaweera vs. Jinadasa (2001)2 SLR 239***, Amerasinghe, J. held that:

> *"No postponements must be granted or absence excused, except upon emergencies occurring after the fixing of the date, which could not have been anticipated or avoided with reasonable diligence, and which cannot otherwise be provided for."*

There is no mention in the original Plaint that the rain water collected in the Plaintiff's land flowed over the lands described in the 3rd and 4th schedules. At the time of filing the

original Plaint, the Plaintiff was aware that for the last 40 years the rain water flowed to Muturajawela across the Defendant's land. The proposed amendment to the Planit is to emphasize the fact that the rain water flowed to Muturajawela across the described lands belonging to the 2nd and 3rd Defendants. Therefore, an amendment to the Plaint would not have arisen if the Plaintiff acted with due diligence when filing the Plaint.

Apart from the procedural delay more akin to the Plaintiff's failure, as observed, an application was made way back in 20/10/2009, where the Plaintiff moved to file an amended Plaint, but failed to do so even on the final date granted by Court. (Journal entry 18 page 28).

Taking into consideration the delay and the circumstances peculiar to this case, an amended Plaint, if permitted, would cause grave prejudice to the Defendant. Therefore, the Court holds that the application to amend the Plaint should be rejected in terms of Section 93(2) of the Civil Procedure Code.

Accordingly, the 1st to 4th questions of law are decided in favor of the Defendant Appellant.

In the consequential issue of law, the Plaintiff-Respondent points out that the learned District Judge has taken this case out of the trial roll for further steps without any objection by the Petitioner. As held in ***Kuruppuarachchi vs. Andreas (supra)****:*

> *"The rationale underlying the amendment introduced by Act No. 9 of 1991 is when the Court earlier discouraged amendment of pleadings on the date of trial, now the court is precluded from allowing such amendments save on the ground postulated in the subsection."*

In terms of ***Section 93 (2)***, the onus is on the party who moves for an amendment to satisfy Court,

> *"that grave and irremediable injustice will be caused if such amendment is not permitted, and on no other ground, and that the party so applying has not been guilty of laches."*

Therefore, the absence of an application objecting to listing the case to be called, cannot be held against the Defendant.

In the circumstances, the consequential issue of law raised by the Plaintiff is answered in the negative.

Accordingly, the order of the learned District Judge of Negombo dated 05/10/2018, and the Judgment dated 21/11/2018, delivered by the High Court of Civil Appeal Negombo is set aside. The application to amend the Plaint is rejected. I make no order as to costs.

Appeal is allowed.

Judge of the Supreme Court

Vijith K. Malalgoda PC. J.
I agree

Judge of the Supreme Court

Mahinda Samayawardhena J.
I agree

Judge of the Supreme Court

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

In the matter of an Application for Special Leave to Appeal against the order of the Court of Appeal in case baring No. CA Writ 416/17 in terms of Article 128 (2) of the Constitution

Mr. Jaliya Wickramasuriya,
6525, Riada Ct. Mc Donough,
GA 30253, USA

Petitioner

SC Appeal 26/2021

SC SPL LA 117/2018
CA Writ Application No.416/2017

Vs,

1. Hon. Thilak Marapana,
   Minister of Foreign Affairs,
   Colombo 01.

2. Prasad Kariyawasam,
   Secretary,
   Ministry of Foreign Affairs,
   Colombo 01.

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

Respondents

And Between Now

Mr. Jaliya Wickramasuriya,
6525, Riada Ct. Mc Donough,
GA 30253, USA

Petitioner-Petitioner

Vs,

1. Hon. Thilak Marapana,
   Minister of Foreign Affairs,
   Colombo 01.

1A. Hon. Dr. Sarath Amunugama,
   Minister of Foreign Affairs,
   Colombo 01.

1B. Hon. Dinesh Gunawardena,
   Minister of Foreign Relations, Silk Development, Employment and Labour Relations,
   Ministry of Foreign Relations,
   Republic Building, Sir Baron Jayathilaka Mawatha,
   Colombo 01.

<u>Substituted Respondent-Respondent</u>

2. Prasad Kariyawasam,
   Secretary, Ministry of Foreign Affairs,
   Colombo 01.

2A. Ravintha Ariyasinha,
   Secretary, Ministry of Foreign Relations,
   Colombo 01.

   And Presently at,

   Ravintha Ariyasinha,
   Ministry of Foreign Relations,
   Republic Building, Sir Baron Jayathilaka Mawatha,
   Colombo 01.

2B. Admiral Prof. Jayanath Colombage,
   Secretary, Ministry of Foreign Relations,
   Republic Building, Sir Baron Jayathilaka Mawatha,
   Colombo 01.

<u>Substituted Respondent-Respondent</u>

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

Respondent-Respondent

Before: Justice Vijith K. Malalgoda, PC
Justice K. K. Wickremasinghe,
Justice Mahinda Samayawardhena,

Counsel: Romesh de Silva, PC with Shavindra Fernando, PC, Manjuka Fernandopulle and Niran Anketell instructed by K. V. Gunasekara for the Petitioner-Petitioner

Mrs. Farzana Jameel, PC, ASG, with Vikum de Abrew, SDSG, and Ms. Yuresha de Silva, SSC, for the 1B, 2B and 3rd Respondents

Argued on: 22.03.2021
Judgment on: 29.10.2021

Vijith K. Malalgoda PC J

The Petitioner Jaliya Chithran Wickramasuriya has come before this court challenging the decision of the Court of Appeal, to uphold the preliminary objection taken before the said court and dismiss the said application, on several grounds as averred in the petition dated 23rd April 2018 filed before this court.

When the instant application was supported before this court on 17.02.2021, court having considered the material placed before court, had granted Special Leave on the following questions of law.

Did not the Court of Appeal err in law by failing to sufficiently consider and/or appreciate that;

i. Ex-facie there was no material before court that in fact the decision contained in the document annexed here to marked P-12 was that of His Excellency the President

ii. What was being challenged Ex-facie was that of the decision of the 2nd Respondent and/or of the 1st Respondent and not that of His Excellency the President and at most the 2nd Respondent is seeking to justify his decision contained in P-12 on purported direction of the President

The Petitioner who was first appointed as the Consular General of Sri Lanka to the United States of America (Los Angeles) for a period of two years commencing form 22.01.2007 by the then President of Sri Lanka was recalled on 11.03. 2008 and was then appointed as the Ambassador of Sri Lanka to the United Stated of America (Washington) on 30.06.2008 by the President of Sri Lanka.

His term of office had come to an end since 15.04.2014 and he had relinquished his duties as the Ambassador since then.

As submitted by the Petitioner, after relinquished his duties in United States of America, he had come back to Sri Lanka and whilst he was in Sri Lanka, proceedings were instituted before the Magistrate's Court of Fort for alleged wrongdoing in respect of the purchase of premises in Washington DC.

Whist denying any allegation levelled against him, the Petitioner had submitted that, in the course of his duties as Ambassador, the Petitioner was instructed by the Government of Sri Lanka to purchase a new chancery building to house the residence of the Ambassador to the United States and a building located at 3025 White Haven Street, NW, Washington DC was purchased on behalf of the Government

of Sri Lanka acting in terms of the instructions given by the Government of Sri Lanka on a decision of the Cabinet of Ministers.

When the Petitioner arrived at the Air Port on 17th November 2016 with his wife, in order to go abroad, he was stopped at the Air Port and released from custody on the undertaking that he would appear before the Financial Crime Investigation Division on the same day. The Petitioner when visited the said unit on the same day, was arrested for alleged offences committed under the "Offences Against Public Property Act" and remanded for fiscal custody after producing him before the Fort Magistrate's Court under case number B21/2016.

The Petitioner who was enlarged on bail on 17th March 2017 after being in remand custody for several months, was permitted by court to travel abroad in order to receive medical treatment for a period of eight weeks and had left Sri Lanka on 17th July 2017 to United States. On 3rd September when he was at Atlanta Air Port to leave for Chile, he was stopped by the law enforcement authorities and was extensively questioned on the same property transaction which is the subject matter of case number B21/2016. United States Law Enforcement Authorities had confirmed to his Lawyer, who was retained to represent him in the United States, that he is under investigation in respect of the same property transaction which is the subject matter in case number B21/2016.

The Petitioner has further submitted that, being the Sri Lanka's Ambassador to the United States of America from July 2008 to May 2014, he is entitled for immunity in respect of acts performed in the exercise of his functions as a member of the Mission in terms of Article 39 (2) of the Vienna Convention of Diplomatic Relations read with section 2 of the Diplomatic Privileges Act No. 9 of 1996 even after ceasing to hold office. However, it was brough to the notice of the Hon, Magistrate Fort on 30th October 2017 by the officer who represented Financial Crime Investigation Division, that the diplomatic

immunities and privileges enjoyed by the Petitioner had been waived by the 1st Respondent, the then Minister of Foreign Affairs and had taken steps to inform the Government of United States of this decision. A copy of the said decision was later delivered to the Attorney at Law who represented the Petitioner before the Fort Magistrate's Court. (P-12)

Since the Petitioner could not leave United States of America pending the investigations carried out by the United States Law Enforcement Authorities based on the purported waiver granted by the Foreign Ministry, which is, according to the Petitioner is *ultra vires* and unlawful, an Application was filed by the Petitioner before the Court of Appeal,

a) Seeking an order in the nature of a Writ of *Certiorari* quashing the decision contained in P-12
b) Seeking an order in the nature of *Mandamus* directing the 1st and/or the 2nd Respondent to inform the Government of United States of America that the Petitioner continues to enjoy all Diplomatic privileges and immunities in terms of Vienna Convention on Diplomatic Privileges and Immunities in respect of acts performed by him in exercise of his functions as the Ambassador to the United States of America

The second Respondent filed an affidavit before the Court of Appeal placing before court the circumstances under which the impugned document the "Note Verbal dated 23.10.2017" (P-12 or R-8) was issued and paragraphs 9 and 10 of the said affidavits reads thus;

> "9. I state that Note Verbal No. 756 dated 23.10.2017 was received from the Embassy of the United States of America, requesting the waiver of diplomatic immunity owning to the Petitioner's conduct pertaining to the purchase of the Sri Lankan Embassy in Washington and the laundering *US $ 332,000* via Shell Companies. A certified copy of the

aforementioned Diplomatic Note is annexed hereto marked as 2R7 and pleaded as part and parcel hereof.

10. I state that pursuant to the instructions received from His Excellency the President, the Embassy of the United States of America was informed by way of Note Verbal dated 23.10.2017 that the immunity conferred on the Petitioner was waived enabling the relevant authorities in the United States of America to conduct investigations into the said incident. As the 1st Respondent was overseas, the aforementioned decision was conveyed by me to the Embassy of United States of America. A certified copy of the Note Verbal dated 23.10.2017 is annexed hereto marked 2R8 and is pleaded as part and parcel hereof."

A preliminary objection was raised by the State with regard to the maintainability of the application before the Court of Appeal based on the affidavit filed by the 2nd Respondent referred to above. It was contended on behalf of the Respondents, that the Court of Appeal does not have jurisdiction to entertain the said application as the decision to waive diplomatic immunity enjoyed by the Petitioner was based on a decision taken by His Excellency the President, which was conveyed to the Embassy of the United States of America by the Secretary to the Ministry of Foreign Affairs.

The Court of Appeal upheld the above preliminary objection and dismissed the application which was pending before the Court of Appeal.

It is the above decision of the Court of Appeal is challenged in the instant application before this court and this court having considered the material placed before it had decided to grant Special Leave on two questions of law as referred to above.

Sri Lanka being a signatory to the Vienna Convention on Diplomatic Relations 1961, had given effect to its obligations by introducing Diplomatic Privileges Act No. 9 of 1996. Section 2 of the said Act had provided “the Articles in the convention” to have the force of Law in Sri Lanka.

The Diplomatic immunity enjoyed by a diplomatic agent (Diplomatic Agent is identified under the convention as “the head of the mission or a member of the diplomatic staff of the mission”) its limitation and waiver is discussed under the convention in Article 31, 32 and 39 as follows;

Article 31

1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of

   a)……

Article 39

1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the Ministry of Foreign Affairs or such other ministry as may be agreed.
2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts

performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.

3. …….

Article 32

1. The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under Article 37 may be waived by the sending state
2. Waiver must always be express
3. ……..

It was the position of the Petitioner that, he is entitled for immunity even though he is no longer holding a diplomatic position, under Article 39 (2) of the Convention for acts committed in the capacity of the Ambassador of Sri Lanka to the United States of America. As already referred to in this judgement, the Petitioner was extensively questioned by the Law Enforcement Authorities with regard to a property transaction which was taken place during his tenor as the Ambassador of Sri Lanka to the United Stated of America.

In these circumstances it is clear that the matter that was investigated by the Law enforcement Authorities of the United States of America was linked with the official work of the Petitioner as the Ambassador to the United States America, and this position is confirmed by the United States Authorities, when they send the Diplomatic Note to the Foreign Ministry of Sri Lanka Requesting the waiver of diplomatic immunity of the Petitioner to the effect;

"As the Ministry is aware, Mr. Wickramasooriya, former Ambassador to the United States, is under investigation for the misappropriation, theft and embezzlement of public funds by a

> public official and the related laundering of those fund. The Embassy has been informed that United States Law Enforcement Authority maintain that during the 2013 purchase of the Sri Lankan Embassy in Washington DC, Mr. Wickramasooriya falsely inflated the sales price of the embassy by approximately *$ 332,000*"

Article 32 (1) and (2), of the convention provides for the sending state to waive immunity granted under Article 39 (2) of the Convention and it is the said determination made under Article 32 (1) and (2) was challenged by the Petitioner before the Court of Appeal.

As submitted by the 2nd Respondent, when the Note verbal dated 23.10.2017 form the embassy of United States America requesting the waiver of the Diplomatic Immunity of the Petitioner was received by the Foreign Ministry, he received instruction from His Excellency the President to waive the Diplomatic Immunity of the Petitioner, and that was communicated to the Embassy of United States by Note verbal dated 23.10.2017 (on the same day)

The Petitioner's entitlement for diplomatic immunity derived from the appointment he received as a diplomatic agent, i.e., as the Ambassador to the United States of America, and the said appointment he received from His Excellency the President under Article 33 (c) of the Constitution, (the text that was in operation as at the date of his appointment) which reads as follows;

> Article 33 In addition to the powers, and functions expressly conferred or imposed on or assigned to him by the Constitution or by any written law whether enacted before or after the commencement of the Constitutions, the President shall have the power-

(c) to receive and recognize and to appoint and accredit Ambassadors, High Commissioners, Plenipotentiaries and other diplomatic agents.

Except for the powers to appoint a diplomatic agent, the constitution (the text that was in operation at the time he was appointed as well as the text that was in operation as at 23.10.2017) is silent on the immunities that derives from such appointment as a diplomatic agent, but it is only the Diplomatic Privileges Act No. 9 of 1996 and the convention which speaks of the entitlement and the removal of Privileges of a diplomatic agent.

As already discussed, under Article 32 of the Convention, the sending state may waive the immunity and it must always be express. Section 2 (3) of the Diplomatic Privileges Act No. 9 of 1996 speaks of a situation where the waiver of Diplomatic immunity by a head of a mission or by a person for the time being performing the functions of a head of a mission, and according to the said section such waiver "shall be deemed to be waiver by the state."

Therefore it is clear, that in the absence of any Constitutional provision with regard to the removal of privileges that derived to a diplomatic agent by appointing him to the said position by Article 33 of the Constitution, under the provisions of the Diplomatic Privileges Act No. 9 of 1996 read with the provisions of the convention, it is the sending state that is entrusted with the removal of diplomatic immunity of a diplomatic agent.

Article 30 (1) and 35 (1) of the Constitution (the text that was in operation on 23.10.2017) provides that;

Article 30 (1) There shall be a President of the Republic of Sri Lanka, who is the Head of the State, the Head of the Executive and of the Government and the Commander-in-Chief of the Armed Forces

Article 35 (1) While any person holds office as President of the Republic of Sri Lanka, no civil or criminal proceedings shall be instituted or continued against the President in respect of anything done or omitted to be done by the President, either in his official or private capacity. Provided that nothing in this paragraph shall be reads and construed as restricting the right of any person to make an application under Article 126 against the Attorney General, in respect of anything done or omitted to be done by the President, in his official capacity; Provided further that the Supreme Court shall have no jurisdiction to pronounce upon the exercise of powers of the President under Article 33 (2) (g)

The President's power to remove the diplomatic immunity as the Head of the State was never challenged neither before the Court of Appeal no before the Supreme Court by the Petitioner but one of the main arguments of the Petitioner was that, ex-facie there is no decision by His Excellency the President before Court, to invoke the immunity of His Excellency the President under Article 35 of the Constitution.

The instant appeal was filed before this court by the Petitioner on 2nd May 2018 but the matter was not supported but had gone down for several days for various reasons. On 17th December 2020 the Petitioner had filed a motion along with several new documents and moved to support the said motion before this court. At that stage learned Addition Solicitor General who represented the Substituted 2B Respondent had moved to file an affidavit from the Substituted 2B Respondent explaining certain matters.

It is an accepted legal principle, for the parties to argue their appeals and the Appellate Court to decide the appeal on the same material that was available before the original court. When the Petitioner filed

the instant appeal before this court he had never moved or sought permission to submit fresh evidence before this court. However, two years after invoking the jurisdiction of this court, the Petitioner had filed some fresh evidence without seeking permission of this court along with the motion dated 17th December 2020 and moved to support the said motion before this court. The day on which the Petitioner was to support the motion, state on behalf of the substituted 2B Respondent, moved to file an affidavit from the said Respondent in order to explain certain development that took place when the instant application is pending before this court. The learned President's Counsel who represented the Petitioner neither supported his motion on that day nor objected to the application by the state.

Substituted 2B Respondent, the incumbent Secretary of the Foreign Ministry had swarm an affidavit with annexures marked R1-R7A and tendered before this along with a motion dated 11th February 2021.

Even though this court was not made to understand any reason as to why fresh material is needed to proceed with the instant appeal by any of the parties before filing the said material, I can observe a similarity between the two sets of documents filed before this court.

I am also mindful of Article 127 (2) of the Constitution which reads thus,

> Article 127 (2) The Supreme Court shall, in the exercise of its jurisdiction, have sole and exclusive cognizance by way of appeal from any order, judgement, decree or sentence made by the Court of Appeal, where any appeal lies in law to the Supreme Court, and it may affirm, reverse or vary any such order judgment, decree or sentence of the Court of Appeal and may issue such directions to any Court of First Instance or order a new trial or further hearing in any proceedings as the justice of the case may require, **and may also call for and admit fresh or additional evidence if the interest of**

> **justice so demands** and may in such event, direct that such evidence be recorded by the Court of Appeal or any Court of First Instance. (emphasis added)

When the instant application was supported before this court on 17.02.2021, three years after it was filed in the registry, the said fresh material was available before the court and presumably, the parties had referred to the fresh material and would have influenced this court in granting Special Leave. In these circumstances it is in the interest of justice, that this court would consider the fresh material that was placed before court by both parties.

However, I am further mindful of the fact that it is the 2nd Respondent, the Secretary to the Ministry of Foreign Affairs, a responsible Public Servant, had filed an affidavit before this court informing the circumstances under which he issued 2R8 when the matter was originally supported before the Court of Appeal, and the learned Additional Solicitor General who represented the said Respondent before court had based his preliminary objection to the contents of the said affidavit.

Even though there is reference to several documents that was exchanged between the Ministry of Foreign Affairs, the Embassy of the United States and Department of State, Washington since 2nd July 2020, in the affidavit filed before this court by the 2B added Respondent, paragraph 9 of the said affidavit refers to a Note Verbal dated 2nd July 2020 as follows;

> "9. I state that Note Verbal bearing No. L/POL/33 dated 23rd October 2017, (by which the diplomatic immunity enjoyed by the Petitioner was waived) was, withdrawn by Note verbal bearing No. L/POL/33 (vii) dated 2nd July 2020, for the reasons contained therein. A certified copy of the Note verbal bearing No. L/POL/33 (VII) dated 2nd July 2020 is annexed hereto marked 2R3 and pleaded as part and parcel hereof."

The reasons for the withdrawal of Note Verbal dated 23rd October 2017 was explained in the second and third paragraphs of the Note Verbal dated 2nd July 2020 (2R3) as follows;

> 2. Although, the aforesaid Note Verbal appears to have been issued by the Ministry of Foreign relations on the basis that such instructions have been issues by Former President, His Excellency Maithripala Sirisena, the Presidential Secretariat and Ministry of Foreign Relations has been able to verify that no records are available in both offices to prove that Former President has issued such instructions.
> 3. Based on above mentioned observations, the Ministry of Foreign Relations is of the view that the said waiver is not legitimate and hence the aforesaid Note Verbal No. L/POL/33 dated 23rd October 2017 is withdrawn."

Even though the 2B added Respondent had not explained the circumstances under which a search was carried out, as to referred in paragraph two above, he has further, failed to inform this court when he is submitting an affidavit to consider as evidence before this court, whether he checked with the author of the previous affidavit, who said to have issued 2R8 (Note verbal dated 23rd October 2017) since the Court of Appeal had considered and acted upon his affidavit as evidence before the said court.

The Petitioner too had filed almost the same set of documents along with the motion dated 17th December 2020 and therefore it is not necessary to consider the said documents separately in this judgment but, it appears to me that both the Petitioner as well as the 2A added Respondent are now disputing a factual position submitted before the Court of Appeal by the predecessor of the 2B added Respondent.

The Petitioner had originally gone before the Court of Appeal seeking orders in the nature of Writ of *Certiorari* and Writ of *Mandamus* and the nature of this application before the Supreme Court has not

changed even though the matter before this court is an appeal against the order of the Court of Appeal. In the Petition filed before this court, the Petitioner had sought the following relief among few other interim orders from this court.

b) set aside the order of the Court of Appeal dated 29th March 2018 in case No.CA/Writ/416/2017;

d) issue an order in the nature of a Writ of *Certiorari* quashing the decision of Respondents contained in the documents annexed marked "P12" to the Petitioner in Court of Appeal case No. CA/Writ/416/2017;

e) Issue an order in the nature of Writ of *Mandamus* directing the 1st and/or 2nd Respondent to write to the Government of the United States of America, informing that the Portioner continue to enjoy all the diplomatic privileges and immunities in terms of Vienna Convention on Diplomatic Privileges and immunities respect of acts performed by him in exercise of his functions the America and United Mexican States;

When the major facts are in dispute the courts are reluctant to issue a Writ of *Mandamus* and this was considered by this Court in the case of ***Dr. Puwanendan and Another Vs. Premasiri and two others (2009) Sri LR 107***

This is a case where the Petitioner had sought a Writ of *Mandamus* to compel the Registrar of Lands to remove an entry in the records of the Land Registry. Whilst affirming the decision of the Court of Appeal and also following a decision of the Court of Appeal in a similar matter, Thilakawardene (J) had observed as follows;

…….. "On 5th March 2008 the Court of Appeal by its judgment, dismissed the applications filed by the Appellant stating *inter-aila t*hat the Appellant's case was based on "disputed facts" and therefore the Court was not inclined issue such a Writ. Despite the significant evidence to support the Appellant's allegation, we believe this dismissal to have been legally correct.

The nature of the Writ of *Mandamus* was clearly articulated in the case of ***Thajudeen Vs. Sri Lanka Tea Board and Another (1981) 2 Sri LR 471***. In Thajudeen, the Honorable Justice Ranasinghe, quoting de. Smith's Judicial Review of Administrative Action (4th ed) 540, 561 stated that,

'*Mandamus* has always been awarded as an extraordinary, residuary and supplementary remedy to be granted only when there is no other means of obtaining justice. Even though all other requirements for securing the remedy have been satisfied by the applicant, the court will decline to exercise its discretion in his favour if a specific alternative remedy equally convenient beneficial and effectual is available'

Thus, the Writ of *Mandamus* is principally a discretionary remedy a legal tool for the dispensation of justice, when no other remedy is available. Given the power of such a remedy the common law. Surrounding this remedy requires multiple conditions that must be met prior to the issuance of a writ by court. Only if (a) the major facts are not in dispute and the legal result of the facts are not subject to controversy and (b)……."

By submitting an affidavit before this court 2B added Respondent had informed that, all his efforts to find any documentary proof with regard to any decision that was communicated from the Presidential Secretariat to the Ministry of Foreign Affairs was failed but he has not taken up the position that there was no such decision by His Excellency the President on or around 23.10.2017 to withdraw the

Diplomatic immunity enjoyed by the Petitioner with regard to the official acts committed by him during his tenor as the Ambassador to the United States of America.

However, the affidavit filed before the Court of Appeal by the 2nd Respondent who said to have received such instruction and acted on the said instruction and communicated such instruction by Note Verbal dated 23.10.2017 was not rejected or denied by any authority before this court.

In the said circumstances, I am not inclined to consider granting any relief as prayed in paragraphs (b), (d) and (e) referred to above based on the fresh evidence placed before this court by both parties, since major facts with regard to the issues of Note Verbal dated 23rd October 2017 are disputed by the said evidence before this court.

When considering the main appeal that was filed before this court, it is further observed that the Court of Appeal had correctly allowed the preliminary objection raised by the state, based on the affidavit filed by the 2nd Respondent before the said court. The decision of the Court of Appeal was mainly based on Article 35 of the constitution.

During the arguments before this court, the learned President's Counsel who represented the Petitioner relied upon the decisions in ***Reys Vs. Al-malki and Another (2017) UK SC 61, AC 735*** and ***Brigadier Andige Priyanka Indunil Fernando Vs. Majuran Sathananthan Case No. Co/1091/2020 and CO/1850/2020*** decision of High Court of Justice Queen Bench division;

As observed by me both the above decisions refer to the diplomatic immunity enjoyed by diplomatic agent and how the domestic court should react to those in compliance with the convention.

However, I see no relevance of any one of those decisions to the instant case, since what was challenged before the Court of Appeal was the decision of the Sending state to waive the diplomatic immunity that

was enjoyed by the Petitioner under Article 39 (2) of the convention. When the sending state had decided to Act under Article 32 of the convention on a request by the receiving state, there is no dispute with regard to acts performed by the diplomatic agent whether it comes within the immunity or not.

For the reasons given in my judgement, I see no merit in the appeal before us. The appeal is therefore dismissed with cost fixed at Rs. 50,000/-.

Appeal Dismissed. With cost.

Judge of the Supreme Court

Justice K. K. Wickremasinghe,

I agree,

Judge of the Supreme Court

Justice Mahinda Samayawardhena,

I 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 (1) of the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006 read together with Article 127 of the Constitution.

S.C. Appeal No. 28/2017
SC/HCCA/LA No. 210/2015
HC/Civil Appeal No. 122/2010 (F)
D.C. Chilaw Case No. 1249/L

Mayandi Suhumaran,
Ward No. 03,
Udappu.

Plaintiff

Vs.

Mookan Sathiyaseelan,
Ward No. 03,
Udappu.

Defendant

AND BETWEEN

Mayandi Suhumaran,
Ward No. 03,
Udappu.

Plaintiff-Appellant

Vs.

Mookan Sathiyaseelan,
Ward No. 03,
Udappu.

Defendant-Respondent

AND NOW BETWEEN

Mayandi Suhumaran,
Ward No. 03,
Udappu.

Plaintiff-Appellant-Appellant

Vs.

Mookan Sathiyaseelan,
Ward No. 03,
Udappu.

Defendant-Respondent-Respondent

Before: **P. Padman Surasena, J.**

A.L.S. Gooneratne, J.

Janak De Silva, J.

Counsel:

M.A. Sumanthiran PC with K. Pirabakaran and Divya Mascarange for the Plaintiff-Appellant-Appellant

Shantha Jayawardena with Niranjan Arulpragasam for the Defendant-Respondent-Respondent

Written Submissions tendered on:

21.08.2017 and 19.02.2021 by the Plaintiff-Appellant-Appellant

22.06.2017 by the Defendant-Respondent-Respondent on

Argued on: 08.03.2021

Decided on: 04.10.2021

Janak De Silva, J.

The Plaintiff-Appellant-Appellant (hereinafter referred to as "Appellant") instituted this action against the Defendant-Respondent-Respondent (hereinafter referred to as "Respondent") seeking a declaration of title to the land called "Udappen Karai Kani" more fully described in the 3rd Schedule to the plaint and for his ejectment. The Respondent made a cross-claim for a declaration of title based on prescriptive title.

The learned District Judge dismissed the action on the basis that the Appellant had failed to establish his title to the corpus. The cross-claim of the Respondent was also dismissed on the same basis.

Aggrieved by the judgment of the District Court, the Appellant appealed to the High Court of Civil Appeal of the North Western Province holden in Kurunegala which appeal was dismissed and hence this appeal.

Leave to appeal has been granted on the following questions of law:

1. Have their Lordships of the High Court erred in law when they came to the finding that 'the admission of the deeds in evidence itself is not proof of title'?
2. Have their Lordships of the High Court erred in law when they come to the finding that the admitted documents P1, P2 and P3 need further proof in terms of Section 68 of the Evidence Ordinance?
3. Have their Lordships of the High Court erred in law when they failed to appreciate that admitted documents P1, P2 and P3 are evidence for all purposes of law?

4. Have their Lordships of the High Court erred in law when they failed to appreciate that there was no further proof needed to establish the title of the Plaintiff in view of the admission of documents P1, P2 and P3?
5. Whether the objection raised in respect of the deeds marked P1, P2 and P3 prior to the commencement of the Defendant's case on 16.08.2006 is a valid and acceptable objection to the admissibility of the same?

The crux of the Appellant's case is that he obtained title to the corpus by deeds marked P1, P2 and P3 executed in his favour by Sinna Kathirkamanapillai Sella Kaliamma. These deeds were objected to when first produced and therefore were marked subject to proof but were read in evidence without any objection at the end of the case of the Appellant. It is on this basis that the Appellant contends that they are evidence for all purposes and that no further proof is required. However, the Respondent counters by claiming that the requirements in section 68 of the Evidence Ordinance have not been satisfied and hence the three deeds P1, P2 and P3 cannot be used as evidence. Questions of law Nos. 2, 3 and 5 cover these conflicting arguments.

The contrasting positions taken by the parties are based on several authorities emanating from this Court. In *Sri Lanka Ports Authority and Another v. Jugolinija-Boal East* [(1981) 1 Sri.L.R. 18 at 24] Samarakoon C.J. held that:

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

This was cited with approval and followed in *Balapitiye Gunananda Thero v. Thalalle Methananda Thero* [(1997) 2 Sri.L.R. 101].

However, this Court has recently held that those authorities do not apply to a document which is required by law to be attested and that such a document can be used in evidence only if the requirements in section 68 of the Evidence Ordinance are satisfied [*Mohamed Naleem Mohamed Ismail v. Samsulebbe Hamithu* (S.C. Appeal 04/2016, S.C.M. 02.04.2018), *Dadallage Mervin Silva v. Mohamed Rosaid Misthihar* (S.C. Appeal 45/2010, S.C.M. 11.06.2019)]. Nonetheless, Amarasekera J. has in his minority judgment in *Kugabalan v. Ranaweera* [S.C. Appeal 36/2014, S.C.M. 12.02.2021] held that in a civil action, if the relevant document is not impeached or challenged through issues, the ratio in *Jugolinija-Boal East* is still valid and applies even with regard to deeds, but if the deed is impeached or challenged through an issue raised, it has to be proved as per the provisions of Evidence Ordinance.

In my view, there is no need for this court to venture into examining questions of law Nos. 2, 3 and 5 and the different views taken in the above cases.

The principal submission of the Appellant, as embodied in questions of law Nos. 1 and 4 is that once the deeds marked P1, P2 and P3 are admitted in evidence, no further evidence is required to prove the title of the Appellant.

Therefore, the matter before court can be decided by examining these two questions of law only, without consideration of questions of law Nos. 2, 3 and 5. The reason is that even where a deed of transfer can be used in evidence after having satisfied the requirements in section 68 of the Evidence Ordinance, its contents are not conclusive as to the title of the vendor.

Let me explain this statement in some detail. Section 3 of the Evidence Ordinance states that 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. It goes on to state that a fact is said to be *"disproved"* when, after considering the *matters* before it, the court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

Clearly the court is directed to consider all matters before it in deciding whether a fact has been proved or not. In the case of a deed of transfer, the contents of the deed itself is not conclusive evidence of the title of the vendee as submitted on behalf of the Appellant.

For example, a deed of transfer may state that A sold to B the land more fully described therein. The recital may further state that A had good title to the land due to its sale to A by C. However the probative value of the contents of this deed, though admitted in evidence, will be impinged if evidence is led to prove that in fact C did not have good title to pass onto A.

Therefore I will examine the factual situation on the hypothesis that deeds marked P1, P2 and P3 can be used in evidence.

I observe that the title of his predecessor is set out in all three deeds relied on by the Appellant marked P1, P2 and P3.

In deed No. 17634 dated 17th November 2000 (P1) attested by M.M. Iqbal, Notary Public, the recital describes the title of Sinna Kathirkamanapillai Sella Kaliamma as follows:

> *"upon inheritance from my Father-in-Law Muthu Vyran Muthurakku Pillai who possessed upon deed No. 1670 dated 1932.7.6 and attested by F. Thambyaiah of Chilaw Notary Public and by deed No. 10945 of 1924.4.15 and attested by B.N.F. Jayasekera of Chilaw Notary Public. (inheritance and undisturbed possession devolved on me though (sic) my late husband Muthu Rakku Kathikamanpillai, for well over thirty (30) years)…"*

In deed No. 17635 dated 17th November 2000 (P2) attested by M.M. Iqbal, Notary Public, the recital describes the title of Sinna Kathirkamanapillai Sella Kaliamma as follows:

> *"upon inheritance from my Father-in-Law Muthu Vyran Muthu Rakkupillai who possessed upon deed No. 1000 dated 1930.9.9 and attested by F. Thambyaiah of Chilaw Notary Public and by deed No. 1467 dated 1930.9.20 attested by F. Thambyaiah of Chilaw Notary Public. (The inheritance and undisturbed and uninterrupted possession devolved on me through my late husband Muthu Rakku Kathikamanpillai, for well over thirty (30) years…"*

In deed No. 17636 dated 17th November 2000 (P3) attested by M.M. Iqbal, Notary Public, the recital describes the title of Sinna Kathirkamanapillai Sella Kaliamma as follows:

> *"upon inheritance from my late Father-in-Law Muthu Vyran Muthu Rakkupillai who possessed upon deed No. 575 dated 1925.6.20 and attested by F. Thambyaiah of Chilaw Notary Public, by deed No. 11335 of 1924.10.4 and deed No. 974 of 1912.7.15 and deed No. 19289 of 1935.8.3 and all three deeds attested by B.N.F. Jayasekera of Chilaw Notary Public.. (The inheritance and undisturbed possession devolved on me through my late husband Muthu Rakku Kathikamanpillai over 30 years…"*

No doubt the recital of a deed may be relevant and have some evidentiary value. In *Cooray v. Wijesuriya* (62 N.L.R. 158) it was held that where the recital of a deed sets out a family relationship of the vendor, such a statement would be very strong evidence of the family relationship. However, the probative value of the contents of a recital in a deed depends on the facts and circumstances of each case.

In the present case the recital of the three deeds P1, P2 and P3 sets out the relationship between Sinna Kathirkamanapillai Sella Kaliamma, her husband Muthu Rakku Kathikamanpillai and his father Muthu Vyran Muthurakku Pillai which may support her title by inheritance as claimed. However, the Respondent led in evidence the testamentary proceedings in D.C. Colombo Case No. 17770/T (V2) pertaining to the estate of Muthu Rakku Kathikamanpillai wherein the letters of administration was issued in favour of Sella Kaliamma Kadirgamanpillai. Admittedly the corpus is not included in the inventory filed of record therein.

Nonetheless, this by itself is insufficient to negate the alleged title of Sinna Kathirkamanapillai Sella Kaliamma to the corpus for it has been held in *Silva v. Silva* (10 N.L.R. 234) 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. In *De Zoysa v. De Zoysa* (26 N.L.R. 472) it was held that no conveyance from the executors is necessary for the purpose of vesting title in the heirs.

Moreover, in *Hassen Hadjiar v. Levane Marikar* (15 N.L.R. 275) it was held that section 547 of the Civil Procedure Code, while it penalizes, does not prohibit, the transfer of property which ought to have been, but has not been, administered. In *W. S. Fernando v. W. E. J. Dabarera* (77 N.L.R. 127) it was held that when an action for declaration of title to a land belonging to a deceased person's estate is instituted by a person claiming to be a successor-in-title of the deceased, section 547 of the Civil Procedure Code does not expressly prohibit the maintenance of the action on the ground that the name of the land is not included in the inventory filed in the testamentary action relating to the estate of the deceased owner. This position was reiterated in *Ratnayake and Others v. Kumarihamy and Others* [(2002) 1 Sri.L.R. 65] when it was held that the non-inclusion of a land in a testamentary proceeding for the administration of an estate of a deceased, cannot in any manner, defeat the title of the deceased and his heirs.

However, the pivotal question in relation to the title of Sinna Kathirkamanapillai Sella Kaliamma arises from the affidavit she filed in the above testamentary proceedings dated 20th of July 1957. She avers, at paragraph 4 therein, that in addition to her, there are several other heirs of Muthu Rakku Kathikamanpillai. Then the question is how she alone could claim title to the corpus in the absence of any other evidence of having obtained exclusive title thereto.

Furthermore, there is also a serious question whether in fact the title to the corpus was actually vested in the father-in-law of Sinna Kathirkamanapillai Sella Kaliamma as claimed. If the facts in the recital in deed No. 17635 dated 17th November 2000 (P2) are considered, F. Thambyaiah, Notary Public attested deed No. 1000 on 1930.9.9 and later attested deed No. 1467 on 1930.9.20 which means he had attested 467 deeds within a period of eleven days up to 1930.9.20.

This fact combined with the absence of the corpus in the inventory filed in the testamentary proceedings, the statement of Sinna Kathirkamanapillai Sella Kaliamma in the testamentary proceedings that there are other heirs of her deceased husband Muthu Rakku Kathikamanpillai raises a serious doubt on the alleged title of the Sinna Kathirkamanapillai Sella Kaliamma.

Moreover, all three deeds P1, P2 and P3 were attested in the year 2000, three years prior to the institution of this action, and the recitals therein refers in detail to eight deeds by which the father-in-law of Sinna Kathirkamanapillai Sella Kaliamma allegedly acquired title to the corpus. Despite being possessed with such details, the Appellant did not seek to lead any of those eight deeds in evidence. Neither was any explanation given for the failure to do so. In fact, under cross–examination, he contended that he bought the corpus after examining all the old deeds and on the advice of his lawyer [Appeal Brief, page 123] which means the Appellant had access to the old deeds. However, no reason was given for the non-production of those deeds.

It is true that the Appellant also sought to rely on the alleged prescriptive title of Sinna Kathirkamanapillai Sella Kaliamma and her predecessors to the corpus. In *Carolis Appu v. Anagihamy* (51 N.L.R. 355) it was held that it is permissible that the period of possession of an intestate person can be tacked on to the possession of his heirs for the purpose of computing the period of ten years. Indeed upon a perusal of the recital to the three deeds P1, P2 and P3, it is clear that Sinna Kathirkamanapillai Sella Kaliamma did in fact seek to transfer the prescriptive rights allegedly acquired by her and her predecessors to the Appellant. In fact in the absence of such an intention to transfer prescriptive title as reflected in the deed of transfer, the Appellant is not entitled in law to rely on any prescriptive title of Sinna Kathirkamanapillai Sella Kaliamma [*Fernando v. Podi Sinno* (6 C.L.R. 73), *Dingirimahatmaya v. Ratnasekera* (63 N.L.R. 405)].

Nonetheless, the facts and circumstances of this case militate against the claim of prescriptive title by the Appellant. Where a party invokes the provisions of Section 3 of the Prescription Ordinance in order to defeat the ownership of an adverse claimant to immovable property, the burden of proof rests fairly and squarely on him to establish a starting point for his or her acquisition of prescriptive rights [*Chelliah v. Wijenathan et al* (54 N.L.R. 337)]. No cogent evidence was given by the Appellant as to how and when Sinna Kathirkamanapillai Sella Kaliamma had possession of the corpus. In fact, the Appellant admitted that the Defendant was in possession of the corpus at the time the three deeds P1, P2 and P3 were executed in the year 2000.

Accordingly, I hold that the Appellant has failed to prove his title as required by law.

For all the foregoing reasons, I answer questions of law Nos. 1 and 4 in the negative and dismiss the appeal with costs and affirm the judgment of the learned District Judge of Chilaw dated 2010.06.30.

The Registrar is directed to take steps accordingly.

The Respondent is entitled to his costs in both the High Court of Civil Appeal holden in Kurunegala and this Court.

Judge of the Supreme Court

P. Padman Surasena, J.

I agree.

Judge of the Supreme Court

A.L. Shiran Gooneratne, J.

I agree.

Judge of the Supreme Court

IN THE SUPREME COURT OF THE

DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Appeal in terms of 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.

S C Appeal No. 31/2019

SC/HCCA/LA/308/2015

SP/HCCA/KAG No. 995/2012(F)

DC Kegalle Case No. 3666/L

Pathirana Mudiyanselage Leelawathie,
Divula Watta
Kehelwathugoda,
Dewalegama.

PLAINTIFF (Deceased)

1a. Vitharanage Indunil Priyantha,
1b. Vitharanage Biso Menike,
1c. Vithranage Hiran,
All of Kehelwathugoda,
Dewalegama.
1d. Vitharanage Anura,
Horanapola,
Kuliyapitiya.
1e. Vitharanage Nadeera,
Kehelwathugoda,

Dewalegama.

SUBSTITUTED PLAINTIFFS

Vs.

Peramuna Gamlath Ralalage Gunerathne,

Divula Watta,

Kehelwathugoda,

Dewalegama.

DEFENDANT (Deceased)

1a. Soma Gunarathne,

1b. Pushpa Kumuduni Kumari Gunarathne,

1c. Chandra Sisira Kumara Gunarathne,

1d. Geethani Kumari Gunarathne,

1e. Damayanthi Kumari Gunarathne.

SUBSTITUTED DEFENDANTS

AND BETWEEN

(In the Provincial High Court of Sabaragamuwa)

1a. Soma Gunarathne,

1b. Pushpa Kumuduni Kumari Gunarathne,

1c. Chandra Sisira Kumara Gunarathne,

1d. Geethani Kumari Gunarathne,

1e. Damayanthi Kumari Gunarathne.

SUBSTITUTED DEFENDANT-APPELLANTS

Vs.

1a. Vitharanage Indunil Priyantha,
1b. Vitharanage Biso Menike,
1c. Vitharanage Hiran,
All of Kehelwathugoda,
Dewalegama.
1d. Vitharanage Anura,
Horanapola,
Kuliyapitiya.
1e. Vitharanage Nadeera,
Kehelwathugoda,
Dewalegama.

SUBSTITUTED PLAINTIFF-RESPONDENTS

AND NOW BETWEEN

(In the Supreme Court)

1a. Vitharanage Indunil Priyantha,
1b. Vitharanage Biso Menike,
1c. Vitharanage Hiran,
All of Kehelwathugoda,
Dewalegama.
1d. Vitharanage Anura,
Horanapola,
Kuliyapitiya.
1e. Vitharanage Nadeera,
Kehelwathugoda,
Dewalegama.

SUBSTITUTED PLAINTIFF-RESPONDENT-APPELLANTS

1a. Soma Gunarathne

1b. Pushpa Kumuduni Kumari Gunarathne

1c. Chandra Sisira Kumara Gunarathne

1d. Geethani Kumari Gunarathne

1e. Damayanthi Kumari Gunarathne

All of Kehelwathugoda,

Dewalegama.

SUBSTITUTED DEFENDANT-APPELLANT-RESPONDENTS

Before: **P. PADMAN SURASENA J**

E. A. G. R. AMARASEKARA J

M. A. SAMAYAWARDHENA J

Counsel: Dr. Sunil Coorey with Ms. Sudarshani Coorey for the Substituted Plaintiff-Respondent-Appellants

Vidura Gunaratne for the Substituted Defendant-Appellant-Respondents

Argued on: 19-02-2021

Decided on: 03-08-2021

P. PADMAN SURASENA J

As can be seen from the caption above, both the Plaintiff and the Defendant have been substituted by the relevant substituted parties who now stand in their respective places. Nevertheless, I would for convenience, use the terms 'the Plaintiff' and 'the Defendant' to identify the two rival parties in this judgment.

The Plaintiff filed plaint dated 04-07-1986, in the District Court of Kegalle against the Defendant seeking *inter alia:*

a. A declaration that the Plaintiff is entitled to the servitude of right of way of a foot path over the land of the Defendant called "Divulgaspitiyawatta" to access

the Kegalle-Polgahawela main road from the land called "Parana Walawwe Watta" in which the Plaintiff resides;

b. the removal of the barbed wire fence constructed by the Defendant obstructing the use of the said right of way;

c. damages in a sum of Rs. 8000/- together with continuing damages at the rate of Rs. 500/- per month until the Plaintiff is granted the use of the sought right of way.

The Defendant filed an answer dated 01-06-1987 denying all material averments and sought the dismissal of the Plaintiff's action together with costs. Thereafter, the learned District Judge at the instance of the Plaintiff, issued a commission on M B Ranatunga Licenced Surveyor to survey and prepare a plan as shown by the Plaintiff. The Licenced Surveyor accordingly surveyed the land on 29-01-1988 and returned the commission with the prepared plan (plan No. K 2294 dated 17-02-1988, hereinafter sometimes referred to as the commission plan) and the report. The said plan and the report have been produced respectively marked **P 1** and **P 2**.

After the return of the commission, having considered the commission plan, the Plaintiff had filed an amended plaint dated 29-08-1988 and the Defendant had filed an amended answer dated 03-01-1989.

The Defendant in the said amended answer has stated the following.

a. It is the barbed wire fence which is shown as a line marked from point "**A**" to "**B**" in the commission plan.

b. High voltage electricity lines have been laid over the said line marked "**A**" to "**B**" in the commission plan. The Licenced Surveyor, in the commission plan has depicted by a square between the points "**A**" and "**B**", the said high voltage electricity posts carrying the warning sign board "අන්තරායයි".

c. The Plaintiff has hitherto been using the roadway shown as "**C**" "**D**" "**E**" in the commission plan.

d. What is shown as "**D**" to "**E**" in the commission plan is a road maintained by the Village Council and what is shown as "**D**" to "**C**" in the commission plan is a bund belonging to the Department of Irrigation maintained by the Agrarian Services.

e. What is shown as "**X**" to "**Y**" in the commission plan is not a public road but a private road giving access to the lands belonging to S A Gunathillake, D M Podihamine and W K M Weerasinghe.

f. What is shown as "**X**" is a culvert and there is only 300 feet from the said culvert "**X**", to access the Kegalle-Polgahawela main road.

g. No cause of action has been accrued to the Plaintiff to maintain the action.

h. There was never a footpath used by the Plaintiff, over his land.

The Defendant prayed for the dismissal of the Plaintiff's action on the above basis.

After the conclusion of the trial, the learned District Judge, by her judgment dated 24-07-2012 held that the Plaintiff had failed to prove, the claimed prescriptive rights over the use of a right of way of a footpath over the Defendant's land.

However, the learned District Judge by her judgment, granted the Plaintiff, a declaration that the Plaintiff is entitled to use a servitude of right of way of necessity over the Defendant's land and directed the Plaintiff to pay the Defendant a sum of Rs. 40,000/- as compensation for using the said right of way. The learned District Judge in her judgment considered the following in granting the said declaration.

a. Although the Plaintiff has an alternative of using the Village Council road from the point "**E**" to "**D**" in the commission plan, the rest of the alternative access goes across a paddy field called "Ambadeniya Kumbura". Owners of the said paddy field had raised objections and had not permitted the Plaintiff to use that as a road preventing the Plaintiff from using that as a right of way. This has resulted in the Plaintiff being landlocked. Therefore, there is no conclusive evidence as to the availability of an alternative roadway for the Plaintiff.

b. The alternative roadway shown by the Defendant, is in fact not a road but is a footpath that goes across a paddy field which becomes non-usable during the rainy season, rendering it incapable of being considered as an alternative road way.

c. In the absence of an alternative route, the Plaintiff is entitled to claim a right of way by necessity.

Being aggrieved by the judgment of the learned District Judge, the Defendant appealed to the Provincial High Court of Sabaragamuwa holden in Kegalle.

The Provincial High Court, after the conclusion of the argument of the said appeal, by its judgment dated 27-08-2015, set aside the decision of the learned District Judge to grant the Plaintiff a declaration that he is entitled to use a servitude of right of way of necessity over the Defendant's land. In making that conclusion, the Provincial High Court made the following observations.

a. The Plaintiff had purchased her land from the owner of the larger land without an access roadway, becoming landlocked due to her own action.

b. The only remedy available to the Plaintiff is to enforce her rights against the seller who sold the landlocked portion to her from a larger land.

Being aggrieved by the judgment of the Provincial High Court, the Plantiff appealed to this Court. When the leave to appeal application pertaining to the instant appeal was supported, having heard the submissions of the learned Counsel for both parties, this Court by its order dated 25-06-2018, has granted leave to appeal in respect of the questions of law set out in sub paragraphs (i), (ii) and (iii) of Paragraph 13 of the petition dated 25-09-2015. The said questions of law are reproduced below:

i. Did the High Court err by holding that the Plaintiff had lost her rights to a roadway due to her own fault?

ii. Did the High Court err by holding that, the only remedy available to the Plaintiff is to file an action against the owner of the larger land who sold her a part of a larger land leaving the Plaintiff landlocked?

iii. Did the High Court err in failing to appreciate that a right of way of necessity cannot be given over D to C, when the surveyor was informed by the owners of paddy lands called Ambadeniya that they oppose to a right of way being granted over the ridges of their paddy fields?

The Plaintiff (and her husband Danawala Withanage Nandoris) admittedly, had purchased half an acre portion from a larger land of 30 Acres from Kuda Banda alias Sisil Bernard Panabokke (who is the owner of the larger land), by the Deed of Transfer No. 48782 attested on 17-02-1958 by David Charles Samarawickrema Seneviratne Karunathilake Notary Public.[1] The Plaintiff has produced this deed marked **P 3**. The said deed (**P 3**) clearly shows that it is a part (1/2 acre) of a larger land (the larger land being of thirty acres in extent) which has been transferred to the Plaintiff. In the said deed (No. 48782) there is no mention about any roadway to access the part of the land transferred. The deed also does not refer to any plan. The said thirty acre larger land is the land called Parana Walawwe Watta.

The Defendant's land is Lot No. 5 which is depicted in plan No. 2973 dated 24-11-1964 prepared by Licensed Surveyor J Aluvihare. The Deed of Transfer No. 1945 attested on 01-08-1966 by Edward Christopher Nugawela Notary Public, is the Deed of Transfer by which the Defendant claims title to his land. It is clear by the said Deed of Transfer No. 1945 that the Defendant's land is Lot No. 5 in plan No. 2973 dated 22-11-1964 made by J Aluvihare Licensed Surveyor containing in extent two roods and sixteen perches. This Deed of Transfer has been produced marked **වි 2**.

The aforesaid Plan No. 2973 clearly shows in its extreme east, the aforesaid thirty acre larger land called Parana Walawwe Watta. The said plan also clearly shows the Lot No. 4 therein, as the access road to said Parana Walawwe Watta. That is the road marked **X** to **Y** in the commission plan. Thus, it is clear that the Plaintiff when purchasing half an acre block from the aforesaid thirty acre larger land, had been content either to access her land from the alternative road **C D E** shown in the commission plan or to make arrangements with the owners of the larger land to obtain access to the road marked **X** to **Y** over the larger land. That is why the learned judges

[1] Paragraph 2 of the amended plaint and deed of transfer No. 48782.

of the Provincial High Court had stated that the Plaintiff has lost her right to a roadway due to her own fault. Our Courts in the past have considered the question whether a person who has bought a landlocked subdivided portion of a larger land, could seek a way of necessity over his neighbour's land, without making a claim for such right of way against his vendor or the owners of the other subdivided lots of the larger land. I would now turn to consider that aspect.

The above question was considered in the case of K. Nagalingam et al Vs Kathirasipillai et al.[2] I would briefly advert to the facts of that case.

In that case, the plaintiff's allotment (Lot No. 4) had originally formed part of a larger land (including Lot Nos. 1, 2, and 3) belonging to her parents. The northern boundary of this larger land was a different public lane and the entire property was later subdivided amongst the members of that plaintiff's family. The said Plaintiff had got the title to the Lots 3 and 4 together with, inter alia, a right of way and watercourse leading to a well (situated on Lot 1) which almost adjoins the northern lane. The said plaintiff later conveyed Lot 3 to her daughter together with similar servitudes. It was thereafter that the said plaintiff claimed a right of way along a path which was to the south of Lot 4. This path had at one stage formed part of a different land, owned in common by the others and the defendants in that case. The basis of that plaintiff's claim was that the owners of Lots 1 and 2 would not permit him a right of way over their lands, so that he must of necessity be granted a servitude along the path which is the common property of those defendants. The learned Commissioner in that case, had accepted the said Plaintiff's argument and entered judgment in favour of that Plaintiff as prayed for. The defendants in that case, then appealed to the Supreme Court. His Lordship Justice Gratiaen having considered the question whether a plaintiff, after becoming an owner of a sub divided allotment of land, was thereafter entitled to a right of way of necessity over its neighbour's land, stated in his judgment as follows:

> "*The plaintiff's claim clearly cannot be sustained. Lot 4 originally formed part of a larger land which was admittedly served by the Northern lane. Upon the subdivision of the larger land, each person who received an allotment which would otherwise*

[2] 58 NLR 371.

be land-locked automatically became entitled under the Roman Dutch Law to a right of way over the allotment or allotments adjoining the public lane. Maasdorp (Edn. 7th) 11, pp 182-183. As was pointed out in Wilhelm v. Norton[3] :

"When a piece of land is split up into two or more portions, the back portion must retain its outlet over the front portion even though nothing was said about it, because the splitting of the land cannot impose a servitude upon the neighbours."

This very sensible principle would have applied in the present case even in the absence of an express reservation of a servitude."

His Lordship Justice Gratiaen on the above basis, proceeded to allow the appeal and dismiss the plaintiff's action in that case, with costs.

Our Courts have consistently applied the above legal principle whenever they were called upon to decide whether a person who has bought a landlocked subdivided portion of a larger land, could seek a way of necessity over his neighbour's land without making such a claim from the owners of the other subdivided lots of the larger land. The cases such as Costa Vs Rowell,[4] Godamune Vs Magilin Nona,[5] are instances where the Court of Appeal has refused to grant such relief. The instant case cannot be an exception. Therefore, the same legal principle will apply. On this point alone, the Plaintiff cannot succeed in this action. Even if it is argued that the above ground was not raised as an issue in the original courts, the burden is on the Plaintiff to prove that she, as the owner of the dominant tenement, is eligible to claim a right of way on the ground of necessity. The answers given by the substituted Plaintiff (at Page 117) proves that they bought this portion from the larger land, disqualifying the Plaintiff to claim a right of way over the Defendant's land. However, there is a more fundamental issue glaring in this case. It is to that issue I will now turn.

In an action of this nature, the plaintiff must clearly identify the dominant tenement and the servient tenement. One of the reasons for such a requirement, as Chief Justice Basnayake stated in the case of Velupillai Vs Subasinghe and another,[6] is because the

[3] (1935) E. D. L. 143 at 169.
[4] 1992 (1) SLR 5, at page 9.
[5] 2009 (1) SLR 109.
[6] 58 NLR 385.

Courts, in case the Plaintiff succeeds in such an action, must be in a position to enter a clear and definite judgment declaring the servitude of a right of way and such definiteness is crucially important when executing the judgment and decree entered. The plaintiff in the aforesaid Velupillai 's case,[7] claimed the right to use the cart-way over the land leased to the defendants in that case, in order to get to the high road. He based his claim on prescription and alternatively prayed for a right of way of necessity. The defendants denied that the plaintiff was entitled to the right of the cart-way as claimed either by virtue of prescriptive user or by way of necessity. Although there were 22 issues framed at the trial, the learned trial Judge first tried only two of them as they went to the root of the case. Those issues are as follows:

> *Issue No. 14* –
>
> *Even if issue No. 5 is answered in the affirmative can the plaintiff acquire and claim a servitude of cart-way either by prescription or by way of necessity?*
>
> *Issue No. 15* –
>
> *If issue No. 14 is answered in the negative has the plaintiff any cause of action and can he maintain the present action?*

The learned trial Judge in that case, after hearing the submissions on the law, answered issues 14 and 15 in the negative. The Plaintiff in that case, then appealed from that decision. His Lordship Basnayake Chief Justice, having considered the submissions, dismissed that appeal with costs, stating the following in his judgment.

> *"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 a servient tenement, nor acquired by any other than by him who owns an adjacent tenement. Here the plaintiff who is the lessee and not the owner of the land claims a servitude from the defendant who is also not the owner but the lessee of the land. …"*

In the case of David V. Gnanawathie,[8] the Court of Appeal also had the occasion to cite the above judgment and quote the afore-stated Basnayake CJ's statement. The

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[7] Ibid.
[8] 2000 (2) SLR 352.

plaintiff in David's case claimed from the defendant in that case, a servitude of right of way by prescriptive user and alternatively a servitude of a way of necessity. The said defendant in his answer, inter alia, pleaded that: the plaintiff never exercised a servitude of right of way over the defendant's land; the plaintiff had no legal right to claim and assert a right of way as prayed for in her plaint; and the plaint disclosed no cause of action against the defendant. In issue eight in that case, the said defendant had raised the question whether the plaintiff in that case, was legally entitled to claim a way of necessity over the servient tenement. The said defendant had framed issue nineteen as a consequential issue raising the question: if the servient tenement and the dominant tenement are lands owned by the State, was the plaintiff in that case, entitled to maintain that action claiming a servitude of a right of way by prescription or a way of necessity? During the course of the trial, it was agreed and conceded by both parties in that case, that the dominant tenement and the servient tenement were both lands owned by the State and lands which had been vested in the Mahaweli Authority. Jayasuriya J in the judgment of the Court of Appeal stated as follows.

> *"The plaintiff not being the owner of the dominant tenement cannot legally claim or exercise this servitude of right of way. Likewise the plaintiff cannot assert that she is claiming a servitude for the Mahaweli Authority. The defendant who is not the owner of the servient tenement cannot legally grant or create this particular servitude. Thus the answers to issue eight and nineteen have necessarily to be in the negative. The learned trial Judge has wrongly answered issue eight in the affirmative, but correctly answered issue nineteen in the negative. Although he has correctly answered issue nineteen in the negative he has wrongly entered judgment in favour of the plaintiff in terms of prayer one and two of the plaint. If the answer to issue nineteen is in the negative, the learned District Judge ought to have refused the claims in prayer one and two of the plaint."*

More recently also, in the case of Matara Kiri Liyanage Mary Agnes Fernando & seven others Vs. Madapathipola Lekamge Patricia Fonseka and others,[9] His Lordship Justice Gamini Amarasekara cited with approval, the judgment of Chief Justice Basnayake in

[9] SC Appeal 129/2014, decided on 18.12.2020.

Velupillai Vs Subasinghe[10] and also the judgment of Justice Jayasuriya in David V. Gnanawathie.[11] Thus, this Court has been consistent in applying the above principle of law.

In the instant case, the Licensed Surveyor has clearly stated that the right of way claimed by the Plaintiff from point **A** to point **B** is situated within Lot No. 6 of plan No. 2973. More importantly, learned counsel for the Plaintiff has intensely cross examined the Defendant on the basis: that the claimed right of way from point **A** to **B** is situated within Lot No. 6 of plan No. 2973 produced marked **පී 1**; that the said Lot No. 6 is a separately demarcated block according to the plan No. 2973; that the Defendant had put up a barbed wire fence encompassing Lot No. 6 and amalgamating it to Lot No. 5 blocking the claimed right of way situated in Lot No. 6. Thus, it is important to observe that the Plaintiff has advanced her case on the basis that the claimed right of way is situated within Lot No. 6 in plan No. 2973 and the Defendant is not the owner of the said Lot No. 6.

As has been stated earlier, the case advanced by the Plaintiff as per the plaint and the issues framed, is a case claiming right of way over the Defendant's land. That is not a case on any cause of action arising out of any encroachment made by the Defendant. However, in the course of the trial what the Plaintiff has established is that the claimed right of way from point **A** to **B** is situated outside the Defendant's land which is Lot No. 5 in plan No. 2973. If that is the case advanced by the Plaintiff, it would suffice to state that the claimed right of way must be obtained from the person who owns Lot No. 6. That right of way is not obtainable from the Defendant as the Plaintiff admittedly has taken up the position that the Defendant is not the owner of the block of land (Lot No. 6) in which the claimed right of way from point **A** to **B** is situated.

Thus, on this point alone the plaint is misconceived.

In these circumstances and for the foregoing reasons, I answer the questions of law in respect of which this Court has granted leave to appeal, as follows.

[10] Supra.
[11] Supra.

Question of law No. (i) – The Provincial High Court has not erred by holding that the Plaintiff had lost her rights to a roadway due to her own fault.

In view of the foregoing conclusions, adjudication over questions of law No. (ii) and (iii) would not arise. Moreover, as the owner of the larger land is not a party to the instant proceedings, in my view, it would be best to refrain from pronouncing something which would be to the detriment of that person. The Plaintiff should advice herself as to the course of actions available to her.

For the foregoing reasons, I affirm the judgment of the Provincial High Court, dated 27-08-2015 and proceed to dismiss this appeal with costs.

JUDGE OF THE SUPREME COURT

E. A. G. R. AMARASEKARA J

I agree,

JUDGE OF THE SUPREME COURT

M. A. SAMAYAWARDHENA J

I agree,

JUDGE OF THE SUPREME COURT

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

B.K. Winson De Paul Rodrigo,
No. 73, Thimbirigasyaya,
Hendala, Wattala.
Plaintiff

SC APPEAL NO: SC/APPEAL/32/2021
SC LA NO: SC/HCCA/LA/509/2016
HCCA GAMPAHA NO: WP/HCCA/GPH/03/2009 (F)
DC NEGOMBO NO: 5527/L

Vs.

1. K.D.H Ferdinandez,
2. Annette Fernando,
   Both of
   No. 3/12,
   Weliamuna Road,
   Hendala, Wattala.
   Defendants

AND BETWEEN

1. K.D.H Ferdinandez,
2. Annette Fernando,
   Both of

No. 3/12,
Weliamuna Road,
Hendala,
Wattala.
Defendant-Appellants

Vs.

B.K. Winson De Paul Rodrigo,
No. 73,
Thimbirigasyaya,
Hendala, Wattala.
Plaintiff-Respondent

AND NOW BETWEEN

B.K. Winson De Paul Rodrigo,
(Deceased)
No. 73,
Thimbirigasyaya,
Hendala, Wattala.
Plaintiff-Respondent-Appellant

Bridget Rodrigo,
No. 73,
Thimbirigasyaya,
Hendala, Wattala.
Substituted Plaintiff-Respondent-Appellant

Vs.

1. K.D.H Ferdinandez, (Deceased)
1A. Ernard Treshiya Fernando,
2. Annette Fernando,
All of
No. 3/12,
Weliamuna Road,
Hendala,
Wattala
Defendant-Appellant-Respondents

Before: P. Padman Surasena, J.
Achala Wengappuli, J.
Mahinda Samayawardhena, J.

Counsel: Nadvi Bahaudeen with Jayantha Bandaranayake for the Substituted Plaintiff-Respondent-Appellant.

Niranjan De Silva for the Defendant-Appellant-Respondents.

Argued on : 07.07.2021

Written submissions:

by the Substituted Plaintiff-Respondent-Appellant on 27.07.2021.

by the Defendant-Appellant-Respondents on 30.07.2021.

Decided on: 15.10.2021

Mahinda Samayawardhena, J.

The plaintiff filed this action against the two defendants seeking a declaration that he is the owner of the land described in the 2nd schedule to the plaint, ejectment of the defendants from a portion of this land as described in the 3rd schedule to the plaint, and damages.

The defendants filed the answer seeking dismissal of the plaintiff's action and a declaration that they are the owners of the land described in the 2nd schedule to the answer. They also sought a declaration that they are entitled to the use of a road about 10 feet wide on the land described in the 1st schedule to the plaint by way of prescription as well as by way of necessity. In furtherance of the claim to the said right of way, they moved in the prayer to the answer that a commission be issued to a surveyor to depict the said right of way.

Let me pause for a while to emphasise that by the said reliefs, the defendants make no claim to the land described in the 1st schedule to the plaint except for a right of way over it.

Both parties took out commissions to explain to the court their respective claims. The plaintiff's commission plan was marked P1 by the plaintiff but the defendants' commission plan found in the case record was not produced in evidence by the defendants.

By the illustration (f) to section 114 of the Evidence Ordinance, the court can presume that the defendants did not produce their own commission plan as evidence because had it been produced it would have been unfavourable to them.

The defendants by deed V4 claim title to a land described as "*the half of one forth portion of Godakadurugahawatte*" and "*containing in extent twenty perches more or less*." But there was no survey plan at the time of purchasing this land or at any time thereafter in order to properly identify the land.

However, the 1st defendant admits in his evidence (at page 170 of the brief) that he saw the surveyor Hopman's plan marked P4 at the time of purchasing the land by deed V4. In Hopman's plan, the land claimed by the plaintiff is clearly depicted and there is no roadway shown on the plan (save the public road on the eastern boundary). This means at the time the defendants purchased the land they claim, they had knowledge of the land claimed by the plaintiff and the fact that there was no right of way which could be used by them through the land of the plaintiff.

The 1st defendant admits in his evidence that the plaintiff gave Hopman's plan to the court commissioner, Croos Dabrera, at the survey. The Croos Dabrera's commission plan marked P1 shows the right of way claimed by the defendants as lot 2. However Croos Dabrera states in his evidence that this was shown on the plan as lot 2 not because there was a road on the ground but for the purpose of identifying the defendants' claim.

According to plan P1, there is a footpath along the western boundary of the land. The defendants admit that they obtained electricity and water supply to their land through this footpath. This goes to prove there was no road on the plaintiff's land.

The defendants' claim to a right of way over the land described in the 1st schedule to the plaint shall fail.

After trial, the learned District Judge entered judgment for the plaintiff as prayed for in the prayer to the plaint.

The reliefs sought by the defendants were refused on the basis that the deeds V2-V4 relied upon by the defendants are not relevant to the land in suit.

On appeal, the High Court of Civil Appeal set aside the judgment of the District Court and allowed the appeal granting the reliefs prayed for by the defendants in the prayer to the answer. Hence the appeal to this court by the plaintiff.

This court granted leave to appeal against the judgment of the High Court of Civil Appeal on the following question of law:

> *Have their Lordships of the High Court of Civil Appeal misdirected themselves in considering a corpus not put in issue in the plaint in delivering the judgment?*

The defendants raised the following two questions of law:

> *Have their Lordships of the High Court of Civil Appeal correctly considered the corpus in relation to the dispute as presented before the District Court?*
>
> *Are the defendants entitled to the reliefs as prayed for in the answer?*

On what basis did the High Court of Civil Appeal set aside the judgment of the District Court? The High Court of Civil Appeal compared the land claimed by the defendants on their title deed V4 with the second land described in the plaintiff's title deed P3 to conclude that the land in suit is an undivided land of which a ½ share is claimed by the plaintiff and a ½ share is claimed by

the defendants, and therefore the plaintiff should have filed a partition action, not an action for declaration of title.

This is a misdirection of primary facts on the part of the High Court of Civil Appeal which vitiates the judgment.

The second land described in the schedule to deed P3 was never put in issue in this case. That land is not the subject matter of this action. This is made clear by the averments in the plaint and the schedules thereto.

The defendants never took up the position in the District Court that the defendants and the plaintiff are entitled to equal shares of the land in suit and therefore the plaintiff's action as presently constituted is misconceived in law.

Nor did the defendants take up the position before the District Court that the two lands described in the 1st schedule to the plaint are situated in two different places. As I said before, the defendants' only claim to the lands described in the 1st schedule to the plaint is a right of way over the two lands. The defendants cannot take up new positions which are questions of fact for the first time on appeal.

I answer the questions of law raised by the plaintiff in the affirmative and those raised by the defendants in the negative.

I set aside the judgment of the High Court of Civil Appeal and restore the judgment of the District Court and allow the appeal with costs.

Judge of the Supreme Court

P. Padman Surasena, J.
I agree.

Judge of the Supreme Court

Achala Wengappuli, J.
I 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 No.33/2015
SC.SPL.LA NO.207/14
C.A.Appeal No. CA 82/2010
High Court Kandy Case No.24/2002

Duminda Munasinghe alias Kaluwa
Presently at
Bogambara Prison,
Kandy.
Accused-Appellant-Petitioner

Vs.

The Hon. Attorney General,
Attorney General's Department,
Colombo 12.
Complainant-Respondent-Respondent

BEORE : **SISIRA J. DE ABREW, J.**

K.K. WICKRAMASINGHE, J. &

JANAK DE SILVA, J.

COUNSEL : Amila Palliyage with Nihara Randeniya, Sandeepani Wijesuriya, Duminda de Alwis and Ruwanthi Doralagoda for the Accused-Appellant-Appellant.

Ayesha Jinasena PC ASG for the Attorney-General.

ARGUED &

DECIDED ON : 02.02.2021.

SISIRA J. DE ABREW, J.

Heard both Counsel in support of their respective cases. This is an appeal filed against the judgment of the Court of Appeal dated 22.09.2014. The Accused-Appellant was convicted by the learned High Court Judge by his judgment dated 02.06.2010 for the offence of murder and was sentenced to death. According to the facts of the case the Accused has killed his own wife. Being aggrieved by the said judgment of the High Court, the Accused-Appellant appealed to the Court of Appeal. The Court of Appeal by its judgment dated 22.09.2014 affirmed the conviction and the death sentence 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 18.02.2015 granted Leave to Appeal on questions of law set out in paragraph 12 of the Petition of Appeal dated 31.10.2014 which are set out below verbatim;

i. Is it unsafe to act upon belated statements of some of the main witnesses for the prosecution?

ii. Has the learned trial judge failed to evaluate the contradictions inter se between the prosecution witnesses?

iii. Is it unsafe to act on the evidence of the witnesses in the light of the contradictions in their evidence.

iv. Is there a denial of a fair trial by remanding the witnesses and producing them from remand during the pendency of the trial which would have been influenced on the other witnesses?

v. Is it unsafe to act upon the belated statement by the witnesses for the prosecution and have the learned trial judge and their Lordships of the Court of Appeal properly considered the validity of those statements?

vi. Is there a proper evaluation of evidence by the learned trial judge?

vii. Are the items of circumstantial evidence consistent with the guilt of the Petitioner and inconsistent with his innocence?

viii. Have their Lordships erred in law by deciding that the only inference that could be drawn is the guilt of the petitioner on the items of circumstantial evidence proved by the prosecution?

Learned Counsel for the Accused-Appellant submitted that after perusing the evidence led at the trial he could not support the above questions of law. Facts of this case may be briefly summarized as follows;

The Accused-Appellant is the husband of the deceased person whose name is Wickramagedara Niroshini Wickramage. On the day of the incident (27.12.1998) around 8 pm. the Accused-Appellant came to the house of the deceased's person. At the time of the incident deceased person was living with her mother and two brothers. On the invitation of the Accused-Appellant the

deceased person went along with the Accused-Appellant to a nearby boutique for the purpose of buying cigarettes. It should be noted here that the Accused-Appellant wanted to buy some cigarettes. After the deceased person went along with the Accused person, the deceased person never returned home. This evidence was given by the mother of the deceased person. On the following day, around 4 pm, the mother of the deceased person found the dead body at Mahaweli river bank which was about ¼ mile away from the house of the deceased person.

On the day of the incident around 10.00 p.m., the Accused-Appellant had met Hussain Khan alias Sunil at a bus stand and had told Hussain Khan that he killed his own wife. In the same night around 11.30 p.m., the Accused-Appellant had told one Mahesh that he killed his own wife.

According to the medical evidence, the course of death was manual strangulation. There were contusions and abrasions on the neck of the deceased person. The Accused-Appellant making a statement from the dock denied the charge.

Learned Counsel for the Accused-Appellant quite correctly submitted that there are no grounds to challenge the evidence of the mother of the deceased, Hussain Khan, Mahesh and the medical evidence.

When we consider the evidence led at the trial, we hold the view that the prosecution has proved its case beyond reasonable doubts. We therefore hold the view that there is no reasons to interfere with the judgment of the High Court and the Court of Appeal. Since the learned Counsel for the Accused-

Appellant submitted in open court that he is not supporting the questions of law, it is not necessary for us to answer the questions of law.

Considering the above material, we affirm the judgment of the Court of Appeal and dismiss this Appeal.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

K.K. WICKRAMASINGHE, J.

I agree.

JUDGE OF THE SUPREME COURT

JANAK DE SILVA, J.

I agree.

JUDGE OF THE SUPREME COURT

Mks

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

In the matter of an Application for Leave to Appeal under and in terms of Article 128 of the Constitution read with Section 5 (2), 6 of the High Court of the Provinces (Special Provisions) Act No.10 of 1996 read with Chapter LVIII of the Civil Procedure Code seeking Leave to Appeal under and in terms of Section 754 (2) of the Civil Procedure Code

Sri Lanka National Cooperative
Council Limited
No.455, Cooperative House,
Galle Road, Colombo 03

Plaintiff

SC Appeal No.34/2017
SC/CHC/LA 61/2016
HC (Civil) No.110/2015/MR

Vs

1. Perera Ramanayake Don Vipula Perera
   No 60/34, Yadessa Cemetery Road,
   Siddamulla, Piliyandala

2. Radiant Trading Company (Private) Limited
   No 1 B, 1-1-10, 9th Lane
   Colombo 3

3. Radiant AC Cabs (Private) Limited
   No 1 B, 1-1-10, 9th Lane
   Colombo 03

4. Lakpathirana Ajith Rohana
   Kumara
   No.24/4, Gammana Road,
   Maharagama

5. Gurunnaselage Don Dulani
   Chandima Wijesinghe
   No.60/34, Yadessa Cemetery
   Road Siddamulla,Piliyandala

6. Ranwalage Sudath Priyantha
   No.195/32, Weliwita Road,
   Malabe
   Defendants

AND NOW BETWEEN

Sri Lanka National Cooperative
Council Limited
No.455, Cooperative House,
Galle Road, Colombo 03
Plaintiff-Petitioner-Appellant

Vs

1. Perera Ramanayake Don Vipula Perera
   No 60/34, Yadessa Cemetery Road,
   Siddamulla, Piliyandala

2. Radiant Trading Company (Private) Limited
   No 1 B, 1-1-10, 9th Lane
   Colombo 3

3. Radiant AC Cabs (Private) Limited
   No 1 B, 1-1-10, 9th Lane
   Colombo 03

4. Lakpathirana Ajith Rohana Kumara
   No.24/4, Gammana Road,
   Maharagama

5. Gurunnaselage Don Dulani Chandima Wijesinghe
   No.60/34, Yadessa Cemetery Road,
   Siddamulla, Piliyandala

6. Ranwalage Sudath Priyantha
   No.195/32, Weliwita Road,
   Malabe
   Defendant-Respondents

BEFORE: Buwaneka Aluwihare PC, J.

Preethi Padman Surasena J.

S. Thurairaja PC, J.

COUNSEL: J. M. Wijebandara with Miss Kalpani Pathirage and Sharin Sohani for the Plaintiff- Petitioner

Maura Gunawansha PC with Prasanna Panawenna and Miss Dilshani Gunaratne for the Defendant-Respondents

ARGUED ON: 19.06.2019

WRITTEN SUBMISSIONS: 12.09.2019

DECIDED ON: 30.06.2021

JUDGEMENT

Aluwihare PC J.,

(1) The Plaintiff-Petitioner-Appellant (hereinafter sometimes referred to as the 'Plaintiff') filed action before the Commercial High Court against the Defendant-Respondents (hereinafter sometimes referred to as the 'Defendants') seeking judgment against the Defendants jointly and/or severally to recover a sum of Rs. 48,031,992.92 due, under the agreements marked 'P2' to 'P5' together with legal interest.

(2) Upon entertaining the Plaint, the learned High Court Judge ordered summons be issued on the Defendants. Accordingly, the 1st to 6th Defendants appeared before the court and filed a joint proxy and the date for filing of answer was fixed for the 19th October 2015. The Defendants filed a motion ('X3') on 15th October 2015 and moved the court seeking an order to have the Defendants, save for the 2nd Defendant, discharged from the case as the parties to the agreements marked and produced along with the plaint, ['P2' to 'P5'], were only the Plaintiff and the 2nd Defendant.

(3) The learned High Court Judge by his order ('X6') discharged all the Defendants other than the 2nd, requiring only the 2nd Defendant to file answer.

(4) Aggrieved by this order, the Plaintiff moved this court by way of Leave to Appeal and Leave was granted on the questions of law referred to in sub-paragraphs (I), (II), (III), (IV) and (V) of paragraph 16 of the petition of the Appellant [Plaintiff].

(5) The questions of law in verbatim, are as follows;

I. Has the learned High Court Judge erred in law in ordering to discharge the 1st, 3rd, 4th, 5th and 6th Defendants acting under Section 22 of the Civil Procedure Code?

II. Are the 1st and 3rd Defendants necessary parties whose presence is necessary for full and effective adjudication of the cause of action alleged in the plaint?

III. Are the 4th to 6th Defendants necessary parties whose presence is necessary for full and effective adjudication of the cause of action alleged in the plaint?

IV. Were not there any tenable grounds before the learned High Court Judge to come to the conclusion that 1st, 3rd, and 4th to 6th defendants were not necessary parties to the cause of action alleged in the plaint, especially in the absence of any oral and/or documentary evidence?

V. Is the order of the learned High Court Judge contrary to Section 14 and 18 of the Civil Procedure Code?

Facts

(6) The Plaintiff is a Cooperative society registered in terms of the provisions of the Cooperative Societies Law No.5 of 1972 under the name "Sri Lanka National Cooperative Council Limited" [hereinafter also referred to as "the Cooperative Council]. The 1st Defendant, at all times material to this transaction, was representing the 2nd and 3rd Defendant companies, Radiant Trading Company (Pvt.) Ltd and Radiant AC Cabs (Pvt.) Ltd. Respectively. The 4th, 5th and 6th Defendants are the other Directors of the 2nd and 3rd Defendant companies.

(7) On or about the 20th July 2010, the Plaintiff entered into a verbal agreement with the 1st Defendant who was representing the 2nd and/or 3rd Defendant companies. Under this agreement, the Plaintiff was to import and handover stocks of cement to the Defendants and the Defendants were to sell the stocks of cement so handed over in the local market and were obliged to pay the Plaintiff the agreed price. [COOP Cement Project].

(8) This verbal agreement was further reaffirmed by the execution of Sales Agency agreements ('P2'- 'P5') during the period of 20th July 2010 to 30th September 2013. **On the face of these documents only the Plaintiff and the 2nd Defendant have been named as parties to the agreement.** It is to be noted that, although in two of the four agreements, the 2nd

Defendant company has been named as the second party to the agreement, the seal of the 3rd Defendant company has been placed on the contract instrument. The 4th to the 6th Defendants have signed one or more of those agreements as witnesses, in their capacity as the directors of the 2nd and or 3rd Defendant companies.

(9) The Plaintiff's case is that, based on the terms and conditions of the agreements, the Plaintiff imported consignments of cement which were "delivered to the 1st Defendant and/or 2nd Defendant and/or 3rd Defendant". The Plaintiff claims that the "1st Defendant and/or 2nd Defendant and/or 3rd Defendant" are legally liable to pay a balance of Rs. 48,301,992.92 to the Plaintiff as sales proceeds of the aforementioned quantity of cement.

(10) In paragraph 15 of the plaint, the Plaintiff has averred that the Defendants have settled Rs.293 million [approximately] out of Rs.342 million [approximately] due to the Plaintiff. The Head of Finance of the 2nd Defendant company by his letter dated 13-05-2013 [P6] has only disputed the amount outstanding.

(11) The Plaintiff states that upon the Defendants jointly and/or severally defaulting the payment, Letters of Demand were served on all 6 Defendants on 12th December 2014 ('P9'- 'P14'). The Defendants had sent a joint reply ('P15') admitting the delivery and acceptance of the quantity of cement, however, disputing the amount payable. The Directors have further stated that the Plaintiff had entered into the agreements marked 'P2', to 'P5', only with the 2nd Defendant Company.

(12) According to the Plaintiff, it was the 1st Defendant who made representations and thereby made the Plaintiff believe that he was acting on behalf of the 2nd and 3rd Defendant companies and that it was the 1st Defendant who entered into the agreements with the Plaintiff and took part in the entire process related to the 'Coop Cement Project'.

(13) The Plaintiff further states that the Plaintiff relying on the representation made by the 1st Defendant as the 'sole owner' of the 2nd and 3rd Defendant companies, the Plaintiff entered into the agreements referred to.

(14) The Plaintiff contends that, apart from the 1st Defendant, the 4th to 6th Defendants were directors of the company, who had a direct link to the actions of the 2nd and 3rd Defendant companies. Therefore, the objective of naming all 6 Defendants in the Plaint is to claim liability jointly and/or severally. The Plaintiff asserts that, in that context, the presence of all defendants is necessary for an effectual, full and final disposal of the action.

The Contention of the Appellant

(15) One of the main arguments on behalf of the Plaintiff- Appellant was that the order of the learned High Court Judge', based on Section 22 of the Civil Procedure Code [hereinafter referred to as the CPC], discharging parties [defendants] was blatantly erroneous and contrary to law.

(16) It was further contended on behalf of the Plaintiff, that there was no legal basis to discharge the defendants from a case, solely on the basis of a Motion, without it being supported by an affidavit, particularly in an instance where summons had been served. It was further argued that such an order [of discharge] can only be made upon the defendants satisfying court and the Defendants have failed to adduce any material to substantiate their application to have some of them discharged. It was also contended that the issue as to whether the plaintiff has a cause of action against the Defendant ***can be decided, only after the pleading are completed and not before*** and to that extent the learned High Court Judge erred in making the order of discharge.

(17) Another point of contention was that the learned High Court Judge had failed to appreciate the fact that the Plaintiff had a "valid cause of action" jointly and or severally against all Defendants and by holding that some of the Defendants were not necessary parties, had offended Section 14 of the CPC.

(18) It was the contention of the learned counsel for the Plaintiff that a motion filed, in terms of section 22 of the CPC *"can only lead to a direction under and in terms of Sections 36 and 37 of the CPC, but not for dismissal of the Plaint and/or discharge of the defendants".* It was further contended that the order of discharge of the Defendants, amounts to a dismissal of the Plaint in respect of those Defendants that were discharged.

(19) It is to be noted that the learned High Court Judge acted on the motion [X3] dated 15th October 2015 filed by the Defendants, by which the Defendants have moved the court for an order of discharge in favour of all Defendants save for the 2nd Defendant, in terms of Sections 18 and 46 (2) of the CPC. Nowhere in the motion the Defendants have referred to Section 22 of the CPC.

(20) It was also urged on behalf of the Plaintiff; "*that any plaintiff has a right to join as defendants, against whom the right to any relief is alleged to exist. Therefore, what is required by pleadings of a Plaint is some kind of allegation against the Defendants, for them to be necessary parties"* and that the learned High Court Judge had *"attempted to try and adjudicate the allegations without even waiting till the filing of the answer".*

The Legal Position

(21) It is clear from the Plaint, that the relief the Plaintiff had sought is a judgement in their favour to recover sums of money due to them in

terms of the "Sales Agency agreements" entered between the parties, [P2 to P5]. All those agreements are between the Plaintiff, Sri Lanka Cooperative Council Ltd (the first Party) and the 2nd Defendant, Radiant Trading Company (PVT) Ltd. (The second party).

(22) The Chairman and the General Secretary had signed **[as witnesses]** on behalf of the first Party the Cooperative Council whilst two directors [1st and 4th Defendants] of Radiant Trading had signed on behalf of the second party as **witnesses.**

(23) There are 22 terms and conditions stipulated under the impugned agreements and all those conditions refer to the 1st and 2nd parties to the agreements and no other.

The Questions of Law

(24) The first question on which Leave to Appeal was granted is as to whether the High Court Judge had **"erred in law in ordering to discharge 1st, 3rd, 4th, 5th and 6th Defendants acting under Section 22 of the Civil Procedure Code?"**

It must be said that the learned High Court Judge had made order striking off all the Defendants save for the 2nd Defendant in terms of Section 20 read with Section 18 of the CPC and not in terms of Section 22 of the CPC. [Page 11 of the impugned order]

The relevant portion of the order is reproduced below;

"… it is hereby ordered to strike out the names of the 1st, 3rd to 6th defendants from the proceedings in terms of Section 20 read with Section 18 of the Civil Procedure Code."

The learned High Court judge had made reference to Section 22 of the CPC to point out the requirement, that any objection with regard to *'joinder of parties who have no interest in the action'* must be taken *'at the earliest possible opportunity'* [under that section]. The learned High

Court Judge had also relied on the decision in the case of **John Singho v. Julis Appu** 10 NLR 351, to illustrate that the above position is the settled law, where it was held that Section 22 requires an objection for want of parties to be taken at the earliest possible opportunity, and that "*otherwise such objection will be considered to have been waived*".

Considering the above, I conclude that the learned High Court Judge had not erred with regard to the application of the relevant provisions in considering the motion filed by the Defendants and I answer the first question of law on which leave was granted in the negative.

(25) As the '(IV)'th question of law on which leave was granted is connected to the above, I wish to deal with the said question before I proceed to consider the other questions of law on which leave to appeal was granted.

(26) The issue raised before us was whether the learned High Court Judge could have come to the conclusion that the 1st and the 3rd to 6th Defendants were not necessary parties, in the absence of any oral or documentary evidence being placed before the court. It was contended that the learned High Court judge could not have decided the issue merely on the motion filed by the Defendants.

(27) The Learned High Court Judge had been of the view that an application for the misjoinder of parties can be made by way of a motion in terms of Section 22 read with Sections 18 and 91 of the Civil Procedure Code; *"The filing of an affidavit or an answer is not mandatory for the making of an application under Section 22 of the Code and the only requirement is to file a motion as required by Section 22 of the Code."* (Page 7 of 'X6'). In the case of **Uragoda v. Jayasinghe** 2004 (1) SLR 108 it was held that "*The issue of misjoinder of parties ought to have been taken by motion in terms of Section 91 read with Section 18 of the Code*." The learned High Court Judge has

relied on the decision in **Uragoda v. Jayasinghe** (supra) in support of this legal position. Also see **Hapuaratchchi and Another v. Dhanapala and Another** (2005) 3 SLR 141 and **London and Lancashire Fire Insurance Co. v. P. & O Company** (18 N.L.R. 15).

(28) The sufficiency of the material before the court, in considering an application made in terms of Section 22 of the CPC is a question of fact. Depending on the facts and circumstances of each case, it is incumbent on the trial judge to decide as to the sufficiency of material, at the point of considering such application. I do not think that there is a rule to say, adducing material is *'sine qua non'.* In the case before us, the Plaintiff had filed 15 documents as a part and parcel of the plaint including the 'Sales Agency agreements' the Plaintiff relied on.

(29) Furthermore, Paragraph 4 and 5 of the Plaint clearly spell out that, initially there had been an oral agreement between the Plaintiff and the 2nd and 3rd Defendants and /or with the 1st Defendant, which was fortified by a notarially executed written agreements [P2 to P5].

(30) The proceedings of 19th October 2015 reflects that the court had been put on notice of 'misjoinder parties' and an application had been made on behalf of the Defendants seeking permission to file written submissions to substantiate that position. Although it had been submitted on behalf of the Plaintiff that all Defendants are necessary parties, no objection was raised with regard to the application made on behalf of the Defendants nor an application made, seeking permission to adduce evidence or other material in order to support the Plaintiff's position on the matter, which they very well could have done. Accordingly, the court ordered both parties to file written submissions.

(31) In the case of **Adlin Fernando v. Lionel Fernando** (1995) 2 SLR 25 it was held; "*(1) That provisions of the Civil Procedure Code, relating to*

*the **joinder of** causes of action and **parties** are rules of procedure and NOT substantive law. Courts should adopt a common sense approach in deciding questions of misjoinder or non-joinder."* [Emphasis Added].

(32) It was also held in the case of **Fernando v. Perera** 2004 (1) SLR 108 "*The issue of misjoinder ought to have been taken by motion in terms of Section 91 of the CPC read with Section18 of the Code*". Considering the above, I resolve the (IV) the question of law referred to above, also in the negative.

The Necessary Parties

(33) Both, the 2nd and 3rd [(i) and (ii)] questions of law on which leave to proceed was granted relate to the issue as to whether the presence of, the 1st and the 3rd Defendants and the 4th to 6th Defendants respectively, is necessary for full and effective adjudication of the cause of action referred to in the plaint.

(34) The question as to 'who is a necessary party' in the context of 'addition or striking out of parties' to an action, is dealt with under Section 18 (1) of the Civil Procedure Code.

Section 18 (1) of the Civil Procedure Code states as follows;

*(1) "**The court may** on or before the hearing, upon the application of either party, and on such terms as the court thinks just, **order** that the name of **any party; whether as plaintiff or as defendant improperly joined, be struck out;** and the court may at any time, either upon or without such application, and on such terms as the court thinks just, order that any plaintiff be made a defendant, or that any defendant be made a plaintiff, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court to*

effectually and completely to adjudicate upon and settle all the questions involved in that action, be added." [Emphasis added].

(35) Our courts have identified that Section 18 has two limbs which contemplate the addition of two different types of persons

(i) Persons who "ought to have been joined, whether as plaintiff or defendant."

(ii) Persons whose "presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in that action.

(36) In **Weeraperuma v. De Silva** 61 NLR 481 at page 484, Basnayake C.J. stated *"… the grounds on which a person may be added as a party to an action are either (i) that he ought to have been joined as a plaintiff or defendant or (ii) that his presence is necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action."*

In **The Chartered Bank v. De Silva** 67 NLR 135 at page 137, Sri Skanda Rajah J. observed; "*Section 18 (1) of our Code, like Order 1 Rule 10 (2) of the Indian Code, makes a distinction between the two classes of persons, viz. persons who ought to have joined, i.e., necessary parties, and persons whose presence is necessary to enable the Court to completely and effectually to adjudicate upon and settle all the questions involved in the suit, i.e., proper parties."*

(37) In **Seylan Bank PLC v. New Lanka Merchants Marketing (PVT) Limited & Others** SC Appeal No. 198/2014, it was observed that the type of persons contemplated in the first limb of section 18 (1) "*are persons who must be added as parties since they are entitled to relief upon or are liable upon the same cause of action which is the subject matter of the case",* whilst the second limb contemplated;

"persons who may not be entitled to relief upon the cause of action which is the subject matter of the case (who will be encompassed by the first limb as set out earlier) but, nevertheless, are persons whose presence before the Court is necessary to enable the Court to effectually and completely adjudicate upon and settle all the questions involved in that action. This type of persons who should be added under and in terms of the second limb of Section 18 (1), are usually referred to as "necessary parties"." (at page 12)

(38) The Plaintiff has contended that the Defendants are those who fall within the aforementioned 2nd limb. In **Seylan Bank PLC c**ase (*supra*) the Supreme Court analysed in depth the various tests formulated and applied in English as well as Sri Lankan Courts to determine whether a particular party should be added as a 'necessary party' to a pending action. Following an extensive examination of the tests utilized by the courts to determine whether a particular party should be added as a 'necessary party', the Supreme Court summarized the tests which may be used in determining this question.

The guidelines that were laid down are as follows;

(i) A Court should keep in mind the desirability of reducing the multiplicity of litigation and, therefore, interpret Section 18 (1) widely;

(ii) However, the object of preventing the multiplicity of litigation does not justify the addition of a party if the addition is not permitted by the words used in Section 18 (1);

(iii) In terms of the first limb of Section 18 (1), a person who must be added because he is a party "who ought to have been joined, whether a plaintiff or defendant", will be a person who should have been named as a plaintiff in terms of Section 11 of the Civil Procedure Code or who should have been named as a defendant in terms of Section 14 of the Civil Procedure Code;

(iv) In terms of the second limb of Section 18 (1), a person who should be added because he is a "necessary party", is a person whose presence before the Court is necessary in order to enable the Court to, effectually and completely, adjudicate upon and settle all the questions involved in the pending action;

(v) Accordingly, a person will be a "necessary party" if he will be bound by the determination of the pending action;

(vi) Similarly, a person will be a "necessary party" if the determination of the pending action will affect his legal right;

(vii) Further, a person will be a "necessary party", in appropriate circumstances, if the determination of the pending action will affect his pecuniary interests or commercial interests;

(viii) A person who is not bound by the determination of a pending action or whose legal rights, pecuniary interests or commercial interests are not affected by the Orders sought in that action may, nevertheless, be added as a "necessary party", if his presence before the Court as a party to that action (and not merely as a witness) is required to, effectually and completely, adjudicate upon and settle all the questions involved in that action. For example, to enable one of the parties to effectually and completely establish their case or to effectually and completely obtain the reliefs they seek in the action;

(ix) Unless one or more of the circumstances described above exist, a person should not be added to a pending action upon a claim that he is a "necessary party" merely because one of the parties to that pending action had a separate dispute with or claim against him or merely because he has a separate dispute with or claim against one of the parties to that action;

(x) *A person is not a "necessary party" merely because he has relevant evidence to give or because he is interested in and wishes to involve himself in the correct solution of the case or because he wishes to be*

(39) Although the application of these guidelines may depend on the facts of each case, they can be used to provide assistance to the court in determining whether the 1st, 3rd -6th Defendants who have been discharged are in fact necessary parties to the action.

(40) I shall now examine the Plaintiff's contention that the 1st, 3rd -6th Defendants are 'necessary parties' to the action in question, in terms of the second limb of Section 18 (1) and the tests applied in **Seylan Bank PLC v. New Lanka Merchants Marketing (PVT) Limited & Others** (*supra*)

(41) The Plaintiff's cause of action against the Defendants, as referred to earlier, is for the recovery of monies due to the Plaintiff, in terms of the Sales Agency agreements ['P2' to 'P5']. Upon the perusal of the Plaint, the Agreements which are held out to be the subject matter of the present action, is clearly between the Plaintiff on the one part and the 2nd Defendant on the other part.

(42) The 2nd Defendant which is incorporated as a private company is a juristic person who has the capacity to enter into contracts. Rights and obligations flowing from the contracts do not in general reach beyond the two contracting parties. According to Chitty [2nd Edition, Chapter 17] *"No one may in general be entitled to rights or bound by obligations flowing from the terms of a contract to which he is not a party."* The essence of a registered company is that it has a legal personality which is separate from its members. The legal foundation of this concept is found in the case of **Salomon v. Salomon & Co. Ltd.** [1897] AC 22 in which the House of Lords laid down the universal principle that a company is a distinct legal person entirely different from its members. This principle of separate legal personality is referred to as the 'veil of incorporation'. As a result of this case, the courts have generally considered themselves bound by the concept

that a company is a separate legal person distinct from its members and would generally not go behind the veil of incorporation.

(43) The cause of action in this case is simply a contractual violation where one party to the contract has failed to settle payments due to the other. On a perusal of the agreements marked P2-P5 it is clear that the 1st party to the agreements is the Plaintiff whilst the 2nd party is the 2nd Defendant Company, namely, Radiant Trading Company (Pvt) Ltd.

Thus evidently, the party liable to make the payment claimed under the contracts is the 2nd Defendant Company.

(44) The High Court Judge observed that on the perusal of the agreements marked 'P2-P5' it appears that the parties to them are the Plaintiff and 2nd Defendant and that the Directors (4th -6th Defendants) have signed them only as witnesses are therefore should be discharged. Considering the above, I am of the view that the Learned High Court Judge had not erred in arriving at the conclusion referred to above and thus, I answer the questions of law referred to in sub- paragraphs (ii) and (iii) of Paragraph 16 of the Petition also in the negative.

(45) The final question that this court is called upon to answer is, as to whether the impugned order of the Learned High Court Judge is contrary to Sections 14 and 18 of the CPC.

(46) With regard to the above question of law, the argument of the plaintiff was twofold.

(a) The words "on or before the hearing" that occurs in **Section 18** of the CPC should not be read to mean, *"any time before hearing"* but to mean *"after pleadings (plaint, answer and replication if any) are completed"*.

(b) In terms **of Section 14** of the CPC, the plaintiff is permitted to name the defendants and the argument of the Defendants that no relief could be obtained against the 1st, and 3rd to the 6th Defendants, ought not to have been entertained by the learned High Court Judge as it was premature and the discharging of those Defendants from the case, offended Section 18 of the CPC.

(47) In order to substantiate their argument, the Plaintiff relied on the decision in the case of **Anil Kumar Singh v. Shiv Nath Mishra** (1995) SCC (3)147, where it was observed that *"The object of the rule is to bring on record all persons who are parties to the dispute relating to the subject matter so that the dispute may be determined in their presence at the same time without any protraction, inconvenience and to avoid multiplicity of proceedings….."* . Relying on the decision in **Seylan Bank PLC v. New Lanka Merchants Marketing (PVT) Ltd and others** SC Appeal 198/2014 it was submitted on behalf of the Plaintiff that, under the second limb of Section 18 (1), persons who may not be liable upon the cause of action, but nevertheless, are persons whose presence before the court is necessary to enable the court to effectually and completely adjudicate upon and settle all questions in that action could be added as parties.

(48) The cause of action in this case, which I have referred to earlier in the judgement, is simply a contractual violation alleged, where one party to the contract has failed to settle payments due to the other. On the perusal of the agreements marked P2-P5 it is clear that the 1st party to the agreements is the Plaintiff whilst the 2nd party is the 2nd Defendant Company, namely, Radiant Trading Company (Pvt) Ltd. Thus evidently, the party liable to make the payment claimed under the agreements, is the 2nd Defendant Company. Thus, ***the parties to the***

subject matter relating to the dispute [as referred to in the case **of Anil Kumar Singh** (supra)] are the Plaintiff and the 2nd Defendant.

(49) The Learned High Court Judge on a careful examination of the Plaint, other documents filed along with it and the submissions made, had arrived at this very conclusion, i.e. that the Plaintiff had the right to claim the amount stated in the plaint from the 2nd Defendant Company, which was the only other party to the relevant sales agency agreements, other than the Plaintiff and that the discharged Defendants "cannot be considered as necessary parties to adjudicate the real dispute between the Plaintiff and the 2nd Defendant".

(50) The submission made on behalf of the Plaintiff that the words *"on or before the hearing"* in Section 18 of the CPC should be read to mean *"after the pleadings"* is mere *ipse dixit* and devoid of any merit. I do not think the legislators had any intention of imposing any restrictions with regard to the ambit of its application.

(51) **Meideen v. Banda** [1 NLR 51] is one of the earliest cases decided by the Supreme Court where the ambit of Section 18 of the CPC came up for consideration. His Lordship Withers J, observing that Section 18 of our CPC corresponds with the language of Rule 1 of the Judicature Rules of 1883 took guidance and followed the judgment of Lord Esher, M.R., in the case of **Byrne v. Brown**, reported in (1889) 22 QBD 657, p. 666 where Lord Esher observed;

"One of the chief objects of the Judicature Acts was to secure that, ***wherever a Court can*** *see in the transaction brought before it that the rights of one of the parties will or may be so affected that under the forms of law other actions may be brought in respect of that transaction, the Court shall have power to bring all the parties before it, and determine the rights of all in one proceeding….."*

"… Another great object **was to diminish the cost of litigation.** *That being so, the Court ought to give the largest construction to those Acts in order to carry out as far as possible the two objects I have mentioned."* [Emphasis added].

(52) Considering the above, I hold that the words "any time before hearing" in section 18 of the CPC is devoid of any fetters of the nature, contended on behalf of the Plaintiff, as far as the application of the said section is concerned. Accordingly, I answer the question of law referred to in sub-paragraph (v) of paragraph 16 of the Petition in the negative.

Accordingly, I affirm the order of the learned High Court Judge dated 23.09.2016 and dismiss the Appeal of the Plaintiff-Petitioner Appellant subject to costs.

Appeal Dismissed

JUDGE OF THE SUPREME COURT

PREETHI 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

MMBL Teas (Pvt) Ltd.,

No. 300, Galle Road,

Colombo 3.

PLAINTIFF

SC Case No. SC/CHC/35/2008

Case No. HC Civil 191/2002 (1)

Vs

1. **British Ceylon Produce Export (Pvt) Ltd.,**
   No. 351/1, Dewanampiyatissa Mawatha,
   Colombo 10.

2. **Abdul Hafeel Ahamed Abbas,**
   No. 619/12, Baseline Road,
   Colombo 09, Presently of No. 573,
   Sudarma Mawatha,
   Wanawasala,
   Kelaniya.

3. **Najiur Rahman Abbas,**
   No. 619/12, Baseline Road,
   Colombo 09.

DEFENDANTS

AND NOW

MMBL Teas (Pvt) Ltd.,

No. 300, Galle Road,

Colombo 3.

PLAINTIFF-APPELLANT

Vs

1. **British Ceylon Produce Export (Pvt) Ltd.,**
   No. 351/1, Dewanampiyatissa Mawatha,
   Colombo 10.

2. **Abdul Hafeel Ahamed Abbas,**
   No. 619/12, Baseline Road,
   Colombo 09, Presently of No. 573,
   Sudarma Mawatha,
   Wanawasala,
   Kelaniya.

3. **Najiur Rahman Abbas,**
   No. 619/12, Baseline Road,
   Colombo 09.

DEFENDANT-RESPONDENTS

Before: Buwaneka Aluwihare, PC, J.

L. T. B. Dehideniya, J.

M. N. B. Fernando, PC, J.

Counsel: Prof. H. M. Zafrullah instructed by Varners for the Plaintiff-Appellant.

Dinesh de Alwis instructed by Ms. Amandi Jayasinghe for the Defendant-Respondent.

Argued on: 27. 08. 2018

Decided on: 17.12. 2021

Aluwihare PC,J.

Case Briefly Stated;

(1) The Plaintiff-Appellant [hereinafter referred to as the Plaintiff] instituted action in the High Court of Colombo exercising Civil jurisdiction against the three Defendant-Respondents [hereinafter referred to as the Defendants].

(2) Plaintiff instituted the said action seeking judgement in a sum of Rs. 7,300,000/= plus legal interest. Plaintiff's claim against the 1st Defendant was upon a Promissory Note whilst the claim against the 2nd and 3rd Defendants was upon a Guarantee Bond.

(3) The execution of both the promissory note [marked and produced as P3] and the guarantee bond [marked and produced as P4] were not disputed by the Defendants. In the answer, however, they denied payment on P3 and P4 and made a claim in reconvention in a sum of Rs. 15 million. The Plaintiff filing a replication denied the Defendants' claim.

(4) By judgement dated 15th May 2008, the Learned High Court judge dismissed the Plaintiff's case and held further that the Defendants were entitled to the reliefs prayed for in the answer. The present appeal arises from the said judgement.

(5) Both parties had been engaged in the business of exporting tea. It appears that, at the time relevant to the dispute in issue, there existed a business relationship between the Plaintiff and the 1st Defendant.

The Plaintiff's Case

(6) Witness Balasubramanium, a Director of the Plaintiff company testifying stated that;

(a) The Plaintiff company had been set up for the export of tea and was associated with the 1st Defendant company in this venture.

(b) The 1st Defendant company would secure orders for the export of tea and the Plaintiff company would finance the purchase of tea. The export of teas had taken place on letters of credit that was assigned to the Plaintiff's bank, which was instructed to credit export proceeds to the Plaintiff's account. The profits were to be shared equally between the Plaintiff and the 1st Defendant.

(c) The operation had been quite straightforward, according to the witness, upon the letter of credit being submitted to the bank, the 1st Defendant company places a firm order and the Plaintiff Company purchases tea, which is delivered to the 1st Defendant company for blending, packing and exporting.

(d) As far as the impugned transaction was concerned, a letter of credit had been received by the Plaintiff's bank for the export of tea to Iran, and consequently a stock of tea had been purchased by the Plaintiff from the auction and stored in the warehouse of the 1st Defendant company. This consignment of tea, however, had not been shipped due to a complaint by the buyer's agent relating to its inferior quality. As a result, the tea had been lying in the stores of the 1st Defendant.

(e) The witness has alleged, that without any intimation to the Plaintiff, the 1st Defendant had made arrangements to have the consignment shipped to Dubai, without the customary letter of credit being opened. On the Plaintiff making a query, the 2nd and 3rd Defendants had confirmed both verbally and in writing [P1], that the payment would be made once the consignment of tea reach Dubai.

(f) The Plaintiff, however, according to the witness, had not been paid for the said consignment of tea.

(g) The witness had further stated that, as the payment was not forthcoming, he requested for additional security for the payment and consequently the 1st Defendant executed a Promissory Note [P3] in favour of the Plaintiff for a sum of Rs. 7,300,000/= which was the Rupee value equivalent of US $ 81,000, the value of the consignment of tea that was exported to Dubai. In addition, a Guarantee Bond [P4] also had been given, signed by 2nd and 3rd Defendants, assuring the payment. [Both the Promissory Note P3 and the Guarantee Bond P4 are dated 2nd July 2001]

(h) As, even by April 2002, the 1st Defendant company had not paid the Plaintiff company the money due, in respect of the consignment of tea exported to Dubai, a letter [P6] was sent by the Plaintiff company presenting the Promissory Note [P3] and requesting payment. The Defendants, however, had not paid the money due on the Promissory Note, as requested. As such, 'notice of dishonour' [P7] was sent to the 1st Defendant company, with

copies to the 2nd to 3rd Defendants, followed by the letter of demand [P8].

(i) The witness under cross-examination stated that the Promissory Note [P3] was executed nearly 5 months after the consignment of tea was exported, because the export of this particular consignment of tea had been quite contrary to the customary practice as explained in paragraph (c) above.

(j) According to the Defendants, the Promissory Note P3 and the Guarantee Bond P4 were given to raise funds to service the pending export orders, which, however, had been denied by the Plaintiff. The position taken up by the Plaintiff was that the particular consignment was shipped on 'consignment' basis instead of on 'letters of credit' which was the agreed procedure between the parties and also without any intimation to the Plaintiff.

(k) The Plaintiff alleges that it was due to this reason, that they requested for security and the Defendants gave the Promissory Note [P3] and the Guarantee Bond [P4] both of which were executed subsequent to the shipment.

The Defendants' version

(7) Mohamed Abbas, Director of the 1st Defendant Company, in his testimony had taken up the position that they had an arrangement with the Plaintiff company, for the Defendants to obtain orders for tea from Iran and the Plaintiff to supply stocks of tea for export. The witness had

referred to these transactions as "L. C. orders". The arrangement was, for the Defendant company to obtain the orders [for tea] and the Plaintiff to purchase the consignments of tea and export on letters of credit assigned to the Plaintiff's bank and the parties to share the profits equally.

(8) When the third consignment [22,550 kg] was to be shipped, an agent from the Iranian buyer had come down and having examined the tea, had declared that the teas were below the quality they desired.

(9) In order to raise the quality of the teas, the 1st Defendant company had blended the consignment of teas supplied by the Plaintiff with superior quality teas and had obtained a fresh order to have the teas shipped to Iran with a trans-shipment in Dubai. The teas so shipped could not proceed beyond Dubai, due to an import restriction clamped by Iran and the consignment had got stuck in Dubai which was the port of trans-shipment. According to the Defendants' witness, the Plaintiff had given instructions to sell the consignment in issue, in Dubai.

(10) Witness Abbas [Director of the 1st Defendant Company] had written to Seylan Bank on 3rd April 2001 and had put the bank on notice that the Plaintiff company [MMBL Teas] had bought a consignment of 22,500 kg of tea and the said consignment was exported to M/s Al Ashraf General Trading Company in Dubai, for onward transmission to Iran [D34].

(11) It appears that the trade embargo or the ban on importing tea to Iran had come into force in March 2001 [D33]. The probable reason for the teas being sold to a buyer in Dubai instead of being shipped to Iran.

(12) Although it was claimed by the Defendants that they lost their goodwill, credentials and reputation *vis-à-vis* the Iranian buyer in view of the Plaintiff's conduct, namely supplying inferior quality teas, the actual reason for the trade to come to a halt, appears to be the embargo on tea imports to Iran.

(13) The defence witness also admitted that [in his testimony] the Plaintiff demanded a "security" and the Defendants having agreed, gave a Promissory Note for Rs. 7.3 million and executed a Guarantee Bond as well.

(14) The defence witness had also admitted that, although the arrangement between the Plaintiff and the 1st Defendant was to obtain orders on letters of credit of foreign buyers in favour of the Plaintiff company, the impugned consignment of teas was not exported on a letter of credit, but on "consignment basis" and the witness admitted that the teas belonged to the Plaintiff company and that the Defendants did not pay the Plaintiff the value for the 22134 kg of teas that were exported. The excuse given by the witness for such non-payment was that the Defendants did not receive payment.

(15) The position taken up by the Defendants was that the Plaintiff company had no financial strength to do exports and the Plaintiff company sought the assistance of the 1st Defendant company, for the Plaintiff to obtain funds from the [Seylan] bank. It must be noted that this assertion of the Defendants was refuted by the Plaintiff. In the course of the testimony, witness Balasubramanium had stated that the Plaintiff had obtained "packing credit" from the bank in order to finance the purchase of teas.

The Contention on behalf of the Plaintiff

(16) It was the contention of the learned counsel for the Plaintiff that:

(a) The Promissory Note and the Guarantee Bond are autonomous documents and that it is settled law that such instruments cannot be read subject to extraneous terms and conditions.

(b) That the learned trial judge was in error when he held that on the evidence, that there was no consideration; whereas according to the evidence led at the trial in fact "valuable consideration" was in fact present.

(c) Allowing the counter claim [claim in reconvention] of the Defendants was wrong, as the same is not in compliance with Sections 43,44,45 and 46(2) of the Civil Procedure Code.

(17) In terms of section 85(1) the Bills of Exchange Ordinance, a Promissory note is defined as;

> *"A promissory note is* ***an unconditional promise*** *in writing made by one person to another signed by the maker,* ***engaging to pay,*** *on demand or at a fixed or determinable future time,* ***a sum certain in money,*** *to, or to the order of, a specified person or to bearer".*

(18) The learned counsel for the Plaintiff argued that the learned trial judge had misdirected himself in concluding that the terms and conditions in documents P3 [the Promissory Note] and P4 [Guarantee Bond] must be interpreted together with the conditions set out in the document marked P1, a letter sent by the 2nd Defendant, to the Finance Director of the Plaintiff company. The learned Counsel further contended that the Promissory Note [P3] cannot be subjected to extraneous terms and

conditions as they are autonomous documents and in any event the letter P1 is merely a communication sent by the 2nd Defendant to the Financial Director, stating, that the 1st Defendant company would pay for the teas exported, no sooner the shipment reached the destination.

(19) The learned counsel, relied on the decision in the case of **Cebora vs. S.I.P (Industrial Products) Ltd.** [1976] Lloyds Law Reports 271, where it was held that *"For some generations one of those certainties has been that the bona fide holder for value of a bill of exchange is entitled , save in truly exceptional circumstances, on its maturity to have it treated as cash, so that in an action upon it the Court will refuse to regard either as a defence or as grounds for a stay of execution any set off, legal or equitable, or any counterclaim whether arising on the particular transaction upon which the bill of exchange came into existence, or, a fortiori, arising in any other way. This rule of practice is thus, in effect, pay up on the bill of exchange first and pursue claims later."* [page 278-279].

It was contended on behalf of the Plaintiff that, to defeat a claim based on a bill of exchange, the defence must relate to a total failure of consideration, as a mere defect of title in the goods supplied will not amount to a total failure of consideration.

(20) The position taken up by the Plaintiff referred to above, must be viewed in the backdrop of the evidence led in the case and the background to the execution of the Promissory Note [P3] and the Guarantee Bond [P4]

(21) The evidence was that both, the Promissory Note [P3] and the Guarantee Bond [P4] was executed nearly five months after the teas [the consignment in issue] were exported as the Defendants in exporting the consignment, had deviated from the agreed practice.

(22) According to witness Balasubramanium, he became aware of the export [of the consignment of teas in issue] only upon being informed by one of his officers and when he made inquiries from the general manager of the 1st Defendant company, Balasubramanium was assured that the Plaintiff would be paid when the consignment reached Dubai. The witness had further stated, that what was intimated to him was confirmed in writing by P1, which is a letter voluntarily issued by the Defendants, assuring payment.

(23) Both the Promissory Note [P3] and the Guarantee Bond [P4] had been executed about 4 months after the letter [P1]. Witness Balasubramanium testifying further had stated, as the Defendants had defaulted in payment even after nearly 5 months after the teas were shipped, he requested additional security against the payment due. Thus, P1 is merely a communication that explains the circumstances that led to the execution of P3 and P4 and has no bearing on the Promissory Note [P3] or the Guarantee bond [P4].

(24) Hence, I hold that the trial judge misdirected himself in holding that the Promissory Note [P3] and the Guarantee Bond [P4] must be interpreted together with the 'conditions' stated in the letter P1. In fact, there are no conditions in P1, but only an assurance by the Defendants that the monies will be paid. The relevant portion of that letter [P1] is reproduced below;

> "REFERENCE 22,500 KILOS TEA WHICH WE HAVE EXPORTED THIS WEEK, SHALL BE PAID NO SOONER THE GOODS REACHED THE DESTINATION & WE UNDERTAKE TO ARRANGE WITH OUR BUYER TO REMIT THE MONEY DIRECT TO YOUR ACCOUNT WITH SEYLAN BANK CHATHAM ST, BRANCH"

(25) Accordingly, I hold that the conclusion reached by the learned trial judge that P3 and P4 must be interpreted based on the conditions on P1 is erroneous. And further, I also hold, that the findings by the learned trial judge that the Defendants are not liable to pay the Plaintiff due to non fulfilment of certain events referred to in the letter P1, is also erroneous.

(26) The learned counsel argued that in deciding the issues raised in the case the learned trial judge has misdirected himself by treating as a relevant factor the Defendant's claim that the entire shipment consisting of 22500 kg of tea, did not belong to the Plaintiff whereas the issue before court was, the failure to honour the Promissory Note [P3].

(27) The crux of the Plaintiff's case was the failure on the part of the Defendants to honour the Promissory Note [P3] drawn for Rs.7.3 million, which was the value of the teas supplied by the Plaintiff and equivalent to the amount on conversion of 81,000 in US $ terms. The 2nd Defendant in his evidence has admitted this fact and the evidence is reproduced below; [proceedings of 23-11-2007, pages 9 &10]

Q. You confirm that the value of the tea exported is in fact $ 81,000 less 4% commission?
A. yes.
Q. That was the value of the tea of the Plaintiff?
A. yes.

(28) With regard to the observation made by the learned trial judge; *"that the teas belonging to the Plaintiff could not have been sold at any stage"* [due to its inferior quality], it was contended on behalf of the Plaintiff, that the defects in the quality of the goods supplied, do not amount to 'no consideration or a total failure of consideration'. As such, it was argued, that the defects in the quality of teas supplied cannot be used as a defence to refuse payment on the Promissory Note [P3] and the

Guarantee Bond [P4]. It was further contended that the issue raised, in the instant case as to the quality of the tea supplied, is irrelevant and should not have been a factor in determining the liability of the Defendants *vis-à-vis* the Promissory Note and the Guarantee Bond.

(29) To my mind, the quality [of teas] is subjective, in that, the goods may appeal to one buyer and may not be so in respect of another. The fact that by blending a mere 334 kg of tea with a stock of 22,500 kg of tea was sufficient to raise the quality of the teas to such a degree that was acceptable to a buyer is an indication that the state of the teas supplied by the Plaintiff was of certain quality and therefore cannot be treated as a case of total failure of consideration. According to the evidence of witness Mohamed Ishan Abbas, a director of the 1st Defendant company, the buyer rejected the tea because the quality was not 'first class'.

(30) In the case of **Cebora** [*supra*] the court observed "….*bona fide holder for value of a bill of exchange is entitled , save in truly exceptional circumstances, on its maturity to have it treated as cash, so that in an action upon it* ***the court will refuse to regard either as a defence or as grounds for a stay of execution any set off, legal or equitable, or any counterclaim whether arising on the particular transaction upon which the bill of exchange came into existence, or, a fortiori, arising in any other way.*** *This rule of practice is thus, in effect, pay up on the bill of exchange first and pursue claims later.*" [page 278-279] The court went on to hold that, "*...total failure of consideration is of course, in a position: it affords a defence…and must be clearly distinguished from allegations of delivery of goods with defects, when the pay first rule applies."* [page 279]

(31) It was also held in the case of **Brown Shipley & Co Ltd. v. Alicia Hosiery Ltd.** [1966] 1 Lloyd's Law Reports 668, "… *judgment should be given upon that bill of exchange as for cash and it is not to be held up by virtue of some counterclaim which the defendant may assert, even… a counterclaim relating to the specific subject-matter of the contract.*" [page 669]

(32) In the instant case, as referred to above, there had been a clear arrangement agreed between the parties as to the procedure with regard to the export of teas. The 2nd Defendant Abdul Hafeel Ahamed in his evidence admitted the position taken up by the Plaintiff. He had admitted that the previous shipments were based on letters of credit and there were a few other shipments lined up, which too were on letters of credit. He also admitted that, in relation to the first two shipments, the Plaintiff had obtained 'packing credit loans' on the strength of the letters of credit and the Plaintiff did not request the Defendants for funds to effect the shipments nor did the 1st Defendant company finance the shipments. The witness also admitted that when it came to the consignment of teas in issue, they never bothered to inform the Plaintiff that they were exporting the said consignment.

(33) Considering the foregoing, I hold that the Plaintiff was a bona fide holder of the Promissory Note [P3] for value and the Plaintiff is legally entitled to receive the sum stated in P3. Further, based on the ratio in the case of **Cebora** [*supra*] I also hold that there were no 'exceptional circumstances' and as such the Plaintiff was entitled to treat the Promissory Note [P3] as cash, on its maturity.

(34) The 2nd and the 3rd Defendants being directors of the 1st Defendant company, gave the Guarantee Bond [P4] in favour of the Plaintiff on the very day the Promissory Note [P3] was drawn and for the identical sum [Rs 7.3 million]. The Plaintiff asserts that the said amount is the monies due to the Plaintiff for the teas supplied for export.

(35) It was argued on behalf of the Plaintiff that the reason for the Defendants to draw the Promissory Note and the Guarantee Bond was to dissuade the Plaintiff from filing legal action against the Defendants for the recovery of the monies due to the Plaintiff.

(36) The contention of the Defendants was that the Guarantee Bond was prepared in order to "comfort the Plaintiff" and as such the Plaintiff cannot rely on the Guarantee Bond P4 to recover any monies from the (2nd and 3rd) Defendants. This position was flatly rejected by the witness Balasubramanium and the evidence does not disclose that there was a necessity to "comfort" the Plaintiff. There is uncontroverted evidence that the Plaintiff had an arrangement with its bank to obtain "packing credit" to finance business operations and there is no evidence whatsoever to suggest that the Plaintiff was facing any financial difficulty to run its operations.

(37) When one considers the evidence placed before court and the execution of the Promissory Note [P3] and the Guarantee Bond [P4] on the same day for the identical sum, which in turn is the value of the consignment of teas supplied by the Plaintiff to the 1st Defendant company for export, it is clear that consideration was present in this case.

(38) The learned counsel for the Plaintiff contended that, it is settled law, with regard to Guarantee Bonds, that the 3rd party normally does not

personally provide consideration, and the Guarantee Bond is enforceable at the request of the beneficiary of the bond.

(39) In this context, the position taken up by the Defendant does not appear to have any merit and I hold that both the 2nd and 3rd Defendants are under a legal duty to honour the Guarantee Bond P4.

Counter Claim by the Defendants

(40) The Defendants made a claim in reconvention [cross claim] for an award of Rs.15 million as damages, which the learned High Court Judge upheld. The counter claim was on the basis that, the Plaintiff failed to purchase and provide stocks of 'quality' tea on a timely basis, when the 1st Defendant received export orders and as a result the Defendants sustained a loss both in reputation and goodwill from the perspective of the foreign buyers.

(41) It was the contention of the learned counsel for the Plaintiff that there was no legal basis for the award of damages and the claim ought to have been disallowed *in limine*. The learned counsel based his argument on two grounds;

(i) That the entire award of damages for the claim in reconvention has been made without proof of such claim being established in court,

And

(ii) That the damages for loss of goodwill, credentials and reputation cannot be awarded in the law of contract and that these are heads of liability where damages are claimed in the law of delict.

(42) With regard to (i) above, i.e., the Defendants' 'claim in reconvention' for damages, the Plaintiff filed a replication denying the claim and had

taken up the position that the claim in reconvention is baseless and a mere afterthought on the part of the Defendants. The Plaintiff's assertion was that the said claim was made in order to avoid liability on their part.

(43) As referred to earlier, the learned trial judge had held that the Defendants proved the counter claim mainly on the basis that the evidence placed by the Defendants *"has not been subjected to any cross examination. Therefore, this court has no option other than to accept the said evidence in respect of the loss caused"*. In stating so, I presume that the learned trial judge had relied on the rationale in the often-quoted decision in **Edrick de Silva vs. Chandradasa de Silva** [1967] 70 N.L.R 169.

(44) I am, however, of the view that, failure to challenge evidence by cross examination by itself may not be sufficient to hold that a particular fact had been proved within the meaning of Section 3 of the Evidence Ordinance. It might, however, be a factor to be taken into account in accepting such evidence. Once the evidence is received, independent of such reception, the court should give its mind to the evidence so received, and consider whether such evidence is sufficient to establish the fact, sought to be proved.

(45) In the case of **Edrick de Silva** [*supra*], their Lordships observed, [at page 174] *"But where the* ***plaintiff has*** *in a civil case* ***led evidence sufficient in law to prove a factum probandum,*** *the failure of the defendant to adduce evidence which contradicts it adds a new factor in favour of the plaintiff. There is then an additional " matter before the Court ", which the definition in Section 3 of the Evidence Ordinance requires the Court to take into account, namely that the evidence led by the plaintiff is uncontradicted.* [emphasis added].

(46) From the pronouncement in **Edrick de Silva,** [supra]it is abundantly clear that the judgement does not detract from the legal requirement that a party seeking to establish a fact must provide sufficient evidence to satisfy court and the dictum in the said case can be applied only in instances where **the party has led evidence sufficient in law to prove the fact** and not otherwise.

(47) Section 3 of the Evidence Ordinance defining proof states; *"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, in the light of the submissions made on behalf of the Plaintiff, it would be necessary to consider, whether the evidence placed before the court by the Defendants was ***sufficient in law*** to establish that they were entitled to the damages claimed, within the meaning of Section 3 of the Evidence Ordinance.

(48) Based on the assertions of the Defendants, the learned trial judge had considered damages under three heads;

(1) the loss caused to the Defendants as a result of their stores being used to store the stocks of tea purchased for exports.
(2) loss caused due to the cancellation of a consignment of tea and
(3) loss of goodwill and reputation.

(49) In the answer filed, the Defendants are silent with regard to sustaining any loss due to the use of their stores to stock tea. That was the arrangement arrived at between the parties. The only issue raised by the Defendants with regard to storage is issue No. 19 which reads as "Was the said stock of tea kept in the warehouse of the Defendants for

a period exceeding 6 months due to the aforesaid reason". There is, however, no 'issue' raised by the Defendants to the effect that the Defendants had sustained any loss or damages as a result of the tea lying in their stores.

(50) According to witness Balasubramanium, storage charges were paid after the export proceeds were received and he had gone onto say that in respect of the consignment of tea in issue, export proceeds were never received by the Plaintiff and therefore storage charges were not paid. [proceedings of 10th March 2005]

(51) The 2nd Defendant had admitted the above position taken by witness Balasubramanium and had, in paragraph 76 of his affidavit averred that *"The **undertaking** given by us [**Defendants**] was that the full proceeds of export will be remitted first to the Plaintiff's account at Seylan Bank Limited and then the profits realized, the amount paid by us [Defendants] to upgrade the stale tea, the cost of packing materials, labour charges, containerizing, transport and **storage charges** were to be reimbursed by the Plaintiff.*" [emphasis added]. Thus, it is clear by their own admission that the reimbursement of storage charges was contingent upon the remittance of sales proceeds to the bank account of the Plaintiff, which never happened in the instant case.

(52) In the answer, the Defendants have averred that, a loss was caused due to the Plaintiff not having adequate tea stocks for export when needed and as a result, stocks had to be purchased at higher prices and in addition the stocks of teas offered for export got rejected due to the Plaintiff supplying inferior quality teas [Issues No. 30 and 31].

(53) With regard to the first aspect referred to above i.e. the Plaintiff not having adequate stocks, the 2nd Defendant's position was that the

Defendants made 'no' profits because the Plaintiff did not have adequate stocks and the Plaintiff had to pay higher prices to purchase tea. [paragraphs 22 and 23 of the 2nd defendant's affidavit]. The 2nd Defendant, however, does not speak of any 'loss' being caused to the Defendants as a result.

(54) In paragraph 52 of the affidavit of the 2nd Defendant, he takes up the position that the Iranian buyer demanded compensation in a sum of US$ 21,690.00/-. Apart from the testimony, the Defendants have not produced any evidence to establish that the Iranian buyer had made such a demand. Although the Defendants had produced a series of written communications between the said buyer and the Defendants relating to the shipment of teas, there isn't a single communication with regard to claiming damages. All what the Defendants have produced, is a letter which they claim, they sent to the Iranian buyer, allegedly containing two cheques, each drawn for Rs. 867,600/ the Rupee equivalent of US $ 21,690/-. Copies of the two cheques have also been marked and produced as D29 and D29A respectively. Both are cash cheques, drawn on the same day for the identical amount, i.e., Rs.867,600/-

(55) The Defendants did not produce any acknowledgment from the Iranian buyer with regard to the receipt of any money paid as damages. It appears highly unusual that in settling damages to an overseas business partner, payment is made in Sri Lankan rupees. It is also unusual that the payment is made by way of cash cheques and each drawn on the same day for the identical amount.

(56) Although the 2nd Defendant had claimed that the Defendants lost an estimated profit of Rs. 1,353,000/- due to the cancellation of the 5th consignment owing to the Plaintiff's failure to purchase teas, it is

apparent that the trade with Iran had come to a standstill due to the ban of tea imports into that country, which had come into effect from 1st March 2001 and which had lasted for three years [D33].

(57) According to the 2nd Defendant the consignment of 22500 kg that is in issue was shipped on the 8th of February to Dubai and when the shipment reached Dubai the Iranian ban on tea imports had come into effect. [Paragraphs 72 and 73 of the affidavit of the 2nd Defendant]

(58) Upon consideration and evaluation of the evidence placed by the Defendants to substantiate their claim for damages, I am of the view that the Defendants have failed to establish that they had sustained any damages due to the acts of the Plaintiff, within the meaning of Section 3 of the Evidence Ordinance and I uphold the argument of the learned counsel for the Plaintiff that the entire award of damages for the claim in reconvention has been made without proof of such claim being established in court. [Paragraph 44 (i) of this judgement]

(59) Accordingly, I set aside the findings of the High Court in relation to the issues referred to below and answer the said issues in the following manner: -

Issue No.1- Not proved
Issue No.2-Yes
Issue No.6-Yes
Issue No.14-Yes
Issue No.23-Not proved
Issue No.25- Not proved
Issue No.26-Not proved
Issue No.28-Not proved
Issue No.29-No
Issue No. 30-not proved

Issue No31. Not proved

Issue No.32-No

Issue No.33-Plaintiff is entitled to the relief as prayed.

Issue No.34 (c) Does not reveal a cause of action against the Plaintiff

Issue No.35. Yes

The findings of the learned trial judge in relation to other issues, which are not contentious, are to remain undisturbed.

The learned High Court judge is directed to enter decree accordingly.

The Appellant is entitled to the costs of this appeal

Appeal allowed.

JUDGE OF THE SUPREME COURT

L.T.B DEHIDENIYA J.

I agree

JUDGE OF THE SUPREME COURT

MURDU FERNANDO PC, J.

I agree

JUDGE OF THE SUPREME COURT

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

In the matter of an Appeal.

Kadireshan Kugabalan

No, 52, Main Street,

Kandapola.

Plaintiff.

SC Appeal No. 36/2014

SC (HC CA) LA No. 232/2012

CP/HCCA/KAN/136/2010(FA)

D.C. Nuwara Eliya Case No. 1279/L

Vs-

Sooriya Mudiyanselage Ranaweera,

Gajabapura, Mahagastota,

Nuwara Eliya.

Defendant.

AND

Sooriya Mudiyanselage Ranaweera

Gajabapura, Mahagastota,

Nuwara Eliya.

Defendant – Appellant.

Vs-

Kadireshan Kugabalan

No, 52, Main Street,

Kandapola.

Plaintiff – Respondent.

AND NOW BETWEEN

Kadireshan Kugabalan

No, 52, Main Street,

Kandapola.

Plaintiff – Respondent – Petitioner.

Vs-

Sooriya Mudiyanselage Ranaweera

Gajabapura, Mahagastota,

Nuwara Eliya.

Defendant – Appellant – Respondent.

Sooriya Mudiyanselage Kanthi Ranaweera

No. 32, Gajabapura, Mahagastota,

Nuwara Eliya.

Substituted Defendant – Appellant – Respondent.

Before: Sisira J de Abrew J

S. Thurairaja PC J

E.A.G.R. Amarasekara J

Counsel: Dr. J.A.De Gunarathne with Parakrama Agalawatta and Mohan Walpita for the Plaintiff – Respondent – Petitioner.

Harsha Soza President's Counsel with Nishaka Jayasena for the Defendant – Appellant – Respondent.

Argued On : 21.09.2020

Decided on : 12.02.2021

E.A.G.R. Amarasekara J

I had the privilege of reading the judgment written by his lordship justice Sisira de Abrew in its draft form. Though I inclined to agree with the final conclusion of the said judgment to dismiss the appeal, since I hold a different view with regard to the *cursus curiae* of original civil courts, namely the reiteration of objections to marked documents at the end of one's case as well as with regard to the ratio in **Sri Lanka Ports Authority V Jugolinija Boal East (1981) 1 Sri L R 18**, with all due respect to his lordship's reasoning, I think it is my duty to give my reasons separately to explain why I agree in dismissing this appeal.

First, I would like to refer to the Latin maxim "*cursus curiae est lex curiae*" which means "the practice of court is the law of the court". This Court in **Samarakoon Mudiyanselage Samarakoon and another V Mohammadu Sally Fajurdeen SC Appeal No. 06/2012** quoted as follows;

"Every Court is the guardian of its own records and master of its own practice" and where a practice has existed it is convenient, except in cases of extreme urgency and necessity, to adhere to it, because it is the practice, even though no reason can be assigned for it; for an inveterate practice in law generally stands upon principles that are founded in justice and convenience." – (Taken from **Broom's Legal Maxims- 10th Edition page 82**.)

"*A court exercising judicial functions has an inherent power to regulate its own procedure, save in so far as its procedure has been laid down by the enacted law, and it cannot adopt a practice or procedure contrary to or inconsistent with rules laid down by statute or adopted by ancient usage*. - (Taken from **Halsbury's Laws of England 4th Edition Vol.10, Para 703.**)

Thus, if the practice is not inconsistent with a rule laid down by a Statute or to the long-standing practice or usage, it has the force of law. Hence, in my view when this court proclaim an established practice invalid in toto or partially limiting its application to certain areas or scopes, this court has to be very careful, since it may cause serious repercussions to people who acted relying on such practice as law up to that moment; Not only in the case such proclamation is made, but, even in others which have been already decided and pending in appeal due to the reason that a party can take up the position that such practice has no legal consequences in toto or relating to certain areas or scopes even though a new legal position that is created by case law has no retrospective effect.- (See **Arulanandam Puvirajakeerthy V Nadaraja Indranee CA 1222/2000(F)**).

In this backdrop, I would prefer to consider whether the practice and ratio enunciated in Jugolinija Boal East case is still valid law even with regard to documents that are required to be

attested by law and whether the factual background of the matter at hand has an exceptional situation that does not allow the application of the said practice and ratio to the case at hand.

His lordship in his draft judgment has expressed the view that due to section 68 of the Evidence Ordinance, ratio in Jugolinija Boal East decision does not apply to documents that are required by law to be attested. However, in my view, not only with regard to the documents that are required to be attested by law, even with regard to other documents, there are provisions in law how they should be proved. For example, any document has to be proved by primary evidence or tendering the original except on occasions where leading of secondary evidence is allowed by law. (see section 64 and 65 of the Evidence Ordinance).

I do not argue against the view that when a document is to be proved, whether it is a one that is required by law to be attested or not, it has to be proved according to the relevant statutory provisions of the law such as provisions found in the Evidence Ordinance. However, there are certain situations where even the law accepts that certain documents need not be further proved. Followings are among them;

- A document admitted by parties need not be proved and with regard to a deed that is required by law to be attested, this principle is contained in section 70 of the Evidence Ordinance.
- Similarly, a deed which is 30 years or more old and comes from the proper custody, may not be proved by the party tendering it due to the presumption contained in section 90 of the Evidence Ordinance.
- As per Section 68 of the Partition Law formal proof of the execution of any deed which, on the face of it, purports to have been duly executed, is not necessary, unless the genuineness of that deed is impeached by a party claiming adversely.
- As per section 154 of the Civil Procedure Code, if the opposing party does not object to the document when a document is tendered in evidence, if it is not a document forbidden by law to be received in evidence, the court has to admit it.

In my view, the practice referred to in Jugolinija Boal East case is linked to the impeaching and objecting to a document when it is first going to be marked in evidence as contemplated by section 154 of the Civil Procedure Code. Perhaps, in the same manner it may be linked to section 68 of partition law subject to the paramount duty of the judge to investigate title in partition actions. I opine that the practice referred to in Jugolinija Boal East case is focused on a situation where it can be considered that the objection or the challenge to the document originally raised as waived as explained below in this judgment.

Evidence Ordinance contained general provisions regarding matters relating to evidence in civil and criminal proceedings while the Civil Procedure Code contains general provisions in relation to procedure in civil proceedings. Nonetheless, when consider in comparison, the Civil Procedure Code contains provisions specially related to civil actions. Hence, if there is any conflict with regard to placing of evidence and procedure in civil actions, one has to consider provisions in Civil Procedure Code with priority.

As mentioned above, if the document is not one forbidden by law to be received in evidence and it is not objected by the opposing party for being received in evidence, the court has to admit it as evidence. The term 'forbidden by law' has been construed to mean absolute prohibition (for example, tax returns), and not to include a case where evidence was required not to be received or used unless certain requirements were fulfilled. – vide **Seyed Mohamed V Perera 58 N L R 246 at254 and Siyadoris V Danoris 42 N L R 311**.

Hence, if no objection is made to a document being marked when it was first tendered in evidence, it becomes evidence for all the purposes of the case and it cannot be challenged only in appeal. Aforesaid legal position had been confirmed by number of decisions of our superior courts. – vide **Cinemas Limited V Sounderarajan (1998) 2 Sri L.R. 16, Adaicappa Chetty V Thos.Cook and Son 31 N L R 385, Silva V Kindersley 18 N L R 85, Seyed Mohommad V Perera (Supra), Siyadoris V Danoris (Supra), Andrishamy V Balahamy (1 Matara Cases 49), Seelawathie Gunasekara V K.W. Resanona S C Appeal No.22 of 1987.**

Of the aforementioned decisions**, Seyed Mohommad V Perera,** and **Siyadoris V Danoris** were decisions of benches comprising two judges of the apex court while **Seelawathie Gunasekara V K W Resanona** was a decision of a bench comprising of 3 judges of the apex court. These three judgments relate to marking of deeds without objections being raised. Thus, all three judgments support the position that if no objection was taken when a document is tendered in evidence for the first time and marking it, it becomes evidence for all the purposes of the case and even if it is a deed, in such circumstances it is not necessary to prove it in accordance with section 68 of the Evidence Ordinance. They further indicate that such objections cannot be taken for the first time in appeal. In this regard I would like to quote from **Seyed Mohommad V Perera** (Supra).

"*Documents are constantly put in evidence in the course of a trial, sometimes without objections and sometimes by express consent. To rule every such document out on the ground of hearsay would necessitate parties calling in to the witness box persons whose testimony in regard to the authenticity of the document neither side disputes though the contents may be disputed. To accept such a proposition as legally sound and valid basis on which trials in the original courts should be conducted would add in no small measure both to the cost of litigation and to the law's delays, which we constantly hear so much about. We have therefore investigated this matter as fully as we can with such assistance as learned counsel were able to give us and we have come to the conclusion that evidence of documents of title of persons who are strangers to the action and have not been called may become inadmissible only if objections to their production is taken in the original court and that they cannot be objected to for the first time in appeal*."

Following extract taken from **Seelawathie Gunasekara V K W Resanona** (Supra) further fortify the aforesaid position of law.

"*In these circumstances section 68 of the Evidence Ordinance would not require the Notary or an attesting witness to be called; being a document which is not 'forbidden by law to be received in evidence', the failure to object to it being received in evidence would amount to a waiver of the objection"*

"*In the absence of an objection or an issue relating to due execution, and as due execution by the other lessors was not challenged in anyway, the finding of the learned District Judge that the deed, in its entirety, was of no force or avail in law cannot be sustained*."

Now, I would like to consider the decision in **Perera & Others V Elisahamy 65 C L W 59** which was delivered by a bench of two judges. It was an appeal over a judgment in a partition action. It appears that no objection was taken to the deed at the time when its contents were first spoken to by the witness. Irrespective of that and section 69 of the Partition Act, Basnayake C J in agreement with de Silva J held that '*the fact that its genuineness was impeached rendered formal proof necessary regardless of whether objection was taken or not*' and '*a court cannot act on facts which are not proved in the manner prescribed in the Evidence Ordinance*'. On a lighter reading of the above decision, one may get the impression that regardless of whether the document or deed was objected to or not when it was first tendered in evidence, it has to be proved according to the provisions in the Evidence Ordinance; if it is a deed, in terms of section 68 of the Evidence Ordinance; but a deeper understanding of the facts of the aforesaid case and its decision indicate that it is so necessary to prove according to the provisions of Evidence Ordinance, regardless of whether any objection is raised or not at the time of marking the document or deed, only if the genuineness of the document or deed is impeached by the opposite party. I do not see any conflict between this decision in **Perera & Others V Elisahamy** and other judgments referred above which indicate that where there is no objection to the document it can be admitted in evidence without further proof in terms of the provisions of the Evidence Ordinance. This decision in **Perera V Elisahamy** only add the condition that if the document is impeached irrespective of whether there is an objection or not it has to be proved in terms of the Evidence Ordinance. **Perera V Elisahamy** contemplates a situation where the document is impeached or challenged even prior to its marking. Even in **Seelawathie Gunasekara V K.W Resanona** (Supra) their lordships while arriving at the decision had observed that there was no issue challenging the deed.

It is necessary to see how a document including a deed can be impeached or challenged in a civil suit. Firstly, it can be impeached through pleadings. Secondly, it can be impeached by raising relevant issues. In a normal civil action, if it is not raised through an issue, the challenge to the document in the pleading may be considered as waived since with the framing of issues pleadings recede to the background. Thirdly, the document or the deed can be challenged by objecting to it under section 154 of the Civil Procedure Code and, if it is a partition action under section 68 of the Partition Law. However, what takes place in a partition action is subject to the incumbent duty of the judge to investigate title.

Hence, what was elaborated above through the decisions of our superior courts shows that in a normal civil action like the one at hand, if the document or the deed is not impeached through an issue or issues, and no objection is taken when it was first tendered in evidence, it becomes evidence for all purposes of the case. On the other hand, if the document or deed is impeached through an issue or issues, irrespective of whether any objection was taken at the first opportunity when it was tendered in evidence or not, the document has to be proved in terms of the Evidence Ordinance.; If it is a deed, in terms of section 68.

Now I would like to elaborate on the practice of reading the documents marked in evidence at the closure of one's case and reiteration of objections to the marked documents and the ratio in Jugolinija Boal East case.

As I stated above, in my view, this is a practice linked to section 154 of the Civil Procedure Code and it also can be linked to the similar provision found in section 68 of the Partition Act. In a Criminal Case, namely **Robins V Grogan 43 N L R 269**, it was held that a document cannot be used in evidence, unless its genuineness has been either admitted or established by proof, which should be given before the document is accepted by court. However, as shown above section 154 of the Civil Procedure Code allows documents, which are not forbidden by law, to be admitted in evidence when there is no objection at the time of tendering it in evidence. As explained above, if the document is challenged or impeached through an issue it still has to be proved according to the Evidence Ordinance.

When a document is objected to it being admitted when it was first tendered in evidence, two questions arise for the court to consider; Firstly, whether the document is authentic, in other words whether it is what the party tendering it represents it to be; Secondly, if it passes the test of authenticity, whether it is legally admissible. Admissibility may be decided on arguments with reference to relevant legal provisions but authenticity has to be decided through the evidence adduced in that regard - vide section 154 of the Civil Procedure Code. If one has to prove the authenticity at the very moment whenever an objection is taken, the court may have to adjourn the recording of the evidence of ongoing witness and allow witnesses to be called to prove the authenticity of the document. If they are not available, the court may have to adjourn the proceedings for the day to give an opportunity to summon witnesses necessary to prove the document. Thus, it makes it expedient to mark a document 'subject to proof' when there is an objection to it and proceed with the ongoing witness. On the other hand, it is always not possible for the opposing counsel to state exactly whether he/she objects or not, since in a civil trial, it is not mandatory for the clients to be present in courts. The counsel may need instructions from his client to object to the document tendered in evidence. One may say, since documents are listed, he can get instructions prior to the trial date, but no one can assume that a fake document with the same description as in the list may not be introduced through a witness. Furthermore, there are occasions where documents are marked with the permission of court as well as by showing to the witness during cross-examination. Hence, in a civil trial, it is necessary for the counsel to get instructions from his client to raise a steady objection to a document. This creates a situation in a civil trial to object to documents tentatively till the counsel gets instructions from his client. Hence, it is conceivable that in a civil trial, certain documents are marked 'subject to proof' tentatively. This make a party to refer or mention those documents when that party intends to close his case to see whether the objections made are carried forward by the opposing party or not. Otherwise, I am not aware of any provision that requires parties to mention the documents marked again at the closure of their case. If the objection is reiterated it is considered as a steady objection and if not, it is considered as a withdrawal or wavier of a tentative objection. If the objection is reiterated, in my view, the party who marked the documents have two options, that is either to show through submissions that further proof is not necessary or it is already proved, or ask permission of court to summon witnesses to prove the documents which are steadily objected

since it is the moment objection is confirmed leaving aside its tentative nature. On the other hand, if the objection is not reiterated, it is considered that it was a tentative objection that was withdrawn. In such circumstance as there is no objections in terms of section 154 of the Civil Procedure Code, the law relating to the application of section 154 as discussed above would apply.

Afore described practice has been so ingrained in our system and, sometimes after mentioning the documents marked, the counsel only looks at the counsel of the opposite party to see his response. Even the court may not record his response unless there is a reiteration of the objection. Thus, this appears to be a practice developed through the practical application of section 154 of the Civil Procedure Code which is legally acceptable. On the other hand, this practice reduces the delay and cost of litigation which is for the convenience of all the stake holders in a given case. The said practice had been adhered by our civil courts and approved by superior courts including this court, not only in Jugolinija Boal East case but also in following cases.

Supreme Court Cases:

Rolax Enterprises(pvt) Ltd. V People's Bank SC CHC Appeal 12/2011, Balapitiya Gunananda Thero V Talalle Methananda Thero (1997) 2 Sri L R 101, Stassen Exports Ltd. V Brooke Bond Group Ltd. (2010) 2 Sri L R 36, Samarakoon V Gunasekara and another (2011) 1 Sri L R 149.

Court of Appeal Cases:

Hemapala V Abeyratne (1978-1979) 2 Sri L R 222, Jayalath V Karunathilaka (2013) 1 Sri L R 337, Wijewardena V Ellawala (1991) 2 Sri L R 14, Gunawardane V Indian Overseas Bank (2001) 2 Sri L R 113, Vellage Sumanasiri De Silva V Gamage Indranee Paranagama CA 1264/1998F

Hence, it is clear that our superior courts approved the said practice and ratio in Jugolinija Boal East case through many decisions till, to my knowledge, two recent decisions expressed a different view, namely the decisions in **Mohamed Naleem Mohamed Ismail V Samsulebbe Hamithu SC Appeal 04/2006** and **Dadallage Anil Shantha Samarasinghe v Dadallage Mervin Silva & another SC Appeal 45/2010**. As per the decision of aforesaid two cases, with regard to a deed which is required by law to be attested, even there was no objection reiterated at the closure of the case of the party who marked that deed, it has to be proved in terms of section 68 of the Evidence Ordinance. It is not clear whether the deeds which were in question in the respective cases were impeached or challenged through issues raised at the trial. However, it is clear that these two judgments refused to follow the ratio in Jugolinija Boal East case. Nevertheless, in the aforesaid two cases application of section 154 of the Civil Procedure Code had not been considered in coming to the said decisions of rejecting the application of ratio in Jugolinija Boal East Case. Both the said cases have referred to the decision of **Samarakoon V Gunasekara and another (2011) 1 Sri L R 149** (Supra). Anyhow, in my view, the decision in Samarakoon V Gunasekara is not a decision that negates the afore-discussed practice or the ratio in Jugolinija Boal East case. In that case, the requirements in terms of or application of section

68 had been considered after referring to the reiteration of objections to the relevant documents at the closure of the party who tendered the relevant documents. The said decision specifically refers to the aforesaid practice and ratio in Jugolinija Boal East case and had never stated that said ratio does not apply to deeds. There the application of section 68 was necessary since the objection was reiterated at the closure of the case of the opposite party.

In **Mohamed Naleem Mohamed Ismail V Samsulebbe Hamithu SC Appeal 04/2006** (supra) their lordships while deciding not to apply the ratio in Jugolinija Boal East case had expressed that neither in the decision of Jugolinija Boal East nor in the decision of Balapitiya Gunananda Thero V Talalle Methananda Thero(supra) it had referred to a document that was required by law to be attested. Though this court is not bound by the decisions of the Court of Appeal, it appears that decisions in Hemapala V Abeyratne (supra) and Wijewardena V Ellawala (Supra) which applied the ratio in Jugolinija Boal East to documents which are required by law to be attested had not been brought to the notice of their lordships prior to making that decision. Furthermore, as said before, the application of section 154 of the Civil Procedure Code or the decisions made by superior courts in relation to deeds that were not objected at the time of marking, namely, Seyed Mohommad V Perera (supra), Siyadoris V Danoris(supra) and Seelawathie Gunasekara V K W Resanona(supra), apparently, had not been brought to the notice of their lordships, prior to making the decision in the said Mohamed Naleem Mohamed Ismail V Samsulebbe Hamithu. Same lapses I observe in relation to the decision in **Dadallage Anil Shantha Samarasinghe v Dadallage Mervin Silva & another(supra**). In the decision of Dadallage Anil Shantha Samarasinghe v Dadallage Mervin Silva & another, there is a reference to the decision in **Robins V Grogan**(supra) but it is a criminal case which has no application of the aforesaid section 154 or section 68 of the Partition Act. Therefore, I do not incline to follow the decisions in the said Mohamed Naleem Mohamed Ismail V Samsulebbe Hamithu SC Appeal 04/2006 and Dadallage Anil Shantha Samarasinghe v Dadallage Mervin Silva & another as they were decided without the opportunity to consider the practical application of the said section 154 and some relevant case laws. As elaborated above I cannot consider Perera V Elisahamy (Supra) as a decision that nullifies the application of ratio in Jugolinija Boal East decision in relation to deeds in general terms but when the deed is impeached or challenged it requires the deed to be proved in terms of section 68 of the Evidence Ordinance.

As mentioned before, in a civil action such as the one at hand, if the relevant document is not impeached or challenged through issues, the ratio in Jugolinija Boal East is still valid. This is so even with regard to the deeds. However, if the deed is impeached or challenged through an issue raised, it has to be proved as per the provisions of Evidence Ordinance.

Moreover, in the case at hand, the defendant had refused to accept that he executed the deed of transfer as alleged by the plaintiff through his answer and thereafter have raised issues no.7 and 8 in that regard. Therefore, what was to be proved with regard to the alleged execution of the relevant deed was elaborated by the said issues. Till the learned judge answered those issues, the challenge to the alleged execution of the deed through issues stood valid. As such, the deed should have been proved in terms of section 68 of the Evidence Ordinance even though there was no objection at the time of marking it or at the closure of the Plaintiff's case. In my view and

as elaborated above, the learned District Judge should not have applied the ratio in Jugolinija Boal East decision to the present case, even though the deed was not objected to at the closure of the plaintiff's case. Hence, I cannot find fault with the decision of the learned High Court Judges for not considering the afore discussed practice or the ratio in Jugolinija Boal East case.

For the foregoing reasons I also decide to answer the questions of law in favour of the Defendant Appellant- Respondent while dismissing the appeal with costs.

…….

E A G R Amarasekara

Judge of the Supreme Court.

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

In the matter of an Appeal

Kadireshan Kugabalan
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Plaintiff

SC Appeal 36/2014
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Vs-

Sooriya Mudiyanselage Ranaweera
Gajabapura, Mahagastota,
Nuwara Eliya.

Defendant

AND
Sooriya Mudiyanselage Ranaweera
Gajabapura, Mahagastota,
Nuwara Eliya.

Defendant-Appellant

Vs

Kadireshan Kugabalan
No.52, Main Street,
Kandapola
Plaintiff-Respondent

AND NOW BETWEEN

Kadireshan Kugabalan
No.52, Main Street,
Kandapola
Plaintiff-Respondent-Petitioner-Appellant

Vs

Sooriya Mudiyanselage Ranaweera
Gajabapura, Mahagastota,
Nuwara Eliya.
Defendant-Appellant Respondent-Respondent

Sooriya Mudiyanselage Kanthi Ranaweera
No.32, Gajabapura, Mahagastota,
Nuwara Eliya.
Substituted Defendant-Appellant Respondent-Respondent

Before: Sisira. J. de Abrew J
S.Thurairaja PC J
Gamini Amarasekere J

Counsel: Dr.J.A.De Gunarathne with Prakrama Agalawatta and Mohan Walpita
for the Plaintiff-Respondent-Petitioner-Appellant
Harsha Soza President's Counsel with Nishaka Jayasena
for the Defendant-Appellant-Respondent-Respondent

Argued on : 21.9.2020

Decided on: 12.2. 2021

Sisira J. de Abrew, J

Plaintiff-Respondent-Petitioner-Appellant (hereinafter referred to as the Plaintiff-Appellant) filed this action in the District Court of Nuwara Eliya against the Defendant-Appellant-Respondent-Respondent (hereinafter referred to as the Defendant-Respondent) seeking a declaration, inter alia, that the Plaintiff-Appellant is the owner of the property in question and to eject the Defendant-Respondent from the property in question. The learned District Judge by her judgment dated 6.7.2010 held the case in favour of the Plaintiff-Appellant. Being aggrieved by the said judgment of the learned District Judge, the Defendant-Respondent filed an appeal in the Civil Appellate High Court of Kandy and the learned Judges of the Civil Appellate High Court by their judgment dated 14.5.2012, set aside the judgment of the learned District Judge and dismissed the action of the Plaintiff-Appellant. Being aggrieved by the said judgment of the learned Judges of the Civil Appellate High Court, the Plaintiff-Appellant has appealed to this court. This court by its order dated 5.3.2014, granted leave to appeal on questions of law set out in paragraphs 17(a) and 17 (b) of the Petition of Appeal dated 25.6.2012 which are set out below.

1. Did the Honourable High Court err and/or misdirect itself in holding that the Plaintiff had failed to prove the said deed of transfer (P1) and (P1c) by calling a witness from the Divisional Secretariat thereby leave room to draw a presumption adverse to the Plaintiff under Section 114 of the Evidence Ordinance in as much as when the aforesaid documents were

read at the close of the Plaintiff's case, when no objection was taken it stood as evidence for all purposes of the law?

2. Does the judgment of Honourable High Court stand as a judgment given per incuriam of the authoritative precedent laid down by Your Lordships' Court in Sri Lanka Ports Authority Vs Jugolinija Boal East (1981) 1 SLR 18?

Facts of this case may be briefly summarized as follows. The Plaintiff-Appellant takes up the position in the plaint and in his evidence that the Defendant-Respondent (Sooriya Mudiyanselage Ranaweera) conveyed property in question to him by Deed bearing No.10650 dated 13.12.2001 (marked P1) alleged to have been attested by Sinnathamby Dhayumanavan Notary Public. The Defendant-Respondent in his answer and evidence takes up the position that he never put his signature on Deed marked P1; that the signature found in Deed marked P1 is not his signature; that he never sold the property in question; and that he did not know a Notary Public by the name of Dhayumanavan. When the above matters are considered the most important question that must be decided in this case is whether the Deed bearing No.10650 dated 13.12.2001 (marked P1) alleged to have been attested by Sinnathamby Dhayumanavan Notary Public has been proved in court in accordance with Section 68 of the Evidence Ordinance. The Plaintiff-Appellant in this case called Sinnathamby Dhayumanavan Notray Public to prove Deed bearing No.10650 dated 13.12.2001 (marked P1) as a witness. But the Plaintiff-Appellant did not call the attesting witnesses in the said deed. Sinnathamby Dhayumanavan Notary Public in the attestation of the said deed states that the executants were unknown to him. Thus Sinnathamby Dhayumanavan Notary Public has admitted in his attestation that Sooriya

Mudiyanselage Ranaweera (the Defendant-Respondent in this case) was unknown to him at the time of the attestation of the Deed bearing No.10650 dated 13.12.2001 (marked P1). Sinnathamby Dhayumanavan Notary Public in his evidence given before the learned District Judge has admitted that he, in his attestation, has stated the above matter. Thus it is established that Sooriya Mudiyanselage Ranaweera, the alleged executant in the Deed bearing No.10650 dated 13.12.2001 (marked P1) was not known to Sinnathamby Dhayumanavan Notray Public who is alleged to have attested the said deed (marked P1). Further in the attestation of the deed (marked P1), Sinnathamby Dhayumanavan Notary Public has failed to state that the attesting witnesses knew Sooriya Mudiyanselage Ranaweera, the alleged executant in the deed (marked P1).

When I consider the above matters, it is necessary to consider whether Sinnathamby Dhayumanavan Notray Public can be regarded as an attesting witness in the deed (marked P1). In order to find an answer to this question it is necessary to consider Section 68 of the Evidence Ordinance and relevant judicial decisions that may be stated below.

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." His Lordship Justice Sinnetamby at page 349 further held as follows. *"To become an attesting witness a notary must personally know the executant and be in a position to bear witness to the fact that the signature on the deed executed before him is the signature of the executant."*

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 දි 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.

Considering the above legal literature, 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.

I have earlier pointed out that the Notary Public who is alleged to have attested Deed bearing No.10650 dated 13.12.2001 (marked P1) did not know the executant in the said deed and that the Notary Public has, in his attestation, failed to state that the attesting witnesses knew the executant personally. For the above reasons, I hold that the Notary Public in Deed bearing No.10650 dated 13.12.2001 (marked P1) cannot be regarded as an attesting witness.

For the above reasons, I hold that the Deed bearing No.10650 dated 13.12.2001 (marked P1) has not been proved in accordance with Section 68 of the Evidence Ordinance and that it cannot be used as evidence in this case.

The next point urged by learned counsel for the Plaintiff-Appellant was that Deed bearing No.10650 dated 13.12.2001 (marked P1) was not objected by the Defendant-Respondent when the case for the Plaintiff-Appellant was closed. Learned counsel therefore contended that the Defendant-Respondent has admitted the said deed marked P1. He relied on the judgment in the case of Sri

Lanka Ports Authority and Another Vs Jugolinija Boal-East [1981] 1SLR 18 wherein this court held as follows.

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

In Balapitiya Gunananda Thero Vs Talalle Methananda Thero [1997] 2 SLR 101this court held as follows.

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

In the present case, Deed bearing No.10650 dated 13.12.2001 (marked P1) was produced at the trial subject to proof. But it was not objected to when the Plaintiff-Appellant closed his case. It has to be noted here that the Defendant-Respondent in his evidence took up the position that he never signed the said deed. I have earlier held that the that the Notary Public in Deed bearing No.10650 dated 13.12.2001 (marked P1) cannot be considered as an attesting witness.

In considering the contention of learned counsel for the for the Plaintiff-Appellant, I would again like to consider Section 68 of the Evidence Ordinance. For the purpose of clarity, it is reproduced below.

> *"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 the case of Robins Vs Grogan 43 NLR 269 wherein Howard CJ held as follows.

> *"A document cannot be used in evidence, unless its genuineness has been either admitted or established by proof, which should be given before the document is accepted by Court."*

Therefore, it is seen that although a document is produced in court with or without objection, it cannot be used as evidence if it is not proved. If the principle enunciated in the case of Sri Lanka Ports Authority and Another Vs Jugolinija Boal-East (supra) is accepted in respect of deeds, even a fraudulent deed marked subject to proof can be used as evidence if it is not objected by the opposing party at the close of the case of the party which produced it. In such a situation, one can argue that courts will have to disregard section 68 of the Evidence Ordinance. I do not think that the principle enunciated in the case of Sri Lanka Ports Authority and Another Vs Jugolinija Boal-East (supra) extends to such a situation. Whether the opposing party takes up an objection or not to a deed which is sought to be produced, the courts will have to follow the procedure laid down in law. In this connection I would like to consider the judicial decision in the case of Samarakoon Vs Gunasekara [2011] 1SLR 149 wherein this court observed the following facts.

> *"In order to prove the Plaintiff's title to the property which is the subject matter of the action, he produced at the trial the notarially executed deeds marked P3 to P6 which were marked subject to proof. No witnesses were called at the trial on behalf of the Plaintiff to prove the said deeds. At the end of the Plaintiffs case, when the Plaintiff's Counsel read in evidence the deeds produced in evidence marked P3 to P6, the defence had made an application to Court to*

exclude those documents which were not properly proved. The learned District Judge held that the documents P3 to P6 had not been properly proved and accordingly, that the Plaintiff had failed to prove his title to the land in question.

The Plaintiff appealed against the decision of the District Judge to the High Court. The High Court reversed the District Judge's finding on the basis that when a deed had been duly signed and executed it must be presumed that it had been properly executed."

His Lordship Justice Amaratunga (with whom Ratnayake J and Ekanayake agreed) held as follows.

The High Court in total disregard of the specific and stringent provisions of Section 68 of the Evidence Ordinance had relied on an obiter dictum made in a case where due execution was challenged, to reverse the decision of the District Judge.

In terms of Section 2 of the Prevention of Frauds Ordinance a sale or transfer of land has to be in writing signed by two or more witnesses before a notary, duly attested by the notary and the witnesses. If this is not done the document and its contents cannot be used in evidence.

His Lordship Justice Amaratunga at page 151 further held as follows.

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

In the case of Perera and others Vs Elisahamy 65 CLW 59 His Lordship Basnayake CJ held as follows.

> *"Even though no objection was taken to the document when its contents were first spoken to by a witness, it should not have been used as evidence and acted upon by the Court. A Court cannot act on facts which are not proved in the manner prescribed in the Evidence Ordinance."*

Considering all the above matters, I hold that when a document which is required to be proved in accordance with the procedure laid down in section 68 of the Evidence Ordinance is produced in evidence subject to proof but not objected to at the close of the case of the party which produced it, such a document cannot be used as evidence by courts if it is not proved in accordance with the procedure laid down in section 68 of the Evidence Ordinance. I further hold that failure on the part of a party to object to a document during the trial does not permit court to use the document as evidence if the document which should be proved in accordance with the procedure laid down in section 68 of the Evidence Ordinance has not been proved.

When I consider all the above matters, I cannot accept the above contention of learned counsel for the Plaintiff-Appellant and I reject it.

I have earlier held that the Deed bearing No.10650 dated 13.12.2001 (marked P1) had not been proved in accordance with Section 68 of the Evidence Ordinance and could not be used as evidence in this case.

For the aforementioned reasons, I answer the 1st question of law as follows.

The Plaintiff-Appellant has failed to prove the Deed bearing No.10650 dated 13.12.2001 marked P1 and the learned Judgers of the Civil Appellate High Court have not made any error in their judgment.

I answer the 2nd question of law as follows.

The judgment of the Civil Appellate High Court is correct.

For the above reasons, I affirm the judgment of the Civil Appellate High Court dated 14.5.2012 and dismiss this appeal with costs. The Defendant-Respondent is entitled to the costs of this appeal and the courts below.

Appeal dismissed.

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

1. T.I.G. Suriyaarachchi,
2. D.N. Suriyaarachchi,
3. P.N. Suriyaarachchi,
   All of
   Halpathota, Baddegama.
   Plaintiffs

SC APPEAL NO: SC/APPEAL/39/2021
SC LA NO: SC/SPL/LA/221/2018
CA NO: CA/272/97 (F)
DC COLOMBO NO: 17364/L

Vs.

1. L.C. Liyanage alias Gunawardena,
   No. 5/5A,
   Sri Naga Vihara Road,
   Pagoda,
   Nugegoda.
2. People's Bank,
   Sir Chittampalam A. Gardiner
   Mawatha,
   Colombo 02.
   Defendants

AND BETWEEN

1. T.I.G. Suriyaarachchi,
2. D.N. Suriyaarachchi,
3. P.N. Suriyaarachchi,
   All of
   Halpathota, Baddegama.
   Plaintiff-Appellants

Vs.

1. L.C. Liyanage alias Gunawardena,
   No. 5/5A,
   Sri Naga Vihara Road,
   Pagoda, Nugegoda.
2. People's Bank,
   Sir Chittampalam A. Gardiner
   Mawatha,
   Colombo 02.
   Defendant-Respondents

AND BETWEEN

1. T.I.G. Suriyaarachchi
   Halpathota, Baddegama.
   1st Plaintiff-Appellant-Appellant

Vs.

1. L.C. Liyanage alias Gunawardena,
   No. 5/5A,
   Sri Naga Vihara Road,
   Pagoda, Nugegoda.

2. People's Bank,
   Sir Chittampalam A. Gardiner
   Mawatha, Colombo 02.
   Defendant-Respondent-
   Respondents

2. D.N. Suriyaarachchi,
3. P.N. Suriyaarachchi, (Deceased)
3A. K.G. Ananda Ratnasiri,
   All of Halpathota, Baddegama.
   2nd and 3rd Plaintiff-Appellant-
   Respondents

AND NOW BETWEEN

1. T.I.G. Suriyaarachchi
   Halpathota, Baddegama.
   1st Plaintiff-Appellant-Appellant-
   Appellant

Vs.

1. L.C. Liyanage alias Gunawardena,
   No. 5/5A,
   Sri Naga Vihara Road,
   Pagoda, Nugegoda.
2. People's Bank,
   Sir Chittampalam A. Gardiner
   Mawatha, Colombo 02.
   Defendant-Respondent-
   Respondent-Respondents

2. D.N. Suriyaarachchi,
3A. K.G. Ananda Ratnasiri,
All of,
Halpathota,
Baddegama.
2nd and 3rd Plaintiff-Appellant-Respondent-Respondents

Before: P. Padman Surasena, J.
Achala Wengappuli, J.
Mahinda Samayawardhena, J.

Counsel: Harith De Mel for the 1st Plaintiff-Appellant-Appellant-Appellant.

P. Narendran for the 1st Defendant-Respondent-Respondent-Respondent.

Kavinda Dias Abeysinghe for the 2nd Defendant-Respondent-Respondent-Respondent.

Argued on : 07.07.2021

Written submissions:

by the 1st Plaintiff-Appellant-Appellant-Appellant on 12.07.2021.

by the 1st Defendant-Respondent-Respondent-Respondent on 20.07.2021.

by the 2nd Defendant-Respondent-Respondent-Respondent on 22.07.2021.

Decided on: 15.10.2021

Mahinda Samayawardhena, J.

The plaintiffs filed this action against the two defendants seeking mainly a declaration of title to the land described in the schedule to the plaint. The 1st and 2nd defendants filed separate answers seeking dismissal of the plaintiffs' action. At the commencement of the trial, two admissions were recorded, followed by issue Nos. 1-4 raised by the plaintiff, 5-10 raised by the 1st defendant, and 11-17 raised by the 2nd defendant.

In terms of section 147 of the Civil Procedure Code, learned counsel for the defendants moved the District Court to try issue Nos. 5-7 raised on behalf of the 1st defendant as preliminary questions of law before evidence was recorded. The District Court after affording an opportunity to file written submissions, answered these three issues in favour of the defendants and dismissed the plaintiffs' action.

Being aggrieved by this order, the plaintiffs preferred an appeal to the Court of Appeal. The Court of Appeal by Judgment dated 08.06.2018 held that the District Court erred in law when it answered the said three issues in favour of the 1st defendant.

However, the Court of Appeal did not stop at that. It went one step further and *ex mero motu* decided issue No. 14 raised by the 2nd defendant as a preliminary question of law in favour of the defendants and dismissed the plaintiffs' action. This appeal by the plaintiffs is against this finding in the Judgment.

This Court granted leave to appeal predominantly on the question whether the Court of Appeal erred in law when it proceeded to decide issue No. 14 in the face of issue No. 11 raised by the 2nd defendant.

Issue No. 14 reads as follows:

> *Have the plaintiffs no legal right to institute and maintain this action in view of section 71(3) of the Finance Act, No. 16 of 1973 and section 22 of the Interpretation Ordinance, No. 18 of 1972?*

The position of the 2nd defendant is that the land in suit was acquired by the 2nd defendant in terms of section 71 of the Finance Act.

The Court of Appeal answered issue No. 14 in the negative on the premise that in view of the ouster clause contained in section 71(3) of the Finance Act, the District Court lacks jurisdiction to hear this action.

The pivotal argument of learned counsel for the plaintiffs is that in answering issue No. 14 in the negative, the Court of Appeal erroneously assumed that the parties were not at variance on the fact of acquisition of the land. Learned counsel draws the attention of Court to issue No. 11 by which the 2nd defendant himself has put this matter in issue. I am impressed by this argument.

Issue No. 11 reads as follows:

> *(a) Was the land described in the schedule to the plaint acquired by the 2nd defendant after conducting an inquiry on Application No. P.R. 1846 made by the father of the 1st defendant to the 2nd defendant under Finance Act 1963?*
> *(b) Was the said acquisition published in the Gazette dated 17.12.1982?*

This seems to me to be the reason why learned counsel for the 2nd defendant did not move the District Court to try issue No. 14 as a preliminary question of law.

In justification of the Judgment of the Court of Appeal, learned counsel for the 2nd defendant states in the written submission that by tendering a letter received by the 1st plaintiff marked X, the plaintiffs by paragraph 8 of the plaint "*have thereby admitted or must be deemed to have admitted that they were aware that the 2nd Respondent bank was claiming that it had acquired the said property*." The fact that the plaintiffs became aware upon receipt of the letter X that the 2nd defendant was claiming the property by acquisition cannot be construed to mean that the plaintiffs admit the fact of acquisition *per se*. If that was so, it could have been recorded as an admission at the trial. The fact that the 2nd defendant himself raised it as an issue goes to prove that the parties were at variance on this point.

An issue can be tried as a preliminary issue if and only if it can be disposed of without recording any evidence. A pure question of law can be tried as a preliminary issue. Nevertheless, when an issue of law is linked or dependent upon another with which the parties are at variance, it cannot be tried as a preliminary question of law.

I answer the questions of law in respect of which leave was granted in the affirmative.

I set aside the Judgment of the Court of Appeal insofar as it deals with issue No. 14 and direct the learned District Judge to proceed with the trial from where it was stopped. The costs of this appeal will be costs in the cause.

Judge of the Supreme Court

P. Padman Surasena, J.
I agree.

Judge of the Supreme Court

Achala Wengappuli, J.
I agree.

Judge of the Supreme Court

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

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

SC (Appeal) No. 43/2019

SC Special Leave to Appeal Application No. 107/2017

CA Writ Application No. 62/2014

Rajagopal Rajendran,
No. 84, Main Street,
Norwood.

As the Power of Attorney holder of the Licensee of Udaya Wine Stores, namely Liyanage Charitha,
No. 14, Gouravilla Colony,
Upcot.

PETITIONER

Vs

1. D.G.M.V. Hapuarachchi,
   Director General of Excise,
   Department of Excise,
   No. 34, W.A.D. Ramanayake Mawatha,
   Colombo 02.

2. Wasantha Dissanayake,
   Deputy Commissioner of Excise,
   No. 34, W.A.D. Ramanayake Mawatha,
   Colombo 02.

RESPONDENTS

AND NOW BETWEEN

Rajagopal Rajendran,
No. 84, Main Street,
Norwood.

As the Power of Attorney holder of the Licensee of Udaya Wine Stores, namely Liyanage Charitha,
No. 14, Gouravilla Colony,
Upcot.

PETITIONER-APPELLANT

VS

1. D.G.M.V. Hapuarachchi,
   Commissioner General of Excise,
   Department of Excise,
   No. 34, W.A.D. Ramanayake Mawatha,
   Colombo 02.

L.K.G. Gunawardane,

Commissioner General of Excise,

Department of Excise,

No. 34, W.A.D. Ramanayake Mawatha,

Colombo 02.

1A ADDED RESPONDENT-RESPONDENT

Mrs. K.H.A. Meegasmulla,

Commissioner General of Excise,

Department of Excise,

No. 34, W.A.D. Ramanayake Mawatha,

Colombo 02.

1B ADDED RESPONDENT-RESPONDENT

Presently at

Department of Excise,

No. 33, Kotte Road,

Rajagiriya.

Mrs. Ranasinghe Semasinghe,

Commissioner General of Excise,

Department of Excise,

No. 33, Kotte Road,

Rajagiriya.

1C ADDED RESPONDENT-RESPONDENT

2. Wasantha Dissanayake,
   Deputy Commissioner of Excise,
   No. 34, W.A.D. Ramanayake Mawatha,
   Colombo 02.

RESPONDENT- RESPONDENTS

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

COUNSEL : Sanjeeewa Jayawardena, PC with Lakmini Warusawithana instructed by Ashoka Niwnhella for the Petitioner-Appellant.
Vikum de Abrew, SDSG for the Respondents- Respondents.

ARGUED ON : 21st July 2020

WRITTEN SUBMISSIONS. : Respondent- Respondent on 7th August 2020.
Petitioner -Appellant on 27th March 2019.

DECIDED ON : 9th July 2021

S. THURAIRAJA, PC, J.

The Parties

The **Petitioner - Appellant** (Hereinafter referred to as the Appellant) in the case is Rajagopal Rajendran who claims to hold the Power of Attorney of Liyanage Charitha, the Licensee of Udaya Wine Stores. The **1st Respondent – Respondent** (Hereinafter referred to as the 1st Respondent) is D.G.M.V. Hapuarachchi who was the Commissioner

of Excise at the time, whereas **1A Added Respondent - Respondent**; Mrs. K.H.A. Meegasmulla, and **1B Added Respondent - Respondent**; Mrs. Ranasinghe Semasinghe had succeeded to the position of Commissioner of Excise and **1C Added Respondent - Respondent**; Mr. Ranasinghe Semasinghe, is the current Commissioner of Excise. The **2nd Respondent - Respondent** (Hereinafter referred to as the 2nd Respondent) Wasantha Dissanayake, is the Deputy Commissioner of Excise, who had issued the purported Technical Crime Report to the said wine stores.

This is an appeal filed by the Appellant against the Order in Case No. CA/WRIT/62/2014 delivered in the Court of Appeal on 31st March 2017 in regard to an application for the issuance of writs of Certiorari and Prohibition as per Article 140 of the Constitution. The case was dismissed by the Court of Appeal observing the lack of locus standi of the Appellant on the basis that he could not have been the Power of Attorney holder of the Licensee of Udaya Wine Stores.

On 8th May 2017 the Appellant has prayed for Special Leave to Appeal before this Court as per Article 128 (2) of the Constitution requesting the Court to set aside the Order of the Court of Appeal and to grant reliefs prayed for or to remit the case back directing the Court of Appeal to hear and determine the writ applications.

On 11th February 2019 Special Leave to Appeal was granted for the following question of law,

> *"For the purpose of instituting the writ application, was not the said Power-of Attorney P2 remain, in spite of the demise of Liyanage Udeni Silva and which remained unrevoked by Liyanage Charitha. " (sic)*

The Facts

It is pertinent to note the facts of the case before we proceed further. The facts according to the records submitted before this Court are as follows,

Liyanage Charitha and Liyanage Udenis Silva were co-licensees of three licenses; FL-3, FL-4 and B-3 issued for the retail sale of arrack, foreign liquor and bottled toddy (not to be consumed on the premises) under the Excise Ordinance No. 08 of 1912 as amended, for Udaya Wine Stores located in No.14, Gouravilla Colony, Upcot.

On 7th November 2006 the said co-licensees granted their power and authority to the Appellant to *inter alia* conduct business activities of Udaya Wine Stores, by the Power of Attorney bearing No. 301, marked 'P2'.

However, subsequent to the demise of Liyanage Udenis Silva in or around 2010, the FL-3, FL-4 and B-3 liquor licenses were issued by the authorities in the name of Liyanage Charitha, as the sole license holder in respect of the said premises. However, it is important to note that no new Power of Attorney was issued by Liyanage Charitha to any person including the Appellant.

On the 10th February 2014, the 2nd Respondent visited the said wine stores and purchased a bottle of extra arrack along with a bottle of beer and tendered a sum of Rs. 1100/=.

During the visit, the staff who were at the premises were Iyakannu Reegan who was the salesperson and Subramaniam Mohanraj who acted as the manager. They were found to be in violation of the provisions of the Excise Ordinance and Regulations made under the Excise Ordinance, as the officer detected a 180 ml bottle filled with liquor and 120 opened bottles of Arrack packed in 10 crates.

Accordingly, a statement was recorded from the salesperson as to the said violation and later another statement was recorded from the manager, following which on 18th February 2014 the Technical Crime Report [TCR] bearing No. 27/2014 [the order marked 'X2'] was issued. The said TCR imposed a composite fee of Rs. 2,644,000/= in lieu of cancellation of the liquor license to be paid on or before 5th March 2014, a delay in remittance would result in an additional 10% fee imposing a total fee of Rs.

2,908,400/=. However, the Appellant claimed that the actions of the Respondents were *ultra vires* in terms of Section 56 of the Excise Ordinance No.08 of 1912 as amended.

Accordingly, the Appellant instituted action as the Power of Attorney holder of Liyanage Charitha and filed a writ application bearing No. 62/2014 seeking a writ of Certiorari quashing the decision in the TCR marked 'X2' and a writ of Prohibition preventing the 2nd Respondent from acting on document marked 'X2'. The Respondents then challenged the locus standi of the Appellant for the above writ action.

As stipulated prior, as the Court of Appeal dismissed the application due to lack of locus standi of the Petitioner, and the said question of law on the validity of the unrevoked Power of Attorney marked 'P2' in the context of the death of one of its grantors has been brought before this Court.

Determination of the Question of Law

It is the contention of the Appellant that the power to institute the current action is derived from the impugned Power of Attorney bearing No. 301 signed by the then co-licensees of the said licenses; Liyanage Charitha and Liyanage Udenis Silva on 7th November 2006, despite the death of the said Liyanage Udenis Silva in 2010.

Section 2 of the Power of Attorney Ordinance No. 4 of 1902 as amended describes a Power of Attorney to include,

> *"... any written power or authority other than that given to an Attorney at Law or Law Agent, given by one person to another to perform any work, do any act, or carry on any trade or business and executed before two witnesses, or executed before or attested by a notary public or by a Justice of Peace, Registrar, Deputy Registrar or by any Judge or Magistrate....."*

Accordingly, by way of a Power of Attorney, the power and authority of the grantor attributed to the conduct specified will be conferred to the grantee giving

him/her the power and authority to act on behalf of the grantor within the bounds of the authority specified.

In considering the Power of Attorney before this court, the first operative clause reads,

> *"WHEREAS **We, are** carrying on the business for wine shop called and known as "Udaya Wine Stores" [hereinafter called as the said business] at No. 14, Gouravilla janapathaya, Upcot and **we** are duly issued with an FL 4 License by the Government Agent of Ambagamuwa [hereinafter called the said license]"* *(Emphasis Added)*

Further the purpose of the said Power of Attorney is stipulated as,

> *"AND WHEREAS **we are** unable to attend all matters concerning the **said business** and the said license personally.*
>
> *AND WHEREAS **We are** desirous of appointing some fit and proper person as our attorney to manage and transact all **our** business and affairs in respect of the **said business and the said license**."* *(Emphasis Added)*

In assessing the above provisions, it is apparent that the authority and power granted to the Appellant, is the authority and power of both Liyanage Udenis Silva and Liyanage Charitha arising from the said license obtained prior to 2014 in their capacity as co – licensees and co-owners of the business, prior to the death of Udenis Silva. In addition to the above purpose the joint power of the said co-licensees were given to the Appellant for the following six additional purposes,

1. *To appear before the Commissioner of Excise on all matter connected to the said business and the said license and make necessary representation on our behalf*
2. *To appear before the Commissioner of Labour, Labour tribunal or other any other forum in respect of all industrial disputes with the employees of the said*

business and in matters connected with the payment of EPF ETF payments statutory or otherwise

3. *To appear before the Commissioner of Inland Revenue and represent all matters connected to the said business, make payment business turnover tax, income Tax and other payments, apply for income tax clearance and attend all necessary formalities with regard to the renewal of the said license annually.*

4. *To make representations on my behalf to all statutory provincial and local authorities in respect of the said business and the said license.*

5. *To enter into any compromise of disputes differences concerning the said business and the said license before any of the aforementioned functionaries and authorities and to execute all necessary writings in our name and on behalf to give effect to same.*

6. *To appear sue or answer and to receive all process in any action appeal or other judicial proceedings whatsoever in any court concerning the said business and the said license and generally to act in all such proceedings in any way in which we might if present be permitted or called on to act. "*

In light of the above, it is evident that specific powers were granted to the Appellant by the grantors in their capacity as co-licensees.

The perspective of the Supreme Court of India in this regard would be of assistance to understand the above. Abhay Manohar Sapre, J in **Tmt. Kasthuri Radhakrishnan & Ors V. M.Chinniyan & Anr 2016 SCW 609** observed the following,

" It is well settled therein that an agent acting under a power of attorney always acts, as a general rule, in the name of his principal. ***Any document executed or thing done by an agent on the strength of power of attorney is as effective as if executed or done in the name of principal, i.e., by the principal himself****. An agent, therefore, always acts on behalf of*

the principal and exercises only those powers, which are given to him in the power of attorney by the principal."

(Emphasis Added)

Accordingly, as per the Power of Attorney placed before this court, the Appellant derives his powers from both Liyanage Udenis Silva and Liyanage Charitha hence his actions shall be considered as actions authorized and done by both grantors. Actions of the Appellant prior to the death of Liyanage Udenis Silva could have been said to be authorized and valid under the Power of Attorney bearing No. 301. However, actions following the death would not be covered under the above Power of Attorney as the joint power and authority conferred to the Appellant would come to an end with the death of Liyanage Udenis Silva.

In the instant situation, the business is operating under Liyanage Charitha, who is the sole license holder in respect to the Premises. Accordingly, in order to transfer the powers and authority of the sole licensee derived from the license, a new Power of Attorney would have to be executed. Therefore, the Power of Attorney bearing No.301, will not have effect in regard to the current dispute.

In further addressing the termination of a Power of Attorney, the concept that the death of the principal or the agent terminates an agency is a well-established concept in common law. In **Garvin v Abeywardene (1923) 24 NLR 382** where a power was conferred among two agents, Bertram C.J observed,

"Where a power is conferred among two agents, it is presumed to be conferred upon them jointly, and an act by one purporting to be an execution of that power is not a good execution. If the two agents are partners, and one partner purports to exercise title power singly as the survivor of the two, his act is none the less invalid. ***At the death of one of the two agents, it terminates the authority of the other.*** *"* *(Emphasis Added)*

Similarly, when two principals grant a certain power to an agent, it is the joint power of the two that is conferred. Especially when the grantors share the source from which the power and authority is derived. In the instant case, when the power and authority was conferred to the Appellant in 2006, the grantors of the Power of Attorney were Liyanage Udenis Silva and Liyanage Charitha who got their power from the jointly owned FL 4 license. Therefore, at the death of Liyanage Udenis Silva the joint power and authority conferred would cease to exist, terminating the Power of Attorney granted.

The Appellant in the written submission filed on his behalf refers to a statement made by the Madras High Court in **Ponnusami Pillai V. Chidambaram Chettiar 1918 Mad 279**, which also states,

> *"We have in each case to determine the true intention of the parties to the contract, from the terms thereof and from the surrounding circumstances"*

Accordingly, it is appropriate that we assess the terms of the Power of Attorney to consider the intention of the said parties. The Power of Attorney reads,

> *"AND WE do hear by direct all acts which shall be had made or done by our said Attorney* ***before he or they shall have received notice of death of any one of us*** *or the revocation of authority contained … in these presents shall be as binding and valid to all intents and purposes as if same had taken place previous to our death or before such revocation any rule of law or equity to the contrary notwithstanding"*
>
> *(Emphasis Added)*

The position that the death of one grantor would terminate a Power of Attorney granted is further confirmed by the aforementioned clause of the impugned Power of Attorney. As per the clause, it is evident that the power of the principals conferred to the agent is joint (as opposed to joint and several principals) as only acts conducted during the lifetime of both grantors have been authorized. Accordingly, power and

authority granted by the grantors would come to an end at the death of one of the grantors.

For the completeness of this discussion, it is pertinent to observe the Non – transferability of liquor licenses, in particular the general prohibition against managing privileges derived by licenses by way of Powers of Attorney.

Section 12 of the Excise Notification No.666 of 31st December 1979, issued under the Excise Ordinance reads,

> *"(a) Non-Transferability of license - manager to be approved. – No privilege of manufacture, supply or sale or any interest therein shall be sold, transferred or sub rented without the previous permission of the government agent or the excise commissioner:* ***nor shall any agent or attorney be appointed for the management of any such privilege*** *or for signing the counterpart agreement of any Excise license* ***without the previous approval of the Government Agent or the Excise Commissioner****. Such agent or attorney shall, in every case, be a citizen of Sri Lanka and such approval shall be given only in exceptional circumstances at the discretion of the government Agent or the Excise Commissioner*
>
> *(b) Provided however that the preceding condition shall not apply in any case where the licensee has obtained the prior written permission of the secretary to the Ministry of Finance and Planning for the purpose."*
>
> *(Emphasis Added)*

The provision expressly prohibits the appointment of an agent for the management of the privileges of manufacturing, supplying, selling or any interest derived from the licenses issued to the licensee. However, under exceptional circumstances if a person is to be appointed as a Power of Attorney to manage such privileges, special provisions have been introduced under the above Section.

Accordingly, such person could be appointed provided he/she is a Sri Lankan citizen and prior approval has been obtained from the Government Agent or Commissioner of Excise regarding such management.

In the instant case, the co-licensees at the time have given the power to manage and transact all business and affairs relating to the license to the Appellant by the Power of Attorney dated 7th November 2006.The said provision of the Power of Attorney reads,

> *"… as our attorney to manage and transact all our business and affairs in respect of the said business and the said license."*

However, the validity of such transfer is questionable, as there was no prior approval obtained.

The learned counsel for the Appellant attempted to show an impression of a rubber stamp belonging to the office of the Divisional Secretary on the Power of Attorney marked 'P2X' and submitted to Court that the same amounts to an approval of the Divisional Secretary. However, considering that such approval is given only in exceptional circumstances it is highly unlikely that a mere rubber seal could amount to an approval. Further, Section 12 (b) reproduced above, provides "*prior written permission of the secretary to the Ministry of Finance and Planning"* as an exception to Section 12 (a). Accordingly, considering the above, it could be implied that the approval of a Government Agent or the Excise Commissioner ought to be given in writing rather than by way of a mere rubber stamp on a Power of Attorney.

Therefore, it is observed that, the licensees are in violation of the said provision. Nevertheless, Udaya wine stores cannot be managed by an agent appointed by way of a Power of Attorney as the court is not satisfied that prior approval of a Government agent or the excise commissioner was obtained as required by Section 12 of the Excise Notification No.666 of 31st December 1979.

Reverting to the question of law before this court as to the validity of the Power of Attorney, I will briefly recall the decision of the Court of Appeal in this regard.

The learned Judge of the Court of Appeal has briefly observed the question on the ability of the Appellant to make a claim on behalf of Liyanage Charitha among other claims addressed. Accordingly, as per the Order of the Court of Appeal the Appellant has failed to satisfy that he is the Power of Attorney holder of the Sole licensee as of 2014. Further, it has been highlighted that the fact that the Appellant was appointed the Power of Attorney holder for both Liyanage Udenis and Liyanage Charitha does not have a bearing on the case as the same will come to an end at the death of one grantor.

Decision

As discussed extensively, I agree with the Order of the Court of Appeal in observing that the Appellant is not the Power of Attorney holder of the Sole Licensee of Udaya wine stores and thus does not have the locus standi to proceed with the writ application.

The question of law that required the attention of this Court is as follows,

> *"For the purpose of instituting the writ application, was not the said Power-of Attorney P2 remain, in spite of the demise of Liyanage Udeni Silva and which remained unrevoked by Liyanage Charitha. " (sic)*

The Power of Attorney 'P2' does not remain in force, in spite of the demise of Liyanage Udenis Silva, even though it remained unrevoked by Liyanage Charitha. This is given that the death of Liyanage Udenis Silva would automatically terminate the Power of Attorney issued by the two grantors, jointly in their capacity as co – licensees of the premises. Thus, even though it was not expressly revoked, the Power of Attorney would cease to exist at the death of one of the grantors. Accordingly, I answer the question of law raised in the negative.

Considering all, I hold that the Power of Attorney bearing No. 301, dated 7th of November 2006 has ceased to exist upon the death of Liyanage Udenis Silva, hence the Appellant; Rajagopal Rajendran cannot be considered as the Power of Attorney holder of the sole licensee; Liyanage Charitha. Therefore, the Appellant does not have the locus standi to institute legal action on behalf of the said licensee.

Appeal dismissed.

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 for special leave in terms of Article 128 of the Constitution.

SC Appeal No. 45/2014
SC (Spl) LA 08/2014
HC Appeal No: HCLT 100/11
LT Application No. 01/242/2002

Gardihewa Kodikara Mallika Ratnapremi Fonseka
No. 380B, Preeethipura, Kalalgoda, Pannipitya

Applicant

Vs.

Sri Lanka Insurance Corporation Limited,
No. 21, Vauxhall Street, Colombo 02.

Respondent

AND BETWEEN

Sri Lanka Insurance Corporation Limited,
No. 21, Vauxhall Street, Colombo 02.

Respondent-Appellant

Vs.

Gardihewa Kodikara Mallika Ratnapremi Fonseka
No. 380B, Preeethipura, Kalalgoda, Pannipitya

Applicant-Respondent

AND NOW BETWEEN

Sri Lanka Insurance Corporation Limited,
No. 21, Vauxhall Street, Colombo 02.

Respondent-Appellant-Appellant

Vs.

Gardihewa Kodikara Mallika
Ratnapremi Fonseka
No. 380B, Preeethipura, Kalalgoda,
Pannipitya
Applicant-Respondent-Respondent

Before: Buwaneka Aluwihare PC, J.
P. Padman Surasena J.
E. A. G. R. Amarasekera J.

Counsel: Sagara Kariyawasam instructed by Ms. Manjula Jayatilaka for the Respondent-Appellant-Appellant.

J. C. Weliamuna PC with Pulasthi Hewamanna for the Applicant-Respondent-Respondent.

Argued on: 17. 07. 2019

Delivered on: 03. 11. 2021

Judgement

Aluwihare PC J.

The Applicant-Respondent-Respondent (hereinafter referred to as the 'Applicant') sought an order for reinstatement or compensation in lieu, from the Labour Tribunal, on the basis that her employment was unjustly terminated by the Respondent-Appellant-Appellant (hereinafter the 'Appellant Corporation').

At the conclusion of the inquiry before the Labour Tribunal, the Learned President of the Labour Tribunal had come to a finding that the termination of the Applicant's services by the Appellant-Corporation was in fact unjust. The Learned President,

however, instead of ordering reinstatement, ordered the Appellant Corporation to pay the Applicant a sum of Rs. 854,460 /- as compensation. The question of reinstatement did not arise as the Applicant had passed her retirement age when the award of the Labour Tribunal was pronounced.

The Learned Judge of the High Court, sitting in appeal, affirmed the order made by the Labour Tribunal and dismissed the appeal of the Appellant Corporation.

This court granted Special Leave to appeal on the questions of law referred to in sub-paragraphs (i), (ii) and (iii) of paragraph 12 of the petition of the Appellant which are as follows;

(i) Has the Honourable Judge of the High Court of the Western Province erred in law in not considering the entirety of the evidence against the Respondent [the Applicant]

(ii) Has the Honourable Judge of the Provincial High Court of the Western Province erred in law in holding that the Respondent [Applicant] cannot be found guilty of charge 04 since the Respondent has been exonerated from the charge number 03 at the domestic inquiry.

(iii) Has the Honourable Judge of the Provincial High Court of the Western Province erred in law in failing to consider the applicability of the judgement of ***Ceylon Oil Workers' Union v. Ceylon Petroleum Corporation*** *(1978-79) 2 SLR 72 to the present case.*

It is to be noted that the questions of law referred to in (i) and (ii) above, relate to the court misdirecting itself on the factual findings. As such, it would be incumbent on this court to consider the facts of this case in considering the said questions of law.

The Factual Matrix

The Applicant was holding the position of Manager, Education and Social Security Department of the Appellant Corporation at the time her services were terminated.

Under the said department, in collaboration with National Gem and Jewellery Authority [hereinafter the NG & JA] an insurance scheme had been launched for gem miners. In the course of the inquiry conducted by the Appellant Corporation, it had come to light that several insurance premiums paid by the NG & JA in favour of the Appellant Corporation, had not got credited. The inquiries revealed that whilst certain insurance premiums that ought to have got credited to the Appellant Corporation and some other payments made upon insurance claims by the Appellant Corporation, to several insured, had got credited to the bank account of one Jayasena Udagedara, another employee of the Appellant Corporation. It had also transpired in the course of the investigation into the alleged fraud that cheques of the Appellant Corporation had been drawn without the 'account payee' crossing. In certain other instances, the 'account payee' crossing on certain cheques had been cancelled. It is alleged that this cancellation of the 'crossings' was done, in order to facilitate the crediting of those cheques to the account of said Jayasena Udagedara.

The position taken up by the Appellant Corporation was, that the removal of the crossings on certain cheques had been done at the request of the Applicant. The Appellant Corporation relied heavily on the evidence of witness Nimal Wijesooriya to substantiate these allegations. Thus, to determine the issues raised in this appeal, it is imperative that this court considers the testimony of the said witness.

It must be stated at the outset, that the Learned President of the Labour Tribunal had not been satisfied with the evidence led on behalf of the Appellant; and the Learned President had come to a finding that the charges 1, 4, 6, 7 and 8 on which the Applicant was found guilty at the domestic inquiry, had not been established by the Appellant on a balance of probability. Furthermore, from the tenor of the award, it appears that the Learned President of the Labour Tribunal had accepted the explanation offered by the Applicant with regard to the said charges.

It is well-settled law that findings of fact by a Labour Tribunal should not be disturbed lightly, unless the court is convinced that the Labour Tribunal had misdirected itself

on material matters which had resulted in substantial prejudice, in this case, to the employer.

The termination of the Applicant's employment was based on the fact that several of the charges preferred against her at the domestic inquiry had been proved and consequently she had been s found guilty. The Learned Labour Tribunal President, however, opined that her guilt had not been satisfactorily established.

As the first two questions of law [(i) and (ii) referred to above] are based on the alleged misdirection on the part of the President of the Labour Tribunal, it would be necessary to consider the evidence led at the inquiry before the Labour Tribunal to resolve the issues.

The case of the Appellant Corporation, pivots on the evidence of the accountant-Internal Audit Division, Nimal Wijesooriya.

I shall now consider the evidence of Nimal Wijesooriya, with a view to ascertaining as to whether the assertion of the Appellant-Corporation can be justified. Witness Wijesooriya at the commencement of his cross-examination had summed up the alleged fraud committed by the Applicant as follows;

> "*Facilitating a sum of Rs. 175,000/- to be credited to the personal account of Jayasena Udagedara and facilitating the cheques collected as premium to the value of Rs. 279,056.25/- to be credited to the account of Jayasena Udagedara, and attempting to commit a fraud thereafter; however, the fraud could not be accomplished."* [page 264 of the Labour Tribunal brief]

The statement of the witness in verbatim is reproduced below.

> "රු. 1 75,600/- ක මුදලක් ජයසේන උඩගෙදර නමැති අයගේ පුද්ගලික **ගිණුමට බැර කිරීමට ඉඩකඩ සැලැස්වීම.** ඒ අතරට වාරික මුදල් වශයෙන් ලැබුණු රු. 2 79,056.25 ක මුදලක් අදාළ චෙක් පත ජයසේන උඩගෙදර යන අයට යන්න සලස්වා ඔහුගෙන් පසුව වංචා කිරීමට උත්සාහ කිරිම **නමුත් වංචා කිරීමට ලැබුණේ නැහැ.**"

At the conclusion of his investigation, what the witness appears to be saying, is, that the Applicant could not commit a fraud, but made an attempt to do so by facilitating the depositing of several cheques to Jayasena Udagedara's account.

The witness insinuates that, there had been some degree of complicity on the part of the Applicant in the fraud committed by Udagedara.

Both to ascertain as to whether there was any nexus between Udagedara and the Applicant and, whether there had had any complicity on the part of the applicant, in the fraudulent acts alleged to have been committed by Udagedara as well, it is necessary to consider the material elicited, in the course of the investigation conducted by witness Wijesooriya.

According to the evidence, the alleged fraud had come to light after the Applicant was transferred out from the Social Insurance department on 1st December 1998. No sooner the management had come to know of the incident, Jayasena Udagedara had stopped reporting for work, and he had vanished without trace. According to the evidence, even the police investigation could not trace him and he had been treated as having vacated his post.

The sum total of Wijesooriya's evidence is that; insurance premiums collected by NG & JA from gem miners who had opted to obtain insurance cover, which in turn had been handed over to Udagedara, along with some insurance payments made to purported claimants, had been credited to Udagedara's personal account.

The complicity on the part of the Applicant, as alleged by the Appellant Corporation, was that, it was she who caused the crossings on the cheques to be cancelled and thereby enabled Udagedara to have the cheques credited to his account, which, would not have been possible otherwise.

The central issue is whether it had been established through evidence, that both the Applicant and Udagedara connived to commit the alleged fraudulent transactions.

As far as Udagedara is concerned, there is no doubt of his involvement as the evidence amply demonstrates that it was he who handled the cheques and which had been credited to his bank account.

Udagedara's involvement can also be inferred by his conduct, in that he suddenly vacated his post without any notice with the Appellant Corporation and thereafter could not be traced. As opposed to that, there is no evidence whatsoever to say that the Applicant benefitted in any way from the fraudulent transactions. This may have been the reason why witness Wijesooriya stated that she "*attempted to commit a fraud, but it could not be accomplished.*" Thereby the investigating officer himself had admitted under oath that the Applicant had not committed any fraud. What remains to be decided is whether there was an attempt on her part to commit the alleged acts or whether there had been some complicity on her part in those transactions.

This issue cannot be resolved by considering the evidence, that the Applicant had the crossing on the cheques cancelled, in isolation. It must necessarily be considered with other relevant factors as well, in order to appreciate the larger picture relating to the impugned transaction.

In this regard, the Applicant's testimony is significant. According to her, she was entrusted with a fair share of responsibilities as Manager of the, Education and Social Security Department. The insurance scheme for gem miners had been newly introduced and she had been directed by the then Chairman Jagath Wickramasinghe to proceed to the NG & JA with Udagedara to finalize matters relating to this newly launched insurance scheme. According to her Udagedara was a *confidant* of the chairman and was tasked to run errands for him. The Applicant, explaining the procedure with regard to payments, had stated that the preparation of payment vouchers was handled by several subject clerks and checked by an executive officer [Sandamali Navaratne] who in turn had to forward the vouchers to Padma Perera [for approval [Witness Wijesooriya has confirmed this procedure under cross examination at page 326 of the LT brief]. It was the position of the Applicant that;

these approved claims are sent to her only in instances where the claimants request for cancellation of the crossings on the cheques, because they did not have bank accounts to credit the payments[cheques]. She had also stated that her interactions, as far as her work was concerned, was with the subordinate staff under her and not with Udagedara. She had added that Udagedara was the choice of the Chairman Jagath Wickramasinghe to coordinate matters with the NG & JA and that he was not entrusted with any work in her unit. The Applicant had claimed that Udagedara was allowed to work in the unit, even after she was transferred out to another section.

The cancellations of the crossings on the cheques in question had been done, not by the Applicant but by the accountant, based, however, on the requests made by the Applicant. In this regard the learned counsel for the Appellant Corporation drew the attention of this court to the evidence of witness Wijesooriya reflected on pages 167 to 175, 216 and 227.The fact that the Accounts Division acceded to the request of the Applicant [to cancel the crossings] demonstrates that the cancellation of the crossings was not something unusual but had been routinely done to oblige the clients of the Corporation. On the other hand, if the Applicant had believed that the representations made to her, to have the crossings on the cheques cancelled were genuine, she cannot be blamed for acting on those representations. Although members of the staff under the Applicant were designated to attend to specific tasks as explained earlier, steps relating to the processing of insurance claims appear to have been interlinked. Each member of the staff was required to work, placing reliance and trust on each other in processing insurance claims or carrying out their tasks. The conduct of the Applicant, hence, has to be viewed in that light. It needs to be emphasized that apart from the requests made by the Applicant to have the crossings on the cheques cancelled, there is no evidence whatsoever to say that she had done anything irregular in relation to the impugned transaction nor has it been established that she had any link with Udagedara as far as the fraudulent transactions were concerned.

In the circumstances, one cannot fault both the learned President of the Labour Tribunal or the learned High Court Judge in reaching the conclusion that the

Appellant Company had failed to prove the charges against the Applicant. As such I hold that neither the learned President of the Labour Tribunal nor the learned High Court Judge had erred either in law or in fact. Accordingly, I answer the questions of law (i) and (ii) referred to above, on which leave was granted, in the negative.

The learned counsel for the Appellant also argued that learned Judge of the High Court erred in law by his failure to apply the principles laid down in the case of **Ceylon Oil Workers' Union v. Ceylon Petroleum Corporation** (1978-79) 2 SLR 72 [The 3rd question of law on which leave was granted].

In the case referred to, it was held that; *"Where the misconduct of the workman lay in the commission of a fraud on the employer, the misconduct is of so serious a nature, that it strikes at the very foundation of the contract of service and warrants summary dismissal. The workman had been placed in a position of trust and confidence by the employer in the expectation that he would discharge his duties honestly and conscientiously, but had shown by his conduct that, he can no longer command the confidence of his employer. The continuation in service of such an employee would prejudice the good name, reputation and interests of the employer."*

No doubt the facts of this case clearly demonstrate that a fraud had been perpetrated on the Appellant Corporation. The above pronouncement of their Lordships would be applicable, as far as employee Udagedara was concerned. I am, however, of the view that it would not be applicable to the Applicant for the reason that the Appellant Corporation had failed to establish any *misconduct* on her part.

Wijayatilake J. in **The Ceylon University Clerical and Technical Association v. The University of Ceylon, Peradeniya** (1970) 72 NLR 84 held that where a Labour Tribunal was tasked with deciding whether the employee was guilty of a criminal act involving moral turpitude such as the misappropriation of funds the standard of proof adopted should be beyond reasonable doubt as in a criminal case. As there is no evidence as to the complicity of the Applicant in the fraud committed by Udagedara, it is only fair that the Applicant be given the benefit of that finding, for as observed by Wijayatilake J. "*A dismissal of this nature would amount to a condemnation for life*

and to do so when there is a reasonable doubt would be, in my opinion, neither just nor equitable." (at page 90).

As such, I answer the third question of law on which leave was granted also in the negative.

Accordingly, the appeal is dismissed subject to costs.

Appeal dismissed

JUDGE OF THE SUPREME COURT

PREETHI PADMAN SURASENA 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 to the Supreme Court under and in terms of section 11A(9) of the Tax Appeals Commission Act, No. 23 of 2011, as amended, read with the Constitution of the Democratic Socialist Republic of Sri Lanka.

Seylan Bank PLC,
No. 90, Galle Road,
Colombo 03.

Appellant

SC Appeal No. 46/2016
CA Case No. CA (tax) 23/2013

Vs.

The Commissioner General of Inland Revenue,
Department of Inland Revenue,
Sir Chittampalam A. Gardiner Mawatha,
Colombo 2.

Respondent

AND NOW BETWEEN

Seylan Bank PLC,
No. 90, Galle Road,
Colombo 03.

Appellant-Appellant

Vs.

The Commissioner General of Inland Revenue,
Department of Inland Revenue,
Sir Chittampalam A. Gardiner Mawatha,
Colombo 2.

Respondent-Respondent

Before	:	Priyantha Jayawardena PC, J Yasantha Kodagoda PC, J K. K. Wickramasinghe, J
Counsel	:	F. N. Goonewardena for the appellant-appellant Priyantha Nawana PC, Additional Solicitor-General, with I. Randeny, State Counsel, for the respondent-respondent
Argued on	:	10th February, 2021
Decided on	:	16th December, 2021

Priyantha Jayawardena PC, J

This is an appeal from a judgment of the Court of Appeal which affirmed the determination of the Tax Appeals Commission, established under the Tax Appeals Commission Act, No. 23 of 2011, as amended (hereinafter referred to as "Tax Appeals Commission").

Facts of the case

The appellant-appellant (hereinafter referred to as "appellant") is a licensed commercial bank under and in terms of the Banking Act, No. 30 of 1988, as amended. Further, the respondent-respondent (hereinafter referred to as "respondent") is the Commissioner-General of Inland Revenue.

In terms of section 106(1) of the Inland Revenue Act, No. 10 of 2006 (hereinafter referred to as "principal Act"), taxpayers were required to furnish a return of their income for any year of assessment, commencing on the 1st day of April of a given year and ending on the 31st day of March in the immediately succeeding year, on or before the 30th day of September immediately succeeding the end of that year of assessment.

Therefore, the appellant had furnished a return of its income for the year of assessment, commencing on the 1st of April, 2007 and ending on the 31st of March, 2008 (hereinafter referred to as the "year of assessment 2007/2008"), on the 30th of September, 2008, within the time period stipulated in section 106(1) of the principal Act.

Hence, the assessor of the Department of Inland Revenue (hereinafter referred to as "assessor") was required to either accept the said return of income, or if he does not accept the said return, estimate the amount of the assessable income of such taxpayer and make an assessment accordingly, under section 163(3) of the said principal Act.

Furthermore, where a taxpayer had furnished a return of his income for a given year of assessment within the time period stipulated in section 106(1) of the principal Act, the assessor was not permitted to make an assessment of income tax for such year of assessment (if any) after the expiry of eighteen months from the end of that year of assessment, in terms of section 163(5)(a) of the principal Act.

Therefore, since the appellant had furnished a return of its income for the year of assessment 2007/2008 within the time period stipulated in section 106(1) of the **principal Act**, the assessor was required to make an assessment of income tax for such year of assessment (if any) on or before the 30th of September, 2009, in terms of section 163(5)(a) of the **principal Act**.

However, while the said time period given to an assessor to make an assessment of income tax for the year of assessment 2007/2008 (if any) under the principal Act was still in operation, Inland Revenue (Amendment) Act, No. 19 of 2009 (hereinafter referred to as "amending Act") was enacted by Parliament and certified by the Speaker on the 31st of March, 2009.

By the said amending Act, *inter alia*, sections 106(1) and 163(5)(a) of the principal Act were amended to extend both the time periods given to a taxpayer to furnish a return of his income for a given year of assessment, and the assessor to make an assessment of income tax for such year of assessment (if any), by two months and six months respectively.

Thus, the assessor had made an assessment of income tax payable by the appellant for the year of assessment 2007/2008 on the 26th of March, 2010, on the basis that the amending Act extended the time period given to an the assessor to make an assessment of income tax for such year of assessment (if any) by six months, *i.e.*, from the 30th of September, 2009 to 31st of March, 2010.

Being aggrieved by the aforesaid assessment issued by the assessor on the 26th of March, 2010, the appellant had appealed to the respondent under section 165 of the Principal Act.

In the said appeal, the appellant had stated, *inter-alia*, that there was no express provision in the amending Act to give retrospective effect to the amendments made to sections 106(1) and 163(5) of the principal Act. Therefore, the said assessment of income tax issued by the assessor on the 26th of March, 2010 was time-barred under and in terms of section 163(5) of the principal Act.

Having considered the said appeal, the respondent had determined, *inter alia*, that the said assessment was made on the 9th of March, 2010 and served on the appellant on the 26th of March, 2010 in terms of sections 163 and 164 of the said Act, as amended. Accordingly, the said appeal was dismissed.

Being aggrieved by the said determination of the respondent, the appellant had appealed to the Tax Appeals Commission under the said Tax Appeals Commission Act.

Having heard the parties, the Tax Appeals Commission determined, *inter alia*, that the aforesaid assessment made by the assessor in respect of the year of assessment 2007/2008 was not time barred under and in terms of the amendment made to section 163(5) of the principal Act, as the said amendment altered procedural law and, therefore, does not violate the rule against retrospective legislation.

Further, the Tax Appeals Commission determined that the said amendment was enacted during the time period given to the assessor to make an assessment for the year of assessment 2007/2008 under section 163(5) of the principal Act. Therefore, since the appellant was aware of the said amendment which extended the time period given to the assessor to make an assessment, before the expiry of the time period stipulated by the principal Act, no prejudice had been caused to the appellant. Accordingly, the said appeal was dismissed.

Being aggrieved by the said determination of the Tax Appeals Commission, the appellant had made an application under section 170 of the said Act requesting the Tax Appeals Commission to

state a case for the opinion of the Court of Appeal. Accordingly, a case was stated for the opinion of the Court of Appeal on the following questions of law;

"1) Was the assessment for the year 2007/2008 dated 26th March, 2010 issued against the appellant time barred in terms of section 163(5)(a) of the Inland Revenue Act, as applicable to such year of assessment?

2) Does the appellant carry on more than one trade, business, profession or vocation in terms of section 106(11) of the Inland Revenue Act?

3) Does the banking business which is carried on by the appellant result in the appellant having more than one source of income as contemplated by the Inland Revenue Act?

4) Was the interest incurred by the appellant to the value of Rs. 292,849,172/= deductible in determining the profits from trade of the appellant for the year of assessment 2007/2008 in terms of section 25 of the Inland Revenue Act?

5) In the alternative, was the aforesaid interest incurred by the appellant to the value of Rs. 292,849,172/= deductible in determining the assessable income of the appellant for the year of assessment 2007/2008 in terms of section 32(5)(a) of the Inland Revenue Act?

6) Notwithstanding the above, was the basis used by the Commissioner General of Inland Revenue in arriving at the interest expenses attributable to the investments made by the appellant in Sri Lanka Development Bonds erroneous in law?"

At the hearing before the Court of Appeal, the court had decided to hear the parties on the first question of law stated above.

Having heard the parties on the above said question of law, the Court of Appeal held, *inter alia*, that the amendment of section 163(5)(a) of the principal Act operates prospectively from the 1st of April, 2009 in terms of section 27(6) of the amending Act. Thus, the deadline for the assessor to make an assessment of income tax for the year of assessment 2007/2008 was extended with prospective effect from the 30th of September, 2009 to the 31st of March, 2010, and the aforesaid assessment dated 26th March, 2010 was not time barred under and in terms of section 163(5)(a) of the principal Act, as amended. Accordingly, the said appeal was dismissed.

Being aggrieved by the aforesaid judgment of the Court of Appeal, the appellant filed an application for special leave to appeal to this court. Having considered the materials placed before this court, special leave to appeal was granted on the following questions of law;

"a) Did the learned Judges of the Court of Appeal fail to make a critical analysis of the submissions of the petitioner, and as such, is the said judgment vitiated by the failure to take into account relevant statutory provisions and circumstances?

b) Did the learned Judges of the Court of Appeal fail to appreciate the relevant provisions of the Inland Revenue Act, No. 10 of 2006, as amended, in particular those relating to the filing of returns and the making of assessments?

c) Did the learned Judges of the Court of Appeal misdirect itself on the law in relation to applicability of the Inland Revenue (Amendment) Act, No. 19 of 2009 to the year of assessment 2007/2008?

d) Did the learned Judges of the Court of Appeal err in holding that the time bar provisions in the Inland Revenue Act, No. 10 of 2006, as amended, were merely procedural and/or that they did not affect rights which had already been acquired by the petitioner with respect to the finality of its tax liability for the year of assessment 2007/2008?"

During the course of submissions, the parties agreed to re-frame the questions of law upon which this court had granted leave to appeal. Accordingly, the question of law is now framed as follows;

"Was the assessment for the year 2007/2008 dated 26.03.2010 issued by the Assessor of Inland Revenue against the Appellant in respect of the return filed on 30.09.2008, time barred in terms of section 163(5)(a) of the Inland Revenue Act as amended by Act No. 19 of 2009?"

Submissions of the appellant

At the hearing of the appeal, learned counsel for the appellant submitted that the amending Act was certified by the Speaker on the 31st of March, 2009. Thus, the Bill would generally become law from the said date, by operation of Article 80(1) of the Constitution.

However, he submitted that section 27 of the amending Act had specifically provided the operative dates of the amendments contained therein. Accordingly, the amendments referred to in section

27(1) to (5) of the amending Act would operate with retrospective effect from the specified dates. However, the amendments that were not referred to in section 27(1) to (5) of the amending Act would operate prospectively from the 1st of April, 2009.

In this regard, it was further submitted that the amendments made to sections 106(1) and 163(5)(a) of the principal Act were not referred to in sections 27(1) to (5) of the amending Act. Thus, the said amendments should operate prospectively from the 1st of April, 2009, in terms of section 27(6) of the amending Act.

Moreover, learned counsel submitted that the amendments made to section 163(5)(a) of the principal Act extended both the time period for the taxpayer to furnish a return of his income, and the time period for the assessor to make any assessment of income tax payable, by two and six months respectively. However, the appellant could not benefit from the extended time period given to the taxpayer to furnish a return of income, as the amending Act was only certified on the 31st of March, 2009, after the said time period extended to file tax returns had lapsed.

Therefore, it was submitted that the amendments made to section 163(5) of the principal Act cannot be interpreted to give the assessor the benefit of an extended deadline, when it was not possible for the appellant to benefit from the extended deadline provided under the said section.

Submissions of the respondent

In response, learned Additional Solicitor-General who appeared for the respondent submitted that time periods set by statute are procedural laws and not substantive laws. Further, he submitted that amendments to procedural laws apply with retrospective effect.

In support of his submission, learned Additional Solicitor-General cited *N. S. Bindra's Interpretation of Statutes*, 12th edition at 228, which cited *Gardner v Lucas* (1873) 3 AC 582 at 603 where the court had held as follows;

> *"…it is quite clear that the subject-matter of an Act might be such that, though there were not any express words to show it, it might be retrospective. For instance, I think it is perfectly settled that if the legislature intended to frame a new procedure, that instead of proceedings in this form or that, you should proceed in another and a different way; clearly these bygone transactions are to be sued for and enforced according to the new form of procedure. Alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not*

> *be... where the effect would be to alter a transaction already entered into, where it would be to make that valid which was previously invalid- to make an instrument which had no effect at all, and from which the patty was at liberty to depart as long as he pleased, binding- I think the prima facie construction of the Act is that it is not to be retrospective, and that it would require strong reasons to show that is not the case."*
>
> [Emphasis added]

Further, he cited *Blyth v Blyth* (1966) 1 All ER 524 at 535 where the court held;

> *"[...] The rule that an Act of Parliament is not to be given retrospective effect only applies to statutes which affect vested rights. It does not apply to statutes which only alter the form of procedure, or the admissibility of evidence, or the effect which the courts give to evidence."*

Moreover, learned Additional Solicitor-General submitted that it is not necessary for the Legislature to make an express provision in the Act to state that procedural laws have a retrospective effect, due to the legal presumption that procedural laws operate with retrospective effect.

Thus, by section 27(1) to (5) of the amending Act, the Legislature had expressly given retrospective effect to only the amendments made to the substantive laws in the principal Act.

Was the assessment of income tax issued out of time?

The issue that needs to be considered in the instant appeal is whether the assessment of income tax payable by the appellant for the year of assessment 2007/2008 dated 26th of March, 2010 was time barred under and in terms of section 163(5)(a) of the said Act, as amended.

Section 163(5)(a) of the said Act, as amended-

(i) refers to the time period given to a taxpayer to furnish a return of his income under section 106(1) of the said Act; and

(ii) sets out the time period given to an assessor to make an assessment of income tax, if any.

A careful consideration of the said section shows that sections 106(1) and 163(5)(a) are interwoven with each other and thus, section 163(5)(a) of the said Act is not a standalone section. In fact, both these sections were amended by the said amending Act, and it is clear that it was necessary to amend both the sections in order to achieve the purpose of amending the principal Act.

Hence, it is necessary to consider both sections 106(1) and 163(5)(a) together, when considering the above question of law.

(i) Time period given to a taxpayer to furnish a return of income under the principal Act

Prior to the amendment of section 106(1) of the principal Act, taxpayers were required to furnish a return of their income for a given year of assessment, on or before the 30th day of September immediately succeeding the end of that year of assessment.

Section 106(1) of the principal Act stated;

> "Every person who is chargeable with income tax under this Act for any year of assessment shall, on or before the thirtieth day of September immediately succeeding the end of that year of assessment, furnish to an Assessor, either in writing or by electronic means, a return in such form and containing such particulars as may be specified by the Commissioner-General, of his income, and if he has a child, the income of such child:
>
> Provided however, the preceding provisions shall not apply to an individual whose income for any year of assessment comprises solely of one or a combination of the following–
>
> (a) profits from employment as specified in section 4 and chargeable with income tax does not exceed rupees four hundred and twenty thousand and income tax under Chapter XIV has been deducted by the employer on the gross amount of such profit and income;
> (b) dividends chargeable with tax on which tax at ten per centum has been deducted under subsection (1) of section 65;
> (c) income from interest chargeable with tax on which income tax at the rate of ten per centum has been deducted under section 133."
>
> [Emphasis added]

(ii) Time period given to an assessor to make an assessment of income tax under the principal Act

Where a taxpayer had furnished a return of income, the assessor was required to either accept the return of income, or if he does not accept the said return, estimate the amount of the assessable income of such taxpayer and make an assessment of income tax under section 163(3) of the said Act.

Further, section 163(5)(a) of the principal Act stated that where a taxpayer had furnished a return of income for a given year of assessment within the time period specified in section 106(1) of the principal Act, the assessor cannot make an assessment of income tax for such year of assessment after the expiry of eighteen months from the end of that year of assessment, subject to specified exceptions.

Section 163(5)(a) of the principal Act stated;

> "Subject to the provisions of section 72, no assessment of the income tax payable under this Act by any person or partnership –
>
> (a) who or which has made a return of his or its income on or before the thirtieth day of September of the year of assessment immediately succeeding that year of assessment, shall be made after the expiry of eighteen months from the end of that year of assessment; and
>
> (b) who has failed to make a return on or before such date as referred to in paragraph (a), shall be made after the expiry of a period of three years from the end of that year of assessment:
>
> Provided, that nothing in this subsection shall apply to the assessment of income tax payable by any person in respect of any year of assessment, consequent to the receipt by such person of any arrears relating to the profits from employment of that person for that year of assessment:
>
> Provided further that, where in the opinion of the Assessor, any fraud, evasion or willful default has been committed by or on behalf of, any person in relation to any income tax payable by such person for any year of assessment, it shall be lawful for the Assessor to make an assessment or an additional assessment on such person at any time after the end of that year of assessment." [Emphasis added]

However, after the time period given to a taxpayer to furnish a return of income for the year of assessment 2007/2008 had lapsed, and before the time period given to the assessor to make an assessment of income tax for such year of assessment had expired, the Inland Revenue (Amendment) Act, No. 19 of 2009, was enacted by Parliament on the 31st of March, 2009. By the said amending Act, both the sections 106(1) and 163(5)(a) of the principal Act were amended.

Effect of the amending Act

(i) Extension of time period given to a taxpayer to furnish a return of income

By the amendment made to section 106(1) of the principal Act, the deadline given to a taxpayer to furnish a return of income was extended from the 30th day of September to the 30th day of November immediately succeeding the end of that year of assessment.

Section 106(1) of the principal Act, **as amended**, states;

> "Every person who is chargeable with income tax under this Act for any year of assessment shall, on or before the ~~thirtieth day of September~~ thirtieth day of November immediately succeeding the end of that year of assessment, furnish to an Assessor, either in writing or by electronic means, a return in such from and containing such particulars as may be specified by the Commissioner-General, of his income, and if he has a child, the income of such child:
>
> Provided however, the preceding provisions shall not apply to an individual whose income for any year of assessment comprises solely of one or a combination of the following–
>
> (a) profits from employment as specified in section 4 and chargeable with income tax, does not exceed-
>
> (i) rupees four hundred and twenty thousand, where such year of assessment is any year of assessment ending on or before March 31, 2009; or
>
> (ii) rupees one million, where such year of assessment is any year of assessment commencing on or after April 1, 2009,
>
> and income tax under Chapter XIV has been deducted by the employer on such profits from employment;

(b) dividends chargeable with tax on which tax at ten per centum has been deducted under subsection (1) of section 65;

(c) income from interest chargeable with tax on which income tax at the rate of ten per centum has been deducted under section 133."

[Emphasis added]

(ii) Extension of time period given to an assessor to make an assessment of income tax

Further, the amendments made to section 163(5)(a) of the principal Act extended the time period given to an assessor to make an assessment of income tax (if any) from eighteen months to two years from the end of that year of assessment, and also reflected the extended time period granted to a taxpayer to furnish a return of income under the amendment made to section 106(1) of the principal Act.

Section 163(5)(a) of the principal Act, **as amended**, states;

"Subject to the provisions of section 72, no assessment of the income tax payable under this Act by any person or partnership –

(a) who or which has made a return of his or its income on or before the ~~thirtieth day of September~~ thirtieth day of November of the year of assessment immediately succeeding that year of assessment, shall be made after the expiry of ~~eighteen months~~ a period of two years from the end of that year of assessment; and

(b) who has failed to make a return on or before such date as referred to in paragraph (a), shall be made after the expiry of a period of ~~three years~~ four years from the end of that year of assessment:

Provided, that nothing in this subsection shall apply to the assessment of income tax payable by any person in respect of any year of assessment, consequent to the receipt by such person of any arrears relating to the profits from employment of that person for that year of assessment:

Provided further that, where in the opinion of the Assessor, any fraud, evasion or willful default has been committed by or on behalf of, any person in relation to any income tax payable by such person for any year of assessment, it shall be lawful for

the Assessor to make an assessment or an additional assessment on such person at any time after the end of that year of assessment."

[Emphasis added]

Hence, the question arises as to whether the amendment made to section 163(5)(a) of the principal Act extended the time period given to the taxpayer to furnish a return of income for the year of assessment 2007/2008, with **retrospective effect**, and extended the time period given to the assessor to make an assessment of income tax for such year of assessment, with **prospective effect.**

Retrospective operation of procedural laws

Article 75 of the Constitution confers power on the legislature to make laws, including laws having retrospective effect. The general principle of interpretation of statutes is described in the Latin maxim '*lex proscipit non respicit'* (the law looks forward, not backward). Thus, amendments made to substantive laws have a prospective effect, unless its effect has been made retrospective by express provision in the Act or by necessary implication. On the other hand, amendments made to procedural laws are presumed to have retrospective effect, unless its effect has been made prospective by express provision in the Act or by necessary implication, or such a construction is textually not possible.

A similar view was expressed in *Maxwell on Interpretation of Statutes*, 12th edition, at 222 which stated;

"*It is perfectly settled law that if the legislature intended to frame a new procedure that, instead of proceeding in this form or that, you should proceed in another and a different way, clearly then bygone transactions are to be sued for and enforced according to the new form of procedure. Alterations in the form of procedure are always retrospective*, ***unless there is some good reason or other why they should not be****."*

[Emphasis added]

Further, the Supreme Court of India in *Hitendra Vishnu Thakur & Others v State of Maharashtra & Others* (1994) 4 SCC 602 held;

"(i) A statute which affects substantive rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment,

*whereas a statute which merely affects procedure, **unless such a construction is textually impossible**, is presumed to be retrospective in its application, should not be given an extended meaning and should be strictly confined to its clearly defined limits;*

(ii) Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal, even though remedial, is substantive in nature;

(iii) Every litigant has a vested right in substantive law, but no such right exists in procedural law;

(iv) A procedural statute should not generally speaking be applied retrospectively, where the result would be to create new disabilities or obligations, or to impose new duties in respect of transactions already accomplished; and
(v) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication.

[Emphasis added]

A careful consideration of the amendments made to sections 106(1) and 163(5)(a) of the principal Act show that they are procedural in nature. Therefore, the said amendments are, ***prima facie,* presumed to have retrospective effect**. In the circumstances, it is necessary to consider whether the said presumption is in fact applicable to the said amendments made by the amending Act.

Effect of section 27 of the amending Act

The amending Act was certified by the Speaker on the 31st of March, 2009. Therefore, the Act should have come into force from the date that it was certified by the Speaker, by operation of Article 80(1) of the Constitution. However, section 27 of the amending Act has specifically set out the dates on which the amendments made by the said amending Act shall come into force.

Section 27 of the amending Act states;

"(1) The amendments made to paragraph (e) of subsection (2) of section 34, subsection (3) of section 78, subsection (4) of section 113, subsection (2) of section 153 and subsection (2) of section 173 of the principal enactment, by sections 10 (2),

section 15, section 17, section 19 and section 21 respectively, of this Act, shall be deemed for all purposes to have come into force on April 1, 2006.

(2) The amendment made to the Second Schedule to the principal enactment by section 25 of this Act, shall be deemed for all purposes to have come into force on April 1, 2007.

(3) The amendment made to section 8, section 40A and section 57 of the principal enactment, by section 3(1) and (2), section 11 and section 13 respectively, of this Act, shall be deemed for all purposes to have come into force on April 1, 2008.

(4) The amendment made to section 13 of the principal enactment by section 5(2) of this Act, shall be deemed for all purposes to have come into force on October 21, 2008.

(5) The amendment made to section 13 by section 5(4) of this Act, shall be deemed for all purposes to have come into force, on February 1, 2009.

(6) **The amendments made to the principal enactment by this Act**, other than the amendments specifically referred to in subsections (1), (2), (3), (4) and (5) of this section, **shall come into force on April 1, 2009**."

[Emphasis added]

Accordingly, the amendments referred to in section 27(1) to (5) of the amending Act are given a retrospective effect from the dates specified therein, in terms of Article 75 of the Constitution.

On the other hand, the amendments that are not referred to in section 27(1) to (5) of the amending Act operate with prospective effect from the 1st of April, 2009, in terms of section 27(6) of the amending Act.

It is pertinent to note that the amendments made to sections 106(1) and 163(5)(a) of the principal Act are not referred to in section 27(1) to (5) of the amending Act.

Further, although there is a general distinction between substantive law and procedural law, section 27(6) of the amending Act does not distinguish between the amendments made to the substantive law and procedural law of the principal Act.

Thus, in the absence of any reference to a segregation between the two branches of law in the said section, it is not possible to read words into the said section by a judicial interpretation, and segregate the amendments made to the substantive law and procedural law of the principal Act.

In the circumstances, I am of the view that section 27(6) of the amending Act was intended to give prospective effect to both the amendments made to the substantive law and procedural law of the principal Act, other than those expressly referred to in section 27(1) to (5) of the amending Act.

Therefore, although the amendments made to sections 106(1) and 163(5)(a) of the principal Act are procedural in nature, the express provision in section 27(6) of the amending Act excludes the applicability of the general presumption that procedural laws be given retrospective effect.

Hence, the amendments made to both sections 106(1) and 163(5)(a) of the principal Act will operate with prospective effect from the 1st of April, 2009, in terms of section 27(6) of the amending Act.

Literal interpretation of the said amendments

As stated above, the amendments made to section 163(5)(a) read with section 106(1) of the principal Act extended the time period given to an assessor to make an assessment of income tax (if any) by six months, if a taxpayer had furnished an income tax return on or before the **30th day of November** immediately succeeding that year of assessment.

However, a plain reading of the said sections show that it was not possible for a taxpayer to file a tax return for the year of assessment 2007/2008 on or before the 30th of November, 2008, as the said amending Act was passed by Parliament and certified by the Speaker on the 31st of March, 2009. Therefore, it is textually not possible to give retrospective effect to the amendments made to section 163(5)(a) read with section 106(1) of the principal Act, in relation to the extension of time given to the taxpayer to file a tax return.

Accordingly, the amendments made to both sections 106(1) and 163(5)(a) of the principal Act should be given prospective effect.

Purpose of the aforesaid amendments

Further, when interpreting the amendments made to section 163(5)(a) read with section 106(1) of the principal Act, it is necessary to give effect to the purpose of amending the said sections of the principal Act.

As stated above, the purpose of the amendments made to section 163(5)(a) read with section 106(1) of the principal Act was not only to grant additional time for an assessor to consider the return of income filed by the taxpayer and make an assessment (if necessary), but also to grant additional time for a taxpayer to prepare a return of income in compliance with the said Act. Particularly, the extension of time given to taxpayers to file income tax returns facilitates large companies and groups of companies to finalize their accounts for a given financial year.

If the amendments made to section 163(5)(a) read with section 106(1) of the principal Act are interpreted to apply to the year of assessment 2007/2008 with retrospective effect, the taxpayers are deprived of filing income tax returns for such year of assessment within the extended time period, as such extended time period had passed by the time the said amendments came into operation. Thus, such an interpretation defeats the purpose of the aforesaid amendments.

Accordingly, it is necessary to give prospective effect to both of the aforesaid amendments in order to give effect to the purpose of the legislation.

In the absence of express provision to the contrary, a section of an Act should not be interpreted to have retrospective effect in part and prospective effect in other part

It is common ground that the extension of the deadline given to an assessor to make an assessment of income tax for the year of assessment 2007/2008 has a prospective effect. Hence, the Court of Appeal held, *inter alia,* that the time period given to an assessor to make an assessment of income tax for the year of assessment 2007/2008 had been extended with prospective effect in terms of section 27(6) of the amending Act.

However, the Court of Appeal had not considered the effect of the said amendments in relation to the taxpayer. As stated above, not only the amendment made to section 106(1) of the principal Act, but the amendment made to section 163(5)(a) of the principal Act also extends the time period given to a taxpayer to furnish a return of income. According to the said interpretation, the time period given to a taxpayer to furnish a return of income for the year of assessment 2007/2008

would be extended from the 30th of September to the 30th of November, 2008. However, such an extended time period had passed by the time the said amendments came into operation. Thus, according to the said interpretation, such extension of time given to the taxpayer to file his tax return for the year of assessment 2007/2008 should be given retrospective effect.

In the absence of express provision to the contrary, therefore, it is not possible to give **retrospective effect** to part of the amendment which extended the time period given to the taxpayer to file the tax return for the year of assessment 2007/2008, and give **prospective effect** to the other part of the amendment which extended the time period given to the assessor to make an assessment of income tax for such year of assessment. Accordingly, both the amendments should be interpreted as having prospective effect. Therefore, I am of the view that the said amendments have no application to the year of assessment 2007/2008.

For the foregoing reason, I am further of the view that the learned Judges of the Court of Appeal had misdirected themselves on the law in relation to the applicability of the said amendments to the year of assessment 2007/2008.

Application of the Interpretation Ordinance

In any event, section 6(3) of the Interpretation Ordinance states that, in the absence of any express provision, a repeal of a written law either in whole or in part, shall not affect any right acquired under the law that is being repealed.

Section 6(3) of the Interpretation Ordinance states;

> "Whenever any written law repeals either in whole or part a former written law, such repeal shall not, **in the absence of any express provision to that effect**, affect or be deemed to have affected-
>
> (a) the past operation of or anything duly done or suffered under the repealed written law;
> (b) any offence committed, any right, liberty, or penalty acquired or incurred under the repealed written law;
> (c) any action, proceeding or thing pending or incomplete when the repealing written law comes into operation, but every such action, proceeding, or thing may be carried on and completed as if there had been no such repeal."
>
> [Emphasis added]

Thus, since the appellant had furnished the return of income in accordance with section 163(5)(a) of the principal Act, prior to the said section being amended, a right had accrued to the appellant under the said section to have an assessment of income tax made (if any) within eighteen months from the end of that year of assessment.

Further, in the absence of express provision to the contrary in the amending Act, the right acquired by the appellant to have the assessment made within a period of eighteen months, is not affected by the subsequent repeal and substitution of the said section by the amending Act.

Hence, the amendments made to sections 106(1) and 163(5)(a) of the principal Act have no application to a tax return filed under and in terms of section 106(1) of the principal Act for the year of assessment 2007/2008.

Article 12(1) of the Constitution

Moreover, interpreting the amendment made to section 163(5)(a) of the principal Act to state that the time limit given to an assessor to make an assessment of income tax for the year of assessment 2007/2008 is extended with prospective effect, and the time limit given to a taxpayer to furnish a return of his income for the said year of assessment is extended with retrospective effect, would only benefit an assessor and not the taxpayer, as a taxpayer is unable to file a tax return in terms of the amendment made to section 106(1) of the principal Act.

In the circumstances, the law should not be interpreted to give an advantage to an assessor and deprive a taxpayer. 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'. Hence, the amendments made to section 163(5)(a) read with section 106(1) of the principal Act should be interpreted to secure the rights of both taxpayers and assessors of the Department of Inland Revenue.

Further, although Article 15(7) of the Constitution restricts the operation of Article 12(1) of the Constitution when enacting legislation for the purpose of, *inter alia*, meeting the just requirements of the general welfare of a democratic society, the said restriction does not apply to enacting laws governing persons who are required to comply with revenue laws or officers who enforce revenue laws. Accordingly, Article 15(7) of the Constitution has no application to the amendments under consideration and, therefore, the aforesaid amendments made to the procedure governing the taxpayers and the officers who enforce the revenue laws must be interpreted in a manner consistent with Article 12(1) of the Constitution.

The above view was expressed in *Inland Revenue (Amendment) Bill*, S.C. (S.D.) Nos. 01/2021 to 03/2021, where the court observed;

> *"It is clear from the above observations made in the aforementioned determinations, that in revenue matters, the State has a wide discretion in selecting the persons or objects to impose tax on or grant concessions to, and such matters will not be inconsistent with Article 12(1) of the Constitution which provides for the equal protection of the law, unless they are manifestly unreasonable or discriminatory.* ***However, a classification shall not be made to exclude liability of persons who perform services to taxpayers. Thus, the exclusion of "a full-time employee of the taxpayer" from the applicability of section 126(5) of the principal enactment, will not be captured within the scope of the aforesaid principle, and is therefore inconsistent with Article 12(1) of the Constitution****."*
>
> [Emphasis added]

Thus, it is necessary to interpret both the said amendments to have prospective effect, to secure equality between the taxpayer and revenue officer in terms of Article 12(1) of the Constitution.

Conclusion

Due to the foregoing reasons, I am of the view that the amendments made to section 163(5)(a) read with section 106(1) of the principal Act have no application to the year of assessment 2007/2008. Accordingly, the assessment of income tax payable by the appellant for the year of assessment 2007/2008 dated 26th of March, 2010 is time barred under and in terms of section 163(5)(a) of the principal Act.

Thus, I answer the below stated question of law as follows;

> *"Was the assessment for the year 2007/2008 dated 26.03.2010 issued by the Assessor of Inland Revenue against the Appellant in respect of the return filed on 30.09.2008, time barred in terms of section 163(5)(a) of the Inland Revenue Act as amended by Act No. 19 of 2009?"*
>
> Yes.

In view of the reasons stated above, I set aside the judgment of the Court of Appeal dated 1st August, 2014 and the determination of the Tax Appeals Commission dated 28th June, 2013. The appeal is allowed.

I order no costs.

Judge of the Supreme Court

Yasantha Kodagoda PC, J

I agree.

Judge of the Supreme Court

K. K. Wickramasinghe, J

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.

Kapila Nishshanka Kumarage
No. 102/03,
Gnananlankara Mawatha,
Ratnapura.

Accused - Appellant -Appellant

SC Appeal No. 51/18
High Court Ratnapura
Appeal No. HCR/APL 42/14
Magistrate's Court Ratnapura
Case No. 68675

Vs.

1. **Officer-in-Charge,**
Special Crimes Investigation Bureau,
Police Station,
Ratnapura.

Complainant - Respondent - Respondent

2. **Hon. Attorney General**
Attorney General's
Department,

Colombo. 12.

Respondent - Respondent

Before: **Priyantha Jayawardena, PC, J.**
L.T.B. Dehideniya, J.
Yasantha Kodagoda, PC, J.

Appearance: Chathura Galhena for the Accused - Appellant - Appellant.
Ganga Wakishta Arachchi, Senior State Counsel with Ruchindra Fernando, State Counsel for the Respondent - Respondent.

Argued on: 4th August, 2020

Written Submissions: Written submissions for the Accused - Appellant - Appellant filed on 21st September 2018 and 7th December 2020.
Written submissions for the Complainant - Respondent - Respondent tendered on 4th December 2020.

Judgment delivered on: 4th May, 2021

Yasantha Kodagoda, PC, J.

Background

On 18th July 2008, the Officer-in-Charge of the Special Crimes Investigation Bureau of the Ratnapura Police Station (Complainant - Respondent - Respondent) instituted criminal proceedings against the Accused - Appellant - Appellant (hereinafter referred to as the "Appellant") in the Magistrate's Court of Ratnapura by filing a Complaint (commonly referred to as a 'Plaint') in terms of section 136(1)(b) of the Code of Criminal Procedure Act. (Number 68675 had been assinged to this case.) The *charge sheet* attached to the Complaint contained three charges, namely 'Cheating', 'Criminal Breach of Trust' and 'Criminal Misappropriation of Property'. The Appellant pleaded *'not guilty'* and a trial was held. Following the conclusion of the trial, on 29th August 2014 the learned Magistrate found the Appellant *'guilty'* and accordingly he was convicted of all three charges. On 12th December 2014, the Appellant was sentenced to a term of 1-year rigorous imprisonment and a fine of Rs. 1,500/=, per each charge. The Appellant appealed against the said conviction and sentence to the High Court of the Sabaragamuwa Province, holden in Ratnapura. (No. HCR/APL 42/14 had been assigned to that Appeal.) Following the hearing of the Appeal, the High Court acquitted the Appellant with regard to the second and third charges, and hence quashed the corresponding sentences. The conviction and sentence pertaining to the first charge of 'cheating', was affirmed. Subject thereto, the Appeal was dismissed. This Appeal is against the said judgment of the High Court of the Provinces.

Following a consideration of an Application seeking Leave to Appeal against the afore-stated judgment of the High Court, this Court on 16th March 2018 granted Leave to Appeal, on the following questions of law:

(i) *"Did the Provincial High Court fail to analyze the lack of mens rea on the part of the Petitioner to constitute an act of cheating?"*

(ii) *"Did the Provincial High Court fail to analyze that the virtual complainant had not been deceived by the act of the Petitioner, which is a necessary ingredient to constitute a charge of cheating?"*

[The reference to the 'Petitioner' in these questions, is a reference to the present 'Appellant'.]

Offence

According to the charge sheet, the offence in respect of which the Appellant stands convicted and sentenced, is as follows:

"That on or about the 25th September 2007, by asserting that money was required for a business purpose, having obtained Rs. 8,00,000/= from Kalawitigoda Pathirannalage Chandralatha, residing at No. 74, Polhengoda, Ratnapura, and in respect thereof having got her to repose confidence by tendering to her a cheque drawn for Rs. 8,00,000/= bearing No. 908494 drawn against Account No. 013001001397 maintained at National Development Bank, Ratnapura, and having told her that she could on the date contained in the cheque deposit the said cheque and obtain money, and thereafter by not having either deposited money in the relevant account on the date stated in the cheque or returned the money to her, dishonestly or fraudulently cheated her, and thereby committed an offence punishable in terms of section 403 of the Penal Code."

Evidence

The virtual complainant Kalawitigoda Pathirannalage Chandralatha Athukorala (hereinafter sometimes referred to as the 'virtual complainant') is a married lady with grown up children. The Appellant had been known to her for approximately five to six years. He was a friend of one of her sons. He had been preparing accounts on behalf of her son, for tax purposes. The Appellant used to frequent her house. She knew that the Appellant was running a shop at the supermarket in a building of the Ratnapura Municipality. On 12th September 2007, the Appellant sought a 'favour' from the virtual complainant; he solicited eight hundred thousand rupees on the premise that money was required for some business activity that he had commenced. She told the Appellant that she would think about it (the request for a loan) and respond. She had with her, four hundred thousand rupees. She collected another four hundred thousand rupees through several ways. Accordingly, on 25th September 2007, the virtual complainant gave a loan of eight hundred thousand rupees (in cash) to the Appellant. The Appellant offered to the virtual complainant a cheque. In response, the virtual complainant told the Appellant that she knew that there wasn't money in the Appellant's bank account and hence the cheque was not necessary. The Appellant responded and said *"its OK aunty, keep the cheque with you for the purpose of having confidence"*. Consequently, the Appellant had drawn and given the virtual complainant a *cash cheque* bearing No. 908494 issued by the NDB Bank drawn against account No. 013001001397, with a face value of eight hundred thousand rupees. The date on the cheque was 20th December 2007 (i.e. the cheque was post-dated). The virtual complainant's position is that she gave the loan to the Appellant because she had *'confidence / trust'* that the Appellant would return the money to her. According to her, the money was given to the Appellant as a loan and in a lump sum. The virtual complainant told the Appellant that she required

the money to be returned by December that year, as she would have to spend money for an eye operation.

In December 2007, she contacted the Appellant and asked him to return the money. He originally undertook to do so. However, he failed to return the money. Later, when she called the Appellant, he did not even pick-up the phone. Thus, the Appellant informed one of her sons, Madhuka Nishantha Athukorala. On 27th December 2007, they deposited the cheque in the account of her son, Madhuka. The cheque was dishonoured by the bank. She has produced to Court the 'Notice of Dishonour' issued by the Bank, marked "P1". Attached to the notice of dishonour issued by the bank, had been a photo-copy of the cheque that was dishonoured. After the cheque was dishonoured, the virtual complainant had informed the Appellant. However, he has not come to meet the Appellant. Up to the time at which the virtual complainant gave evidence in Court, the Appellant had not returned the money.

However, the case record reveals that after the case for the prosecution was closed and the learned Magistrate called upon the Appellant to present defence evidence, the Appellant had returned a portion of the money to the virtual complainant and again defaulted.

Under cross-examination, the virtual complainant testified that, she had '*utmost confidence*' in the Appellant. No document was exchanged between the parties at the time the loan was given. She has denied a suggestion put to her that she declined to accept the cheque due to the reason that she knew that there wasn't money in the Appellant's bank account. However, she has admitted that she told the Appellant that she did not require the cheque, and that what was required was for him to return the money, as she wanted the

money for her eye operation. She has also admitted the suggestion made by the learned counsel for the Appellant, that the cheque was accepted by her as a form of 'security'. The appellant had told the virtual complainant that he "*will definitely return the money in December*". The witness has responded positively to the position taken up by the defence counsel that the money was given to the Appellant as a *loan.* She has also responded positively to the position put to her that the Appellant gave a promise to her and he was unable to return the money to her. Under cross-examination, the witness has also said that the Appellant requested her to even mortgage her jewelry and give him the money he solicited. Thus, she had collected the money from multiple sources and given eight hundred thousand rupees to the Appellant. The virtual complainant has denied the suggestion put to her under cross-examination, that she gave the money to the Appellant in three instalments. She has been emphatic that she gave the eight hundred thousand rupees to the appellant in a lump sum. She has also denied the suggestion put to her that the *loan* was given to the Appellant at an interest rate of eight percent.

The second witness to testify on behalf of the prosecution had been Jinendra Asanga Dawulgama, an Assistant Manager of the Ratnapura Branch of the National Development Bank. According to his testimony, Kapila Nishshanka Kumarage (the Appellant) had an account bearing No. 013001001397, maintained at the Ratnapura branch of the National Development Bank. Cheque No. 908494 had been drawn against that account. This account had been '*closed*' with effect from 11th January 2007. The account had been closed by the Bank, following three cheques issued against the account having got dishonoured. A letter had been sent to the Appellant notifying him that the bank had closed the account. At the time cheque No. 908494 had been issued, the account remained closed. The witness has produced to Court a statement

of accounts relating to the relevant bank account, which was marked "P2". According to the witness, that statement reflects *inter alia* to the dishonouring of the cheque in issue.

The third and the final witness to testify for the prosecution was Police Sergeant Kulatunga Mudiyanselage Jayanath, of the Special Crimes Investigations Unit of the Ratnapura Police Station. His evidence was formal in nature. The virtual complainant had lodged a complaint regarding this matter on 24th January 2008, and he had conducted the investigation into that complaint.

Following the closure of the case for the prosecution, the learned Magistrate had called upon the Appellant to present the defence case. On 15th November 2015, learned defence counsel has informed court that no evidence will be presented to Court on behalf of the Appellant. Thus, the trial had been concluded.

Submissions of counsel

Learned counsel for the Appellant submitted that, "*a charge of cheating requires the complainant to handover to the offender an article or property* ***as a result of being deceived***". (emphasis added.) In the instant case, "*the complainant should have been deceived by receiving of the cheque drawn by the Appellant*". He further submitted that, "*it is essential that the lending of money occurred due to the act of deceit committed by the Accused, which induced the act of lending money to the Appellant*". "*If the lending of money had not been induced by giving the cheque to the complainant, the charge of cheating framed against the Appellant would not be proved*". He submitted further, that the gravamen of the charge relates to the

"inducement caused by the deceit of giving a cheque without funds, and not to the promise to re-pay the sum borrowed by the Appellant".

Learned counsel cited illustration "(f)" of section 398 of the Penal Code, which provides as follows:

"A, intentionally deceives Z into a belief that A means to repay any money that Z may lend to him, and thereby dishonestly induces Z to lend him money, A not intending to repay it. A cheats."

Counsel for the Appellant also submitted that, the facts of this matter are distinguishable with the facts of illustration "(f)" of section 398 of the Penal Code, since the Appellant did not dishonestly induce the virtual complainant to lend him money, and hence the said illustration is inapplicable to this case.

Learned counsel for the Appellant also drew the attention of the Court to illustration "(d)" of section 398, which provides as follows:

"A, by tendering in payment for an article, a cheque on a bank with which A keeps no money, and by which A expects that the cheque will be dishonoured, intentionally deceives Z, and thereby dishonestly induces Z to deliver the article, intending not to pay for it. A cheats."

Learned counsel submitted that though it appears that the facts of the instant matter come within the scope of illustration "(d)", it is necessary to examine whether it was the tendering of the cheque that induced the virtual complainant to lend money to the Appellant. He submitted that for some conduct to amount to deception, a false impression must be intentionally given or a false statement should be made, to induce someone to act upon the said representation. His position was that, as the evidence suggests, the lending of the money was not induced by giving the cheque, and was occasioned by the trust placed on the Appellant by the virtual complainant. He submitted that

the cheque was not even given as a mode of repayment. He further submitted that, according to the evidence, when the money was due, the virtual complainant originally tried to contact the Appellant to ask for the money to be returned, and it was only when her attempts to contact the Appellant failed, that she gave the cheque to her son to deposit it. Thus, learned counsel summed up his submission on the footing that "*the lending of the money was not induced by the tendering of the cheque*". Therefore, he submitted that the prosecution has failed to establish the element of '*deception by tendering the cheque*', and hence the Appellant's conviction for '*cheating*' was unlawful. Accordingly, he urged that the Appeal be allowed and the conviction and sentenced imposed on the Appellant be quashed.

On behalf of the Respondent, learned Senior State Counsel in her written submissions, referring to the evidence of the virtual complainant, submitted the following: "*… it is also evident that the virtual complainant had initially given it much thought and she was initially reluctant to give the Petitioner (sic) the said sum of money … However, the Petitioner (sic) had then provided the virtual complainant with a cheque as an assurance that the said sum of money would be returned by the Petitioner (sic) … In fact, the virtual complainant has also stated that the Petitioner (sic) had insisted on her taking the cheque … As a result of the said assurance, the virtual complainant had finally decided that the Petitioner (sic) could be trusted to return the said amount. The money had therefore been given to the Petitioner (sic) on 25th September 2007 …*"

Learned Senior State Counsel also drew the attention of this Court to illustration "(d)" of section 398 of the Penal Code, and submitted that, "*the aforesaid illustration matches the exact circumstances of the present case, as the Petitioner (sic) had essentially forced the cheque in issue on the virtual complainant as*

an instrument of inducement (knowing that the said cheque could not be encashed) to deliver the sum of money to him."

Learned Senior State Counsel submitted that the tendering of a cheque from an account which had already been closed several months prior, is reflective of the dishonest intention on the part of the Appellant. It was further submitted that the Appellant had no intention of repaying the virtual complainant. The Appellant intended to cause loss to the virtual complainant and thereby the *mens rea* of the offence of 'cheating' is satisfied.

Learned Senior State Counsel citing *Arvindbhai Ravjibhai Patel v. State of Gujarat* (1998 Cr.L.J. 463) submitted that it has been held that, "*if after taking a loan, for a considerable period the same is not paid till the date the complaint is filed, then from that point of time it can be prima facie said that he had the dishonest intention of not to pay right from the beginning. If the law is not interpreted in this manner, dishonest persons would screamingly skip the law and defeat the justice*".

The position of the learned Senior State Counsel is that the tendering of the cheque would have '*undoubtedly reassured the virtual complainant into providing the petitioner (sic) the loan*'. Thus, by tendering the cheque, the Appellant had 'deceived' the virtual complainant. The presentation of the cheque induced the virtual complainant to deliver to the Appellant the property, namely the loan of Rs. 800,000/=.

The written submissions filed on behalf of the Respondent also contained the following paragraph:

"*Further, it is pertinent to note that the Petitioner (sic) has had multiple connected matters pertaining to similar offences which were pending at the time (Case Nos,*

68674, 68676 & B 354/2008 - at page 40, High Court Appeal Brief marked 'X'), as well as a previous conviction from the Magistrate's Court of Ratnapura in Case No. 68673 (at page 82, High Court Appeal Brief marked 'X'). These facts indubitably go towards the Petitioner's character, that he is a repeat offender who has engaged in cheating persons in a manner similar to that in which he cheated the virtual complainant in this matter."

In the light of these submissions, learned Senior State Counsel submitted that the charge of 'cheating' has been clearly proven by the prosecution, and therefore submitted that the conviction of the Appellant for having committed *cheating* was lawful, and hence the Appeal be dismissed.

Consideration of the law, evidence, submissions and conclusions

Offence of 'Cheating'

Section 398 of the Penal Codes defines the offence of *Cheating* in the following manner:

"***Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person****, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation, or property, or damage or loss to the Government, is said to 'cheat'."* (Emphasis added.)

From this definition, it is evident that the offence of '*cheating*' can be committed in several ways. The focus here is not on the *modus operandi* that may be adopted by the perpetrator of the offence, but on technical ways recognized by

the Penal Code, as amounting to *'cheating'*. Those multiple ways in which the offence of *'cheating'* may be committed, are as follows:

1. **By deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person.**
2. By deceiving any person, fraudulently or dishonestly induces the person so deceived to consent that any person shall retain any property.
3. By deceiving any person, intentionally induces the person so deceived to do anything which he would not do if he were not so deceived, and which act causes or is likely to cause damage or harm to that person in body, mind, reputation, or property, or damage or loss to the Government.
4. By deceiving any person, intentionally induces the person so deceived to omit to do anything which he would do if he were not so deceived, and which omission causes or is likely to cause damage or harm to that person in body, mind, reputation, or property, or damage or loss to the Government.

In view of the evidence presented by the prosecution at the trial and the submissions made before this Court by both learned counsel, the manner in which the offence of *'cheating'* may be committed cited in "1" above is of particular significance to the adjudication of this Appeal.

That the offence of *'cheating'* can be committed in these four ways is reflected clearly in Dr. Sir Hari Singh Gour's *'The Penal Law of India'* (Diamond Jubilee - 10th Edition, Volume IV, page 3636), which provides as follows:

"To constitute 'cheating' under this section, there must be -

(1) deception of any person and thereby,

(2) (a) fraudulently or dishonestly inducing that person -

(i) to deliver any property to any person, or

(ii) to consent that any person shall retain any property,

or

(2) (b) intentionally inducing that person to do or omit to do anything which if he were not so deceived, and which act or omission causes or is likely to cause harm to that person in body, mind, reputation or property."

Thus, it is Dr. Gour's view as well, that to constitute the offence of *'cheating'* ingredients "(1)" and "(2)(a)" or "(2)(b)" should be satisfied.

It would therefore be seen that ***deception*** is the core ingredient of the offence of 'cheating', and it is common to all four ways in which the offence may be committed. In comparison thereof, ***fraudulence*** and ***dishonesty***, which operate as alternate ingredients of the offence, are expressly provided ingredients only to the first and second ways in which the offence of 'cheating' may be committed, wherein the offender induces the victim to either (a) deliver any property to any person, or (b) to consent that any person shall retain any property. The third and fourth ways in which the offence of 'cheating' may be committed, do not contain *'fraudulence'* or *'dishonesty'* as constituent ingredients. Nevertheless, it is important to note that *'dishonesty'* is embedded in the ingredient of *'deception'*, and hence *'dishonesty'* is actually a requirement for all four ways in which the offence of *cheating* could be committed. This aspect will be discussed in further detail in due course.

Furthermore, with regard to the first and second ways in which the offence of *cheating* may be committed, it would not be necessary for the prosecution to prove that the victim suffered any loss or was likely to suffer any loss as a result of being subject to the offence, though pecuniary loss or loss of property would in most instances be a consequential result. However, with regard to the third

and fourth ways in which the offence may be committed, it would be necessary for the prosecution to prove a particular consequential loss or a likelihood of such a consequential loss as a result of being subject to the offence of '*cheating*'. Such consequential loss should be in the nature of either (i) actual damage or harm to such person in body, mind, reputation, or property, or damage or loss to the government, or (ii) the likelihood of causing such damage or harm to such person in body, mind, reputation, or property, or damage of loss to the government.

The term *'deception'* has not been defined in the Penal Code. *Black's Law Dictionary* (11th Edition) provides two definitions to the term *'deception'*. Those are *(i) the act of deliberately causing someone to believe that something is true when the actor knows it to be false,* and *(ii) a trick intended to make a person believe something untrue*. Generally, *deception* is carried out through making some verbal assertion or through conduct or by a combination of both. In *deception*, the verbal assertion contains falsehood which the perpetrator knows to be false. It has the effect of misleading the victim. However, a verbal assertion of falsehood is not absolutely essential. As the *explanation* to section 398 provides, "*a* ***dishonest concealment*** *of facts is a deception within the meaning of this section*". (Emphasis added.) Thus, not a mere omission to tell the truth or concealment of the truth, but an omission or concealment with the intention of dishonestly concealing the truth, would amount to *deception*. As Dr. Gour has pointed out, *deception* has in it the element of misleading, or making a person believe something that is not real. It implies causing a person to believe as true, something that is false. (page 3637) In *deception,* the motive for uttering falsehood or a false representation through other means, or the concealment of the truth, is *dishonesty*. The term "*dishonestly*" has been defined in section 22 of the Penal Code in the following manner:

"Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do that thing dishonestly." Section 21(1) provides that, "'*wrongful gain' is gain by unlawful means of property to which the person gaining is not legally entitled*", and section 21(2) provides that, "'*wrongful loss' is the loss by unlawful means of property to which the person losing it is legally entitled'*. Thus, *dishonesty* connotes an intention to cause wrongful gain or wrongful loss contrary to law.

It would thus be seen that *deception* is distinct from the utterance of mere falsehood or failure to reveal the truth. It is not a mere misrepresentation as well. *Deception* is the inducement that is provided by the perpetrator of the offence of *cheating* to the victim, which should have been practiced with a *dishonest* intention. Thus, '*dishonesty*' is the *mens rea* of the offence of *cheating* common to all four ways in which the offence may be committed.

From the structuring of the charge of '*cheating*' preferred against the Appellant (i.e. the first charge on the charge sheet), it would be seen that the prosecution had premised the charge on the first out of the four ways in which I have described above, the offence of '*cheating*' may be committed. Thus, it is necessary to consider whether, the prosecution has proven that the Appellant practiced *deception* in respect of the virtual complainant in the manner alleged in the charge. Whether he entertained a dishonest intention when he solicited a loan from the virtual complainant is of critical importance. Furthermore, it is necessary to consider whether through such *deception,* the Appellant had *fraudulently* or *dishonestly* induced the virtual complainant to deliver property to the Appellant. From the perspective of the virtual complainant, it is necessary to consider whether it was the alleged act of *deception* (if any) practiced by the Appellant, which caused the virtual complainant to deliver

property to the Appellant. Even if the alleged offender had practiced *deception*, and nonetheless quite independent of the deceptive assertion made by the offender, the alleged victim had due to some auxiliary reason departed with property, the offence of '*cheating*' would not be made out. This is because, the prosecution under such circumstances has failed to establish **a causal relationship between the *deception* practiced by the alleged offender and the conduct of the victim**.

It would be seen that section 398 contains only the definition of the offence of 'cheating'. The punishment for 'cheating' is contained in sections 400, 401, 402 and 403 of the Penal Code. The punishment for committing '*cheating*' is conditioned upon the satisfaction of certain associated circumstances stipulated in these sections. In the instant matter, the Appellant was charged with having committed the offence of '*cheating*', punishable in terms of section 403 of the Penal Code. Section 403 provides as follows:

"***Whoever cheats and <u>thereby</u> dishonestly induces the person deceived to deliver any property to any person****, or to make, alter, or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security,* ***shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.***" (Emphasis added.)

Therefore, to be punishable in terms of section 403 of the Penal Code, it is necessary to consider whether the prosecution has proven that **as a result of being cheated**, the virtual complainant had **delivered property** to the Appellant.

Analysis of the evidence and application of the law

Offence of Cheating

It is now necessary to re-visit the evidence, while applying the afore-stated applicable legal principles. According to the virtual complainant, the Appellant was known to the virtual complainant for some time. It is evident that, well before the Appellant solicited a 'loan' from her, she had confidence or trust in the Appellant. According to her, due to the several reasons she has described in her testimony, she had *'utmost trust'* in the Appellant. On 12th September 2007, the Appellant solicited a *'loan'* from the virtual complainant. The prosecution did not place any evidence before Court that at the time the loan was solicited the Appellant had undertaken to tender to the virtual complainant a cheque, either as security or as the means by which the loan would be repaid. When the loan was solicited by the Appellant, the virtual complainant did not immediately indicate to the Appellant whether or not she will accede to the request. She contemplated on the matter for some time and at some point-of-time after the 12th of September, she seems to have decided to grant the loan to the Appellant. The date on which she took that decision has not been elicited from the virtual complainant. Having decided to grant the loan to the Appellant, the virtual complainant took certain steps to collect the required amount of money. That is because, she had only four hundred thousand rupees with her and the amount required was eight hundred thousand rupees. It was on the 25th September 2007 that she handed over to the Appellant the loan amounting to eight hundred thousand rupees. It is on that day that the Appellant drew the cheque in issue in the presence of the virtual complainant, and handed it over to her. The prosecution has not presented specific evidence on whether the cheque was tendered to the virtual complainant before or after the money was given by the virtual complainant to the Appellant. However, what is evident is that the cheque was handed over

to the virtual complainant by the Appellant some-time after the virtual complainant decided to lend the money to the Appellant. When the cheque was offered, the virtual complainant told the Appellant that it (the cheque) was not necessary, as in any event she knew that the Appellant did not have money in the account. However, the Appellant insisted on giving the cheque, and the virtual complainant accepted it as *'security'*. On being specifically questioned under cross-examination by learned counsel for the accused, the virtual complainant has testified that she gave the loan to the Appellant because she had 'confidence' in him. She has at no stage stated that she gave the loan on the belief that she considered the cheque to be *valuable security* and hence she will be able to encash the cheque when she required money. Thus, it would be seen that there is no specific evidence that the tendering of the cheque caused the virtual complainant to decide to grant the loan to the Appellant. In the circumstances, I am not inclined to agree with the submission of the learned Senior State Counsel that it was as a result of tendering the cheque as an assurance, that the virtual complainant decided to give the money to the Appellant. Further, even if this Court were to infer that the cheque had been given to the virtual complainant by the Appellant before the money was given to him, that the tendering of the cheque was the governing reason which resulted in the virtual complainant having decided to give the loan amounting to eight hundred thousand rupees to the Appellant, remains an unresolved issue.

At page 3641 (supra), Dr. Gour has pointed out that, *'to constitute the offence of cheating, there must be a deception which must precede and induce, under the first part of this section, the delivery or retention of property, or the act or omission referred to in the second part'*.

Views identical to Dr. Gour's have been expressed by Justice Hearne in *The King v. Wijerama* [2 CLJ 211], wherein it has been stated as follows:
"*Cheating is defined in section 398 C.P.C. The indictment in the present case refers to the first part of section 398. Under this part, in order to constitute 'cheating' there must be deception which must precede and induce the delivery or retention of property.*"

It is necessary to observe that in the matter under examination by me, **the prosecution has not proved that the impugned deceptive act of the Appellant preceded and induced the virtual complainant to lend him money**.

Indeed, in *The King v. Chandrasekera* (23 NLR 286) it has been held by Justice Shaw that the inducement to deliver the property need not have been wholly due to the deceit practiced by the perpetrator of cheating, independent of other auxiliary causes. However, the key issue to be determined is whether the tendering of the cheque by the Appellant to the virtual complainant was perceived by the virtual complainant as the means of recovery of the loan or as valuable security, and hence she was **thereby** persuaded to grant the loan of rupees eight hundred thousand to the Appellant because the cheque was tendered to her. For the tendering of the cheque to have played a decisive role on the virtual complainant having decided to give the money to the Appellant as a loan, the cheque should have been given to the virtual complainant at or before the time she decided to give the loan to the Appellant, or the Appellant should have given a promise to the virtual complainant that a cheque will be given to her if she were to give the money to him. As pointed out earlier, no evidence has been placed before this Court to that effect.

According to the testimony provided by the Assistant Manager of the Ratnapura Branch of the National Development Bank, the cheque in issue bearing No. 908494 had been drawn against the Appellant's bank account bearing No. 01300100139. This account had been *closed* by the bank on 11th January 2007, upon detecting that three cheques issued by the Appellant against this account had been dishonoured due to want of necessary funds. The fact that the account was being *closed*, had been communicated to the Appellant. The Appellant took no steps to re-activate the account. Thus, when the appellant drew cheque No. 908494, he knew that the corresponding account against which the cheque was being drawn had been *closed*. After the tendering of the cheque to the virtual complainant, the Appellant made no attempt to re-activate the account and deposit sufficient funds into that account so that there will be funds in the account to honour the cheque when the cheque is deposited by the virtual complainant. It is under such circumstances that in December 2007 when the virtual complainant's son deposited the cheque, it was dishonoured by the bank.

When the Appellant handed over the cheque to the virtual complainant and asked her to keep it as *'security'*, he made no reference to the fact that the relevant account had been *closed* by the bank. It can under these circumstances be argued that the Appellant's conduct of drawing and tendering the cheque was illegal as it amounted to an offence. When tendering the cheque to the virtual complainant, the Appellant had deliberately given the impression that the cheque was to be kept as *'security'*, when in fact, it was not a *'valuable security'* as at that point of time. Nor did he take any steps afterwards to convert the cheque in to a *'valuable security'* by re-activating the bank account and depositing sufficient money in it, facilitating the realization of the cheque when it is tendered to the bank. Consequent to the receipt of loan, when he was

obliged to return the money to the virtual complainant, the Appellant defaulted, and also started to avoid the virtual complainant. These items of subsequent conduct can be taken into consideration when arriving at an inferential finding regarding the state of mind of the Appellant at the time he accepted the money and handed over the cheque to the virtual complainant.

In my view, these circumstances by themselves are insufficient to arrive at an inference that at the time the Appellant solicited the loan and subsequently tendered the cheque, he entertained a dishonest intention. That is in view of the reasonable possibility that at the time the cheque was tendered the Appellant may have in *good faith* intended to repay the loan when the loan money was due, either by tendering cash or by depositing sufficient money in the bank account so that the cheque when tendered would be honoured. Thus, in my view, it cannot be unequivocally concluded that the Appellant had by the tendering of the cheque to the virtual complainant, engaged in *deception* of the virtual complainant by the dishonest concealment of certain relevant facts pertaining to the cheque and by asserting facts that gave the virtual complainant a false impression.

In any event, it is important to note that, even if this Court were to arrive at a finding that the tendering of the cheque and assertions made associated with the tendering of the cheque amounts to *deception*, that by itself does not convert the character of the Appellant's conduct to the offence of '*cheating*'. As pointed out earlier, the prosecution has failed to prove that it was the *deception* if any practiced by the Appellant that thereby caused the virtual complainant to give the solicited sum of money to the Appellant.

As the virtual complainant herself has admitted, the transaction between herself and the Appellant was one relating to a *loan*. From the perspective of the law of contracts, there has certainly been a breach of contract by the Appellant. According to Dr. Gour, *"a mere breach of contract cannot give rise to a criminal prosecution. The distinction between a case of mere breach of contract and one of cheating, depends upon the intention of the accused at the time of the alleged inducement, which must be judged by his subsequent act but of which the subsequent act is not the sole criterion"*. (page 3634, supra) Dr. Gour has also pointed out that, *"if the terms of the agreement are not carried out, it may attract civil as well as criminal consequences. The vital factor to be considered is whether at the time of the agreement, there was an intention to carry out the terms of the agreement or not. If at its inception there was no intention to carry out the terms, it would constitute the offence of 'cheating'. Not otherwise"*. (page 3635, supra) In view of the attendant facts and circumstances of this case, it cannot be concluded beyond a reasonable doubt that at the time of the making the request to the virtual complainant and when receiving the eight hundred thousand rupees, the Appellant entertained the intention of not re-paying the amount as per the undertaking he gave to the virtual complainant.

Charge against the Appellant

Section 165(3) of the Code of Criminal Procedure Act, No. 15 of 1979 provides that, *"when the nature of the case is such that the particulars mentioned in section 164 and the preceding sub-sections of this section do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose"*. Particularly in offences such as '*cheating*' which has multiple technical ways in which the offence may be committed, the manner in which the offence had been committed should be specified. Illustration "(b)" of section 165

provides as follows: *'A is accused of cheating B at a given time and place. The charge must set out the manner in which A cheated B."* In compliance with this requirement, the charge against the Appellant contained the following averment: *"… by tendering to her a cheque drawn for Rs. 8,00,000/= bearing No. 908494 drawn against Account No. 013001001397 maintained at National Development Bank, Ratnapura, and having told her that* ***she could on the date contained in the cheque deposit the said cheque and obtain money*** *…"* (Emphasis added.) However, no evidence has been presented at the trial that the Appellant made such an utterance to the virtual complainant. Therefore, the prosecution has failed in establishing that the Appellant committed the offence of *cheating* in the manner in which the prosecution has alleged in the charge that the offence was committed. Thus, the evidence in the case is not compatible with the charge. That is another ground on which I conclude that the prosecution has failed to prove the charge of '*cheating*' against the Appellant.

I am of the view that, in the circumstances of this case, the answers to the following questions would point towards the absence of culpability of the Appellant for the offence of '*cheating*'.

(a) *Did the Appellant entertain a dishonest intention when he solicited the loan?*

(b) *Based on a dishonest intention, did the Appellant practice deception by concealing from the virtual complainant the fact that the bank account was closed and that there was no money in the account to honour the cheque?*

(c) *Did the Appellant solicit the loan and thereafter borrow the money from the virtual complainant with the intention of not repaying it?*

(d) *At the time the loan was solicited, did the Appellant know that he would not be in a position to settle the loan?*

(e) *While entertaining grounds to believe that he will not be in a position to settle the loan, did the Appellant conceal from the virtual complainant the fact that he will not be able to repay the money that was being borrowed?*

(f) *Did the tendering of the cheque by the Appellant to the virtual complainant result in the virtual complainant being deceived and thereby did the virtual complainant decide to give the money to the Appellant?*

In my view, the evidence presented at the trial is insufficient to conclusively answer any of the above questions in the affirmative. Thus, the conviction of the Appellant cannot be affirmed.

Arvindbhai Ravjibhai Patel v. State of Gujarat

I must now deal with the citing of the judgment in *Arvindbhai Ravjibhai Patel v. State of Gujarat*, by the learned Senior State Counsel in support of her submission, that the Appellant was culpable for having committed the offence of '*cheating*'.

The first matter I wish to observe is that, the said judgment of the High Court of Gujarat, India, has been decided by Judge K. Vaidya sitting alone, in respect of an application by which Arvindbhai Ravijibhai Patel sought the quashing of an order made by the Chief Judicial Magistrate of Surat. Following a consideration of a complaint filed in the Magistrate's Court of Surat by one Dhirubhai Shambhubai Kakadia against Patel that the latter had cheated him to give a loan of Rs. 90,000/=, the Magistrate had made an order directing the Police to inquire into the complaint and report. Thus, the impugned order made by the Magistrate challenged in the High Court was not a judgment in respect of a conviction and sentence imposed against Patel by a Magistrate. In the said case, what the High Court had been called upon to consider was whether there was sufficient material before the Magistrate that would in

terms of the applicable law warrant the Magistrate to require the police to inquire into the complaint and report back to the Magistrate. Thus, the matter that required adjudication by the High Court of Gujarat was not whether the evidence disclosed proof beyond reasonable doubt as to whether the accused (Patel) had committed the offence of '*cheating*'. It should be noted that there is a significant difference in the threshold of evidence an appellate court is required to consider between the two scenarios. In the matter before Judge Vaidya, all what he was required to consider was whether the material before the learned Magistrate disclosed well-founded information that Patel had committed the offence of '*cheating*', which would warrant the conduct of an inquiry into the complaint by the police. That question had been answered in the affirmative by Judge Vaidya. Thus, the judgment cited by learned Senior State Counsel has been decided on a totally different context and therefore notwithstanding the above being a judgment pronounced by a foreign court of law, I am constrained to conclude that it is not a *'relevant'* judgment from the context of this matter.

The second matter that needs to be dealt with by this Court, relates to the citing of this particular judgment of a foreign court of law. I am conscious that, learned Senior State Counsel when citing this judgment did not invite this Court to invoke the doctrine of judicial precedent (*stare decisis*) and thereby did not invite this Court to feel legally bound by or even obliged to follow the *ratio decidendi* of the cited judgment. In fact, the doctrine of judicial precedent does not require a Court of a sovereign and independent country to be bound by a judgment of a foreign country, notwithstanding the foreign judgment having been pronounced by a relatively superior Court in the comparative judicial hierarchies of the two countries. In fact, being legally bound to follow a judgment of a Court of another country would be inconsistent with the

sovereignty of the Democratic Socialist Republic of Sri Lanka and Article 3 read with Article 4 of the Constitution. Applying the doctrine of judicial precedent in respect of a judgment of a foreign Court, even though it may be in respect of a judgment of a relatively superior Court, would in my view also be inconsistent with the concept of *sovereignty of nation states* and contrary to Article 2 of the Charter of the United Nations which recognizes the principle of *sovereign equality*. However, an exception to this is found during the pre-republican era of Sri Lanka, when Sri Lankan courts were required to be bound by judgments of the Privy Council of the United Kingdom, pronounced in appeals to that Court from judgments of Courts of Ceylon (as Sri Lanka was called then). That is because, the law of the country (at that time) recognized the Privy Council to be the court of final resort.

Nevertheless, I wish to observe that the views of judges of superior courts can considerably be enriched by considering foreign judgments and appreciating the interpretation and application of the law by the justices who decided the relevant judgments and the judicial wisdom contained therein. Indeed, particularly during the embryological stage of the development of the fundamental rights jurisdiction, the Supreme Court of Sri Lanka gained much from judgments pronounced by the Supreme Court of India. A careful comparison of related judgments of the two national jurisdictions reveal how *'judicial borrowings'* if I may use that terminology, has contributed towards the development of the law in Sri Lanka. Furthermore, Public and Administrative Law of this country has gained significantly and exponentially from judgments of the Privy Council and the House of Lords of the United Kingdom.

However, in view of the sheer number and the multiplicity of views contained in judgments of foreign courts of comparable jurisdictions, unless a judge is

extremely careful and meticulously rigorous in examining the cited judgment in the backdrop of judgments of the same foreign jurisdiction not cited by counsel, it is probable that such judge may succumb to the consequences of possible *cherry-picking* of foreign judgments by counsel.

Be that as it may, it appears to me that the judgment in issue was cited by learned Senior State Counsel on the assumption that this Court should consider itself to be persuaded to follow the views expressed by Judge K. Vaidya and thereby be guided by his views. As observed earlier, the cited judgment is one of the High Court of the State of Gujarat, India. Based on the hierarchy of Courts in India, the High Court of the State of India cannot be equated to the Supreme Court of the Democratic Socialist Republic of Sri Lanka. Justice Thamotheram in *Walker Sons & Co. (U.K.) Ltd. v. Gunatilake and Others* [(1978-79-80) 1 Sri L.R. 231 at page 243] has expressed the view that it is the judgments of the highest Courts of a particular country which should be recognized as a judgment declaratory of the law of that country. I am in respectful agreement of that view. Therefore, the judgment of Judge K. Vaidya referred to by the learned Senior State Counsel cannot be considered as the law on the matter in terms of the law of India.

Subject to the absence of the term *'or damage or loss to the government'*, the offence of *'cheating'* is defined in section 415 of the Indian Penal Code of 1860 in the identical manner in which it has been defined in the Penal Code of this country. Further, in criminal matters, the applicable legal principles pertaining to relevancy and admissibility of evidence, burden of proof, and judicial practices relating to assessment of credibility and testimonial trustworthiness of evidence of Sri Lanka and India are comparable. However, a Judgment of a High Court of a State of India would certainly not even attract persuasive

influence on the Supreme Court of Sri Lanka. Therefore, even if the facts were identical, and the cited judgment also related to a consideration of an Appeal arising out of a conviction and sentence imposed by a trial court relating to the committing of the offence of '*cheating*', I see no useful purpose having been served by citing the judgment referred to above.

If at all, what may serve as helpful guidance to the Supreme Court of Sri Lanka would be judgments of the Supreme Court of India, in instances where the jurisdictions of the two courts and the applicable laws are comparable.

In any event, I must place on record that Courts must exercise great caution and apply extreme diligence when considering a judgment of a Court of a foreign jurisdiction, as a judgment must be necessarily viewed and appreciated in the backdrop of the applicable law, sources of law, evolution of the law, jurisdiction of the relevant court, comparable binding judicial precedents, subsequent developments of judicial precedents, natural and inherent conduct of the people of that country, and the socio-cultural and other conditions and circumstances which prevailed in such country at the time the particular judgment was pronounced. All such relevant factors may not be apparent *ex-facie* in the cited judgment and would not be within the domain of knowledge of judges invited to consider such judgment of the relevant foreign Court.

Former Chief Justice of India Justice K. G. Balakrishnan in "*The Role of Foreign Precedents in a country's Legal System*" [National Law School of India Review, Volume 22 (No. 1) 2010] has expressed the view that, "*… judges should be cautious against giving undue weightage to precedents decided in entirely different socio-political settings. … reliance on foreign precedents should also be shaped by the*

discipline expected of a common law judge in weighing the credibility and persuasive value of precedents from different legal systems".

From that perspective too, the judgment cited by learned Senior State Counsel provides hardly any assistance for the determination of this Appeal, and must be classified as being *'irrelevant'*. In the circumstances, it would be necessary to call upon counsel to refrain from citing judgments of foreign jurisdictions that do not have any relevance to the case at hand required to be decided by a Sri Lankan Court.

Antecedents and the character of the Appellant

As referred to earlier, learned Senior State Counsel citing certain journal entries and proceedings of the case, submitted that the Appellant had several connected cases relating to several similar offences and that he had been once convicted of having committed an offence. Her submission was that these facts *'indubitably go toward the Petitioner's* [sic] *character, that he is a repeat offender who has engaged in cheating persons in a manner similar to that in which he cheated the virtual complainant in this matter".* It appears from the said submission that the Respondent's position is that, the said antecedents amounting to bad character of the Appellant should be taken into account for the purpose of considering the lawfulness or otherwise of the conviction that is impugned by the Appellant in this Appeal.

Section 54 of the Evidence Ordinance provides as follows:

In criminal proceedings the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant." Explanations 1 and 2 of section 54 provide that this section does not apply to cases in which the bad character of any person is itself a fact

in issue and that in such cases a previous conviction is relevant notwithstanding such evidence amounting to evidence of bad character. E.R.S.R. Coomaraswamy in "*The Law of Evidence*" (Volume I, page 684) has aptly summarized the position of the law in this regard in the following manner: "*Section 54 lays down the general rule that in criminal proceedings, the fact that the accused has a bad character is irrelevant, except in exceptional cases mentioned therein. Evidence may not be given of the accused's previous convictions and misconduct on other occasions for the purpose of supporting an argument that he is the kind of person who would commit the crime charged. As Wigmore puts it, "the rule, then, firmly and universally established in policy and tradition is that the prosecution may not initially attack the defendant's character".*" Lord Sumner in *Thompson v. Rex* [(1918) A.C. 232] has held that, "*no one doubts that it does not tend to prove a man guilty of a particular crime to show that he is the kind of man who would commit a crime or that he is generally disposed to crime and even to a particular crime'*. In *Makin v. Attorney General for New South Wales* [(1894) A.C. 57] it has been held by Lord Herschell that, it is not competent for the prosecution to adduce evidence tending to show that the accused had been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that he is likely, from his criminal conduct or character to have committed the offence, for which he is being tried.

This is not a case where the character of the accused was a fact in issue. Indeed, in such cases, evidence relating to the bad character of the accused can be presented by the prosecution. Nor had the accused acting in terms of section 52 of the Evidence Ordinance presented to court evidence of his good character. In such instances, evidence amounting to the bad character of the accused can be presented to rebut the evidence presented on behalf of the accused. Thus, neither of these two situations are applicable.

The third situation whether the presentation of evidence which may amount to evidence of bad character may be relevant, would be instances where the prosecution seeks to present evidence in terms of sections 14 or 15 of the Evidence Ordinance for the purpose of establishing the existence of a particular state of mind of the accused at the time of committing of the offence which would constitute the *means rea* of the offence, or for the purpose of establishing a state of body or bodily feeling. Towards this objective evidence which may amount to bad character of the accused may be led, as well as evidence of similar occurrences involving the accused, commonly referred to as *system evidence*. Illustrations "*(a)*", "*(b)*" and "*(c)*" of section 14 and illustration "*(c)*" of section 15 provide ample illustration of this principle of evidence. However, in such situations too, evidence which amounts to bad character of the accused would be permitted by court only in exceptional circumstances if the prosecution can show a high degree of probative force in such evidence, the principle being that the court should protect the accused against the consequential prejudicial impact arising out of such evidence of bad character.

The fourth and the final circumstances under which evidence which may amount to bad character of the accused may be relevant, would be for the purpose of establishing the 'cause' and the 'motive' for the committing of an offence, which would be relevant in terms of sections 7 and 8(1) of the Evidence Ordinance, respectively. Illustration "*(a)*" of section 8 which provides that, "*when 'A' is tried for the murder of 'B', the facts that 'A' murdered 'C', that 'B' knew that 'A' had murdered 'C', and that 'B' had tried to extort money from 'A' by threatening to make his knowledge public, are relevant*", amply exemplifies the position of the law in this regard. However, even when evidence which may amount to bad character of the accused is sought to be presented by the

prosecution as means of establishing the 'cause' and or the 'motive' for committing the offence, the trial Court must exercise great caution in ensuring that the probative value of such evidence outweighs its prejudicial effect.

It would be seen that the circumstances cited above by the learned Senior State Counsel which in any event has not been presented as 'evidence' before the learned Magistrate, do not come within any of the four situations described above, which make evidence of bad character relevant and admissible. Therefore, consideration of such factors submitted by the learned Senior State Counsel would be obnoxious to the law and hence this court refrains from doing so.

Impugned judgments of the High Court and the Magistrate's Court

It is a matter of regret that the learned Magistrate who found the Appellant *guilty* as charged in respect of all three offences, has not considered the evidence led by the prosecution from the perspective of the ingredients of the offences the Appellant had been charged with. After arriving at determinations regarding the credibility and testimonial trustworthiness of the witnesses who testified at the trial, a trial judge must necessarily consider the evidence from the perspective of the constituent ingredients of the offence the accused has been charged with. Having identified witnesses who are credible, the trial judge must conclude whether their testimony is trustworthy. He must thereafter apply the evidence emanating from such credible and trustworthy witnesses, to the ingredients of the offence, and consider and arrive at a conclusion on whether the available evidence would be sufficient to prove the ingredients of the offence. If following a consideration of the evidence for the prosecution, the learned trial judge arrives at an affirmative finding, he must thereafter consider the totality of the evidence presented by both the

prosecution and the defence and determine whether the prosecution has proved its case against the accused beyond reasonable doubt.

The learned High Court judge has proceeded on the footing that, the Appellant had by tendering the cheque and giving an undertaking to the virtual complainant that the amount obtained as a loan would be returned as promised, had thereby created a belief in the mind of the virtual complainant that the money would be returned, and had therefore committed the offence of *cheating.* The learned High Court judge has also not considered the impact arising out of the pre-existing confidence / trust the virtual complainant had towards the Appellant. Nor has the learned High Court Judge considered whether the conduct of the Appellant amounted to *deception,* whether it was such deceptive conduct which resulted in the virtual complainant giving the money to the Appellant, and whether the Appellant entertained a *dishonest* intention.

In view of the foregoing, I answer the questions of law presented to this Court in the following manner:

(i) The Provincial High Court had failed to analyse whether the evidence led at the trial justifies the conclusion that the Appellant entertained the requisite *mens rea* of the offence of *cheating*, which in view of the manner in which the charge had been framed and the evidence presented by the prosecution was a *dishonest intention.*

(ii) The Provincial High Court had failed to analyze and conclude that the virtual complainant had not been deceived by the impugned conduct of the Appellant, which is a necessary ingredient to constitute a charge of *cheating*.

In view of the above, I conclude that both the judgments of the High Court and the Magistrate's Court are against the weight of the evidence and are not lawful.

In the circumstances, I allow this Appeal. Accordingly, I acquit the Appellant of the charge of *cheating*.

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

1. Herath Mudiyanselage Podi Nilame,
2. Herath Mudiyanselage Seneviratne, (Deceased)

2A. H.M. Podinilame,
All of
Bogala Road,
Kotiyakumbura.
Plaintiffs

SC APPEAL NO: SC/APPEAL/52/2018
SC LA NO: SC/HCCA/LA/94/2015
HCCA KEGALLE NO: SP/HCCA/KEG/860/2011/F
DC KEGALLE NO: 25389/P

Vs.

1. Walpola Kankanamalage Gunarathne of
Morawawka, Ruwanwella.
2. E.N. Margret Nona of
Pattiyamulla, Kotiyakumbura.
(Deceased)

2A. Hapuarachchilage Susantha Rohan Hapuarachchi of
Pattiyamulla, Kotiyakumbura.

3. Dadagama Ralalage
   Sumanawathie Menike of
   Ampe, Kotiyakumbura.
4. Kanthi Asoka of
   Ampe, Kotiyakumbura.
5. Hapuarachchilage Susantha
   Rohan Hapuarachchi of
   Pattiyamulla, Kotiyakumbura.
6. H.M. Chandrasekara of
   No. 20,
   Parawatte Janapadaya,
   Kotiyakumbura.
7. H.M. Chandrawathie Herath,
   C/O W.A. Gunathilake of
   Delgamuwa, Warakapola.
8. H.M. Sumanawathie,
   C/O S.S. Chandrasekara of
   No. 20,
   Parawatta Janapadaya,
   Kotiyakumbura.
9. H.M. Anula Herath,
   C/O V.G.R.S. Raja of
   Udapelpita, Weragala,
   Warakapola.
10. M.N. Saliya Niroshane Herath of
    No. 10965,
    Police Official Quarters,
    Peduru Kotuwa,
    Trincomalee.

    Defendants

AND BETWEEN

2A. Hapuarachchilage Susantha
Rohan Hapuarachchi of
Pattiyamulla, Kotiyakumbura.

3. Dadagama Ralalage
Sumanawathie Menike of
Ampe, Kotiyakumbura.

4. Kanthi Asoka of
Ampe, Kotiyakumbura.

5. Hapuarachchilage Susantha
Rohan Hapuarachchi of
Pattiyamulla, Kotiyakumbura.

2A, 3rd to 5th Defendant-Appellants

Vs.

1. Herath Mudiyanselage Podi
Nilame,

2A. H.M. Podinilame,
All of
Bogala Road,
Kotiyakumbura.

Plaintiff-Respondents

1. Walpola Kankanamalage
Gunarathne of
Morawawka,
Ruwanwella.
(Deceased)

1A. Seelawathi Podimanike,
1B. Shayamala Gunarathna,
1C. Nalaka Nishantha Gunarathna,
1D. Chanaka Nishantha Gunarathna,
All of
Morawaka, Ruwanwella.

6. H.M. Chandrasekara of
No. 20,
Parawatte Janapadaya,
Kotiyakumbura.

7. H.M. Chandrawathie Herath,
C/O W.A. Gunathilake of
Delgamuwa, Warakapola.

8. H.M. Sumanawathie,
C/O S.S. Chandrasekara of
No. 20,
Parawatta Janapadaya,
Kotiyakumbura.

9. H.M. Anula Herath,
C/O V.G.R.S. Raja of
Udapelpita, Weragala,
Warakapola.

10. M.N. Saliya Niroshane Herath of
No. 10965,
Police Official Quarters,
Peduru Kotuwa,
Trincomalee.
Defendant-Respondents

AND NOW BETWEEN

2A. Hapuarachchilage Susantha
Rohan Hapuarachchi of
Pattiyamulla, Kotiyakumbura.

3. Dadagama Ralalage
Sumanawathie Menike of
Ampe, Kotiyakumbura.

4. Kanthi Asoka of
Ampe, Kotiyakumbura.

5. Hapuarachchilage Susantha
Rohan Hapuarachchi of
Pattiyamulla, Kotiyakumbura.

2A, 3rd to 5th Defendant-
Appellant-Petitioners

Vs.

1. Herath Mudiyanselage Podi
Nilame,

2A. H.M. Podinilame,
All of
Bogala Road,
Kotiyakumbura.

Plaintiff-Respondent-Respondents

1A. Seelawathi Podimanike,

1B. Shayamala Gunarathna,

1C. Nalaka Nishantha Gunarathna,

1D. Chanaka Nishantha Gunarathna,
All of
Morawaka, Ruwanwella.

6. H.M. Chandrasekara of
No. 20,
Parawatte Janapadaya,
Kotiyakumbura.
7. H.M. Chandrawathie Herath,
C/O W.A. Gunathilake of
Delgamuwa,
Warakapola.
8. H.M. Sumanawathie,
C/O S.S. Chandrasekara of
No. 20,
Parawatta Janapadaya,
Kotiyakumbura.
9. H.M. Anula Herath,
C/O V.G.R.S. Raja of
Udapelpita,
Weragala,
Warakapola.
10. M.N. Saliya Niroshane Herath of
No. 10965,
Police Official Quarters,
Peduru Kotuwa,
Trincomalee. (Deceased)
10A. Sayibudeen Neyi Rahima,
C/O S.M. Rahima of
Trincomalee Road,
Saliya Mawatha,
Mihinthale.
<u>Defendant-Respondent-Respondents</u>

Before: P. Padman Surasena, J.
Yasantha Kodagoda, P.C., J.
Mahinda Samayawardhena, J.

Counsel: Harsha Soza, P.C., with Zahara Hassim for the 2A, 3rd to 5th Defendant-Appellant-Appellants.

K. Asoke Fernando with A.R.R. Siriwardane for the Plaintiff-Respondent-Respondents.

Chathura Galhena with Manoja Gunawardana for the 1B Defendant-Respondent-Respondent.

Rasika Dissanayake with Chandrasiri Wanigapura and Shasir Hussair for the 6th, 7th and 9th Defendant-Respondent-Respondents.

Pulasthi Hewamanna with Harini Jayawardhana and Anjalee Karunaratna for the 10A Defendant-Respondent-Respondent.

Argued on : 29.04.2021

Written submissions:

by the 2A, 3rd to 5th Defendant-Appellant-Appellants on 30.05.2018.

by the Plaintiff-Respondent-Respondents on 20.09.2018.

by the 10th Defendant-Respondent-Respondent on 23.10.2018.

Decided on: 10.06.2021

Mahinda Samayawardhena, J.

The two Plaintiffs filed this action in the District Court of Kegalle seeking to partition the land described in the schedule to the plaint among the two Plaintiffs, the 1st and 6th to 10th Defendants. Of all the Defendants, only the 1st and 2nd Defendants filed a joint statement of claim. At the trial, apart from the Plaintiffs, the 2nd to 5th Defendants raised issues. Upon conclusion of the trial, the learned District Judge delivered the Judgment partitioning the land depicted in the Preliminary Plan in accordance with the pedigree set out by the Plaintiffs. The appeal filed by the 2nd to 5th Defendants against this Judgment to the High Court of Civil Appeal was dismissed. Hence the appeal to this Court by the 2nd to 5th Defendants. This Court granted leave to appeal on the question whether the Plaintiffs have properly identified the land to be partitioned.

In a partition action, if the corpus cannot be identified, *ipso facto*, the action shall fail. If the corpus cannot be identified, there is no necessity to investigate title, as title shall be investigated on an identifiable portion of land. The Court shall not first investigate title and then look for the land to be partitioned. It shall happen *vice versa*. The finding that the corpus has not been identified decides the fate of the case without further ado, this finding shall only be reached after careful consideration of all the facts and circumstances of the case, and not as a convenient method to summarily dispose of long-drawn-out partition actions without analysing the complicated pedigrees set forth by the parties to the action.

A partition action cannot be filed to partition a portion of the land. The entire land should be brought into the action and the co-owners of the whole corpus should be made parties.

In the instant action, as described in the schedule to the plaint, the land sought by the Plaintiffs to be partitioned is as follows:

> *The amalgamated land called Egodawatta and Batalawatta situated at Ampe in Kandupita Pattu of Beligal Korale of Kegalle District in the Sabaragamuwa Province and bounded on the North by Paddy Field, East by Paddy Field, South by Limit of Galpathage Watta, and West by Ditch and Stone Fence, and containing in extent 15 Lahas of paddy sowing area.*

In terms of section 16(1) of the Partition Law, the Court issued a commission to survey the land and prepare the Preliminary Plan depicting the said land sought to be partitioned. The Preliminary Plan together with the Report was received by Court in 1991. In the Preliminary Plan, the land surveyed is described in the following manner:

> *The amalgamated land called Egodawatta and Batalawatta situated at Ampe in Kandupita Pattu of Beligal Korale of Kegalle District in the Sabaragamuwa Province and bounded on the North by Madugahamula Kanati and Aswaddume Paddy field, East by Aswaddume Paddy field and Gamsabha road, South by Millagahamula Watta alias Hitinawatta, and West by Madugahamula Kanati and Paddy field containing in extent 1 acre, 1 rood and 32 perches.*

In the Report to the Preliminary Plan, the surveyor records that at the survey the 2nd Defendant informed him that a portion of the land on the western boundary should be included in the corpus. However the 2nd Defendant did not show the portion which shall be included in the corpus to the surveyor. Neither was such an application made to Court.

According to section 16(2) of the Partition Law, on the application of a defendant, the Court can direct the surveyor to survey any larger or smaller land than that pointed out by the Plaintiff to him.

Section 16(2) reads as follows:

> *The commission issued to a surveyor under subsection (1) of this section shall be substantially in the form set out in the Second Schedule to this Law and shall have attached thereto a copy of the plaint certified as a true copy by the registered attorney for the Plaintiff.*
>
> *The court may, on such terms as to costs of survey or otherwise, issue a commission at the instance of any party to the action, authorizing the surveyor to survey any larger or smaller land than that pointed out by the Plaintiff where such party claims that such survey is necessary for the adjudication of the action.*

Perhaps in consideration of the said observation made by the surveyor in his Report, the Court granted at least eight specific dates for consideration of the Preliminary Plan prior to the 1st and 2nd Defendants filing their statement of claim in 1994. But none of the Defendants took steps to take out a commission to

prepare an alternative Plan to show the portion of land purportedly excluded in the Preliminary Plan.

As I mentioned earlier, only the 1st and 2nd Defendants filed a joint statement of claim. The 3rd to 5th Defendants informed the Court that they would abide by the statement of claim filed by the 1st and 2nd Defendants.

In the second paragraph of the statement of claim of the 1st and 2nd Defendants, it is repeated that the entire land to be partitioned is not depicted in the Preliminary Plan, as a portion of the land on the western boundary has been left out. However, even in the statement of claim, the 1st and 2nd Defendants do not specify the excluded portion or at least the extent of it.

This is against section 19(2) of the Partition Law which lays down the detailed procedure to be followed by a Defendant who seeks to have a larger land partitioned. In short, such a defendant shall take all the steps afresh that a plaintiff in a partition action shall take, which include compliance with the provisions of sections 12-18 of the Partition Law. No such steps were taken by the 2nd-5th Defendants.

Section 19(2) reads as follows:

> *19(2)(a) Where a defendant seeks to have a larger land than that sought to be partitioned by the Plaintiff made the subject-matter of the action in order to obtain a decree for the partition or, sale of such larger land under the provisions of this Law, his statement of claim shall include a statement of the particulars required by section 4 in respect of such larger land; and he shall comply with the*

requirements of section 5, as if his statement of claim were a plaint under this Law in respect of such larger land.

(b) Where any defendant seeks to have a larger land made the subject-matter of the action as provided in paragraph (a) of this subsection, the court shall specify the party to the action by whom and the date on or before which an application for the registration of the action as a lis pendens affecting such larger land shall be filed in court, and the estimated costs of survey of such larger land as determined by court shall be deposited in court.

(c) Where the party specified under paragraph (b) of this subsection fails to comply with the requirements of that paragraph, the court shall make order rejecting the claim to make the larger land the subject-matter of the action, unless any other party, in whose statement of claim a similar claim shall have been set up, shall comply therewith on or before the date specified in paragraph (b) or within such extended period of time that the court may, on the application of any such party, fix for the purpose.

(d) After the action is registered as a lis pendens affecting the larger land and the estimated costs of the survey of the larger land have been deposited in court, the court shall-

> *(i) add as parties to the action all persons disclosed in the statement of claim of the party at whose instance the larger land is being made the subject-matter of the action as being persons who ought to be included as parties to an action in respect of such larger land under section 5; and*

(ii) proceed with the action as though it had been instituted in respect of such larger land; and for that purpose, fix a date on or before which the party specified under paragraph (b) of this subsection shall, or any other interested party may, comply with the requirements of section 12 in relation to the larger land as hereinafter modified.

(e) Where the larger land is made the subject-matter of the action, the provisions of sections 12, 13, 14 and 15 shall, mutatis mutandis, apply as if the statement of claim of the party seeking a partition or sale of the larger land were the plaint in the action; and-

(i) such party shall with his declaration under section 12, in lieu of an amended statement of claim, file an amended caption including therein as parties to the action all persons not mentioned in his statement of claim, but who should be made parties to an action for the larger land under section 5, and such amended caption shall be deemed for all purposes to be the caption to his statement of claim in the action;

(ii) summons shall be issued on all persons added as parties under paragraph (d) of this subsection and all persons included as necessary parties under sub-paragraph (i) hereof;

(iii) notice of the action in respect of the larger land shall be issued on all parties to the action in the original plaint together with a copy of the statement of claim referred to above;

(iv) the provisions of section 20 shall apply to new claimants or parties disclosed thereafter.

(f) If the party specified by the court under paragraph (b) of this subsection or any other interested party fails or neglects to comply with the provisions of section 12, as hereinbefore modified on or before the date specified in that paragraph, the court may make order dismissing the action in respect of the larger land.

(g) Where the requirements of section 12 as hereinbefore modified are complied with, the court shall order summonses and notices of action as provided in paragraph (e) of this subsection to issue and shall also order the issue of a commission for the survey of the larger land, and the provisions of sections 16, 17 and 18 shall accordingly apply in relation to such survey.

Although at the outset the 1st and 2nd Defendants filed a joint statement of claim, the 1st Defendant seems to have later accepted the Preliminary Plan and the pedigree of the Plaintiffs.

Ultimately, on the seventh date of trial, the 2nd to 5th Defendants made an application to Court to issue a commission for an alternative Plan. Notwithstanding this was a belated application, the Court took the case out of the trial roll and directed the said Defendants to take steps to issue the commission. However no steps were taken, and on the commission returnable date the said Defendants informed the Court that an alternative Plan was not necessary. Such was the nature of the complaint of the 2nd to 5th Defendants.

The 2nd to 5th Defendants raised issues at the trial. The first issue was whether the land to be partitioned was depicted in the Preliminary Plan and, if not, whether the Plaintiffs could maintain this action. The District Court answered this issue against the said Defendants. This issue was not specific and shall be understood in line with the second paragraph of the statement of claim of the 1st and 2nd Defendants, where they state that the entire land to be partitioned was not depicted in the Preliminary Plan because a portion on the western boundary had not been brought into the action.

It is significant to note that the complaint of the 2nd to 5th Defendants is not that a different land was surveyed but that the entire land was not surveyed; or, to be more specific, that a portion on the western boundary was not surveyed.

At the trial, the Preliminary Plan and the Report were marked X and X1 respectively by the 1st Plaintiff, without objection. Notwithstanding that the 2nd to 5th Defendants did not take out a commission for an alternative Plan, if they still had some concerns that a portion of the land had been left out by the surveyor, they could have summoned the surveyor to give evidence. This was not done.

Section 18(1) deals with the return of the surveyor's commission after the preliminary survey.

Section 18(2) states *inter alia* that the Preliminary Plan and Report may be used as evidence without further proof subject to the surveyor being summoned to give oral testimony on the application of any party to the action.

Section 18(2) of the Partition Law reads as follows:

The documents referred to in paragraphs (a), (b) and (c) of subsection (1) of this section may, without further proof, be used as evidence of the facts stated or appearing therein at any stage of the partition action:

Provided that the court shall, on the application of any party to the action and on such terms as may be determined by the court, order that the surveyor shall be summoned and examined orally on any point or matter arising on, or in connection with, any such document or any statement of fact therein or any relevant fact which is alleged by any party to have been omitted therefrom.

Let me now consider on what basis the 2nd to 5th Defendants state that a portion of the land on the western boundary is not included in the corpus. As I stated earlier, this was not addressed in the statement of claim but is discernible by going through the questions put to the 1st Plaintiff by learned Counsel for the 2nd to 5th Defendants during the course of the cross examination in the District Court. The 1st Plaintiff was cross examined by learned Counsel for the 2nd to 5th Defendants on the extent of the land to be partitioned. The cross examination was based on the premise that in the area where the land to be partitioned is situated (at Ampe in Kegalle), 8 *lahas* of paddy sowing area is equal to 1 acre. This was also emphasised in the written submissions tendered to the District Court after the conclusion of the trial. The 1st Plaintiff admitted this during the course of the cross examination.

The 1st Plaintiff in his evidence in chief described the boundaries of the schedule to the plaint as the land surveyed by the surveyor. These are the same boundaries which are stated in all

the title deeds of the Plaintiff. They are P1 executed in 1961, P2 executed in 1980, P3 executed in 1939, P4 executed in 1927, and P5 executed in 1929. It is significant to note that all the deeds marked by the 2nd to 5th Defendants carry the same boundaries. They are 1V1 executed in 1965, 1V2 executed in 1980, 3V1 executed in 1988, 4V1 executed in 1988, 5V1 executed in 1965, and 5V2 executed in 1988.

The extent of the land as described in the old deeds (for instance, P5 executed in 1929) is 15 *lahas* of paddy sowing area. The schedule to the plaint is a reproduction of the land described in these old deeds. Without surveyor Plans being available, the extent of the land given in these old deeds is speculative. Hence it was a common occurrence at that time for a deed to purport to convey either much more or much less than what a person was entitled to.

According to the above conversion (i.e. 8 *lahas* of paddy sowing area being equal to 1 acre in that area), it was the position of the 2nd to 5th Defendants before the District Court that the Preliminary Plan shall depict a land little less than 2 acres but instead depicts a land only in extent of 1 acre, 1 rood and 32 perches. It is on this basis the said Defendants took up the position that only a part of the land was surveyed by the surveyor.

However, the position of the learned President's Counsel for the 2nd to 5th Defendants before this Court is contradictory. His position before this Court is that according to the accepted Sinhala land measures, as cited in *Ratnayake v. Kumarihamy [2002] 1 Sri LR 64 at 80*, 7 *lahas* is equal to 1 bushel, and 1 bushel being 2 roods, 14 *lahas* is equal to 4 roods or 1 acre.

According to this conversion, learned President's Counsel submits that 15 *lahas* would be a little over one acre, *viz.* 1 acre and 12 perches, but the surveyor surveyed a land of 1 acre, 1 rood and 32 perches, a land in excess of the land to be partitioned, and therefore there is a serious question as to the identification of the corpus.

This is a textbook case for highlighting the unreliability in comparing ancient land measures with English standard equivalents.

In *Ratnayake v. Kumarihamy (supra)*, the Plaintiff filed a partition action seeking to partition a land of 4 *lahas* of kurakkan sowing extent. The extent of the land shown in the Preliminary Plan was 8 acres, 1 rood and 16 perches, which the contesting Defendants contended was far in excess of the extent described in the schedule to the plaint. Counsel for the Defendants contended that the English equivalent to the customary Sinhala measure of 1 *laha* of kurakkan sowing extent is 1 acre, and the Preliminary Plan depicted a land more than double the correct extent. However upon consideration of the totality of the evidence led in the case, the District Court held, and the Court of Appeal affirmed, that the land described in the Preliminary Plan was the land described in the schedule to the plaint, notwithstanding that it did not correspond to the traditional Sinhala measurement. On appeal, the Supreme Court upheld the Judgment of the Court of Appeal, which is reported in *Ratnayake v. Kumarihamy [2005] 1 Sri LR 303*. Udalagama J. in the Supreme Court stated at 307-308:

> *I would also reiterate the observations of the President of the Court of Appeal in the impugned judgment that land*

> *measures computed on the basis of land required to be sown with Kurakkan vary from district to district depending on the fertility of soil and quality of grain and in the said circumstances difficult to correlate the sowing extent with accuracy. Thus there cannot be a definite basis for the contention that 1 Laha sowing extent be it Kurakkan or even paddy would be equivalent to 1 acre.*

This is a common issue confronted by Judges and Lawyers in partition actions where the extent of the land in old deeds is given by way of traditional land measures based on paddy or kurakkan sowing extent without reference to a Plan. The Plaintiff reproduces in the schedule to the plaint the schedule to the old deeds prepared decades if not centuries ago as the land to be partitioned. The surveyor commissioned to prepare the Preliminary Plan records the existing boundaries of the land, not the old boundaries stated in the schedule to the plaint. The surveyor further records the extent of the land in English standard measures and not ancient land measures. The difficulties arise when the traditional land measures are compared with the English standard equivalents. The common conversion tables found in various sources are unreliable.

If I may reiterate what has already been stated by experienced Judges in the past, it is not possible to correlate sowing extents accurately with surface extents. Such a correlation depends on various factors such as the size and quality of the grain, the fertility of the soil, the peculiarities of the sower and local conditions (e.g. the violence of the wind at the time of sowing and the water supply to the sowing area). In unfertile soil the seed would be sown thicker than in fertile soil. An

inexperienced sower would scatter seeds unevenly, thereby requiring more seeds than an experienced sower. If the quality of the grain, be it paddy or kurakkan, is poor, more grain would be necessary than if the quality were high. It is also relevant to note that the sizes (the capacity) of the traditional measures such as *lahas* and *neliyas* differ not only between districts but also within districts.

In addition to the 2nd to 5th Defendants disputing the identification of the corpus by making a comparison between sowing extent and surface area, the said Defendants attempted before the High Court and this Court to add another string to their bow when they stated that, of the four boundaries shown in the Preliminary Plan, two boundaries differ from the boundaries given in the title deeds. I must mention that this is an afterthought. This was not in their contemplation when they filed their statement of claim (after the Preliminary Plan had been tendered to Court).

As I have already emphasised, the boundaries in the schedule to the plaint are given as stated in the deeds of which the first one was executed as far back as 1927. The land was surveyed to prepare the Preliminary Plan in 1991, i.e. 64 years after the execution of the first deed produced in the case. The 2nd to 5th Defendants admit that the northern and eastern boundaries as stated in the deeds correspond with those in the Preliminary Plan. But they say the southern and western boundaries do not match. This argument on boundaries, similar to the argument on the extent of the land, is unsustainable.

The 3rd and 5th Defendants gave evidence on behalf of the 2nd to 5th Defendants. The 5th Defendant in his evidence in chief did

not speak about the boundaries or the extent of the land. In fact, in the cross examination he admitted that the land described in the schedule to the plaint is the land in suit, which means it is the land depicted in the Preliminary Plan.

The 3rd Defendant in her evidence in chief stated that a portion on the western boundary was not included in the corpus. I have already dealt with this matter to a certain extent.

Let me first deal with the southern boundary. According to the deeds, the southern boundary is "the limit (boundary) of Galpathage Watta". According to the Preliminary Plan, the southern boundary is Millagahamula Watta alias Hitina Watta. The 3rd Defendant in her cross examination accepted that Millagahamula Watta alias Hitina Watta and Galpathage Watta are one and the same land. Learned President's Counsel for the 2nd to 5th Defendants submits that the 3rd Defendant did not make a spontaneous admission to this effect and the said answer was only in response to a leading question put to her during the cross-examination. I am unable to accept this submission. The same question has been asked or suggested more than once.

Even assuming there was no such admission, it is noteworthy that in the old deeds the southern boundary is identified by the owner of the land and not by the name of the land. Galpathage Watta means "the land belonging to Galpatha". In the Preliminary Plan, the surveyor records the existing boundaries. Galpatha, who is mentioned in the old deeds, would not have been among the living at the time of the survey, and his descendants and successors would have been in possession of the land to the south of the land to be partitioned. Instead of

giving the names of the present owners of the land on the southern boundary, the surveyor has recorded the name of the land. This discrepancy cannot be interpreted as the southern boundary in the Preliminary Plan being different from the boundary of the title deeds.

The same principle applies to the western boundary. The old title deeds identify the western boundary as "Ditch and Stone Fence". In the Preliminary Plan prepared 64 years after the first known deed executed in 1927, the surveyor identifies the western boundary as Madugahamula Kanati (the name of the land) and the Paddy Field. This does not necessarily mean there is a discrepancy in the western boundary. The name of the land to the western boundary is not given in the old deeds. The ditch and the stone fence which existed many moons ago cannot be expected to have remained unchanged when the surveyor went to the land more than 64 years after the execution of the first known deed. Furthermore, the stone fence indicates that there were two lands separated by a fence in 1927.

It is a grave error to conclude in partition actions that the identification of the corpus is not established upon a mere superficial comparison of the schedule to the plaint, which is a reproduction of the schedules to old deeds, with the existing boundaries as depicted in the Preliminary Plan. Boundaries do not remain unchanged. They change over the years due to various factors, be it natural or man-made. Whether or not the Preliminary Plan represents the land described in the schedule to the plaint shall be determined upon a consideration of the totality of the evidence led in the case and not solely by such a comparison.

Learned President's Counsel for the 2nd to 5th Defendants makes another point to contend that the land to be partitioned has not been properly identified. This relates to the Survey Report tendered to Court together with the Preliminary Plan. The surveyor has not stated in the Report that the land surveyed by him is in his opinion substantially the same as the land sought to be partitioned as described in the schedule to the plaint. Section 18(1)(a)(i)-(viii) of the Partition Law sets out the several items which shall be included in the Report. Section 18(1)(a)(iii) refers to the above requirement. In the Report relevant to this case, both this question and the answer are not there. This is different from leaving the question unanswered or answering the question in the negative. It is not clear whether the surveyor failed to mention it by mistake in his handwritten Report. It may have even been intentional since the 2nd Defendant had told the surveyor that a portion of the land to the west should be included in the corpus and the surveyor was awaiting further directions. Without raising this issue for the first time in this Court, the 2nd to 5th Defendants should have raised it in the District Court when the Court granted the parties a number of dates for consideration of the Preliminary Plan. I accept that the surveyor shall record the above-stated question and answer it in the Report. *(Sopaya Silva v. Magilin Silva [1989] 2 Sri LR 105)* However, failure to answer this question or answering it in the negative shall not be decisive. In other words, the Court cannot dismiss a partition action on the basis that the surveyor in his Report to the Preliminary Plan has failed to answer or answered in the negative the question "*Whether or not the land surveyed by him is in his opinion substantially the same as the land sought to be partitioned as described in the schedule to the plaint*". Nor can the Court blindly accept that the Preliminary Plan depicts

the entire land to be partitioned, if the surveyor in his Report answers the above question in the affirmative. Whether or not the land has been correctly identified shall be finally decided not by the surveyor but by the Court having taken into consideration the totality of the evidence adduced before it. The answer to the said question by the surveyor is undoubtedly an important item of evidence but it cannot decide the whole case.

I must also add that in terms of section 16(2) of the Partition Law, together with the commission a copy of the plaint shall also be sent to the surveyor. In the commission issued in this action, the surveyor was directed to survey the land described in the schedule to the plaint and prepare the Preliminary Plan accordingly. Although the surveyor failed to answer the question required by section 18(1)(a)(iii), he states in the Report that he executed the commission in terms of the directions given. This means what is depicted in the Preliminary Plan is the land described in the schedule to the plaint. This observation shall not be taken as licence for Court Commissioners to be remiss in their duties in sending Reports to Court in partition actions.

In the facts and circumstances of this case, I hold that the land to be partitioned as stated in the schedule to the plaint is depicted in the Preliminary Plan. The corpus has been properly identified. I answer the question of law in respect of which leave was granted in the affirmative.

The Judgment of the High Court of Civil Appeal is affirmed and the appeal is dismissed with costs.

Judge of the Supreme Court

P. Padman Surasena, J.
I agree.

Judge of the Supreme Court

Yasantha Kodagoda, P.C., J.
I agree.

Judge of the Supreme Court

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

1. Vithanage Dona Sreema Sarani Swarnalatha Perera,
   No. 10/B 105/10,
   Mattegoda Niwasa Housing Scheme,
   Polgasowita.
2. Violet Gunawickrema,
   "Dimuthu", Palatuwa,
   Malimbada.

Plaintiffs

SC APPEAL NO: SC/APPEAL/53/2016
SC LA NO: SC/HCCA/LA/519/2014
HCCA NO: WP/HCCA/COLOMBO/27/2008/LA
DC COLOMBO NO: 20939/L

Vs.

1. Kamalawathie Munasinghe alias M.A. Kamalawathie,
2. W.D. Padmasiri alias Hemasiri Perera,
   Both of No. C-B 12/14,
   Ranpokunagama,
   Nittambuwa.
3. Sithy Raleena Siddique,
   No. 146/18,
   Aramaya Road,
   Dematagoda.

Defendants

AND BETWEEN

1. Kamalawathie Munasinghe alias
   M.A. Kamalawathie, (deceased)

1A. W.D. Padmasiri alias Hemasiri
   Perera,
   No. C-B 12/14,
   Ranpokunagama,
   Nittambuwa.

2. W.D. Padmasiri alias Hemasiri
   Perera,
   No. C-B 12/14,
   Ranpokunagama,
   Nittambuwa.

3. Sithy Raleena Siddique,
   No. 114, Kollonnawa Road,
   Dematagoda.

Defendant-Petitioners

Vs.

1. Vithanage Dona Sreema Sarani
   Swarnalatha Perera,
   No. 10/B 105/10,
   Mattegoda Housing Scheme,
   Polgasowita.

2. Violet Gunawickrema,
   "Dimuthu",
   Palatuwa,
   Malimbada.

Plaintiff-Respondents

AND NOW BETWEEN

1. Kamalawathie Munasinghe alias
   M.A. Kamalawathie,
   (deceased)

1A. W.D. Padmasiri alias Hemasiri
   Perera,
   No. C-B 12/14,
   Ranpokunagama,
   Nittambuwa.

2. W.D. Padmasiri alias Hemasiri
   Perera,
   No. C-B 12/14,
   Ranpokunagama,
   Nittambuwa.

3. Sithy Raleena Siddique,
   No. 114,
   Kollonnawa Road,
   Dematagoda.

Defendant-Petitioner-Appellants

Vs.

1. Vithanage Dona Sreema Sarani
   Swarnalatha Perera,
   No. 10/B 105/10,
   Mattegoda Housing Scheme,
   Polgasowita.

2. Violet Gunawickrema,
   "Dimuthu",
   Palatuwa,
   Malimbada.

Plaintiff-Respondent-Respondents

Before: P. Padman Surasena, J.
Yasantha Kodagoda, P.C., J.
Mahinda Samayawardhena, J.

Counsel: Murshid Maharoof with Shoaib Ahamed for the Substituted 1A and 2nd Defendant-Petitioner-Appellants.
Ranjan Suwandaratne, P.C., with Anil Rajakaruna for the Plaintiff-Respondent-Respondents.

Argued on: 29.04.2021

Written submissions:

by the 1A, 2nd and 3rd Defendant-Petitioner-Appellants on 11.05.2021.

by the Plaintiff-Respondent-Respondents on 01.02.2017.

Decided on: 10.06.2021

Mahinda Samayawardhena, J.

The two Plaintiffs filed this action against the three Defendants seeking a declaration that the land in suit is being held in trust by the Defendants for the two Plaintiffs and the two minor children of the 2nd Plaintiff. At the trial, the Defendants raised a preliminary question of law to the maintainability of the action on the premise that the alleged cause of action of the Plaintiffs is prescribed in law. The District Court held that the cause of action is not prescribed. It also stated in passing that in any event, prescription does not run against the two minors. The case was refixed for further trial.

On appeal, the High Court held that the action against the two Plaintiffs is prescribed but not against the two minors, and therefore the Order of the District Court is correct.

The Plaintiffs did not appeal against this Judgment but the Defendants did. This Court granted leave to appeal on the question whether the High Court erred in law when it decided to allow the action to proceed on the basis that prescription does not run against the two minors when the alleged minors are not parties to the case.

The Plaintiffs have not made the minors parties to the action notwithstanding they seek Judgment in favour of themselves and the minors. The Court knows nothing about the two alleged minors – not even their names, gender or age. Without any information, how can the Court pronounce Judgment in favour or against the minors?

When the High Court decided that the action of the two Plaintiffs is prescribed and the two Plaintiffs accepted that decision by not appealing against it, the Plaintiffs have no *locus standi* to maintain this action. After the above finding, there is no live action.

If the Plaintiffs want to maintain the action on behalf of the alleged two minors, there is a special procedure laid down in the Civil Procedure Code to follow. No such procedure was followed by the Plaintiffs in this case.

According to section 476 of the Civil Procedure Code, every action by a minor shall be instituted in the name of the minor by an adult person who in such action shall be designated in the plaint as the next friend of the minor. Section 477 of the Civil Procedure Code is also to similar effect. Such particulars shall appear in the caption of the pleadings.

In this case, the minors have not been named as Plaintiffs nor are they represented in Court through a next friend.

It shall be noted that any adult person cannot file a case on behalf of a minor with or without declaring himself the next friend. The appointment of next friend shall be made by the Court. The legislature in its wisdom has introduced such a procedure to safeguard the interests of minors.

According to section 481 of the Civil Procedure Code, a person of sound mind and full age is eligible to be appointed next friend of a minor, if his interest is not adverse to that of the minor and he is not a Defendant in the action. Such appointment has to be made on application by way of summary procedure supported by affidavit showing the required qualifications. The Defendant shall be made Respondent to the application, and the minor shall appear in Court when the application is made unless prevented by good cause.

For the purpose of disposing of this appeal, there is no necessity to analyse all the provisions in law with regard to next friends, but suffice it to say that the Civil Procedure Code *inter alia* provides for the removal of next friends.

The brief outline above goes to show that unless there is a formal appointment made by Court, a person cannot represent a minor in Court in the guise of safeguarding the interests of the minor. What I stated above is applicable when an action is filed by a minor.

The same is true when an action is filed against a minor, in which event the Court shall, under section 479 of the Civil Procedure Code, appoint an adult as guardian to defend the action on behalf of the minor.

The High Court was in error when it held that the Plaintiffs can continue with the action (despite their action being prescribed) as the reliefs have also been prayed on behalf of the minors. I answer the question of law in respect of which leave was granted in the affirmative.

The Judgment of the High Court insofar as it allowed the Plaintiffs to continue with the action on behalf of the minors is set aside and the appeal is allowed. The Plaintiffs' action in the District Court shall stand dismissed. The Defendants are entitled to costs in all three Courts.

Judge of the Supreme Court

P. Padman Surasena, J.
I agree.

Judge of the Supreme Court

Yasantha Kodagoda, P.C., J.
I agree.

Judge of the Supreme Court

IN THE SUPREME COURT OF THE

DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an appeal in terms of section 5 C of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended by Act No. 54 of 2006.

SC Appeal 53/2021

SC/HCCA/LA Appln No : 106/2019

High Court Case No : WP/HCCA/Negombo/10/2014/LA

[Formerly WP/HCCA/Gampaha/49/2014/LA]

District Court of Negombo Case No: 7566/L

1. K. M. Hema Celsia Fernando,
   No. 48, St Joseph's Street,
   Negombo.
2. N. H. Lourds Sulani Jayasinghe,
   No. 48/1, St Joseph's Street,
   Negombo.

PLAINTIFFS.

Vs.

K. Madhuri Anuradha Rodrigo,
No. 48/2, St Joseph's Street,
Negombo.

DEFENDANT.

AND BETWEEN

1. K. M. Hema Celsia Fernando,
   No. 48, St Joseph's Street,

Negombo.

2. N. H. Lourds Sulani Jayasinghe,
   No. 48/1, St Joseph's Street,
   Negombo.

PLAINTIFF - APPELLANTS.

Vs.

K. Madhuri Anuradha Rodrigo,
No. 48/2, St Joseph's Street,
Negombo.

DEFENDANT - RESPONDENT.

AND NOW BETWEEN

K. Madhuri Anuradha Rodrigo,
No. 48/2, St Joseph's Street,
Negombo.

DEFENDANT - RESPONDENT - APPELLANT.

Vs.

1. K. M. Hema Celsia Fernando,
   No. 48, St Joseph's Street,
   Negombo.
2. N. H. Lourds Sulani Jayasinghe,
   No. 48/1, St Joseph's Street,
   Negombo.

PLAINTIFF - APPELLANT - RESPONDENTS.

Before: **P. PADMAN SURASENA J**

ACHALA WENGAPPULI J

MAHINDA SAMAYAWARDHENA J

Counsel: Aravinda Athurupana for the Defendant-Respondent-Appellant.

Sudarshani Cooray for the Plaintiff-Appellant-Respondents.

Argued on: 04 - 08 - 2021

Decided on: 16 - 11 -2021

P. Padman Surasena J

The Plaintiff - Appellant - Respondents (hereinafter referred to as the Plaintiffs) filed the plaint dated 17-04-2012 in the District Court of Negombo praying inter alia for a declaration that the Defendant-Respondent-Appellant (hereinafter referred to as the Defendant) is not entitled to use as a right of way, Lot 5 and Lot 4 depicted in Plan No. 1177 dated 13-04-1982, prepared by R. I. Fernando Licensed Surveyor (hereinafter referred to as the Plan No. 1177). The said Lots are more fully described respectively in the 5th and 6th schedules to the plaint. According to the Plan No. 1177, the said Lots 5 and 4 jointly make a roadway to gives access to Lots 2 and 3 depicted in the same Plan, from St. Joseph's Street.

The 1st Plaintiff occupies Lot 1; the 2nd Plaintiff occupies Lot 2; and the Defendant occupies Lot 3 depicted in the said Plan. The said plan is a partition plan (surveyed and partitioned on 13-04-1982) prepared to partition then existed larger land called Beligahawatta amongst the three co-owners (siblings) at that time. The said three co-owners were firstly, Kurukulasuriya Maria Hema Celsia Fernando (the 1st Plaintiff), secondly, Kurukulasuriya Philip Antony Roshan Fernando and thirdly, Kurukulasuriya Micheal Joseph Rohan Fernando. The said three co-owners are the children of Kurukulasuriya Micheal Fester Fernando (father) and Kurukulasuriya Mary Melverin Florence Fernando (mother) who had owned the said larger land by virtue of deed No. 5121 attested on 02-05-1956 by P.D.F.de Croos Notary Public.

After the partition plan No. 1177 was prepared, the three co-owners executed the Deed of Partition bearing No. 404 dated19-02-1983, attested by M John Andrew Fabian Tissera Notary Public. According to the plaint, by virtue of the said Deed of Partition No. 404, the 1st Plaintiff became the owner of Lot 1; Kurukulasuriya Philip Antony Roshan Fernando became the owner of Lot No. 2; and Kurukulasuriya Micheal Joseph Rohan Fernando became the owner of Lot No. 3.

Thereafter, Kurukulasuriya Philip Antony Roshan Fernando by virtue of deed No, 42 attested on 16-08-1994 by G. A. L. Palitha Dammika Silva Notary Public, transferred Lot 2, to the 1st Plaintiff.

Thereafter the 1st Plaintiff transferred the said Lot 2, to her daughter (the 2nd Plaintiff) by deed No. 2875 attested on 17-05-2005 by7 M. J. Basil A Tissera Notary Public.

Kurukulasuriya Micheal Joseph Rohan Fernando Transferred Lot 3 to Kaluarachchige Ignatious Loyola Rodrigo and Wimalawathie Sangaraja by deed No. 1699 attested on 23-03-1993 by M. J. Basil A Tissera Notary Public. Thereafter, said Kaluarachchige Ignatious Loyola Rodrigo transferred his interest in Lot No. 3 to Wimalawathie Sangaraja by deed No. 1919 attested on 06-12-1994 by M.J. Basil A Tissera Notary Public which made said Wimalawathie Sangaraja the sole owner of said Lot 3. Thereafter, said Wimalawathie Sangaraja transferred Lot 3 to the Defendant by virtue of deed No. 87279 attested on 18-01-2007 by Jayasekara Abeyruwan Notary Public making the Defendant the present owner of Lot 3.[1]

The said sub division was done in such a way that only the Lot 1 would have a road frontage from St. Joseph's Street, and the remaining two blocks (Lots 2 and 3) would get access from St. Joseph's Street through Lot 5 and Lot 4 reserved as a road way in the Plan No. 1177 at the time of the said sub division. Thus, when coming from St. Joseph's Street, the first block of land one would meet, would be Lot 1; the second block would be Lot 2; and the last block would be Lot 3. The Defendant is the person who at the moment occupies the last block i.e., Lot 3. The above facts make it clear that both the Plaintiffs and the Defendant derive their respective titles from one and the same source.

While the case was pending in the District Court, the Plaintiffs filed the Petition dated 25-07-2013 supported by an affidavit,[2] praying for an enjoining order in the first instance and an interim injunction, to prevent the Defendant or her agents or servants from using or obstructing the aforesaid roadway. The Plaintiffs in their Petition have prayed inter alia;

a) *for an enjoining order in the first place, preventing the Defendant from using the land strip Lot 4 depicted in Plan No. 1177 as a right of way; preventing the Defendant from bringing any vehicle on to the said land strip; preventing the Defendant from placing or storing any other object on the said land strip;*
b) *for an interim injunction thereafter, preventing the Defendant from using the land strip Lot 4 depicted in Plan No. 1177 as a right of way; preventing the Defendant from*

[1] As has been pointed out by the learned District Judge at page 3 of his order, there appear to be some confusion in mentioning the Lot No.'s in the plaint.
[2] The date of swearing the affidavit has not been inserted (only the month & the year has been inserted).

bringing any vehicle on to the said land strip; preventing the Defendant from placing or storing any other object on the said land strip;

Strangely, the Plaintiffs for the reasons best known to them, had not sought/prayed to restrain the Defendant from using Lot 5 as a road. The learned District Judge having granted the enjoining order as prayed for, subsequently by his order dated 19-09-2014 refused to grant the interim order, and proceeded to dissolve the enjoining order subject to a cost of Rs. 17,500.

On an appeal, the Provincial High Court by its judgment dated 08-02-2019, had set aside the order of the learned District Judge and directed that the interim injunction be issued; hence the Defendant has preferred this appeal.

Upon the Appellant supporting the application for leave to appeal relevant to this appeal, this Court by its order dated 16-03-2021, had granted leave to appeal on three questions of law,[3] which are to the following effect;

a. whether the High Court has failed to appreciate that the order made by the District court refusing to grant interim injunction had been made upon a detailed analysis of the principles of law and the matters adduced in respect of establishing a prima facie fair chance of winning the action, the balance of convenience, and the equitable considerations;
b. whether the High Court had come to its conclusions without any evaluation, analysis or examination of the findings of the District court and without making its determination as to those findings of the District court;
c. whether the High Court has failed to appreciate that there was no peril of any damage being caused to the roofs of the buildings of the Plaintiffs by the mere user of the said access path by the Defendant.

At the outset, I must mention that I find it difficult to follow and understand any rationale in the judgment of the learned High Court Judge. I also have to say that no lawful reason for setting aside the learned District Judge's order, is discernible from the judgment of the learned High Court Judge. However, if at all there is some reason, that must be found in the following two paragraphs because only those two paragraphs, have indicated something resembling such a reason.

[3] Questions of law set out in paragraph 12 (ii), (iii), (iv) of the petition dated 21-03-2019.

> *"In this case, even if Lots No. 4 and 5 are not permitted for the Defendant to use, it does not prejudice her as she has another road. This entire case is to determine whether Defendants have the right for Lots No. 4 and 5 that will be the final decision of the case. Therefore, that will be a part of the final decision. Until then, if Lots No. 4 and 5 are permitted to be used by the Defendant, there will be an irreparable loss to the Plaintiff because they are already getting a final remedy.*
>
> *According to the Plaint, it might damage to the roofs of buildings of the Plaintiffs. Therefore, it is best to maintain the status quo of granting a permanent injunction until the final determination of the case."*

Although the Plaintiffs had only sought in their petition nothing more than an interim injunction, the learned Provincial High Court Judge (according to the second paragraph above), had granted a permanent injunction. However, in view of the qualification "*until the final determination of the case"* inserted soon thereafter, I would think that it is an interim injunction and hence would not proceed any further to discuss about that lapse in the Provincial High Court's judgment. Nevertheless, suffice it to say that the above lapse taken along with the illogical reasoning would still indicate the diligence with which the learned Provincial High Court Judge had dealt with this case.

The above two paragraphs of the judgment of the Provincial High Court indicates the followings as reasons.

i. *'Preventing the Defendant from using Lots No. 4 and 5 does not prejudice her as she has another road';*
ii. *'Determination whether the Defendant has the right for Lots No. 4 and 5 will be the final decision of the case';*
iii. *'If Lots No. 4 and 5 are permitted to be used by the Defendant, there will be an irreparable loss to the Plaintiff because they are already getting a final remedy';*
iv. *'According to the Plaint, it might damage the roofs of buildings of the Plaintiffs'.*

In the course of the argument, the learned counsel for the Defendant complained to this Court that the Plaintiffs had never complained to the District Court in their pleadings that there is a danger of damaging the roofs of the buildings of the Plaintiffs by the Defendant's use of the disputed roadway. Upon the aforesaid complaint, this Court requested the learned counsel for the Plaintiffs to point out any averment to that effect, in the pleadings of the Plaintiffs. However,

the learned counsel for the Plaintiffs was unable to point out any such averment in the affidavit filed by the Plaintiffs along with the application for the interim injunction. Thus, the assertion by the learned High Court Judge that the usage of the disputed roadway by the Defendant, would damage the roofs of the buildings of the Plaintiffs, is not supported by any evidence and hence is a perverse conclusion. It is not a part of the case advanced by the Plaintiffs as no such averment is found in the Petition which prayed for the interim injunction. Thus, I see no factual or legal basis for the fourth reason mentioned above.

Neither party had moved Court at this stage to finally determine whether the Defendant has a right for Lots No. 4 and 5. Indeed neither the learned District Judge nor the learned High Court Judge has even attempted to decide that. Thus, the second reason given by the learned High Court Judge is a nonexistent reason.

As regards the first reason above, the learned High Court Judge appears to have been satisfied with the making of such a bare statement without any reference to any fact or any evidence as against the evaluation of the evidence adduced in the inquiry by the learned District Judge which has been set out in the District Court order. Thus, the assertion that the 'prevention of the use of Lots No.4 and 5 does not prejudice the Defendant as she has another road', is a misconception by the learned High Court Judge, which is not supported by evidence.

The third reason above, is a possibility of causing an irreparable loss to the Plaintiff. However, no one is able to ascertain what that irreparable loss would be, or how such a loss could be caused to the Plaintiffs, by the mere user of the disputed roadway by the Defendant.

The above observations would be sufficient for me to re-affirm my already mentioned view that there are no lawful reasons for setting aside the learned District Judge's order, discernible from the judgment of the learned High Court Judge. In my view that is sufficient to set aside the judgment of the Provincial High Court. However, I am mindful that the correctness of the refusal of the interim injunction by the learned District Judge would be another important consideration that should be addressed.

Before I proceed to consider the learned District Judge's order, let me glance through the law relating to Injunctions, focusing in particular on Interim Injunctions. Interim injunction is an equitable remedy and is not available as of right, such injunction will be granted at the discretion of the court. The effect and the purpose of such injunction is to preserve the status quo of the subject matter of the action until the final judgment is delivered. The Civil Procedure Code has

dedicated its Chapter XLVIII for the procedure relating to applications for injunctions. Section 662 is the first section in that Chapter which is as follows.

> *662. Every application for an injunction for any of the purposes mentioned in section 54 of the Judicature Act, except in cases where an injunction is prayed for in a plaint in any action, shall be by petition, and shall be accompanied by an affidavit of the applicant or some other person having knowledge of the facts, containing a statement of the facts on which the application is based.*

Section 662 is followed by few other sections in that Chapter and they form the procedure to be followed when an application for an injunction (for any of the purposes mentioned in section 54 of the Judicature Act), is made. As has been clearly stated in section 662, the 'purposes' for which such injunction may be obtained are set out in section 54 of the Judicature Act. The corollary of the above is that a Court can only grant such an injunction for the purposes set out in section 54 of the Judicature Act. This means that it is this section which vests Courts with jurisdiction to grant such injunctions.

In the case of Alubhay Vs Mohideen,[4] a case relating to an issuance of an interim injunction, De Sampayo J stated that it was section 87 of the Courts Ordinance No. 1 of 1889 which creates the jurisdiction of the Court to grant injunctions, and one must look to the Civil Procedure Code for the relevant procedure. Looking back at the recent legal history of the country, one could observe that the Courts Ordinance No. 1 of 1889 was replaced by the Administration of Justice Law No. 44 of 1973,[5] and the latter was in turn replaced by the Judicature Act No. 2 of 1978. This is why in Felix Dias Bandaranayake Vs. State Film Corporation and another,[6] Justice Soza stated that 'generally speaking section 54 of the Judicature Act No. 2 of 1978 is the jurisdictional section while sections 662, 664 and 666 of the Civil Procedure Code set out the procedure' for granting of injunctions. This concept has been long followed by our Courts. Thus, section 54 of the Judicature Act states the substantive law relating to injunctions in the following manner.

Section 54:

> *(1) Where in any action instituted in a High Court, District Court or a Small Claims Court, it appears-*

[4] 18 NLR 486.
[5] Jurisdiction to grant interim injunctions was in section 42 therein.
[6] 1981 (2) Sri L. R. 287 at page 292.

(a) from the plaint that the plaintiff demands and is entitled to a judgment against the defendant, restraining the commission or continuance of an act or nuisance, the commission or continuance of which would produce injury to the plaintiff; or

(b) that the defendant during the pendency of the action is doing or committing or procuring or suffering to be done or committed, or threatens or is about to do or procure or suffer to be done or committed, an act or nuisance in violation of the plaintiffs rights in respect of the subject matter of the action and tending to render the judgment ineffectual, or

(c) that the defendant during the pendency of the action threatens or is about to remove or dispose of his property with intent to defraud the plaintiff,

the Court may, on its appearing by the affidavit of the plaintiff or any other person that sufficient grounds exist therefor, grant an injunction restraining any such defendant from-

(i) committing or continuing any such act or nuisance;

(ii) doing or committing any such act or nuisance;

(iii) removing or disposing of such property.

(2) For the purposes of this section, any defendant who shall have by his answer set up any claim in reconvention and shall thereupon demand an affirmative judgment against the plaintiff shall be deemed a plaintiff, and shall have the same right to an injunction as he would have in an action brought by him against the plaintiff for the cause of action stated in the claim in reconvention, and the plaintiff shall be deemed the defendant and the claim in reconvention the plaint.

(3) Such injunctions may be granted at any time after the commencement of the action and before final judgment after notice to the defendant, where the object of granting an injunction will be defeated by delay, the court may enjoin the defendant until the hearing and decision of the application for an injunction but for periods not exceeding fourteen days at a time.

The above section shows that a court may grant an injunction for one or more of the purposes set out in section 54 (1) under three limbs namely (a), (b), (c). While the aforesaid three limbs [(a), (b), (c)] set out the purposes for which injunctions may be granted, limbs (i), (ii) and (iii) appearing at the end of section 54 (1), set out what a Court can restrain by the issuance of an injunction. It is not accidentally that the same wordings found in the aforesaid three limbs [(a),

(b), (c)] have been incorporated in verbatim, in limbs (i), (ii) and (iii) appearing at the end of that section. This is why Justice Soza stated the following, in Felix Dias Bandaranayake case,[7]

> *"It is necessary first of all to have a clear picture of the legal principles that are applicable to the question before us. The jurisdictional provisions have already been noted. This is an action instituted in the District Court and the application for an interim injunction was made at the time the plaint was filed. So section 54(1) (a) and (i) of the Judicature Act No. 2 of 1978 and sections 662 and 664 of the Civil Procedure Code apply. If it appears from the plaint that the plaintiff demands and is entitled to a judgment against the defendants, restraining the commission of an act or nuisance, which would produce injury to him the Court may, on its appearing by the affidavit of the plaintiff or any other person (and that would include the defendants as I have already pointed out) that sufficient grounds exist therefor, grant an interim injunction restraining the defendants from committing any such act or nuisance. The plaintiff must therefore have a clear legal right which is being infringed or about to be infringed. …"*

The law, namely section 662 of the Civil Procedure Code as well as section 54 of the Judicature Act, make a clear distinction between an instance where an injunction has been prayed for in the plaint itself, and an instance where an injunction is sought in a petition filed subsequent to filing of the plaint. This is evident from the phrase *"Every application for an injunction for any of the purposes mentioned in section 54 of the Judicature Act, except in cases where an injunction is prayed for in a plaint in any action, shall be by petition…"* in section 662 of the Civil Procedure Code and the following phrase in section 54 of the Judicature Act;

> *(1) Where in any action instituted in a High Court, District Court or a Small Claims Court,* ***it appears-***
>
> *(a)* ***from the plaint*** *that the plaintiff demands and is entitled to a judgment against the defendant,….* (Emphasis is mine)

Thus, section 54(1)(a) applies to an instance where an injunction has been prayed for in the plaint itself. What an injunction issued in such a situation can restrain, is what has been stated in (i) appearing at the end of that section.

As the injunction in the instant case, was sought at a later stage after filing the plaint, it would be section 54(1)(b) and/or 54(1)(c) of the Judicature Act which would apply. This is also

[7] Supra at page 301.

confirmed by the fact that both those limbs have the phrase '*during the pendency of the action'* which denotes that both the *'act or nuisance'* referred to in section 54(1)(b) and the *'removal or disposal of the defendant's property'* referred to in section 54(1)(c) are situations which must have arisen during the pendency of the action.

The wording in limb 54(1)(c) namely *"threatens or is about to"* clearly indicates that section 54 (1)(c) caters to actions which the defendant intends taking in future. Further, section 54(1)(c) refers to a situation where the defendant *'threatens or is about to remove or dispose of his property with intent to defraud the plaintiff'.* While the Plaintiffs in the instant case have not complained of anything of that sort happening, the requirement "*with intent to defraud the plaintiff* " is also absent in this case. The Plaintiffs have sought an injunction to restrain the Defendant from using the disputed roadway and that would not be an instance falling under section 54(1)(c) of the Judicature Act. Therefore, that limb has no application to the instant case. Thus, what needs to be considered is whether the Plaintiffs in the instant case have sought an injunction for a purpose which falls under section 54(1)(b) of the Judicature Act.

In relation to the above, the relevant catch phrase in section 54(1)(b) would be *'an act or nuisance in violation of the Plaintiff's rights in respect of the subject matter of the action and tending to render the judgment ineffectual'*. As per this section, a plaintiff must satisfy two requirements; firstly, an occurrence of 'an act or nuisance in violation of the Plaintiff's rights in respect of the subject matter of the action'; and secondly the occurrence of the said act or nuisance would 'tend to render the judgment ineffectual'.

Although section 54 of the Judicature Act has given a wide discretion to courts to issue injunctions whenever it is just to do so, over the years our courts have developed three primary grounds or parameters or guidelines to guide themselves when deciding the question whether it should proceed to grant an interim injunction against a defendant. Those grounds could be summarized in to a brief form to read as follows.

1) Has the applicant made out a strong prima facie case?
2) Whether the balance of convenience is in his favour?
3) Do equitable considerations favour the grant of an injunction?

Let me pause there for a moment and turn back again to the case of Felix Dias Bandaranayake Vs. State Film Corporation and another.[8] His Lordship Soza J in that case, has laid down the steps

[8] Supra at page 302.

the Court should follow in a chronological order. As the first step His Lordship has stated in that case thus,

> *"In Sri Lanka we start off with a prima facie case. That is, the applicant for an interim injunction must show that there is a serious matter in relation to his legal rights, to be tried at the hearing and that he has a good chance of winning. It is not necessary that the plaintiff should be certain to win. It is sufficient if the probabilities are he will win. Where however the plaintiff has established a strong prima facie case that he has title to the legal right claimed by him but only an arguable case that the defendant has infringed it or is about to infringe it, the injunction should not be granted (Hubbard v Vosper).[9]"*

His Lordship Justice Soza in the same case states the 2nd step to be followed when deciding whether to grant an interim injunction in the following manner.

> *"If a prima facie case has been made out, we go on and consider where the balance of convenience lies- Yakkaduwe Sri Pragnarama Thero v. The Minister of Education.[10] This is tested out by weighing the injury which the defendant will suffer if the injunction is granted and he should ultimately turn out to be the victor against the injury which the plaintiff will sustain if the injunction were refused and he should ultimately turn out to be the victor. The main factor here is the extent of the uncompensatable disadvantage or irreparable damage to either-party. As the object of issuing an interim injunction is to preserve the property in dispute in statu quo the injunction should not be refused if it will result in the plaintiff being cheated of his lawful rights or practically decide the case in the defendant's favour and thus make the plaintiff's eventual success in the suit if he achieves it a barren and worthless victory.- see* ***Bannerjee*** *(ibid) pp. 578, 579."*[11]

His Lordship Justice Soza in the same case has laid down a 3rd step also when deciding on the question of granting an interim injunction. It is in the following paragraph.

> *"Lastly as the injunction is an equitable relief granted in the discretion of the Court, the conduct and dealings of the parties (Ceylon Hotels Corporation v Jayatunga)[12] and the circumstances of the case are relevant. Has the applicant come into Court with clean*

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[9] [1972] 1 All E. R. 1023, 1029.
[10] (1969) 71 N L R 506, 511.
[11] Supra at page 303.
[12] (1969) 74 N L R 443, 446.

> *hands? - see Duchess of Argyll v Duke of Argyll.[13] Has his conduct been such as to constitute acquiescence in the violation of infringement of his rights as the Court of Appeal in England found in Monson v Tussauds Limited[14] or waiver of his rights to the injunction?"*[15]

In the case of Seelawathie Mallawa Vs. Millie Keerthiratne,[16] His Lordship Victor Perera J, too has adopted a similar view when he stated as follows.

> *"The principles which the Court must take into account when deciding whether to grant an injunction or not have been formulated from time to time in decisions of our Courts and have sometimes been re-formulated on the basis of decisions of the English Courts. Generally the line of approach in exercising the Court's discretion whether to grant an interim injunction or not has been, first to look at the whole case before it. The primary consideration was the relative strength of the parties cases. The Court must have regard not only to the nature and strength of the plaintiff's claim and demand but also to the strength of the defence. It is when the Court has formed the opinion that the plaintiff had a strong prima facie case, that the Court had then to decide what was best to be done in the circumstances. ..... Initially the plaintiff therefore needs only to satisfy the Court that there is a serious matter to be tried at the hearing. …"*

In the case of D. S. Dissanayake Vs. Agricultural and Industrial Credit Corporation and others,[17] His Lordship Justice H N G Fernando stated the same principle which can be seen in the following paragraph.

> *"The proper question for decision upon an application for an interim injunction is " whether there is a serious matter to be tried at the hearing " (Jinadasa v. Weerasinghe1[1 (1929) 31 N. L. R. 33.]). If it appears from the pleadings already filed that such a matter does exist, the further question is whether the circumstances are such that a decree which may ultimately be entered in favour of the party seeking the injunction would be nugatory or ineffective if the injunction is not issued."*

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[13] [1967] 1 Ch. 302, 331,332.
[14] [1894] 1 QB 671 (C.A.).
[15] Supra at page 303.
[16] 1982 Sri L. R. 384 at 388 & 389.
[17] (1962) 64 NLR 283.

In a more recent case, M N Kariyawasam Vs. N W Sujatha Janaki and two others,[18] Her Ladyship Justice Chandra Ekanayake too has endorsed the same views. Thus, our Courts have consistently adopted the above process in many cases.

Having stated as above, a brief account of the law pertaining to granting of injunctions, let me now consider whether the refusal of the interim injunction by the learned District Judge in the instant case, is justifiable.

Although the learned District Judge has given many reasons for the rejection of the interim injunction in his painstakingly written order, for the purpose of disposing this case it would suffice to observe the clear conclusion by the learned District Judge that the plaintiffs have failed to establish a prima facie case. In that regard, as the learned District Judge has stated in his order, the Plaintiffs are yet to obtain the title of the Lots No. 5 and 4 based on prescription. Hence the burden of proving undisturbed, uninterrupted possession adverse to the title of the Plaintiffs, over the said lots, under the laws governing prescription, is on the Plaintiffs. However, as pointed out by the learned District Judge, the Plaintiffs have failed to address some of the important elements of such proof. The Plaintiffs have failed to adduce any date or any time period during which they have commenced the required adverse possession.

I also cannot find fault with the conclusion of the learned District Judge to accept and act on the affidavits of the Grama Niladhari of the area, and the Postman who on a daily basis had used the relevant road, to access the house of the Defendant to execute his official duties. In addition to the above, the learned District Judge has given in his order, number of other reasons as well. I do not find any reason to disagree with them. However, I would not venture into an exercise of analyzing all those reasons as what I have mentioned above would be sufficient for me to agree with the learned District Judge that the plaintiffs have failed to establish a prima facie case which is sufficient for the disposal of this appeal.

Thus, in my view, the evidence adduced in the inquiry by both parties do not point to or do not justify a conclusion that the Plaintiffs have established a prima facie case. Therefore, the Plaintiff's case for an interim injunction clearly does not pass the first threshold of necessity to establish a prima facie case. Therefore, the consideration of the question of balance of convenience would really not arise. However, for the sake of completeness I would albeit briefly, mention few observations on that aspect as well.

[18] 2013 B A L R Vol. XX page 77.

As has been mentioned above, the Plaintiffs' claim for the Lots 4 and 5 are purely based on prescription. This is because the Defendant's title and the Plaintiffs' tittle both emanate from the same source and therefore the Plaintiffs do not challenge the deed of the Defendant. Roadway over Lots 4 and 5 is the roadway giving access the Defendant's Lot from St. Joseph's Street. It is the same roadway which gives access to the 2nd Plaintiff's Lot according to the plan No. 1177. Thus, the balance of convenience by preventing just one party, namely the Defendant, from using the disputed roadway is definitely not in favour of the Plaintiffs. This is because both parties can continue to use the disputed roadway until a final determination is made by Court. I cannot see how a mere usage by one party, of a roadway which merely passes just two blocks of land (outside their boundaries) could cause an irreparable damage to the other parties. There is also no evidence to establish such a claim.

In any case, the usage by the Defendant, the disputed roadway, cannot be identified as an 'an act or nuisance, the commission or continuance of which would produce injury to the Plaintiff' which warrants granting an interim injunction under section 54(1)(a) of the Judicature Act. The said act cannot also be identified as 'an act or nuisance in violation of the Plaintiff's rights in respect of the subject matter of the action and tending to render the judgment ineffectual', which warrants granting an interim injunction under section 54(1)(b) of the Judicature Act.

As has been observed above, not granting the interim injunction against the Defendant would not anyway prejudice the rights of the plaintiffs. The plaintiffs would also not suffer an irreparable damage as a result of the Defendant's use of the disputed roadway. The learned District Judge has given extensive reasons for refusing to grant an interim injunction prayed for, by the Plaintiffs. I cannot see any basis to deviate from the conclusions arrived at by the learned District Judge. The underlying principle of granting temporary relief is to maintain the status-quo until the final determination of the suit. In those circumstances, I hold that the learned District Judge's decision to refuse to grant an interim injunction in the instant case is a well-founded one. For the aforementioned reasons the plaintiffs are not entitled to the interim injunction sought.

I answer the questions of law as follows.

a. the learned District Judge has correctly evaluated the material when concluding that the Plaintiffs have failed to establish a prima facie case with a fair chance of winning the action and that the balance of convenience has been tilted in favour of the Defendant. The

Provincial High Court has failed to correctly appreciate the reasons given by the learned District Judge for refusing to grant the interim injunction.

b. The Provincial High Court had come to its conclusions without any evaluation, analysis or examination of the reasons set out in the order of the learned District Judge. The Provincial High Court also has failed to give any lawful reason for setting aside the order of the learned District Judge.
c. The Provincial High Court has failed to appreciate that the Plaintiffs have not advanced any case on any possible damage being caused to the "roofs of the buildings of the Plaintiffs. In any case there is no such danger by the mere user of the said access path by the Defendant.

For the above reasons, I set aside the judgment of the Provincial High Court dated 08-02-2019 and procced to restore and affirm the order dated 19-09-2014 pronounced by the learned District Judge refusing to grant the interim injunction and dissolving the enjoining order. I allow this appeal with costs payable by the Plaintiffs to the Defendant.

JUDGE OF THE SUPREME COURT

ACHALA WENGAPPULI J

I agree,

JUDGE OF THE SUPREME COURT

MAHINDA SAMAYAWARDHENA J

I agree,

JUDGE OF THE SUPREME COURT

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

In the matter of an Application for Leave to Appeal against the judgment of the Provincial High Court of the North Western Province (exercising its Civil Appellate Jurisdiction) holden at Kurunegala, Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka read with Section 5C (1) of the High court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006

SC APPEAL NO. 55/2016

SC/HCCA/LA/ No. 326/2013

HCCA (Kurunegala): NWP/HCCA/ KUR/88/2003/F

D.C. Kuliyapitiya No: 11938/P

1. Wickramasinghe Mudiyanselage Podimenike.
2. Wickramasinghe Mudiyanselage Menikhamy.
3. Wickramasinghe Mudiyanselage Dolimenika.

All of Hanthihawa, Halmillawewa.

PLAINTIFFS

-VS-

1. Wickramasinghe Mudiyanselage Peiris Singho.
2. Wickramasinghe Mudiyanselage Podinona
3. Wickramasinghe Mudiyanselage Kirimenika
4. Wickramasinghe Mudiyanselage Piyadasa

5. Wickramasinghe Mudiyanselage Jinadasa
6. Wickramasinghe Mudiyanselage Dingirimenika
7. Wasala Mudiyanselage Rosalin Nona.

All of Hanthihawa, Halmillawewa.

DEFENDANTS

AND BETWEEN

2. Wickramasinghe Mudiyanselage Menikhamy.
3. Wickramasinghe Mudiyanselage Dolimenika.

All of Hanthihawa, Halmillawewa.

2ND AND 3RD PLAINTIFFS - APPELLANTS

-VS-

1. Wickramasinghe Mudiyanselage Podimenike. (**Deceased**)

1A. Rajapaksha Mudiyanselage Dassanayake

Both of Hanthihawa, Halmillawewa

SUBSTITUTED 1ST PLAINTIFF- RESPONDENT

1. Wickramasinghe Mudiyanselage Peiris Singho (**Deceased**).

1A. Wasala Mudiyanselage Rosalin Nona
2. Wickramasinghe Mudiyanselage Podinona
3. Wickramasinghe Mudiyanselage Kirimenika
4. Wickramasinghe Mudiyanselage Piyadasa
5. Wickramasinghe Mudiyanselage Jinadasa (**Deceased**)

5A. Gajanayake Mudiyanselage Indrani Gajanayake
6. Wickramasinghe Mudiyanselage Dingirimenika
7. Wasala Mudiyanselage Rosalin Nona.

All of Hanthihawa, Halmillawewa.

DEFENDANTS - RESPONDENTS

AND NOW BETWEEN

1. Wickramasinghe Mudiyanselage Peiris Singho (**Deceased**).

1A. Wasala Mudiyanselage Rosalin Nona (**Deceased**)

1B. Wickramasinghe Mudiyanselage Gnanalatha

1C. Wickramasinghe Mudiyanselage Rathnalatha Wickramasinghe

1D. Wickramasinghe Mudiyanselage Karunasena Wickramasinghe

1E. Wickramasinghe Mudiyanselage Pathmalatha Wickramasinghe

1F. Wickramasinghe Mudiyanselage Chandralatha Wickramasinghe
1G. Wickramasinghe Mudiyanselage Swarnalatha Wickramasinghe
1H. Wickramasinghe Mudiyanselage Karunathilake Wickramasinghe
1I. Wickramasinghe Mudiyanselage Bandula Kumara Wickramasinghe

All of Hanthihawa, Halmillawewa.

SUBSTITUTED 1B-1I DEFENDANTS – RESPONDENTS – APPELLANTS

7. Wasala Mudiyanselage Rosalin Nona. (**Deceased)**
7A. Wickramasinghe Mudiyanselage Gnanalatha
7B. Wickramasinghe Mudiyanselage Rathnalatha Wickramasinghe
7C. Wickramasinghe Mudiyanselage Karunasena Wickramasinghe
7D. Wickramasinghe Mudiyanselage Pathmalatha Wickramasinghe
7E. Wickramasinghe Mudiyanselage Chandralatha Wickramasinghe
7F. Wickramasinghe Mudiyanselage Swarnalatha Wickramasinghe
7G. Wickramasinghe Mudiyanselage Karunathilake Wickramasinghe
7H. Wickramasinghe Mudiyanselage Bandula Kumara Wickramasinghe

All of Hanthihawa, Halmillawewa.

SUBSTITUTED 7A-7H DEFENDANTS – RESPONDENTS – APPELLANTS

-**VS-**

2. Wickramasinghe Mudiyanselage Menikhamy.
3. Wickramasinghe Mudiyanselage Dolimenika (**Deceased**)

Both of Hanthihawa, Halmillawewa

3A. Rajapaksha Mudiyanselage Jayalath
Egoda Rakupola, Ilukhena, Udubaddawa.

3B. Rajapaksha Mudiyanselage Kusuma Rajapaksha
Hanthihawa, Halmillawewa, Panduwasnuwara.

3C. Rajapaksha Mudiyanselage Gamini Lalith Rajapaksha
Hanthihawa, Halmillawewa, Panduwasnuwara.

3D. Rajapaksha Mudiyanselage Ashoka Rajapaksha
Egoda Rakupola, Ilukhena, Udubaddawa.

3E. Jayakody Arachchige Sarath Kumara Jayakody
Hanthihawa, Halmillawewa, Panduwasnuwara.

2nd AND SUBSTITUTED 3A-3E PLAINTIFFS – APPELLANTS - RESPONDENTS

1. Wickramasinghe Mudiyanselage Podimenike. (**Deceased**)

1A. Rajapaksha Mudiyanselage Dassanayake

Both of Hanthihawa, Halmillawewa

SUBSTITUTED 1ST PLAINTIFF – RESPONDENTS- RESPONDENTS

2. Wickramasinghe Mudiyanselage Podinona
3. Wickramasinghe Mudiyanselage Kirimenika
4. Wickramasinghe Mudiyanselage Piyadasa
5. Wickramasinghe Mudiyanselage Jinadasa (**Deceased**)

5A. Gajanayake Mudiyanselage Indrani Gajanayake

6. Wickramasinghe Mudiyanselage Dingirimenika

All of Hanthihawa, Halmillawewa.

2ND – 6TH DEFENDANTS – RESPONDENTS - RESPONDENTS

BEFORE : L.T.B. DEHIDENIYA, J.

P. PADMAN SURASENA, J.

S. THURAIRAJA, PC, J.

COUNSEL : Lakshman Perera, PC, with Thishya Weragoda, Ms. Shalini Fernando and MS. Piyumi Wickramage for the 1A and 7th Defendants – Respondents- Appellants

M.C. Jayaratne, PC, with M.D.J. Bandara and Nishani Hettiarachchi for the 3E Substituted Plaintiffs– Appellants - Respondent.

ARGUED ON: 29th September 2020.

WRITTEN SUBMISSIONS: Written Submissions for 1A and 7th Defendants– Respondent – Appellant filed on 17/05/2016

Written Submissions for 2A and 3A-3E Substituted Plaintiffs – Appellants- Respondents filed on 08/10/2018

DECIDED ON: 29th September 2021.

S. THURAIRAJA, PC, J.

I find it pertinent to first establish the facts of this case. Wickramasinghe Mudiyanselage Podimenike, Wickramasinghe Mudiyanselage Menikhamy and Wickramasinghe Mudiyanselage Dolimenika i.e. Plaintiffs – Appellants – Respondents (hereinafter sometimes referred to as the Plaintiffs – Respondents.) instituted partition action by plaint dated 1st July 1998 against Wickramasinghe Mudiyanselage Peiris Singho, Wickramasinghe Mudiyanselage Podinona, Wickramasinghe Mudiyanselage Kirimenika, Wickramasinghe Mudiyanselage Piyadasa, Wickramasinghe Mudiyanselage Jinadasa, Wickramasinghe Mudiyanselage Dingirimenika i.e. 1st – 6th Defendants – Respondents – Respondents (hereinafter referred to as the 1st – 6th Defendants – Respondents) and Wasala Mudiyanselage Rosalin Nona i.e. 7th

Defendant – Respondent – Appellant (hereinafter referred to as the 7th Defendant – Appellant). In their Plaint the Plaintiffs – Respondents averred *inter alia* that the original owner of the land which was sought to be partitioned was one named Wickramasinghe Mudiyanselage Yahapathhamy who was a person subject to the Kandyan Law and the land was a Paraveni (ancestral) land. Upon his death his children, namely 1st Plaintiff – Respondent, 2nd Plaintiff – Respondent, 3rd Plaintiff – Respondent, 1st Defendant – Respondent, 2nd Defendant – Respondent and Ukkubanda (deceased father of the 4th – 6th Defendants inherited the land in equal share subject to the life interest of his widow Ranmenika.

Ranmenika passed away in 1992. Thereafter the Plaintiffs instituted an action to partition the land in the District Court. The 1st and 2nd Defendant – Respondents filed a joint statement of claim dated 25/07/2000 admitting that Wickramasinghe Mudiyanselage Yahapathhamy was a person who was subject to the Kandyan Law. However, they claimed that the Plaintiff – Respondents and the 2nd Defendant – Respondent are daughters who married in Diga during the lifetime of their father and have as such forfeited their right to succession to the paraveni property. They also claimed that Yahapathhamy was not the original owner of the land in question and that the 1st Defendant – Respondent had prescribed to the land and therefore he sought a dismissal of the Plaintiff – Respondent's action.

The 1A and 7th Defendant – Appellant being the wife of the 1st Defendant – Respondent filed her own statement of claims stating that the 1st Defendant had by Deed of Gift transferred the rights to the land in suit to her and therefore sought a dismissal of the Plaintiff – Respondent's action. The matter then proceeded to trial. The 3rd Plaintiff – Respondent gave evidence and stated that the 4 daughters of the deceased namely the Plaintiff – Respondents and the 2nd Defendant – Respondent went out inn Diga marriage prior to the death of the deceased. She also stated that she returned to the Mahagedara (Ancestral home also referred to as "Mulgedara") in

1972 with her 4 children after the death of her husband and has remained there since. However, the 1A and 7th Defendant – Appellant provided that the 3rd Plaintiff – Respondent had not adduced any evidence as to how her forfeited rights to succession were revived and re-admitted to the household upon the return to the Mahagedara in 1972.

Having considered the following the learned District Court judge held that the 1st to 3rd Plaintiffs have entered into valid marriages prior to the death of Yahapathhamy in 1973 and the mere return by the Diga married 3rd Plaintiff to the Mahagedara upon the death of her husband does not entitle her to claim rights as a Binna married daughter. Being aggrieved by this judgment the 2nd and 3rd Plaintiff – Respondents preferred an appeal in terms of Section 754(1) of the Civil Procedure Code to the Court of Appeal. Upon the promulgation of the High Court of the Provinces (Special Provisions) (Amendment) Act no. 54 of 2006, said appeal was heard by the Provincial High Court of the North Western Province holden at Kurunegala.

The primary issue that was to be determined by the High Court was the issue of whether the 3rd Plaintiff – Respondent who had gotten married under the General Marriage Ordinance on 28/03/1957 and who had subsequently returned to the Mahagedara after her husband's death in 1972 had acquired the rights of a Binna married daughter. The High Court judge came to the conclusion that there is no evidence to show that the 1st and 2nd Plaintiff ever came back within the paternal power to make them heirs of Yahapathhamy. It was also held that the 2nd Defendant – Respondent had disclaimed any rights in the case itself. The High Court Judge held that the heirs of Yahapathhamy for the land that was sought to be partitioned were the 3rd Plaintiff – Respondent, 1st Defendant – Respondent and the children of Ukkubanda and that they should inherit an undivided 1/3rd each from the land that was sought to be partitioned, thus the appeal of the Plaintiffs – Respondents was allowed.

Being aggrieved by this decision the 1A and 7th Defendant – Appellant an appeal to this court to have the decision of the High Court set aside. Leave to appeal was granted under (b), (d) and (e) of paragraph 18 of the Petition dated 13th August 2013. These questions of law have been reproduced for ease of reference.

(18.)

b. the learned provincial high court judge has erred in law by coming to the conclusion that Yahapathhamy;

i. Had readmitted Dolimenika as a binna married daughter by allowing her to possess the land comprising of the mulgedara 7-8 years prior to his death.

ii. Could, in law, re-admit Dolimenika as a binna married daughter 7-8 years prior to his death during the subsistence of her diga marriage in contravention of Section 9(1) of the Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938.

d. the learned Provincial High Court Judge has erred in law by coming to the conclusion that Yahapathhamy could, in law, grant rights in relation to immovable property, to the 3rd Plaintiff, in contravention of Section 2 of the Prevention of Frauds Ordinance No. 7 of 1840

e. the learned Provincial High Court Judge has erred in law by misapplying the burden of proof required in proving that Dolimenika had in fact regained binna rights.

After considering the available material I find that the decisive factor in this matter is the issue with regards to the 3rd Plaintiff – Respondent's marriage. Namely whether it was in fact readmitted as a Binna marriage as the High Court had done in its judgment.

After perusing the material before us, it is apparent that the daughter was given in marriage under the General Marriage Ordinance in the year 1957 and after her husband's death in 1972 after approximately 15 years of marriage she was allowed to live with her parents in her Mulgedara and continued to do so until her father's death. Her claim is that upon coming back to her Mulgedara she acquired the rights of a woman under the Binna marriage.

For purposes of clarity, I will first differentiate a Diga marriage from a Binna marriage. Marriage in Diga and Binna are the two methods of marriage under the Kandyan Law. A Diga marriage according to the Kandyan law is when a woman is given away and is settled in the home of her husband, which is the more common of the two types of marriages. A Binna marriage is one where the bridegroom is received into the house of the bride and according to certain stipulations abides there permanently. This type of marriage would more commonly occur where the bride is an heiress or a daughter of a wealthy family in which there are few sons. The type of marriage entered into directly effects the succession to property. A Diga married daughter does not typically succeed to the property of her father. Whereas a Binna married daughter retains her to succession after the marriage. Hence one of the most pressing issues in this case is whether the 3rd Plaintiff had reacquired the rights of a Binna married daughter when she returned to her Mulgedara after the demise of her husband.

It is also notable that the 3rd Plaintiff – Respondent was married under the provisions of the General Marriages Ordinance. The general practice in relation to marriages registered under the General Marriages Ordinance is that where an entry as to the nature of the marriage is absent, the presumption is that the marriage is a Diga marriage. This was discussed in the case of ***Lewis Singho v Kusumawathie and others 2003 (2) SLR 128***. In this case Dissanayake, J stated as follows;

> *Applying the above principles where a party who is governed by the Marriage and Divorce (Kandyan) Act contracts a marriage under the Marriage Registration*

Ordinance, in the absence of an entry in the certificate of marriage with regard to the nature of the so marriage contracted the presumption recognised under section 28(1) of the Marriage and Divorce (Kandyan) Act would be applicable and such a marriage would be presumed to have been one of Diga until the contrary is proved.

*Thus since in the certificate of marriage of Enso Nona (V1) which is one issued under the General Marriages Ordinance**, where an entry with regard to the nature of marriage is absent, the presumption is that the marriage is Diga and not Binna.***

(Emphasis added)

Fredrick Austin Haley in his book *A Treaties on the laws and customs of the Sinhalese* also wrote about this presumption. In page 195 of this book, it has been stated that in the absence of an entry in the register specifying its nature, the marriage is presumed to be a Diga one until the contrary is proved. This is also referenced in the aforementioned judgment by Justice Dissanayake. Thus it is presumed that the marriage of the 3rd Plaintiff – Respondent is a Diga marriage. It is also vital to note that the 3rd Plaintiff – Respondent when asked in cross examination whether she and the 2nd Plaintiff – Respondent went in Diga marriage, had replied in the affirmative.

Thus, it is apparent that for the 3rd – Plaintiff Respondent to succeed to her father's property, her Diga marriage should have converted into a Binna marriage as Diga married daughters have no right to their father's property. Section 9 (1) of the Kandyan Law Declaration and Amendment Ordinance sets out the nature of these two types of marriages. It states as follows;

Section 9

(1) A marriage contracted after the commencement of this Ordinance in binna or in diga shall be and until dissolved shall continue to be, for all purposes of the law

governing the succession to the estates of deceased persons, a binna or a diga marriage, as the case may be, and shall have full effect as such ; ***and no change after any such marriage in the residence of either party to that marriage and no conduct after any such marriage of either party to that marriage or of any other person shall convert or be deemed to convert a binna marriage into a diga marriage or a diga marriage into a binna marriage or cause or be deemed to cause a person married in diga to have the rights of succession of a person married in binna, or a person married in binna to have the rights of succession of a person married in diga.***

(Emphasis added)

However there have been certain circumstances where daughters who have been married in Diga have acquired certain Binna rights. In Armour's Grammar of the Kandyan Law by Joseph Martinus Perera these circumstances have been established. A few of these circumstances are, where a Diga married daughter is recalled by her father and remained in the father's house until his demise, and if after she was married, she was married in Binna, and if the son lived away from his father's house settled in Binna in his wife's village, then the daughter and the son will inherit equal shares of the father's estate. Another instance is where the Diga married daughter returns destitute. In those circumstances she will be entitled to maintenance. However, in this matter it does not seem that the 3rd Plaintiff – Respondent had acted in a manner in which her Diga rights had converted into Binna rights. Although there has been a change of residence this does not necessarily confer the rights of a Binna married daughter on a Diga married one. In Sawers' Digest of Kandyan Law (page 2) the change in the nature of these marriages is discussed.

Daughters, while they remain in their father's house, have a temporary joint interest with their brothers in the landed property of their parents; ***but this they lose when given out in what is called a deega marriage****, either by their*

parents or brothers, after the death of the parents. It is, however, reserved for the daughters, ***in the event of their being divorced from their deega husbands, or becoming widows destitute of the means of support, that they have a right to return to the house of their parents and there to have lodging and support and clothing from their parents estate;*** *but the children born to a deega husband have no right of inheritance in the estate of their mother's parents*

(Emphasis added)

This principle was discussed extensively in the case of ***Jayasinghe v Kiribindu and Others 1997 (2) SLR 1***. In this case it was stated as follows;

"There is no dispute that Kiribindu, the plaintiff-respondent, never left her parental home and lived in it before and after the death of her father. However, was she allowed to settle in binna in the mulgedera? Living in the mulgedera (or on ancestral properties e.g. see D.C. Kurunegala 19107 (1873) Ill Grenier 115; Dingiri Amma v. Ukku Amma, having a binna connection: cf Gonigoda v. Dunuwlla, cf also Doratiyawe v. Ukku Banda Korale, did not automatically confer rights of inheritance on a daughter who had been married in diga. Her rights would depend on whether her residence could be regarded as a settlement in binna in the house or property of the father. Whether there was a settlement in binna would depend on the establishment of that fact established by the evidence in a particular case. In Re Mahara Ratemahatmaya, where a man lived for some years in the family house of a woman with the intention of forming a marital connection, it was held by Rowe, C.J. and Morgan J. that, unless there be some substantial proof to the contrary arising from a proved disparity of rank or other legal obstacle, that would amount to a marriage in binna.

On the other hand, as we have seen, if a daughter who had gone out in diga be divorced, or left a widow, or ill-treated or reduced to penury by her husband's

misfortune or bad conduct, she is entitled, on returning to her parents, to live with them and be supported.

However, although there was residence, that alone did not confer the rights of a binna married daughter on such a person."

(Emphasis added)

In this case it was further stated;

"undoubtedly the place of residence is an important indicator of the character of a marriage. Ordinarily, in the absence of contrary evidence we ought to be entitled to presume that the common course of usual events consistent with the ordinary practices of Kandyan Society followed. And so, a woman who after marriage lived in her mulgedara with her husband maybe supposed to have been settled in binna. On the other hand, it would be expected that a woman married in diga would have been led away from her parental home. It was a symbolic manifestation of the departure of the woman to join another family and bear children who will belong to a different genes.

Such a person would live in her husband's home or upon the property of her new family. However, if it was agreed that the marriage was a diga marriage, it would be a diga marriage, irrespective of the fact that the bride took up residence in her father's house…the determination of the character is, perhaps unfortunately, but nevertheless, somewhat more complex than seeking a response to the simple question: where did she live?"

Taking the aforementioned into consideration I find that the marriage of the 3rd Plaintiff – Respondent had not been converted into a Binna marriage. Furthermore, the burden of proof in proving against the presumption of a Diga marriage lies with the person who claims that she comes under a Binna marriage. The 3rd Plaintiff – Respondent has not provided this court with sufficient material to rebut the presumption of a Diga marriage nor has there been any material produced to prove

that she had returned to the Mulgedara under any of the circumstances mentioned above that may confer on her any of the rights a Binna daughter might have.

Taking the aforementioned into consideration I answer the 1A and 7th Defendant – Appellant questions of law affirmatively.

On careful analysis of the material that was produced before the high court I am of the view that the judgment given in NP/HCCA/KUR/88/2003 is erroneous and thus I am inclined to allow the appeal of the 1A and 7th Defendant – Appellant.

Appeal allowed

JUDGE OF THE SUPREME COURT

L.T.B. DEHIDENIYA, J.

I agree

JUDGE OF THE SUPREME COURT

P. PADMAN SURASENA, J.

I agree

JUDGE OF THE SUPREME COURT

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

In the matter of an Appeal from the order of the Court of Appeal dated 06th October 2016 made in Writ Application No. 317/16 in terms of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Ravindra Kahanda Kumara Weragama,
Welgala Estate, Weragama,
Kaikawela, Matale.

Petitioner

S.C. Appeal No. 55/2017
S.C. (Spl) L.A. Application No. 231/2016
C.A. Writ Application No. 317/2016 **Vs.**

M.A.S. Weerasinghe,
Commissioner General of Agrarian Development,
Department of Agrarian Development,
No. 42, Sir Marcus Fernando Mawatha,
Colombo 07.

Respondent

AND NOW BETWEEN

Ravindra Kahanda Kumara Weragama,
Welgala Estate, Weragama,
Kaikawela, Matale.

Petitioner-Appellant

Vs.

M.A.S. Weerasinghe,
Commissioner General of Agrarian Development,
Department of Agrarian Development,
No. 42, Sir Marcus Fernando Mawatha,
Colombo 07.

Respondent-Respondent

Before: B.P. Aluwihare, P.C., J.
Yasantha Kodagoda, P.C., J.
Janak De Silva, J.

Counsel: Dulindra Weerasuriya P.C. with Pasan Malinda for the Petitioner-Appellant
Rajitha Perera SSC for the Respondent-Respondent

Written Submissions filed on:
Petitioner-Appellant on 01.06.2017 and 18.08.2021
Respondent-Respondent on 31.05.2017 and 04.08.2021

Argued on: 07.07.2021

Decided on: 07.12.2021

Janak De Silva, J.

The Petitioner-Appellant (hereinafter referred to as "Appellant") owns four parts of land containing in total R. 1 P. 9.56. By letter dated 04.01.2016 (P4), he asked the Assistant Commissioner of Agrarian Services of Matale to declare these highlands. Permission was also sought to grow trees on the earth.

The Respondent-Respondent (hereinafter referred to as "Respondent") in a letter dated 24.03.2016 (P11) stated that the said lands are not paddy land. He claimed to do so under section 28 of the Agrarian Development Act No. 46 of 2000 as amended (hereinafter referred to as “Act”). In that letter, he sought to impose four conditions that must be met in order for the land to be used for non-agricultural purposes, namely:

කොන්දේසි

01. ඉඩමේ කරනු ලබන සංවර්ධන කටයුතු වලදී රටේ පවත්නා නීතිරීති වලට අනුව අදාල පලාත් පාලන ආයතනය හා අදාල අනෙකුත් ආයතනයන්ගේ අනුමැතිය ඔබ විසින් ලබා ගත යුතු අතර එකී ආයතන විසින් පනවනු ලබන කොන්දේසි වලට අනුව කටයුතු කළ යුතුය.

02. මෙම ඉඩමෙහි කිසිදු ආකාරයක පස් පිරවීමක්/ ගොඩකිරීමක් සිදු නොකළ යුතුය.

03. මෙම ඉඩම වෙන්දේසි කිරීම සඳහා කට්ටි කිරීමක් සිදු නොකළ යුතුය. (දරුවන් අතර දේපල බෙදා දීමේදී මෙය අදාල නොවේ)

04. යාබද වගා කරන කුඹුරු ඉඩම් පවතී නම් එකී කුඹුරු ඉඩම් වල වගා කටයුතු වලට හා ජලාපවහන පද්ධති වලට බාධාවක් නොවන අයුරින් කටයුතු කළ යුතුය.

05. කුඹුරු ඉඩමක් නොවන බවට ලබාදෙන මෙම සහතිකය ඉඩමේ භුක්තිය හා අයිතිය සම්බන්ධයෙන් පැන නගින ගැටළු වලදී සාක්ෂියක් ලෙස අදාල කරගත නොහැක.

The Appellant sought a writ of certiorari to quash those conditions. It was argued that the Respondent lacked the power to impose such conditions on the use of non-agricultural land.

The Court of Appeal refused notice and held that the Act provided the Respondent to protect both paddy and agricultural land. The Court concluded that the Respondent had the authority to impose terms and conditions on non-agricultural land use.

This Court has granted special leave to appeal on the following question:

> "Has the Commissioner General of Agrarian Development (Respondent-Respondent) the legal authority to impose conditions when he declares a land not to be a paddy land under section 28(1) of the Agrarian Development Act No. 46 of 2000?"

The long title of the Act states, among other things, that it is to provide for the utilisation of agricultural lands in accordance with agricultural policies. It is part of the Act and, as such, is considered an aid to construction. Moreover, the preamble to the Act elucidates that it has become necessary to set out the restrictions to be imposed on persons using agricultural land for non-agricultural purposes in order to ensure maximum utilization of agricultural land for agricultural production. In *Union of India v. Elphinstone Springg and Weaving Co Ltd & Ors* [AIR (2001) Supreme Court 724] the Supreme Court of India held that a long title along with the preamble is a good guide regarding the object, scope or purpose of the Act.

Hence, there can be no doubt that part of the object, scope or purpose of the Act is to provide for the utilization of agricultural lands in accordance with agricultural policies. That goal is pursued by restricting the use of agricultural land for non-agricultural purposes.

Part II of the Act is titled "*utilising agricultural lands in accordance with agricultural policies*". Section 22(1) of the Act plays a pivotal role in the implementation of this object, scope or purpose by imposing a duty on every owner cultivator or occupier of any agricultural land who desires to cultivate or manage such land to do so in accordance with standards of cultivation provided in the Act or any regulation made thereunder. Section 22(2) of the Act provides for the promulgation of regulations prescribing the crops to be cultivated, the livestock to be reared, the fish to be bred according to the situation and natural resources of the land, and generally for the efficient management of agricultural land and for better cultivation.

Accordingly, any restrictions on the cultivation or management of agricultural lands are sought to be done by the Act by standards of cultivation provided in the Act or regulations made thereunder.

The issue to be considered is whether the Act has additionally vested power in the Commissioner-General of Agrarian Development to impose other conditions on owner cultivators or occupier of any agricultural land as to its use. The Court of Appeal concluded that he had this authority under sections 28 and 29 of the Act.

When interpreting empowering instruments, what is not permitted should be considered prohibited [*Ashbury Railway Carriage and Iron Co. ltd. v. Hector Riche* (1875) L.R. 653)]. It is the strict doctrine of ultra vires which was the subject of some refinement later so that it could be applied in a reasonable manner. Hence whatever may be regarded as incidental to, or consequential upon, those things which the Legislature has authorized ought not (unless expressly prohibited) to be held by judicial construction, to be ultra vires [*Attorney-General v. The Great Eastern Railway Co.* (1880) 5 A.C. 473].

Upon a careful examination of sections 28 and 29 of the Act, it is clear that they deal with determining whether a land is a paddy land and the identification of paddy lands which can be cultivated with paddy and other crops.

In this context, it is necessary to remember that, by definition, rice growing is included in the meaning of "agriculture" in the Act. Upon a further examination of section 100 of the Act, it is clear that although all “paddy land” falls within the meaning of “agricultural land”, all “agricultural land” does not fall within the meaning of “paddy land”.

Accordingly, I hold that sections 28 and 29 of the Act does not empower the Commissioner-General of Agrarian Development to impose conditions on owner cultivators or occupier of any agricultural land as to its use.

Admittedly, section 31(1) of the Act empowers the Commissioner-General of Agrarian Development or an officer appointed under section 38(2) of the Act to enter upon any extent of agricultural land to inspect and make inquiries. However, subsection 31(2) of the Act limits the scope of this inspection and investigation for the purpose of determining the matters specified in it. None of these matters pertain to the conditions imposed by the Commissioner General for Agrarian Development on agricultural land use.

On the contrary, section 31(3) of the Act empowers such officers to examine any permission issued under section 32(1) or 33(1) of the Act in order to ascertain whether the terms and conditions subject to which permission has been issued are being complied with. These provisions deal with the use of paddy land for purposes other than agricultural cultivation without the permission of the Commissioner-General of Agrarian Development and filling up of paddy land or utilizing paddy land for any purpose other than cultivation.

Accordingly, I hold that the provisions in Part II the Act only makes provision for terms and conditions to be imposed by the Commissioner-General of Agrarian Development on the use of paddy lands. They do not expressly or implicitly allow him to impose terms and conditions on agricultural land use.

The learned President's Counsel drew our attention to a judgment of the Court of Appeal in *Ranatunge v. Commissioner General of Agrarian Development and Another* [C.A. (Writ) 180/2017; 17.07.2019] where I held that the Commissioner-General of Agrarian Development is not empowered to impose any conditions pursuant to section 28 of the Act after he decided that the land is not a paddy land. I see no reason to change my conclusions therein.

Nonetheless, I am mindful of the decision in *Peiris v. The Commissioner of Inland Revenue* (65 N.L.R. 457) where Sansoni J. held that an exercise of a power will be referable to a jurisdiction which confers validity upon it and not to a jurisdiction under which it will be nugatory. This principle has been applied even to cases where a Statute which confers no power has been quoted as authority for a particular act, and there was in force another Statute which conferred that power.

Therefore, though the Commissioner-General of Agrarian Development has purported to act in terms of Section 28 of the Act in imposing the conditions set out in letter dated 24.03.2016 (P11), the whole Act must be examined to ascertain the true limits of the powers of the Commissioner-General of Agrarian Development on imposing terms and conditions on the use of the agricultural land.

In this respect, I note that section 83 of the Act gives the Commissioner General for Agrarian Development the power to make certain orders. Such orders may take the form of requiring remedial measures where, amongst other matters, any irrigation channel, watercourse, bund, bank, reservation tank, dam, tank reach or irrigation reserve is blocked up, obstructed or encroached upon, damaged or caused to be damaged. This power is granted to ensure that the cultivation of paddy lands is done in accordance with the provisions of the Act. Limiting this power to remedial measures following damage runs counter to the purpose or objective of the Act. Accordingly, I hold that the Commissioner-General of Agrarian Development has incidental or consequential power in terms of section 83 of the Act to take preventive measures to stop any of the acts specified therein from occurring. It includes the power to restrict agricultural land use to prevent any of the acts specified in section 83 of the Act from occurring.

Accordingly, I answer the question of law in the negative. However, under section 83 of the Act, the Commissioner-General of Agrarian Development has the incidental or consequential power to take preventive measures to prevent any act specified therein from occurring. It includes the power to restrict agricultural land use to prevent any act specified therein from occurring.

I will now examine the conditions imposed by the Respondent by letter dated 24.03.2016 (P11) and its vires in that legal context. Condition 1 seems to be a repeat of the applicable laws. However, nothing in the Act indicates that the Respondent has powers to monitor the implementation of these laws. Therefore, condition 1 is ultra vires his powers.

Conditions 2 and 3 are restrictions on the agricultural land use. These are not restrictions imposed in terms of standards of cultivation provided in the Act or regulations made thereunder. Neither are they aimed at preventing any of the acts specified in section 83 of the Act. Accordingly, conditions 2 and 3 are ultra vires the powers of the Commissioner-General of Agrarian Development.

Condition 4 is intended at preventing any obstruction to paddy cultivation and watercourse. The Commissioner General for Agrarian Development has the incidental or consequential power under section 83 of the Act to take such preventive measures. Therefore condition 4 is intra vires his powers.

The certificate issued pursuant to section 28 of the Act determines whether the lands are paddy lands. It does not entail any examination of possession or title. Accordingly, condition 5 is intra vires the power of the Commissioner-General of Agrarian Development.

For the reasons set out above, I conclude that conditions 1, 2 and 3 imposed by the Respondent in a letter dated 24.03.2016 (P11) are ultra vires. None of the other determinations or conditions are ultra vires.

The Appellant sought a writ of certiorari to quash the decision to impose five conditions set out in P11. As explained earlier, only conditions 1, 2 and 3 exceed the Respondent's authority.

In *Thames Water Authority v. Elmbridge Borough Council* [(1983) 1 Q.B. 570] it was held that where a local authority had acted in excess of their powers, the court is entitled to look not only at the document but at the factual situation and, where the excess of the power was easily identifiable from the valid exercise of power, to give effect to the document in so far as the exercise of the power had been intra vires. Similar approach was adopted in *Regina v. Secretary of State for Transport ex parte Greater London Council* [(1985) 3 W.L.R. 574] when it was held that in an appropriate case, certiorari will go to quash an unlawful part of an administrative decision having effect in public law while leaving the remainder valid.

Such severance of any ultra vires part of a decision is also circumscribed. In *Agricultural, Horticultural and Forestry Industry Training Board v. Ayelsbury Mushrooms Ltd.* [(1972) 1 W.L.R. 190] court held that where the bad can be cleanly severed from the good, the court will quash the bad part only and leave the good part standing. In *R. v. North Hertfordshire District Council ex parte Cobbold* [(1985) 3 AII.E.R. 486] court held that where a specific part of a licence could be identified as being offensive and therefore unlawful, it could only be severed from the licence so far as to leave the remainder untainted if the severance would not alter the essential character or substance of that which remained. It follows that severance would not be permitted where the words which is sought to sever were fundamental to the purpose of the whole licence.

I hold that conditions 1, 2 and 3 of letter dated 24.03.2016 (P11) can be cleanly severed from the other valid parts of the document without altering the essential character or substance of the remainder.

For the reasons set out above, I set aside the judgment of the Court of Appeal dated 06.10.2016 and issue a writ of certiorari quashing the conditions 1, 2 and 3 of letter dated 24.03.2016 (P11).

I make no order as to costs.

JUDGE OF THE SUPREME COURT

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

I agree.

JUDGE OF THE SUPREME COURT

Yasantha Kodagoda, P.C., J.

I agree.

JUDGE OF THE SUPREME COURT

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

Algama Appuhamylage Don
Wasantha Lankanayake,
Bayawa, Awulegama.
Plaintiff

SC APPEAL NO: SC/APPEAL/57/2019
SC LA NO: SC/HCCA/LA/237/2018
HCCA KURUNEGALA NO: NWP/HCCA/KURU/80/2015/F
DC WARIYAPOLA NO: 09/SPL

Vs.

Algama Appuhamylage Don
Ananda Algama,
Hingurugamuwa,
Awulegama.
Defendant

AND BETWEEN

Algama Appuhamylage Don
Wasantha Lankanayake,
Bayawa, Awulegama.
Plaintiff-Appellant

Vs.

Algama Appuhamylage Don
Ananda Algama,
Hingurugamuwa,
Awulegama.
Defendant-Respondent

AND NOW BETWEEN

Algama Appuhamylage Don
Ananda Algama,
Hingurugamuwa,
Awulegama.
Defendant-Respondent-Appellant

Vs.

Algama Appuhamylage Don
Wasantha Lankanayake,
Bayawa, Awulegama.
Plaintiff-Appellant-Respondent

Before: P. Padman Surasena, J.
E.A.G.R. Amarasekara, J.
Mahinda Samayawardhena, J.

Counsel: W. Dayaratne, P.C., with Ranjika Jayawardene for the Defendant-Respondent-Appellant.

Sapumal Bandara with Geethika Mannaperuma for the Plaintiff-Appellant-Respondent.

Argued on: 10.03.2021

Written submissions:

by the Plaintiff-Appellant-Respondent on 08.09.2020.

by the Defendant-Respondent-Appellant on 07.01.2021.

Further written submissions:

by the Defendant-Respondent-Appellant on 27.04.2021.

Decided on: 10.06.2021

Mahinda Samayawardhena, J.

By way of Deed of Transfer No. 10950, the Plaintiff-Appellant-Respondent (Plaintiff) transferred some of her undivided rights to the land described in the schedule to the Deed to her brother, the Defendant-Respondent-Appellant (Defendant). The Plaintiff states that although this Deed is *ex facie* an outright transfer, it was in fact security for a loan obtained by her from the Defendant, and there was an oral agreement between them that the Defendant brother would retransfer the property once she repaid the loan with interest. The Plaintiff's position is that she never intended to pass the beneficial interest in the property to the Defendant thereby resulting in a constructive trust being created in her favour.

Section 83 of the Trusts Ordinance, No. 9 of 1917, as amended, reads as follows:

> *Where the owner of property transfers or bequeaths it, and it cannot reasonably be inferred consistently with the attendant circumstances that he intended to dispose of the beneficial interest therein, the transferee or legatee must hold such property for the benefit of the owner or his legal representative.*

The Defendant had also acquired undivided rights to this property by other Deeds. He filed a partition action to partition the larger land making the Plaintiff also a Defendant. The partition case was concluded without contest. The Plaintiff did not raise her claim to the constructive trust in the partition action.

The Plaintiff states that the Defendant continuously postponed the retransfer of the property and she was ultimately compelled to file this case as a last resort to vindicate her rights.

The Defendant denies this version of the Plaintiff. The defendant states that the transaction was an outright transfer of the property and he is not holding the property in trust for the Plaintiff.

After trial, the District Court held against the Plaintiff on the basis that the partition decree wiped out the constructive trust, if any.

On appeal, the High Court of Civil Appeal reversed the Judgment and directed the District Court to enter Judgment for the Plaintiff.

The Defendant is now before this Court against the Judgment of the High Court.

The Defendant raised several questions of law but this Court granted leave to appeal on two questions, which in essence is whether the High Court erred in law when it decided that a constructive trust is not extinguished by a decree for partition, notwithstanding that the Plaintiff, being aware of the partition action, did not claim such a right in the partition action.

In the Partition Ordinance, No. 10 of 1863, section 9 dealt with the conclusive effect of a partition decree and there was no express provision protecting constructive trusts after a decree for partition was entered. Hence there was an ambiguity as to whether constructive trusts survived a partition decree.

In cases such as *Babunona v. Cornelis Appu (1910) 14 NLR 45, Galgamuwa v. Weerasekera (1919) 21 NLR 108*, the Court held against the survival of a constructive trust, but in cases such as *Sultan v. Sivanadian (1911) 15 NLR 135, Weeraman v. De Silva (1920) 22 NLR 107*, the Court held in favour of the survival of a constructive trust despite a partition decree being entered.

However this question was set at rest by a Full Bench of the Supreme Court in *Marikar v. Marikar (1920) 22 NLR 137* wherein the Supreme Court, having reviewed the conflicting previous decisions authoritatively held:

> *A trust, express or constructive, is not extinguished by a decree for partition, and attaches to the divided portion, which on the partition is assigned to the trustee.*

The Full Bench of the Supreme Court took the view that section 9 of the Partition Ordinance was not intended to extinguish equitable interests, and the trustee, being the owner of the share, represents the beneficiary in respect of it, and a partition

decree in favour of the trustee will be conclusive against all those who may claim the same share or any interest therein but is not intended to shut out the beneficiary himself.

Dr. L.J.M. Cooray in his treatise *The Reception in Ceylon of the English Trust (1971)*, justifies this conclusion from a different perspective. He states at page 209 that notwithstanding the trust is wiped out by the decree for partition, "*He [the trustee] may be regarded as a trustee under a constructive trust (distinct from the old trust which the decree has wiped out) which constructive trust arises under section 90 read with section 53 [of the Trusts Ordinance], when he receives a partition title to the former trust property under the decree.*"

This Full Bench decision was followed in subsequent decisions such as *Punchimahatmaya v. Medagama (1949) 51 NLR 276*. Notably, the District Court Judgment in the instant case makes no reference to *Marikar v. Marikar*.

The Partition Act, No. 16 of 1951, succeeded the Partition Ordinance. Unlike the Partition Ordinance, the Partition Act made special reference to trusts. Section 48(1) of the Partition Act (which corresponds to section 9 of the Partition Ordinance) recognised the finality and conclusiveness of a partition decree. It stated that such a decree is free from all encumbrances whatsoever other than those specified in the decree. It further expounded:

> *In this subsection "encumbrance" means any mortgage, lease, usufruct, servitude, fideicommissum, life interest, trust, or any interest whatsoever howsoever arising except a constructive or charitable trust, a lease at will or for a period not exceeding one month, and the rights of a proprietor of a nindagama.*

Although the Full Bench of the Supreme Court in *Marikar*'s case held that a trust, be it express or constructive, would not be extinguished by a partition decree, the Partition Act enacted that a trust was extinguished by a partition decree unless specifically reserved in the decree or if it were a constructive or charitable trust.

When the Defendant in the instant case filed the partition action, the Partition Law, No. 21 of 1977, was in force. Similar to the Partition Act, section 48(1) of the Partition Law endowed partition decrees with finality devoid of encumbrances other than those specified in the decree. What is meant by "encumbrance" is defined in the Partition Law in the following manner:

> *In this subsection and in the next subsection "encumbrance" means any mortgage, lease, usufruct, servitude, life interest, trust, or any interest whatsoever howsoever arising except a constructive or charitable trust, a lease at will or for a period not exceeding one month.*

Hence, similar to the Partition Act, the Partition Law spares constructive trusts despite a partition decree being final and conclusive.

The learned District Judge in this case has accepted that in terms of section 48(1), a constructive trust is not wiped out by the entering of a partition decree. But the District Judge qualifies this by stating that the beneficiary of a constructive trust can claim the benefit of the said provision only if the partition decree had been obtained without the beneficiary's knowledge, and not in an instance where he remained silent

having been fully aware of the partition action. The District Court took the view that as the Plaintiff had kept silent about the constructive trust after she was made a party to the partition action, the alleged constructive trust was wiped out by the partition decree and therefore the Plaintiff's action should fail. The District Court did not go into the merits of the Plaintiff's claim despite voluminous evidence being led on the question of the existence of a constructive trust.

This finding of the District Court is not correct and goes against the *ratio decidendi* of *Marikar*'s case. Had the learned District Judge read the Judgment in *Herat v. Amunugama (1955) 56 NLR 529*, which he cites in his Judgment, he would have realised his mistake. In *Herat*'s case, Gratiaen J. states at pages 534-535:

> *It has no doubt been authoritatively decided that Section 9 of the Partition Ordinance does not necessarily extinguish constructive trusts – Marikar v. Marikar (1920) 22 NLR 137…. In Marikar's case (supra) the beneficiary (although a party) had not put in issue the bare legal estate of the constructive trustee.*

Learned President's Council for the Defendant submits that in *Marikar*'s case there was a constructive trust but in the instant case the Defendant denies any such trust. This is also not correct. In *Marikar*'s case there was no admitted trust. There was only "*an alleged constructive trust*".

Let me quote the first paragraph of the Judgment in *Marikar*'s case to clear any doubts:

> *The question for determination in this case relates to an alleged constructive trust attaching to an undivided share*

> *of a land which was the subject of a partition suit. The person beneficially interested under the alleged trust – though himself otherwise a party to the suit – did not assert a claim to his equitable right in the suit. Judgment was given, and a decree entered, without any reference to the trust. The question is therefore, whether, assuming the existence of the trust, it is extinguished by the decree, or whether it attaches to the share allotted in severalty.*

I must emphasise that at the time *Marikar*'s case was decided in 1920, there was no statutory safeguard to preserve constructive trusts and yet the Supreme Court interpreted section 9 of the Partition Ordinance (which stated that a partition decree is conclusive) liberally in order to protect trusts. Subsequent legislation expressly protected constructive trusts and therefore there cannot be any doubt on the matter. There is no necessity to rely on Marikar's Judgment any more.

The learned District Judge states that if a person is allowed to file a separate action to establish a constructive trust in respect of a portion of land which was the subject matter of a partition decree to which he was a party, it would lead to an "*absurd interpretation*" of section 48(4) of the Partition Law.

If two interpretations of a statute are possible and one leads to absurdity and the other is in harmony with common sense and justice, the Court has the option of selecting the latter. But if the language of a statute is plain, the Court cannot as a general rule give a different interpretation on the ground of absurdity. The intention of the legislature is clear when the legislature in express terms preserved constructive trusts despite finality of partition decrees in line with the dicta in *Marikar*'s case.

The argument of learned President's Council for the Defendant is that the partition decree can be challenged before the District Court only on the grounds set out in section 48(4) of the Partition Law and nowhere in that section is it expressly stated that a partition decree can be challenged by a separate action filed on the ground of a constructive trust. This position is untenable because the challenge by the beneficiary is not against the partition decree but against the trustee.

Notwithstanding the Defendant proposed questions of law in relation to (a) prescription on a constructive trust, and (b) proof of the attendant circumstances in establishing a constructive trust, this Court did not grant leave on those questions. The High Court has adequately addressed (b) above and concluded that there exists a constructive trust as claimed by the Plaintiff.

I answer the two questions of law raised on behalf of the Defendant in the negative.

The Judgment of the High Court of Civil Appeal is affirmed and the appeal is dismissed with costs.

Judge of the Supreme Court

P. 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 from a Judgment of the Provincial High Court of the Southern Province holden in Galle dated 31st May 2019 in HC/LT/1138/2016, in terms of the Industrial Disputes Act and the High Court of Provinces (Special Provisions) Act No. 10 of 1990 read with the Rules of the Supreme Court, with Leave to Appeal obtained.

SC Appeal 61/2020

SC HCCA SPL LA 45/2019

SP HC/GA/LT/APL/1138/16

LT4/G/25/2013

Dhinayadura Jinadasa,
Moonugoda Road, Seenigama,
Hikkaduwa

Applicant

Vs.

The Trustee,
Sri Devol, Maha Devalaya,
Seenigama, Hikkaduwa.

Respondent

And Between

Dhisenthuwa Handi Sarath,
The Trustee,
Sri Devol, Maha Devalaya,
Seenigama, Hikkaduwa.

Respondent-Appellant

Vs.

Dhinayadura Jinadasa,
Moonugoda Road, Seenigama,
Hikkaduwa

Applicant-Respondent

And Now Between

Dhinayadura Jinadasa,
Moonugoda Road, Seenigama,
Hikkaduwa

Applicant-Respondent-Appellant

Vs.

Dhisenthuwa Handi Sarath,
The Trustee,
Sri Devol, Maha Devalaya,
Seenigama, Hikkaduwa.

Respondent-Appellant-Respondent

Before: Justice Vijith K. Malalgoda PC
Justice A.L.S. Gooneratne
Justice M. A. Samayawardhena

Counsel: Mr. Suren Fernando with Sajith Dias for the Applicant-Respondent-Appellant
Mr. D. V. R. Isuru Lakpura, for the Respondent-Appellant-Respondent

Argued on: **15.02.2021**
Judgment on: **09.07.2021**

Vijith K. Malalgoda PC J

The Applicant-Respondent-Appellant (hereinafter referred to as "The Appellant") has preferred an application before the Labour Tribunal of Galle on 07th February 2013 for alleged unlawful termination of his employment by the Respondent-Appellant-Respondent (hereinafter referred to as "The

Respondent") and sought an order for reinstatement with backwages, reasonable compensation and for all statutory entitlements for the loss of his employment as a Boatman in the Seenigama Devol Maha Devalaya.

At the conclusion of the trial before the Labour Tribunal, the learned President of the Labour Tribunal had come to a conclusion that the termination of the Appellant's service by the Respondent was in fact unjust. Further, considering the working history, nature of work and the income of the Appellant as a boatman, the learned President ordered the Respondent to pay Rs 2,100,000/= being the 7 years' salary, instead of making an order for reinstatement.

Being aggrieved by the said Order, the Respondent made an appeal to the Provincial High Court of Galle. By the judgment dated 31st May 2019, the learned High Court Judge partly allowed the Appeal and reduced the quantum of compensation to one year salary, i.e., Rs. 300 000/= considering the age of the Respondent and his future prospects as a boatman.

The Appellant preferred the instant application to this Court seeking to set aside the judgment of the High Court and to affirm the Order of the learned President of the Labour Tribunal. This court considering the submission by both parties, granted special leave on questions of law identified in sub paragraphs (d) and (e) of the Paragraph 11 of the Petition dated 10th July 2019, which are as follows;

(d) Did his Lordship of the High Court err in law in failing to recognize that the Order of the learned President of the Labour Tribunal was lawful, just and equitable?

(e) Did his Lordship of the High Court err in law in altering the quantum of compensation awarded?

When answering the 1st question referred to above, it is important to consider whether the order that was challenged before the High Court, which was delivered by the learned President of the Labour Tribunal was lawful, just and equitable.

When the Respondent appealed against the order of the Labour Tribunal to the High Court, the High Court made order to reduce the quantum of compensation, but did not interfere with the findings of the Labour Tribunal with regard to its decision that,

a) There was a Master-Servant relationship existed between the Applicant and the Respondent
b) The services of the Applicant was illegally terminated by the Respondent
c) The Labour Tribunal had decided to pay compensation instead of making an order for reinstatement

Even though the Appellant preferred the instant appeal before this court against the decision of the High Court to reduce the quantum of compensation without interfering with the rest of the order, the Respondent was satisfied with the said finding and did not appeal against the said order.

In the said circumstances it is not necessary for this Court to consider whether the order of the Labour Tribunal is lawful, just and equitable with regard to its finding on the above three issues which is not challenged in the instant application.

The only remaining issue that has to be looked by this Court is, whether the order made by the Labour Tribunal to pay Rs. 2100000.00 being seven years' salary instead of making an order of reinstatement, was lawful, just and equitable.

Based on the finding that was reached by the Labour Tribunal, that the services of the appellant who had worked as a boatman at Seenigama Devol Maha Devalaya had unjustly terminated, the Labour

Tribunal had decided to grant compensation in lieu of reinstatement, since by then the appellant was reaching the age of 65 years. In the absence of a specific service agreement between the two parties, deciding the age of retirement and the other service benefits, the only document the Labour tribunal relied was the letter of appointment which was produced marked as A-9. However, A-9 is silent on its effect on continued long service and consequences of terminating the continued long service. In those circumstances the Labour Tribunal whilst concluding the last drawn salary as Rs. 25000.00 based on the evidence placed before the tribunal, computed the compensation on a mechanical basis to make it seven years' salary, but had failed to give any reason as to how the seven-year period was calculated.

In the absence of an accepted legal regime in calculating compensation in lieu of reinstatement, the method that should be followed by the Labour Tribunal had been identified in a series of appellate decisions.

In the case of ***Jayasuriya Vs. State Plantation Corporation (1995) II Sri L.R.379*** *at page 381 Amarasinghe J* had identified the more logical method of computing the compensation as,

> "In determining compensation what is expected is that after a weighing together of the evidence and probabilities in the case, the Tribunal must form an opinion of the nature and extent of the loss, arriving in the end at an amount that a sensible person would not regard as mean or extravagant but would rather consider to be just and equitable in all the circumstances of the case……..
>
> ……. 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"

In the case of ***The Ceylon Transport Board Vs. Wijerathne 77 NLR 48*** *Vythialingam J* had gone into this issue in more detail and observed that,

> "In making an order for the payment of compensation to a workman in lieu of an order for reinstatement under Section 33 (5) of the Industrial Disputes Act, a Labour Tribunal should take into account such circumstances as the nature of the employer's business and his capacity to pay, 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 action were blame-worthy and the effect of the dismissal on future pension rights. Account should also be taken of any sums paid or actually earned or which should also have been earned since the dismissal took place"

When granting compensation to the Appellant the Labour Tribunal was mindful of the decision in ***The Ceylon Transport Board Vs. Wijerathne*** (*supra*) and had referred to the guidelines identified in the said judgment as follows;

> "වන්දි නියම කිරීමේ දී සලකා බැලිය යුතු කරුණු සම්බන්ධව ඉතා පැහැදිලි ලෙස කරුණු ඉදිරිපත් කර ඇති නඩුවක් වනුයේ, The Ceylon Transport Board vs, Wijerathne (77 NLR 481) දරණ නඩුවයි. එම නඩුවේදී ඉදිරිපත් වූ නිගමනයන්, අනුගමනය කරමින් ශ්‍රේෂ්ඨාධිකරණය විසින් මඟපෙන්වීමක් ලබා දී තිබේ.
>
> i. ව්‍යාපාරයේ ස්වභාවය.
> ii. සේවයාගේ ගෙවීමේ හැකියාව.
> iii. සේවකයාගේ වයස.
> iv. රැකියාවේ ස්වභාවය.
> v. ඔහුගේ සේවා කාලය.

vi. ඔහුගේ වර්තමාන වැටුප.

vii. ඔහුගේ අනාගත අපේක්ෂාවන්.

viii. සේවකයාගේ අතීත සේවා වාර්තාව.

ix. වෙනත් රැකියාවක් ලබා ගැනීමට ඇති ඉඩකඩ.

x. සේවය අවසන් කල අන්දම.

xi. ඉදිරිපත් වී ඇති චෝදනාවල තත්වය.

xii. වගඋත්තරකරුගේ ක්‍රියා කලාපයේ ස්වභාවය.

xiii. සේවය අවසන් වීම නිසා ඔහුට විය හැකි බලපෑම.

xiv. අහිමි වන අනාගත විශ්‍රාම ප්‍රතිලාභ.

xv. සේවය රහිතව සිටි කාලයේ ඉපයූ වැටුප හා වෙනත් කරුණු."

However, when calculating the compensation, whether the Labour Tribunal was in fact followed the said guidelines supported by the evidence led before the tribunal and made a just and equitable order is a matter that has to be considered at this stage. When considering the above I am further mindful of the following observation made by Amarasinghe J in the case of ***Jayasuriya Vs. Sri Lanka State Plantation Corporation***. *(supra)*

> "The Industrial Disputes Act No. 43 of 1950 Section 31D states that the order of a Labour Tribunal shall be final and shall not be called in question in any court except on a question of law. While appellate courts will not intervene with pure findings of fact, they will review the findings treating them as a question of law, if it appears that the Tribunal has made a finding wholly unsupported by evidence, or which is inconsistent with the evidence and contradictory of it; or where the Tribunal has failed to consider material and relevant evidence; or where it has failed to decide a material question or misconstrued the question at issue and had directed its attention to the wrong matters; or where there was an erroneous misconception amounting to a misdirection; or where it failed to consider material documents or misconstrued them or

> where the Tribunal has failed to consider the version of one party or his evidence; or erroneously supposed there was no evidence."

It is also observed in the case of ***Sri Lanka State Plantation Corporation Vs. Lanka Podu Seva Sangamaya (1990) I Sri LR 84*** that;

> "An appeal lies against an order of a Labour Tribunal on a Question of Law. Thus, the Appeal Court may intervene if the Tribunal appears to have made a finding for which there is no evidence - a finding which is both inconsistent with the evidence and contradictory of it."

As revealed before the Labour Tribunal, the Appellant was 64 years old and was working as the chief boatman at the time his services were terminated in August 2012. Even though the Appellant had claimed that he was fit enough to work as a boatman even at the age of 64, no evidence was placed before the tribunal with regard to his future prospects and/or opportunities for obtaining alternative employment. It is also evident that, in the absence of any agreed retiring age, the Respondent had allowed the Appellant to work until he reached the age of 64 years. However, the Labour Tribunal had failed to give its mind to this aspect of the case. In the absence of an agreed retiring age between the parties, the Labour Tribunal should be more responsible to take into consideration the reasonable age when computing compensation.

S. R. de Silva had considered the question of retiring age in the absence of a written agreement as follows;

> "……. While there is no law relating to the age of retirement, the general practice has been to retire such employees at 55. There are, however, exceptions. In the plantation industries (tea and rubber) the age of retirement of manual workers has been prescribed as 60 for males and 55 for females.

> Where the age of retirement is not covered by the contract of employment or a collective agreement; it is not unusual to find cases involving the justification of retirement being the subject matter of application to Labour tribunal. It could fairly and safely be assumed that retirement at the age of 60 would not be regarded as unreasonable by a Labour tribunal, even if retirement at that age was not contracted for."
>
> ['**The Legal Framework of Industrial Relations in Ceylon**' by S.R De Silva at page 586]

In the case of ***Elpitiya Plantations Ltd Vs. Ceylon Estates Staff Union and others (2004) 1 SLR 239***, it was held that the optional age of retirement with the employer was 55 years, subject to the annual extensions until 60 years which is the compulsory age of retirement and the extensions of services may be given is a discretion on the part of the employer. Therefore, it was further held that the termination of the workman's service at 55 years was not just or inequitable.

In the case of ***M/S. British Paints (India) Ltd Vs, Workmen 1966 AIR 732***, it was held that,

> "Considering that there has been a general improvement in the standard of health in this country and also considering that longevity has increased, fixation of age of retirement at 60 years -appears to us to be quite reasonable in the present circumstances. Age of retirement at 55 years was fixed in the last century in government service and had become the pattern for fixing the age of retirement everywhere. But time in our opinion has now come considering the improvement in the standard of health and increase in longevity in this country during the last fifty years that the age of retirement should be fixed at a higher level, and we consider that generally speaking in the present circumstances fixing the age of retirement at 60 years would be fair and proper, unless there are special circumstances justifying fixation of a lower age of retirement."

In the case of ***Guest, Keen, Williams Private Ltd Vs P. J. Sterling and Others 1959 AIR 1279*** it was observed that,

> "In fixing the age of superannuation industrial tribunals have to take into account several relevant factors. What is the nature of the work assigned to the employees in the course of their employment? What, is the nature of the wage structure paid to them? What are the retirement benefits and other amenities available to them? What is the character of the climate where the employees work and what is the age of superannuation fixed in comparable industries in the same region? What is generally the practice prevailing in the industry in the past in the matter of retiring its employees? These and other relevant facts have to be weighed by the tribunal in every case when it is called upon to fix an age of superannuation in an industrial dispute."

However, as revealed before the Labour Tribunal, at the time of the Appellant's services were terminated, he has already passed the retirement age but admittedly he was engaged in a very responsible job.

Even though he has more experience and fitness to work as claimed by him, this does not mean that he should continue with his job until he feels unfit, in the absence of an agreed retiring age between the employer the employee. The learned President of the Labour Tribunal should have mindful of this aspect when computing compensation

Therefore, the learned President of the Labour Tribunal should have considered the financial loss caused to the Appellant as well as the retirement age or current age of the Appellant when computing the compensation, because it is erroneous to assess the compensation based on the uncertain loss and indefinite period for retirement.

When considering the above it is observed that there is no reasonable basis in computing compensation based on 7 years' wages as the Appellant was terminated at the age of 64 and thus, he does not have any future losses on the termination of the employment. Therefore, this court is of in the view that the Appellant cannot be reinstated because of his current age and on the other hand, awarding compensation as Rs 2,100,000 being 7 years' salary is erroneous and excessive.

When awarding 7 years' salary as compensation, the learned President of the Labour Tribunal had also considered the fact that the Appellant was not paid EPF and gratuity by the employer but, payment of statutory dues cannot be considered in granting compensation since there is a statutory remedy available for non-payment of such dues.

When the Respondent appealed against the findings of the Labour Tribunal to the High Court, the High Court Judge while reducing the amount of compensation ordered by the Labour Tribunal had stated that;

> "Yet, considering the age of the Respondent (now the Appellant) and his future prospects as a workman, the compensation awarded by the learned President of the Labour Tribunal should be declared to be excessive.
>
> As such, having considered the age and the future prospects of the workman based on the nature of the work engaged by him, I hereby vary the amount of compensation to the sum of Rupees Three Hundred Thousand which is equivalent to one year salary of the Respondent"

However, the learned High Court Judge in reducing the amount of compensation ordered by the learned President had not provided sufficient grounds as to why he reduced the 7 years' salary of the Appellant into 1 year. On the other hand, for a just and equitable Order, it is not sufficient to say that 'considering the age of the Respondent and his future prospects…' to reduce the amount ordered by the learned

President without analyzing the material with regard to the computation of the compensation ordered by the learned President is erroneous or excessive.

Even though it is declared that the learned High Court Judge had failed to give reasons in reducing the compensation ordered by the Labour Tribunal, when considering the matters that has been already discussed in this judgement, payment of one year's salary as compensation to an employee whose services had been unlawfully terminated appears to be just and equitable.

I therefore answer both questions of law raised before this court in negative and dismiss the instant appeal without cost.

This Appeal is Dismissed. No cost.

Judge of the Supreme Court

Justice A. L. S. Gooneratne,

I agree,

Judge of the Supreme Court

Justice M. A. Samayawardhena,

I agree,

Judge of the Supreme Court

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

1. Irene Leticia Haththotuwa,
2. Gamage Don Mayurasinghe Haththotuwa,
   Both of No.162/10,
   Rajagiriya Road,
   Rajagiriya.
   Plaintiffs

SC APPEAL NO: SC/APPEAL/66/2011
SC LA NO: SC/SPL/LA/210/2010
CA NO: CA/573/96 (F)
DC COLOMBO NO: 6127/ZL

Vs.

1. Warnakulasuriya Wargakkarige Lalitha Fernando,
2. Hettiarachchige Upali Perera Wijegunasekara, (Deceased)
   Both of No.166,
   Rajagiriya Road,
   Rajagiriya.
   Defendants

AND BETWEEN

Warnakulasuriya Wargakkarige
Lalitha Fernando,
No.166,
Rajagiriya Road,
Rajagiriya.
Defendant-Appellant

Vs.

1. Irene Leticia Haththotuwa,
2. Gamage Don Mayurasinghe
Haththotuwa,
Both of No.162/10,
Rajagiriya Road,
Rajagiriya.
Plaintiff-Respondents

AND NOW BETWEEN

1. Irene Leticia Haththotuwa,
2. Gamage Don Mayurasinghe
Haththotuwa, (Deceased)

2A. Nadira Yasanthi Haththotuwa,
Both of No.162/10,
Rajagiriya Road,
Rajagiriya.
Plaintiff-Respondent-Appellants

Vs.

Warnakulasuriya Wargakkarige
Lalitha Fernando,
No.166, Rajagiriya Road,
Rajagiriya.
Defendant-Appellant-Respondent

Before: P. Padman Surasena, J.
Achala Wengappuli, J.
Mahinda Samayawardhena, J.

Counsel: Priyantha Gamage for the Plaintiff-Respondent-Appellants.
Harsha Soza, P.C., with Rajindh Perera for the Defendant-Appellant-Respondent.

Argued on : 07.07.2021

Further written submissions:

by the Plaintiff-Respondent-Appellants on 20.07.2021.

by the Defendant-Appellant-Respondent on 20.07.2021.

Decided on: 15.10.2021

Mahinda Samayawardhena, J.

The subject matter of this action is Lot 3 in Plan No. 170 (P1). There is no dispute that by order made in the District Court Colombo Case No. 11384/MB, Lipnus Perera became the owner of this land in 1942 (1V4), and he gifted this land to his son, the

2nd defendant, by deed No. 1642 (P2) in 1969. The 2nd defendant by deed No. 3047 (P3) gifted the land to the 1st and 2nd plaintiffs in 1979. Thereafter by deed No. 2861 (P4) the 2nd defendant sold the land to the 1st defendant in 1988. The plaintiffs filed this action seeking a declaration that they are the owners of the land by deed P3 and that the subsequent deed P4 has no force or avail in law.

The 2nd defendant died soon after the institution of the action. The 1st defendant filed the answer seeking a declaration that she is the owner of the land on deed P4 which gets priority over deed P3 on the basis that P3 was registered in a wrong folio and her subsequent deed P4 was registered in the correct folio.

The District Court held with the plaintiffs. On appeal, the Court of Appeal set aside the judgment of the District Court and held with the defendant. This appeal by the plaintiffs is from the judgment of the Court of Appeal.

Learned counsel for the plaintiffs sought leave to appeal against the judgment of the Court of Appeal only on the following three questions of law:

(a) Have their Lordships of the Court of Appeal erred in holding that where a deed is registered in a new folio following a partition of a land, it is not necessary for the purpose of proving 'due registration' to prove that the 'new folio' in which the subsequent competing deed has been registered is a continuation of 'the folio in which the first registered instrument affecting the same land is registered'?

(b) Have their Lordships of the Court of Appeal erred in failing to follow the decisions of the Supreme Court in Meurling v. Gimarahamy 25 NLR 500 and Diyes Singho v. Herath 64 NLR 492?

(c) Is the said judgment of the Court of Appeal untenable in law that it has selectively ignored judgments of the Supreme Court which were binding on the said court?

In broad terms, the only question to be decided in this appeal is the question of prior registration.

There is no question of the due execution of both deeds P3 and P4. Learned counsel for the plaintiffs accepts before this court that the plaintiffs' deed P3 has been registered in a wrong folio. The contention of learned counsel for the plaintiffs is that the defendant's deed P4 has also not been duly registered and therefore the plaintiffs' deed P3 shall prevail since the 2nd defendant had no right to alienate by deed P4 after the execution of deed P3. This argument is entitled to succeed if P4 has not been duly registered.

Let me now consider whether P4 has been duly registered. Section 7(1) of the Registration of Documents Ordinance, No. 23 of 1927, as amended, states that any instrument affecting land, unless it is duly registered under Chapter III of the Ordinance, shall be void against all parties claiming an adverse interest thereto on valuable consideration by virtue of any subsequent instrument which is duly registered under this Chapter.

What is "due registration" as contemplated in this section? The answer is found in section 14(1) of the Registration of Documents Ordinance. The basic principle is that any instrument affecting land shall be registered in the folio in which the first registered instrument was registered or in another folio maintained in continuation thereof with cross references connecting the folios are properly made. (*Heenappuhamy v. Charles (1973) 77 NLR 169*)

Section 14(1) reads as follows:

> *Every instrument presented for registration shall be registered in the book allotted to the division in which the land affected by the instrument is situated and in the folio in which the first registered instrument affecting the same land is registered, or in another folio (whether of the same volume or of another volume) bearing a separate number, opened in continuation thereof, cross reference being entered in the prescribed manner so as to connect the said folios.*

Based on section 14(1), the argument of learned counsel for the plaintiffs is that the defendant failed to prove that her subsequent deed P4 was registered in the folio in which the first deed affecting the land was registered or in another folio opened in continuation of the said folio (in which the first deed affecting the land was registered).

I regret my inability to agree with this argument for the following reasons.

According to 1V4, the deed of Lipnus Perera was registered in folio M 433/268. Lipnus Perera amalgamated the said land of 1 rood and 8 perches with another land of 1 rood and 16.75 perches and subdivided the amalgamated land into 8 lots by Plan P1.

These new lots were registered in different new folios with cross references to the previous folio M 433/268 (1V4).

The new folio opened for Lot 3 (the subject matter of this action) is M 936/176 (1V6).

There is a cross reference in 1V6 which says "*vide M 433/268 [1V4] and 417/83 for original lands*."

There is a cross reference in 1V4 which says "*vide M 936/175-180, 182 for Lots 4, 3, 2, 1, 6, 7, 8 after amalgamation of this land with another land*."

It is in this new folio 1V6 that the unimpeached deed P2 and all other subsequent deeds including the defendant's deed P4 (save and except the plaintiffs' deed P3) were registered.

The plaintiffs' deed P3 was registered in a completely different folio M 1211/185 without any cross reference to folio M 433/268 (1V4) or M 936/176 (1V6).

Hence *prima facie* the new folio 1V6 is the correct folio.

The precise point made by learned counsel for the plaintiffs is that there is a reference in folio 1V4 that the said folio was brought forward from another folio, namely M 423, and since this latter folio was not produced in evidence, the defendant

failed to prove that her deed P4 was duly registered in the folio in which the first registered instrument affecting the land was registered or in another folio opened in continuation thereof as required by section 14(1). Learned counsel cites *Meurling v. Gimarahamy (1922) 25 NLR 500* and *Diyes Singho v. Herath (1962) 64 NLR 492* in support.

Section 14(1) is subject to provisos. However learned counsel for the plaintiffs does not refer to them. Proviso (a) to section 14(1) reads as follows:

> *[A]n instrument may, if the Registrar thinks fit, be entered in a new folio, cross references being entered in the prescribed manner so as to connect the registration with any previous registration affecting the same land or any part thereof.*

It is admitted that a new folio was opened for Lot 3 after the subdivision by Plan P1. As I will explain below, this is permissible and learned counsel for the plaintiffs does not dispute it.

There is a difference between section 14(1) and the proviso (a) to section 14(1).

According to section 14(1) "*Every instrument presented for registration shall be registered…in the folio in which the first registered instrument affecting the same land is registered, or in another folio…opened in continuation thereof, cross reference being entered in the prescribed manner so as to connect the said folios.*"

But the proviso (a) to section 14(1) states that if a new folio is opened (as opposed to continuing with the earlier one), cross references shall be made "*to connect the registration with any previous registration affecting the same land*". No doubt "any previous registration" does not encapsulate a wrong registration.

As I have already explained, the new folio 1V6 satisfies the requirement in the proviso (a) to section 14(1) by the cross reference to the previous registration M 433/268 (1V4).

In addition, the previous registration 1V4 also contains a cross reference to the new registration 1V6 thereby connecting both folios.

What is the purpose of registration? It is mainly to facilitate reference to all existing alienations or encumbrances affecting the land.

Under the proviso (a) to section 14(1), the Registrar of Lands has the discretion to open a new folio with cross references connecting the new registration with any previous registration.

A new folio is opened, for instance, when new allotments of land come into existence by way of partition, be it by way of a decree of court or amicable partition. *(Ramasamy Chetty v. Marikar (1915) 18 NLR 503 at 505, Karunanayake v. Gunasekara (1962) 65 NLR 529)*

When a new folio is opened without cross reference to the old folio and without a corresponding cross reference in the old folio to the new folio, it is a wrong folio. Nevertheless, it was held in *Chelliah Pillai v. Devadason (1937) 39 NLR 68* that if proper

references are later made in the correct folio and the wrong folio connecting both, "*the new folio must be regarded as a right folio from the time the cross references are made*."

There can be a rare situation where cross reference is not necessary for the reason that no deed affecting the land has been previously registered. This is recognised by the proviso (b) to section 14(1), which reads as follows:

> *[W]here no instrument affecting the same land has been previously registered, the instrument shall be registered in a new folio to be allotted by the Registrar.*

The two cases strongly relied on by learned counsel for the plaintiffs, *Meurling v. Gimarahamy (1922) 25 NLR 500* and *Diyes Singho v. Herath (1962) 64 NLR 492* are clearly distinguishable from the instant case. In these two cases, there was no question of new folios being opened but the competing deeds were registered in folios maintained in continuation of the original folios. What was considered in these two cases was the applicability of section 14(1) and not the proviso (a) to section 14(1).

In point of fact, when *Meurling's* case was decided in 1922, what was in force was the Land Registration Ordinance, No. 14 of 1891, wherein there was no corresponding section to the proviso (a) to section 14(1) of the Registration of Documents Ordinance.

In *Meurling's* case, the deeds were registered in two different folios and the folio in which any deed was first registered was

rightly considered the correct folio. In the instant case there are no such complications.

In *Diyes Singho's* case, the plaintiff's competing subsequent deed was registered in the folio where the partition decree was registered, but that folio indicated that it had itself been brought forward from another folio which was not explained by the plaintiff who produced the subsequent deed. The partition deed was not registered in a new folio but in continuation of the earlier folio and there was no consensus that the partition decree was registered in the correct folio. Hence the applicability of the proviso (a) to section 14(1) of the Registration of Documents Ordinance was never considered. In the instant case there is no such question.

The Supreme Court in *Diyes Singho's* case made a pertinent observation at page 494: "*The question whether an instrument has been duly registered as required by the Ordinance is a mixed question of law and fact.*" It is not a pure question of law.

In the instant case it is undisputed that Lipnus Perera became the owner of the land registered in 1V4 and, after the sub-division of the land, the lot in dispute (Lot 3) was registered in the new folio 1V6 with cross references made in both 1V4 and 1V6. Lipnus Perera then gifted Lot 3 by deed P2 to the 2nd defendant and it was registered in 1V6. At the trial, the plaintiffs did not put in issue that Lipnus Perera's deed (registered in 1V4 as far back as in 1942) or the 2nd defendant's deed P2 (registered in 1V6 as far back as in 1969) was registered in a wrong folio. No such suggestion was made to the officer

from the Land Registry called to give evidence by the defendant. The only suggestion made to this witness was that there is a reference in 1V4 that it was brought forward from M 423 (which is the number of the volume; the folio number is unclear in 1V4).

Let me make two points clear: this is not a criminal case to raise some doubts and take advantage of the situation; and litigation is not a game of hide and seek.

Unless the matter (which is a question of fact or a mixed question of fact and law) is clearly and explicitly put in issue in the trial court, a party cannot pursue such matter for the first time on appeal.

In the instant case, the plaintiffs by way of issues 1-5 took up the position that by deed P3 they became the owner of the land and the subsequent alienation of the same land by the same person in favour of the defendant by deed P4 conveys no right to the latter. This position was taken up under the common law.

Whilst accepting that her deed is the subsequent deed from the same source, the defendant by way of issues 6-21 took up the position that the plaintiffs' deed was registered in the wrong folio and her deed was registered in the correct folio and therefore her deed supersedes the plaintiffs' deed. This position was taken under section 7(1) read with section 14 of the Registration of Documents Ordinance.

Thereupon the plaintiffs by way of consequential issues 22 and 23 took up the position that although the defendant's deed is

registered in the correct folio, the defendant is disentitled to the benefit of prior registration because the defendant's deed was obtained and prior registration was secured by fraud or collusion. This position was taken under section 7(2) of the Registration of Documents Ordinance, which states "*But fraud or collusion in obtaining such subsequent instrument or in securing the prior registration thereof shall defeat the priority of the person claiming thereunder.*" This was the focal point in the trial court but was not pursued before this court. The plaintiffs by way of consequential issues did not take up the position that the defendant's deed was registered in a wrong folio.

For the aforesaid reasons, I hold that the defendant has proved that her subsequent deed P4 was duly registered.

I also note that the first question of law before this court is on a wrong premise in that the Court of Appeal has not stated that where a deed is registered in a new folio it is not necessary to prove that the new folio is a continuation of the folio in which the first deed was registered. What the Court of Appeal has stated is "*the deed No. 2861 (P4) has been duly registered in volume M 936 folio 176 (1V6) in continuation of folio 268 in volume M 433 (1V4).*"

I answer all three questions of law in the negative and dismiss the appeal but without costs.

Judge of the Supreme Court

P. Padman Surasena, J.
I agree.

Judge of the Supreme Court

Achala Wengappuli, J.
I agree.

Judge of the Supreme Court

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

Thangavetpillai Selvakumar of
Nelukkulam, Vavuniya.
By his Attorney
R. Sellathurai (Deceased) and
Letchumy Sellathurai of
Nelukkulam, Vavuniya.
Plaintiff

SC APPEAL NO: SC/APPEAL/66/2012
SC LA NO: SC/HCCA/LA/112/2011
HCCA NO: NP/HCCA/VAVUNIYA/01/2002/F
DC VAVUNIYA NO: L/514

Vs.

Vallipuram Radhakrishnan of
Neriyakulam Road,
Nelukkulam,
Vavuniya.
Defendant

AND BETWEEN

Vallipuram Radhakrishnan of
Neriyakulam Road,
Nelukkulam,
Vavuniya.
Defendant-Appellant

Vs.

Thangavetpillai Selvakumar of
Nelukkulam, Vavuniya.
By his Attorney
R. Sellathurai (Deceased) and
Letchumy Sellathurai of
Nelukkulam, Vavuniya.
Plaintiff-Respondent

AND NOW BETWEEN

Vallipuram Radhakrishnan of
Neriyakulam Road,
Nelukkulam,
Vavuniya.
Defendant-Appellant-Appellant

Vs.

Thangavetpillai Selvakumar of
Nelukkulam, Vavuniya.
By his Attorney
R. Sellathurai (Deceased) and
Letchumy Sellathurai of
Nelukkulam,
Vavuniya.
Plaintiff-Respondent-Respondent

Before: Vijith K. Malalgoda, P.C., J.
K.K. Wickramasinghe, J.
Mahinda Samayawardhena, J.

Counsel: G. Rajagulendra with S. Devapalan for the Defendant-Appellant-Appellant.

V. Puvitharan, P.C., with Anuja Rasanayakham for the Plaintiff-Respondent-Respondent.

Argued on: 22.03.2021

Decided on: 04.05.2021

Mahinda Samayawardhena, J.

The Plaintiff instituted this action in June 2000 in the District Court of Vavuniya seeking a declaration that he is entitled to possess the land in suit on the strength of the Permit marked P2 issued in his name under the Land Development Ordinance, ejectment of the Defendant from the land on the basis that the Defendant has been in unlawful possession of it since January 1999, and damages. The Defendant filed answer seeking dismissal of the Plaintiff's action. In his answer, the Defendant, whilst admitting that he came into possession of the land in late 1998, further took up the position that the land was a state-owned forest land which he cleared for development. He also avers in the answer that the land described in the schedule to the plaint and the land described in the schedule to the answer are different. After trial, the District Court entered Judgment for the Plaintiff and on appeal, the High Court affirmed it. This Court granted leave to appeal against the Judgment of the High Court on the following two questions of law formulated by the Plaintiff:

(a) Did the High Court err in law when it failed to consider the proper onus of proof in this action?

(b) Did the High Court err in law when it failed that the allotment of land described in the schedule to the plaint and the allotment of land described in the schedule to the Power of Attorney has not been identified as one and the same land?

The first question of law quoted above is unclear, and at the argument, learned counsel for the Defendant-Appellant did not assist the Court to understand it either. However, I believe I was able to discern its meaning by reading the Judgment of the District Court along with the written submissions filed in this Court. Let me explain.

The Defendant raised issue No. 7 on the identification of the land. It reads as follows: "*Are the boundaries of the land which are described in the schedule to the plaint and the boundaries of the land which are claimed by the Defendant one and the same?*" The learned District Judge answered this question in the affirmative.

The land described in the schedule to the plaint and the land described in the schedule to the Permit are the same. The Permit was issued in 1990. The Plaintiff claims the land according to the metes and bounds described in the Permit.

In the schedule to the plaint, the boundaries given are as follows: North by the land of V. Ponniah and Road; East by the land of Suppiah Kathiresan; South by the land of R. Ponnammah; and West by the Path.

The answer of the Defendant was filed in 2001 – eleven years after the Permit was issued. In the schedule to the answer, the boundaries given are as follows: North by the land of Mahadevan; East by the State Forest; South by the land of Sivarasa; and West by the Neriyakulam Road.

It is relevant to bear in mind that the land in question and the parties to this action are from Vavuniya in the Northern Province. Many people in this province were displaced due to the civil war; perhaps as a result, the names of the claimants of the adjoining lands may have also changed over the years.

It is true that the Plaintiff has not taken out a commission to identify the land described in the schedule to the plaint. However, in the facts and circumstances of this case, this does not go to the root of the Plaintiff's case. The Permit P2 has been issued by the Land Officer in Vavuniya. At the trial, the Land Officer was summoned to give evidence on behalf of both parties. When he was summoned by the Defendant, he stated in his evidence that the Defendant made an application to him for a Permit to the land he was in possession of, and when he checked with the Settlement Officer and examined the Land Ledger, Alienation Registry etc., he realised that a Permit had already been issued on the land. The Land Officer then informed the Defendant of his findings. The Permit the Land Officer made reference to, was the Permit issued to the Plaintiff. At that point in time, the Defendant had not taken up the position that he was claiming a different land. This means the land described in the schedule to the Permit (and the plaint) and the land claimed by the Defendant are the same. The Land Officer was not cross-examined further on this matter. On this basis, the identification of the land was established before Court.

However, the learned District Judge states in his Judgment that the burden is on the Defendant to prove that the two lands – the land described in the Permit and the land in the possession of the Defendant – are different. This finding is erroneous. The burden is on the Plaintiff to prove that the

land the Defendant is in possession of is the same as that described in the schedule to the plaint. However, no prejudice was caused thereby to the Defendant as the Plaintiff had already adduced evidence and the learned District Judge had already accepted that the land the Defendant is currently in possession of is the land described in the Permit and the plaint.

In the Judgment of the High Court, there is no specific reference to the burden of proof in terms of the identification of the corpus. The two sets of written submissions filed by the Defendant before the High Court are available in the brief. In the said written submissions, the Defendant has not taken up this issue on the burden of proof. The said written submissions are largely if not solely dedicated to the defects in the Plaintiff's Power of Attorney (as the action was filed by a Power of Attorney holder). If the Defendant did not take up such a matter before the High Court, the formulation of the first question of law in the manner as it stands is misleading. I answer the first question of law against the Defendant.

However, even if this question was answered in favour of the Defendant, I would not be inclined to set aside the Judgment of the High Court on that basis, as I am satisfied the Plaintiff has discharged his burden in establishing the identity of the corpus.

Let me now turn to the second question of law. Similar to the first, this question is also not very clear. I am unable to comprehend why it was raised. This question suggests that the land described in the schedule to the plaint and the land described in the schedule to the Power of Attorney are different. Perusal of the two reveals this is not so.

In fact, even if there was a discrepancy, it would be immaterial as the Power of Attorney holder has been given the appropriate authority to deal with the land described in the Permit. The Permit number and the other relevant instructions are given in the Power of Attorney itself. Furthermore, there is no legal requirement to describe the land by metes and bounds in the Power of Attorney. For the above reasons, I also answer this question of law against the Defendant.

There is no merit in this appeal.

I dismiss the appeal with costs.

Judge of the Supreme Court

Vijith K. Malalgoda, P.C., J.
I agree.

Judge of the Supreme Court

K.K. Wickramasinghe, J.
I agree.

Judge of the Supreme Court

IN THE SUPEME COURT OF THE DEMOCRATICSOCIALIST REPULIC OF SRI LANKA.

In the matter of an Appeal to the Supreme Court of the Democratic Socialist Republic of Sri Lanka.

SC/Appeal/No.68/2015

SC/SPL/LA/240/14

C.A. Appeal No. 335/99(F)

D.C Maho Case No. 3664/L

IN THE DISTRICT COURT OF MAHO.

Rangallage Sirimawathie Navaratne.

No. 17/6, Malkaduwawa, Circular Road,

Kurunegala.

Plaintiff.

Vs.

Semasinghe Wanninayake

Mudyanselage Kamalawathie,

Rest House Road, Ebalagodayagama,

Nikaweratiya.

Defendant.

IN THE COURT OF APPEAL.

Rangallage Sirimawathie Navaratne.

No. 17/6, Malkaduwawa, Circular Road, Kurunegala.

Plaintiff – Appellant.

Vs.

Semasinghe Wanninayake

Mudyanselage Kamalawathie,

Rest House Road, Ebalagodayagama,

Nikaweratiya.

Defendant – Respondent.

IN THE SUPREME COURT.

Rangallage Sirimawathie Navaratne.

No. 17/6, Malkaduwawa, Circular Road,

Kurunegala.

Plaintiff – Appellant – Appellant.

Vs.

Semasinghe Wanninayake

Mudyanselage Kamalawathie,

Rest House Road, Ebalagodayagama,

Nikaweratiya.

Defendant – Respondent - Respondent.

Before : Sisira J De Abrew J

L.T.B. Dehideniya J

E.A.G.R. Amarasekara J

Counsel : Dr. Sunil F.A. Cooray with Nilanga Perera for the Plaintiff – Appellant – Appellant.

Upendra Walgampaya for the Defendant – Respondent – Respondent.

Argued on : 05.07.2020.

Decided on : 02.06.2021.

E.A.G.R. Amarasekara J

The Plaintiff – Appellant – Appellant (hereinafter sometimes referred to as the Plaintiff or the Appellant) instituted an action against the Defendant – Respondent – Respondent (hereinafter sometimes referred to as the Respondent or the Defendant) in the District Court of Maho praying inter alia for a judgment;

- Directing the defendant to retransfer the property described in the schedule to the plaint to the plaintiff by executing a deed of conveyance and,
- In the event the defendant fails to do so, for such transfer to be effected by executing a deed of transfer by the Registrar of the District Court of Maho, and,
- To evict the defendant and everyone under her and to give the vacant possession of the land to the plaintiff,
- For a sum of Rs. 75000/- for the damages already caused and Rs.1000 per month as damages for unlawful possession.

Plaintiff by her plaint dated 23.01.1993 inter alia stated that;

- The plaintiff who was the owner of the land described in the schedule to the plaint mortgaged the property to the defendant and obtained a loan by keeping the said land as a security, and the said mortgage(උකස්කරය) was executed as a transfer deed (deed of transfer no. 560 dated 27.01.1989 attested by W.T.M.P.B. Tennakoon, Notary Public) and together with it, another deed (පොරොන්දු පත්‍රය) was executed by the defendant undertaking to re-convey the land to the plaintiff, namely deed no. 563 dated 31.01.1989 attested by said W.T.M.P.B. Tennakoon, Notary Public.
- The plaintiff's signature was also obtained on some other documents at the time of signing the said deeds.
- Although the deed no. 560 had been executed as a deed of transfer, it was always considered by the plaintiff as a mortgage bond for the repayment of

the loan obtained from the defendant. The consideration of Rs. 100'000 stated in the said deed is the balance amount of the loan obtained from the defendant and the interest that had to be paid.

- Although the plaintiff had endeavored to repay the balance of the said loan together with a reasonable interest thereon to the defendant, the defendant failed to accept the same. Thus, the plaintiff made an application to the Debt Conciliation Board (hereinafter sometimes referred to as the board) which was inquired into by the said board.
- Although the plaintiff suggested a settlement before the said board, the defendant refused to come into the said settlement. Having considered the said settlement as a fair offer, on 16.01.1991, the said board issued a certificate under Section 32(2) of the Debt Conciliation Ordinance (hereinafter sometimes referred to as the Ordinance)
- Although the defendant made an application to review against the said decision of the board, the said application was refused by the board.
- The land in issue had been in the possession of the plaintiff at every time material to the case. However, since the plaintiff had to go abroad for overseas employment, the plaintiff leased out the premises to Amarasinghe Arachchige Siri Amarasignhe by deed of lease no. 17 dated 16.09.1991 attested by T.M. Amarakoon, Notary Public for a period of 2 years and has kept one room to store the belongings of the plaintiff and left the country.
- However, subsequent to the issuance of the aforesaid certificate, the defendant on or around 01.11.1991 has ejected the lessee of the plaintiff, has thrown out the belongings of the plaintiff and has taken the possession of the land in issue unlawfully. The defendant is now in possession due to an order delivered by the Primary Court pursuant to an action filed by the Nikawaratiya Police. In this regard case No. 3599/L is pending before the same District Court.
- The damages caused to the property by the defendant amounts to Rs. 75'000/- and the defendant is causing continuing damages to the plaintiff due to unlawful possession at the rate of Rs,1000/- per month.
- Thus, a cause of action has arisen against the defendant to the plaintiff to file an action to get the reliefs as prayed for.

The defendant filed her answer dated 07.06.1993, and as per the answer;

- The defendant admitted the execution of aforesaid deeds no. 560 and no.563 but she has stated that she purchased the said land for Rs. 100000.00 by deed no.560 and agreed re-convey by deed no.563, if Rs.300000.00 was paid within 3 years from the date of execution of the said deed which was 31.03.1991.
- The defendant has stated that as the owner of the land, the defendant leased out the premises to the plaintiff by deed of lease no. 561 dated 27.01.1989 and thereafter it was again given on lease to the plaintiff until the month of May 1989 by deed of lease no. 769 dated 17.08.1989.
- A preliminary objection has been taken that the plaintiff cannot maintain the action since the defendant was the owner of the land in issue at every time material to this action.
- The defendant has stated that the said board, having considered the deed no.560 and deed no. 563 as a mortgage, made an effort to grant a relief to the plaintiff and requested the plaintiff to pay Rs.100000.00 and a reasonable interest to the defendant, but the defendant refused to accept it as it was not reasonable. Thus, on 16.01.1991, the said board dismissed the application of the plaintiff.
- It is averred that however, in order to give further reliefs to the plaintiff, the aforesaid board ordered the plaintiff to pay the defendant Rs. 100’000/- with 20% interest from 27.01.1989 less Rs.18000.00 within 18 months from 16.01.1991, namely before 16.07.1992 and issued a certificate under Section 32(2) of the said Ordinance.
- It is further averred, that the plaintiff has deliberately renounced the reliefs given under the certificate as from 17.17.1992, and the reliefs given by the said certificate is no more valid after 17.17.1992.
- The defendant has stated that since the plaintiff did not have any right in the land in suit after 27.01.1989, the deed of lease executed by the plaintiff as mentioned in paragraph 10 of the plaint is of no avail in law.
- It is also stated that, subsequent to the expiry of the lease granted by the defendant to the plaintiff, as the absolute owner of the land in suit, the defendant has a right to enjoy the land in issue.

Accordingly, the defendant prayed that the action filed by the plaintiff be dismissed and for costs.

As per the aforesaid pleadings it can be observed that the deed no 560 and 563 were not executed on the same day and there appears to be a deed of lease which gave possession back to the plaintiff from the defendant after the deed of transfer no.560, which, as per the plaintiff's stance, is the purported mortgage.

There were 7 admissions made by the parties.[1] On behalf of the plaintiff issues no. 1-9 were raised and on behalf of the defendant issues no. 10-28 were raised.[2]

Thus, at the trial, jurisdiction of the court was admitted and followings were among the admitted facts as per the said admissions made by the parties at the commencement of the trial.

1. Execution and signing of the aforesaid deeds no.560 dated 27.01.89 and 563 dated 31.01.89.
2. The fact that the plaintiff made an application to the aforesaid board and the said board held an inquiry.
3. The board suggested that the plaintiff shall pay the consideration of deed no.560, namely Rs.100000.00 along with the interest.
4. The board suggested that the interest be 20% per year.
5. The fact that the board issued a certificate dated 16.01.1991 under section 32(2) of the Ordinance.

Only one Chandimal Pathiraja, an officer from the Debt Conciliation Board had given evidence on behalf of the plaintiff. Neither the plaintiff, nor the power of attorney holder nor any other witness has testified at the trial for the plaintiff. Apparently, said Pathiraja has been called to give evidence with regard to the application made to the said board and issuance of the section 32(2) certificate and to tender the relevant documents in evidence. No evidence was, thus led with regard to the issues no.3 to 8 raised at the trial by the plaintiff. It appears that even the plaintiff later limited her case only to issues no. 1, 2 and to the costs and other reliefs raised in issue no.9, as she had stated in her written submission in the original court that she does not seek any relief as prayed in prayer (c) and (d) of the plaint and only seek relief as per prayer (a) (b) (e) and (f).[3]

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[1] Vide proceedings dated 22.01.1996 and 22.02.1999, pages 46 and 86 of the brief.
[2] Vide pages 47 to 50.
[3] Vide paragraphs 12 and 13 of the written submissions tendered to the original court at page 112 of the brief.

Hence, the plaintiff's case before the original court rested upon the issues no 1 and 2 which queried whether the plaintiff is entitled to the relief (a) and (b) of the prayer in terms of the certificate issued by the aforesaid board as per section 32(2) of the Ordinance and if so, what would be the amount and interest that has to be paid by the plaintiff to the defendant.

The plaintiff has tendered documents marked P1 to P4 at the trial, namely aforesaid certificate issued as per section 32(2) of the Ordinance, deed no.560, deed no.563 and minutes of the board meeting dated 27.02.1992 which refused to review the order due to the absence of the defendant respectively. The defendant gave evidence in support of her case and has tendered in evidence documents marked V1 to V7, namely, minutes of a board meeting dated 20.12.1990 which dismissed the application of the plaintiff on a previous occasion, aforesaid certificate issued as per section 32(2) of the ordinance, aforesaid deed no.560, deed of lease no. 561, aforesaid deed no.563, deed of lease no.769 and aforesaid minutes of the board meeting dated 27.02 1992.

After the conclusion of the trial learned District Judge delivered his judgment dated 22.03.1999 dismissing the action of the plaintiff with costs. The learned District Judge in his judgment inter alia stated that;

- Plaintiff had not given evidence to testify the facts adduced in his plaint and only an officer from the Debt Conciliation Board had given evidence on behalf of the plaintiff.
- The said board cannot order to pay the relevant amount and interest within a prescribed period in terms of section 32(2) or any other section of the Ordinance when there was no settlement between the creditor and the debtor.[4]
- A certificate issued under Section 32(2) of the Ordinance cannot be the sole basis for entering judgment in favor of the plaintiff, and the plaintiff has to file an action under the regular procedure and the plaintiff has to prove that a cause of action has arisen against the defendant, but she had failed to do so, therefore, not entitled to any reliefs prayed for in the plaint.
- No evidence was adduced on behalf of the plaintiff to the effect that the defendant was in unlawful possession of the property in question or that

[4] Vide page 10 of the district court judgment.

the defendant had caused damages to the plaintiff's properties or that a cause of action had arisen as set out in the plaint.

Being aggrieved by the said judgment, the plaintiff preferred an appeal to the Court of Appeal. The Court of Appeal having heard the arguments of both the parties dismissed the appeal of the plaintiff with costs. Learned Court of Appeal Judges in the said judgment inter alia stated that;

- In **Silva Vs Sai Nona 78 NLR 313** it was held that the certificate issued under section 32(2) of the Debt Conciliation Ordinance read with Act No. 05 of 1959 cannot reduce a conditional transfer in law to a mortgage. As per the said judgment conditional transfer is treated as a mortgage only for the purpose of the jurisdiction of the board.
- The plaintiff has not made payments according to the requirements of the certificate of the Debt Conciliation Board. All these facts have been admitted by the parties at the trial.
- No evidence was adduced on behalf of the plaintiff to the effect that the defendant was in unlawful possession of the subject matter in question or that the defendant has caused damages or that a cause of action has arisen as set out in the plaint.
- The learned district judge has correctly analysed the evidence before him and has come to the correct conclusion that the plaintiff failed in proving that a cause of action had arisen against the defendant in this case.

Having heard the submissions of the counsel for the plaintiff and the counsel for the defendant in the special leave to appeal application filed against the judgment of the Court of Appeal, this court was inclined to grant leave to appeal on the questions of law set out in paragraph 16 of the petition of appeal undated, but, filed on 10.12.2014[5], which will be referred to and answered later in this judgment.

As said before, the plaintiff's case rested upon the issues no.1 and 2 raised at the original court. As per the way the said two issues were framed, the plaintiff to be successful, she must establish that, along with the admissions already made, by the issuance of section 32(2) certificate, she is entitled to a judgment in her

[5] Vide Journal entry dated 01.04.2015

favour as prayed in prayer (a) and (b) of the plaint. For this, she either has to establish that along with the admissions made, such certificate is sufficient to enter judgment and decree even without a cause of action or that in the backdrop of the admissions made, the issuance of such certificate itself gives a cause of action and proof for that cause of action for her to get a judgment in her favour. At this moment, it must be noted that the action was filed in the district court not to enforce a certificate under any given provision in law but on an alleged cause/s of action as averred in the plaint. It must also be noted that even though in paragraph 15 of the plaint, the plaintiff had averred that causes of action have accrued to the plaintiff, in the body of the plaint the plaintiff had not set forth separate causes of action as required by section 40(d) of the Civil Procedure Code but averred the cause/s of action as a composite whole through its averments. It appears, now, that the plaintiff had relinquished proving most of the averments in that composite whole and rely only on the production of the said certificate (P1) and purported decisions of the board connected to it (P4) along with the two deeds no.560 (P2) and no.563 (P3).

In deciding whether the learned judges below erred, it is necessary to peruse some relevant provisions in the Ordinance as amended in relation to the facts of the case at hand. However, as the said certificate and the order mentioned in it as part of it was made on 16.01.1991, the amendments made to the Ordinance by Acts no. 29 of 1999 and 4 of 2019 need not to be considered in this decision as they are amendments made after the issuance of the said certificate marked P1. Section 14 of the Ordinance provide for debtors and secured creditors to make application to the board to effect settlement of the debts. Thus, the scheme of the act is to effect settlement of debts through applications made by the debtor or the creditor. As per the section 19A as amended by the Act No. 20 of 1983, the board can entertain applications in relation to debts that are secured by conditional transfers of property as is a mortgage within the meaning of the ordinance, only if the application is made before the expiry of the period within which the property has to be redeemed by the debtor by virtue of any legally enforceable agreement between the debtor and his creditor. (As per the amendments made in 1999, now it is possible for the board to entertain application relating to debts secured even by transfers of immovable property as is a mortgage within the meaning of the Ordinance.) Thus, transfer deeds were

not subject to the board's jurisdiction, unless it could have been considered as a conditional transfer as per the interpretation given in the Ordinance at the time the relevant application was made. Hence, it is pertinent to peruse the interpretations given to mortgage and conditional transfers in the Ordinance at the time of the relevant application, which are quoted below.

' "Mortgage" with reference to any immovable property, includes any conditional transfer of such property which, having regard to all the circumstances of the case, is in reality intended to be security for the repayment to the transferee of a sum lent by him to the transferor.'

Hence, it is clear for the purposes of the Ordinance to effect a settlement of a loan, the legislature has made provision to consider a conditional transfer as a mortgage if the circumstances shows that it was in reality a security for repayment of a loan. (With the amendments made to the Ordinance in 1999 now even transfer deeds can be considered as mortgages for the aforesaid purposes)

" 'Conditional transfer of immovable property' means any transfer, sale, or alienation of immovable property which is effected by a notarial instrument and which, by virtue of such instrument or any other notarial instrument, is subject to the right of the person by whom the property was transferred, sold or alienated or of any other person to redeem or purchase the property within a period specified in such instrument or such other instrument."

Thus, right to redeem or purchase the property may contain in the very document which becomes a conditional transfer without any doubt or in some other notarial document when the first document is a transfer deed on the face of it. It appears from the decision of the board contained in the overleaf of the P1 certificate as part of that certificate, the board considered the deeds no.560 and 563 together as a conditional transfer that falls within the interpretation of mortgage given in the Ordinance. However, as per section 21A of the Ordinance prior to the amendment made in 1999, which section was relevant to the application made to the board in the case at hand, the board had to consider certain matters before deciding a conditional transfer was in reality a mortgage as per the Ordinance. They were;

- The language in relevant notarial instruments,

- Any difference between the sum received by the transferor from transferee and the value of the property transferred,
- The continuation of the transferor's possession of the property transferred, and
- The existence of a legally enforceable agreement between the transferor and the transferee whereby the transferor is bound to pay interest or any sum that may reasonably be considered as an interest.

As per order referred to in P1 certificate as part of it, it is clear that the board decided to consider deeds marked 560 (P2) and 563 (P3) formed a conditional transfer and also fall within the interpretation of mortgage given in the Ordinance. However, order contained in the certificate(P1) does not indicate that the board considered that there was a lease agreement (deed of lease marked as V4) executed between the plaintiff (transferee) and the defendant (transferor) in between the execution of P2 and P3 and that, if V4 is a legally valid document, the plaintiff's possession after P2 can be referable to said V4. On the other hand, whether deed no.560 is a conditional transfer or not has to be decided on the intention of the parties as at the time they entered into that contract. It is true, even if there was no condition to reconvey in the same document, the intention can be shown through a subsequent deed such as P3 but when there is deed of lease written prior to P3 giving the possession of the property back to the plaintiff, it appears parties to those P2 and P3 considered P2 as an outright transfer that gave the possession of the property to the defendant. To support this view there was another deed of lease executed between the parties even after the execution of P3, marked as V6. Thus, it appears the background to the transactions between the plaintiff and the defendant suggests a possibility that the possession of the plaintiff of the property, after P2 was executed, was not due to the fact that it was a conditional transfer but due to a lease agreement and that P3 was a separate agreement to resell the property. However, for some reason the board had considered the deed of transfer P2 as a conditional transfer and, that it also fell within the interpretation of "mortgage" as contemplated by section 64 of the Ordinance. Thus, the board had tried to effect a settlement but the defendant refused to accept the said settlement. In this regard, it is pertinent to examine the provisions of section 32(2) that existed prior to the amendment made by Act no.29 of 1999.

“32(2). Where no amicable settlement is arrived at between the debtor and any secured creditor, the board shall dismiss the application so far as it relates to the debts due to the creditor, and may, if it is of the opinion that the debtor has made the creditor a fair offer which the creditor ought reasonably to have accepted, grant the debtor a certificate in the prescribed form in respect of the debts owed by him to that creditor.”

The gazette containing the relevant prescribed form is found in pages 127 to 130 of the brief. The said form is reproduced below.

“ The Debt Conciliation Ordinance, No. 39 of 1941

Form of Certificate under Section 32(2)

This is to certify that during proceedings No. …….

under the Debt Conciliation Ordinance, no.39 of 1941, between

…….of……(debtor) on the one hand and ……..of

……..(creditor) on the other hand, for the settlement of an

alleged debt of ……..……rupees …… the said creditor has,

in our opinion, refused a fair offer of settlement made by the said

debtor which the said creditor ought reasonably to have accepted.

2. The following particulars of the debt were furnished by the

debtor under section ……of the Ordinance: -

(Particulars)

Dated the ……day of ……19…

…….

Chairman, Debt Conciliation Board

Thus, when the said section 32(2) is considered together with the prescribed form, it is clear even when the board considered a conditional transfer as a mortgage and proceeded to inquire into the application, if there was no amicable settlement, the board had to dismiss the application as per the provisions existed

at the time the relevant application was made and considered. And there was no provision to include an order or decision of the board in the certificate. On the other hand, it is not logical to allow the board to make a decision on the application when the law requires it to dismiss the application. The section only allowed the board to express its opinion if it thought that a fair offer was rejected by the creditor. As per the prescribed form, particulars of the debt furnished by the debtor could have been entered in the said form. Under the provision to include particulars of debt furnished by the debtor, the board has included its purported decision in the certificate by referring to the interest ordered and to the order contained in the overleaf. Such an act or step by the board is not supported by any provision in the Ordinance. Thus, what is found in the certificate marked P1, that is within the legal provisions relevant to the matter, appears to be the opinion expressed by the board that a fair suggestion to settle the loan was refused by the defendant and the details provided by the plaintiff with regard the purported debt. It cannot be perceived how a court of law can grant reliefs as prayed for in prayer (a) and (b), namely an order to reconvey the property and to evict the defendant, on a mere expression of an opinion of the board as to the refusal of the settlement or on the other contents in P1 which are not envisaged or permitted by the section 32(2) to include in such certificate.

It is also pertinent to note that, even though, section 40 of the Ordinance makes the settlements reached under section 30 and 31 final between the parties subject to the board's power to review them, there was no provision in the Ordinance at the relevant time giving any finality to a certificate issued under section 32(2) or to the opinion expressed therein or to any order that may contained therein. As said before, other than dismissing the application and expressing the opinion as to the fairness of refusing the settlement, under section 32(2) there was no provision to make any other order or to include it in the certificate. Further, there was no provision in the Ordinance that make such an order or conclusions included in a certificate issued under section 32(2) unassailable before a court of law. The bar in relation to civil actions contained in section 56 of the Ordinance concern only entertaining of actions in respect of pending matters before the board or the validity of any procedure before the board or the legality of any settlement and certain application to execute decrees but not with regard to purported conclusions of the board that may contain in a

certificate issued under section 32(2). Section 60 of the ordinance only make documents issued by the board prima facie proof of the contents of that document and that it was issued by the board. Thus, with regard to P1 certificate, one can argue that it is a prima facie evidence to say that the board was of the opinion stated therein and came to the decisions stated therein but it does not stop a civil court questioning the correctness of such conclusions in the said certificate and coming into its own decision with regard to the nature of the transactions.

After filing an application by the debtor or creditor, in the process endeavoring to effect a settlement, the board under certain sections of the Ordinance can make certain decisions. For example, under section 29(4) the board can issue a certificate in respect of debts owed by the debtor to the creditor when the creditor fails to show cause to the satisfaction of the board and under section 37, the board can decide the existence or the amount of the debt after hearing evidence when there is a dispute in that regard and, the decision shall be binding on all parties in all proceedings before the board. Even in this instant, no provision is made to bind parties on such decision in proceedings before court of law. Under section 47, the board is empowered to make orders or decision or settlements when a matter has been referred to it by a court. Section 48 provides that the court shall enter decree in accordance with such settlement, order or decision. However, there is no evidence or issue raised to indicate that the order or decision included in P1 is a decision made under section 29(4), 37 or 47. Thus, other than the opinion of the board with regard to the refusal of the settlement and the parts that relates to the dismissal of the plaintiff's application, the rest of the order/s or decision/s of the board that contained in P2 remain an order/s or decision/s which was/were not contemplated by section 32(2) of the ordinance.

Thus, on the face of it what is not contemplated by section 32(2) or the prescribed form are not matters ipso facto put in to effect by a court merely because the said certificate was tendered in court and conclusions or decisions of the board which are not contemplated by the said section 32(2) cannot be binding on the parties or the court which hear a case after the issuance of the said certificate. There may be an evidential value it bears to indicate that the application before the board was dismissed and the board was of the opinion that the settlement offered was fair and it ought to have been accepted by the creditor.

Furthermore, no provision of law is there in the ordinance that enable the board to convert a transfer or a conditional transfer to a mortgage. As discussed above, the Ordinance enable the board to consider conditional transfers (at present even transfer deeds) as mortgages in terms of the interpretations given in section 64 for the purposes of the ordinance to effect settlements of loans. Merely because the board considered a conditional transfer as a mortgage for such a purpose, a civil court of law is not bound to consider such deed as a mortgage when it becomes the subject matter in an action filed before it and the civil court has to decide the action on the facts proved before it. By tendering a certificate in terms of section 32(2), what can be proved is that the application before the board was dismissed and the board was of the view that the suggested settlement was fair and the plaintiff ought reasonably to have accepted it. It also could have proved the particulars of the debt as furnished by the debtor to the board to the extent revealed in the certificate as it can be considered as prima facie proof as indicated above.

It is also important to consider section 39(2)(a) of the Ordinance. Section 39(1) and 39(2)(b) relates to actions filed by the creditor and have no relevance to the matter at hand. Section 39(2)(a) prior to the amendment made in 1999 and as existed at the relevant time to the case at hand, is quoted below.

" (2) 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 the 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 reconvey title to, and possession of, that property to the debtor, in relation to the debt, on the payment by the debtor of the debt together with the interest thereon in such installments and within such period not exceeding ten years, as the court thinks fit; and

(b)……"

The aforementioned section does not refer to an application to enforce the certificate. There is no other section in the Ordinance that enables a party to file an application to enforce the certificate issued under section 32(2). On the other

hand, section 32(2) certificate, as per the law at the relevant time, could contain only a dismissal of an application and an opinion of the board as to the refusal of a suggested settlement and details about the debt as furnished by the purported debtor to the board. Thus, it could not contain a decision that can be enforced by a court merely by producing it. As explained above other orders or decisions contained in P1 certificate could not have been included in it as per section 32(2). Hence P1 certificate does not contain anything that can be enforced by mere production of it. Further the aforementioned section contemplates an action filed for the recovery of the property. As per section 6 of the Civil Procedure Code, every application to a court for relief or remedy obtainable through the exercise of court's power or authority or otherwise to invite its interference, constitute an action. It was stated in **Lowe Vs Fernando 16 N L R 398** that generally "cause of action" is the wrong for the prevention or redress of which an action may be brought[6]. The wrong is the combination of the right and its violation. It is said that every action is based on a cause of action[7]. Thus, the action contemplated in section 39(2) (a) of the Ordinance also has to be based on a cause of action. In fact, the plaint in the action in the district court appears to have been drafted on purported causes of action- vide paragraph 15 of the plaint. Thus, to be successful in the action, the plaintiff had to prove her cause of action. By tendering or proving a certificate issued under section 32(2) of the ordinance which can lawfully contain a dismissal of an application tendered by the plaintiff to the board and an opinion of the board as to the reasonableness of the refusal of the defendant to accept a suggested settlement which in the opinion of the board was a fair settlement cannot prove a cause of action when it is considered with admissions made. To prove a cause of action, the plaintiff must prove a wrong done to her by the defendant. Mere opinion of the board along with the admissions mentioned above cannot prove such wrong. She should have proved that P2 is in fact a conditional transfer and she reasonably took steps to fulfill the conditions but the plaintiff failed to reconvey the property or at least that her proposed settlement was in fact a reasonable settlement but the plaintiff failed to accept it and reconvey the property. Mere proof of the opinion of the board cannot be considered as proof of such cause of action. She or person who had first-hand knowledge should have given evidence to prove such cause of action.

[6] See section 5 of the Civil Procedure Code which interprets the cause of action.
[7] Jakson V Spittel 1880 LR 5 CA 542 cited in Seylan Bank Ltd V Piyasena and Others (2005) 2 Sri L R 132

As only an officer from debt conciliation board gave evidence who has no knowledge of P2 and P3 deeds or the deeds of lease mentioned by the defendant, it cannot be considered that she proved any cause of action. In this regard, it is necessary to refer to the following decision in **Silva V Sai Nona 78 N L R 313**[8] which expressed its view as follows;

"In this context, the case Johanahamy V Susiripala (69 N L R 29) may be usefully referred to. In that case it was sought to be argued, as in the present case, that once the Debt Conciliation Board chose to treat a transaction involving a conditional transfer as a mortgage, it got transformed into a mortgage and the stamp of mortgage attached to the transaction even in proceedings outside the board also. This argument was rightly rejected. It was held that a conditional transfer was treated as a mortgage only for purposes of the jurisdiction of the board and that such recognition by the board as mortgage did not entail the consequence that title remained with the vendor (debtor)"[9]

"By virtue of this amendment,[10]the board is enabled to entertain, for the purposes of exercise its jurisdiction, a new category of transactions, viz, conditional transfer savouring of a mortgage. The Board is now authorised to effect a settlement between the parties to a conditional transfer. Any such settlement, on being reached and authenticated, supersedes the terms and stipulations of the original conditional transfer -sec.40.The question arises as to the consequences when no settlement between the parties is possible because of unreasonable attitude of the 'creditor' the transferee. Section 32 of the Ordinance provides for the dismissal of application in such an eventuality and for the grant of a certificate in terms of the section[11]."

"But when a conditional transfer has been squeezed into the definition of mortgage for the purpose of proceedings before Debt Conciliation Board, the engrafting does not outlive such proceedings and the transaction resumes its old label and nature after such proceedings get terminated by the dismissal of the application in terms of section 32 of the Ordinance[12]."

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[8] Manam Maggie Silva V Manikkuge Sai Nona 78 NLR 313
[9] Ibid at at page 324
[10] Act No.5 of 1959
[11] Manam Maggie Silva V Manikkuge Sai Nona 78 NLR 313 at page 323
[12] Ibid at page 324

"The meaning given statutorily to the word 'mortgage' for the purpose of jurisdiction of the Board cannot be extended to other jurisdictions unless there is warrant in the language of the statute. The unnatural sense ascribed to the word should be confined to the statutory context and should not be extended to other contexts though in pari materia[13]."

The learned counsel for the plaintiff argued that the above decision now does not apply since section 39(2) has been introduced by an amendment after the said decision. I am not inclined to accept this argument in its totality as said before, the provisions to consider a conditional transfer as a mortgage are provided for the purposes of the Ordinance, namely to effect settlements of loans. If the legislature wanted to give power to the board to convert conditional transfers to mortgages it should have been given expressly in the ordinance or by an amending Act. As observed in the above case if there is no settlement, the document regains its old label and nature. Section 39(2) only gives a court a discretion to grant relief as provided by that section in a suitable case notwithstanding the title to the property vested in the creditor in relation to the debt, when a certificate has been granted with regard to a conditional transfer of immovable property, but as explained above, it has not done away with the proof of a cause of action.

In the backdrop of above discussion now I would consider the questions of laws allowed by this Court.

Question;

a) In terms of the provisions of Section 39(2)(a) of the Debt Conciliation Ordinance (as amended) the plaintiff is entitled to the reliefs prayed for in the plaint, on the admissions recorded and the documents admitted as evidence in the District Court without objection;

Answer;

The above assertion cannot be accepted as the admissions made and the documents marked were not sufficient to prove a cause of action; a wrong done

[13] Ibid at page 325

by the defendant. A court of law is not bound to blindly follow an opinion of another institution. The court of law must form its own opinion

Question;

b) Has the Court of Appeal erred in applying to the facts of the present case the decision of Silva V Sai Nona 78 NLR 313, which has been decided before the enactment of S. 39(2)(a) of the Ordinance, and which therefore did not consider the meaning and effect of the said S.39(2)(a)?

Answer;

No

Question;

c) Has the Court of Appeal erred in holding that the certificate issued under the said S.32(2) of the Ordinance required the plaintiff to make payment of Rs.100,000/= to the Defendant along with an interest of 20% within 18 months?

Answer;

No. As the said order is included as a part of the certificate, but as per section32(2), such an order cannot be a part of the certificate.

Question;

d) Was the certificate under S.32(2) issued because there was no settlement?

Answer;

Yes.

Question;

e) Under the certificate there was no requirement that the plaintiff should pay money to the Defendant, there being no settlement between them;

Answer;

Yes, as per the law there cannot be any order made in a section 32(2) certificate requiring the plaintiff to pay as there was no settlement. However, the certificate issued included such an order as part of it which is not supported by provisions in section 32(2).

Question;

f) Has the Court of Appeal misunderstood and misinterpreted the meaning and effect of the certificate of non-settlement issued under the said S.32(2)?

Answer;

No. The Court of Appeal has only referred to the order contained in the certificate and has not expressed any view regarding whether such an inclusion of an order is correct but has stated that the plaintiff had not made payment as per the requirement in the said certificate. Since such an order was correctly or wrongly included in the certificate by referring to it among the contents of the certificate by stating that the said order is on the over leaf and 20% interest per year was ordered, the Court of Appeal was referring to the factual situation in relation to the certificate actually issued. The conclusion of the court of appeal was to affirm the analysis of the learned district judge as no cause of action was proved by the plaintiff.

Question;

g) Has the Court of Appeal erred by upholding as correct the finding of the District Court that the plaint of the Plaintiff did not disclose a cause of action?

Answer;

No, the decisions of the District Court confirmed by the Court of Appeal was that the plaintiff failed to prove a cause of action.

Question;

h) Has the Court of Appeal failed to analyze and carefully consider the provisions of section 39(2)(a) of the Debt Conciliation Ordinance (as amended). ” this court.

Answer;

No, sufficient analysis with reference to case law has been done and has come to the correct finding at the end.

For the foregoing reasons, this court cannot allow the appeal. Therefore, the appeal is dismissed with costs.

……

Judge of the Supreme Court.

Sisira J de Abrew, J.

I agree.

……

Judge of the Supreme Court.

L.T.B. Dehideniya, J.

I agree.

……..

Judge of the Supreme Court.

IN THE SUPREME COURT

OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Appeal under and in terms of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Pannipitiya Medical Services (Pvt.) Ltd.
No. 334/4, Hokandara Road,
Moraketiya,
Pannipitia.

Plaintiff

SC Appeal No. 70/17
WP/HCCA/AV/1442/13(F)
DC Homagama No. 11532/M

Vs.

Nadeeka Udayani Dharmapala
No. 61/4, Thapassarakanda,
Kalawana.

Defendant

AND

Nadeeka Udayani Dharmapala
No. 61/4, Thapassarakanda,
Kalawana.

Defendant – Appellant

Vs.

Pannipitiya Medical Services (Pvt.) Ltd.
No. 334/4, Hokandara Road,
Moraketiya,
Pannipitia.

Plaintiff – Respondent

AND NOW BETWEEN

Pannipitiya Medical Services (Pvt.) Ltd.
No. 334/4, Hokandara Road,
Moraketiya,
Pannipitia.

Plaintiff – Respondent - Appellant

Vs.

Nadeeka Udayani Dharmapala
No. 61/4, Thapassarakanda,
Kalawana.

Defendant – Appellant - Respondent

Before: **Hon. Priyantha Jayawardena, PC, J.**
Hon. P. Padman Surasena, J.
Hon. Yasantha Kodagoda, PC, J.

Counsel: Anura Ranawaka for the Plaintiff – Respondent - Appellant.
Defendant – Appellant – Respondent unrepresented.

Argued on: 23rd July, 2020

Decided on: 28th June, 2021

JUDGMENT

YASANTHA KODAGODA, PC, J.

This judgment relates to an Appeal from a Judgment of the High Court of the Provinces of the Western Province holden in Avissawella, setting aside a Judgment of the District Court of Homagama.

At the argument stage before us, the Respondent was absent and unrepresented. This Court took up this matter for argument, after satisfying ourselves that the Appellant has on three occasions complied with directives issued by this Court in issuing Notice of this Appeal to the Respondent. In fact, Notices had been dispatched to the Respondent immediately after this Appeal was filed, immediately before the Application was taken up for consideration for the granting of leave to appeal, and thereafter following the matter being fixed for Argument. The Respondent did not respond to any of these Notices, and therefore this Court concluded that the defended is not interested in vindicating her position or defending the judgment delivered in her favour by the High Court.

Plaint, Answer and the Issues

On 23rd October 2009, the Plaintiff – Respondent – Appellant filed Plaint in the District Court of Homagama stating the following:

> That the Plaintiff is a company carrying out amongst other business activities, the running of a private hospital named *Pannipitiya Nursing Home*.
>
> That the Defendant joined the Plaintiff company as a *Probationary Trainee.* At the time the Defendant joined the Plaintiff company, the parties entered into a *Service Agreement* dated 16th October 2004 (a copy of which was attached to the Plaint marked "P1").

That the said agreement contained amongst others the following three conditions, namely, (i) there shall be a training programme of two years duration for which the cost would be borne by the Plaintiff, (ii) following the completion of the training, the Defendant shall serve the Plaintiff for a period of five years, and (iii) if the agreement is breached, the Defendant shall pay a sum of Rs. 50,000/= to the Plaintiff.

That the Defendant commenced the afore-stated training programme on 16th October, 2004.

That while serving the Plaintiff, with effect from 18th July 2008, without any prior notice, the Defendant ceased to report for work.

That two attempts made in writing to contact the Defendant failed.

That since the Defendant has breached a condition of the afore-stated agreement, she is obliged to pay the Plaintiff a sum of Rs. 50,000/=, and that she is estopped from pleading that she cannot pay the Plaintiff the said sum.

That in view of the foregoing, a cause of action has arisen to the Plaintiff to institute legal action to claim a sum of Rs. 50,000/= from the Defendant, together with legal interest thereon.

Wherefore, the Plaintiff prayed that Judgment and Decree be entered against the Defendant in favour of the Plaintiff, directing the Defendant to pay the Plaintiff a sum of Rs. 50,000/=, together with legal interest thereon.

In response, by Answer dated 18th May 2010, the Defendant – Appellant – Respondent took up the following position:

That the Plaintiff did not provide any service training or education to the Defendant, and that by observing the conduct of senior personnel, the Defendant secured an understanding regarding the work of a hospital laboratory.

That the Plaintiff did not conduct itself according to the agreement marked "P1" and that the said Agreement had been prepared to shield itself from labour and other laws of the country, that therefore the said Agreement was a *sham contract,* and thus based on such Agreement, it was not possible to institute legal action against the Defendant.

That without providing training to the Defendant as provided in the afore-stated Agreement, and without issuing a formal letter of appointment and sufficient wages, the Plaintiff had retained the services of the Defendant.

Wherefore, the Defendant prayed that the Plaintiff's case be dismissed.

On 30th July 2010, on behalf of the Plaintiff, the following issues were raised:

(1) Whether the Defendant has breached the conditions of Agreement marked "P1"?

(2) If so, whether the Plaintiff was entitled to the reliefs prayed for in the Plaint?

The issues raised on behalf of the Defendant were the following:

(3) Whether the Plaintiff had breached the conditions of Agreement marked 'P1'?

(4) Was the afore-stated agreement entered into, in order to enable the Plaintiff to shield itself from the industrial laws of the country?

(5) Was the afore-stated agreement intended not to be enforced and thus was a *sham agreement*?

(6) Did the Plaintiff obtain the services of the Defendant without providing her with training as provided in Agreement marked 'P1', without issuing her a letter of appointment and adequate wages?

(7) If the afore-stated issues are answered in the affirmative, can the Plaintiff obtain the reliefs prayed for in the Plaint?

Plaintiff's case

During the trial, the Administrative Officer of the Plaintiff company Shakila Nayana Kumari testified on behalf of the Plaintiff. According to her testimony, following an advertisement calling for applications, the Defendant had submitted an application for the post of *'Laboratory Technician'*, and following an interview, she had been selected for training for the post *'Probationary Laboratory Technician'*. Under cross-examination, the witness has clarified that, the Defendant was recruited on 16th October 2004. This position tallies with the date on which Agreement "P1" has been entered into. At the stage of recruitment, the Plaintiff had entered into an agreement with the Defendant, marked "P1".

Following recruitment, a two years training had been provided to the Defendant. Subsequently, the Defendant had been confirmed in the position. After approximately 3½ years of service, the Defendant had presented a written request to leave the

organization. It had been explained to the Defendant that she could not leave the organization in view of the agreement entered into. Subsequently, the Defendant had ceased to report for duty. Under cross-examination, the witness has stated that the defendant ceased to report for work with effect from 18th July 2008. Thereafter, two letters had been sent to her for no avail.

Under cross-examination, it had been suggested to the witness that no formal laboratory training was provided to the Defendant by the Plaintiff with the aid of trained laboratory technicians and qualified doctors. The witness has denied this suggestion. The witness has stated the names of two doctors and two senior laboratory technicians who participated as trainers. Learned Counsel for the Defendant has suggested to the witness that no trainers had participated in the training programme including those whose names were revealed as having functioned as trainers. This suggestion has also been denied by the witness. However, during the argument stage, learned Counsel for the Plaintiff – Respondent - Appellant submitted to this Court that, what was provided to the Defendant was an *'on the job training'*. That, such a training was provided by serving technicians of the organization, has not been seriously contested by learned Counsel for the Defendant, when he cross-examined the witness. In fact, the witness's cross-examination seems to have been aimed at establishing that fact and that no formal training by external trainers was provided to the Defendant.

The witness has also testified regarding the conduct of an examination at the end of the training period. The examination had been conducted by three doctors. They had reported that the Defendant lacked 'theoretical knowledge'. The position taken up by learned Counsel for the Plaintiff – Respondent – Appellant during the appeal hearing before us, was that as the Defendant was not successful at the afore-stated examination, her training period was extended. The witness also took up the position that, following an extended training period of three months, the Plaintiff had deemed the Defendant to have been successful at the examination. However, the witness has not stated with effect from when the Plaintiff had successfully completed the training programme. Neither oral nor documentary evidence to that effect had been presented at the trial. The witness's position was that, before the certificate of 'completion of training' could be issued, the Defendant had ceased to report for work.

Under cross-examination, the witness has admitted that, the Defendant was not issued with a 'letter of appointment'. The witness has clarified that, a letter of appointment was not issued, because the Defendant had been required to enhance her theoretical knowledge. The witness has admitted that, following the training, the Defendant had not been issued with a certificate of 'successful completion of training'. The position of the witness was that, at a particular point of time, the Defendant was placed on the salary scale of a Medical Laboratory Technician. When questioned by the learned Counsel for the Defendant as to why the Defendant was paid the salary of a Medical Laboratory Technician without issuing a 'letter of appointment', the witness had no answer to give. It has also been suggested to the witness that it was the Plaintiff who breached Agreement marked "P1". This suggestion has also been denied by the witness. The witness has stated that the Defendant handed over to her a 'letter of resignation', stating that she was leaving due to personal reasons. However, this letter was not produced at the trial. No other evidence had been presented on behalf of the Plaintiff company.

Defendant's case

The Defendant had testified on her behalf. She has admitted having entered into "P1" with the Plaintiff. Following recruitment, she had been initially assigned to the 'emergency treatment unit' and had attended to miscellaneous functions of that unit. She had thereafter been assigned to the location where blood samples are obtained. At that location, she had attended to functions such as writing bills and taking samples to the laboratory. She had thereafter requested that she be given the opportunity of taking blood samples, and subsequently she had received that opportunity. She implied thereby that she obtained 'on the job training' in that regard. She emphasized that she did not receive any formal training either in the form of lectures or practical training. After some time working at the Plaintiff company, she had been assigned to the laboratory. At the laboratory, she had through her own observation and with the assistance of seniors who worked at the laboratory, gradually learnt various functions associated with testing of samples.

The Defendant has testified with regard to an incident where she had tendered a letter to the management requesting that an acknowledgement be issued that she handed over the originals of her educational certificates, and containing an undertaking that the company would release them to the Defendant when required. This request had resulted

in the head of the organization having scolded her. Following that incident, she had decided to leave the organization. Afterwards, she had submitted a letter giving one months notice of her intended resignation. She claims to have thereafter been subjected to maltreatment. Thus, she had ceased to report for work.

In her evidence, the Defendant was emphatic that she (a) did not receive formal training for a duration of two years, (b) was not subjected to an examination (formal assessment) following a period of formal training, and (c) did not receive a letter confirming her in service.

The cross-examination of the Defendant by learned Counsel for the Plaintiff has been aimed at primarily establishing five matters, namely (i) that the Defendant received 'on the job' training, (ii) that the Defendant did not successfully complete the training programme as evident by the findings of the three consultant medical specialists who assessed her, (iii) that during her service at the Plaintiff company the Defendant was paid a salary, (iv) that the Plaintiff did not violate Agreement marked "P1", and (v) that the Defendant acted in violation of Agreement marked "P1". As regards '(i)' and '(ii)', the Plaintiff disagreed with the position taken up by learned counsel for the Plaintiff. Her position was that, she did not receive a formal training as provided for in "P1", and that her performance was not properly assessed. She has not contested the suggestion that she was paid a salary. Her position was that, while she did not act contrary to "P1", and that it was the Plaintiff who acted in breach of the said Agreement.

Judgment of the District Court

Following the conclusion of evidence, on 18th February 2013, the learned District Judge delivered judgment in favour of the Plaintiff. In the said judgment, the learned District Judge has taken into consideration the facts that, the Defendant has admitted that (i) in terms of Agreement marked "P1", the Defendant had been enrolled by the Plaintiff to a laboratory technician training programme, (ii) the said Agreement stipulated a training period of 2 years, (iii) following such training period, the Defendant was required to serve the Plaintiff for a further period of 5 years, and (iii) if the Defendant were to cease to work for the Plaintiff prior to the 7 years cumulative period, in terms of the Agreement, she was liable to pay the Plaintiff a sum of Rs. 50,000/=. Thus, the learned District Judge has arrived at the finding that the Defendant has intentionally breached a condition of

the Agreement marked "P1", and that on a balance of probabilities, the Plaintiff has established its case against the Defendant. The the learned District Judge has answered the 1st and 2nd issues in the affirmative, 3rd, 4th, 5th and 6th issues in the negative, and has held that the Defendant cannot in any event prove the 7th issue in the affirmative. Accordingly, the learned District Judge has ruled that the Plaintiff is entitled to the relief prayed for, and has accordingly granted the Plaintiff the relief prayed for.

Judgment of the High Court of the Provinces

Against the Judgment of the District Court, the Defendant appealed to the High Court of the Provinces holden in Avissawella. Following hearing of the Appeal, on 12th November 2015, the learned Judge of the High Court delivered Judgment allowing the Appeal with costs payable to the Defendant by the Plaintiff at Rs. 10,000/=. The learned High Court Judge has laid emphasis on the fact that, the obligation on the part of the Defendant to serve the Plaintiff for a period of 5 years would arise only after completion of the training period. According to Agreement marked "P1", at the end of the training period, a 'written and oral examination' should be held. Such an examination has not been held. The learned Judge has further held that, in any event, the contractual obligation of serving the Plaintiff for 5 years would arise only after the Defendant passed the afore-stated examination. In the circumstances, the learned High Court Judge has concluded that, it was in fact the Plaintiff who had breached Agreement marked "P1", and thus no cause of action had accrued in favour of the Plaintiff. Therefore, the learned Judge of the High Court has concluded that the learned District Judge had erred in holding with the Plaintiff and granting relief. Thus, he has while allowing the Appeal, dismissed the Plaintiff's action with costs.

Grant of leave and question of law

On 28th March 2017, following the learned Counsel for the Plaintiff – Respondent – Petitioner supporting the Petition seeking the grant of leave to appeal, this Court had granted leave to appeal on the following question of law:

> *"Has the learned High Court Judge erred in law in coming to the finding that the Petitioner* (sic 'Appellant') *acting in breach of the Agreement "P1" failed to hold a written and oral examination, contrary to the evidence that the Respondent's work had been evaluated by three consultant doctors, which clearly amount to a*

proper examination of the skills acquired by the Respondent as a trainee laboratory technician?"

Analysis of the evidence, application of the law and conclusions

In order to decide this matter, it is necessary to carefully examine the clauses of Agreement marked "P1". According to Clause 1 of "P1", which has been titled 'Service Contract', the Plaintiff has been designated as the 'employer' and the Defendant as the 'trainee'. It further states that, the trainee (Defendant) had entered a 'training programme' relating to the position 'laboratory technician'. The afore-stated 'training' will be provided at the expense of the employer (Plaintiff). The said 'training programme' shall be of 24 months duration, at the end of which, the trainee (Defendant) shall sit for a 'written and oral examination' that will be held and is required to pass the said examination. Clause 2 of the Agreement provides that, following the passing of the afore-stated examination, the trainee shall serve the employer at the Pannipitiya Medical Services (Pvt.) Ltd in the position of 'Laboratory Technician' for a period of 5 years. Should the trainee be unsuccessful at passing the afore-stated examination, the trainee shall serve the employer in a different position. Clause 2 does not state the duration of employment in the alternate position, should the trainee be unsuccessful at passing the afore-stated examination. Clause 3 provides that, (a) upon successful passing of the afore-stated examination, when the trainee commences functioning in the position 'Laboratory Technician', or (b) if the trainee is unsuccessful at the examination when functioning in the alternate position that is given to her, she would agree to contribute 8% of her salary as the 'trust fund contribution' and contribute towards a 'security deposit'. Clause 4 of the Agreement provides that, should the Agreement be breached under whatsoever circumstances, the trainee (Defendant) shall pay a sum of Rs. 50,000/= to the employer (Plaintiff). Clause 4 further provides that, should the trainee leave the training without completion or should she be expelled from the training on disciplinary grounds, the trainee shall pay the employer (Plaintiff) a sum of money stipulated by the employer as being the cost of the training.

From the relief prayed in the Plaint, it is evident that the Plaintiff has sought a decree from the District Court for liquidated damages. This according to the Plaint and the evidence presented on behalf of the Plaintiff arises out of the Defendant having failed to perform the obligation contained in clause 2 of the agreement by ceasing to work for the

Plaintiff prior to the expiry of 5 years following the conduct of the examination. It is necessary to observe that, 'working for the employer for 5 years post passing of the examination' or 'working for the employer for an unspecified period in an alternate position following the trainee being unsuccessful at the examination' as provided in clause 2 of the agreement on the one hand, are alternate obligations conferred on the Defendant by agreement marked "P1". According to the Plaintiff, it is the first of these two obligations the Plaintiff claims the Defendant defaulted. Further, the Plaintiff alleges that, the Defendant failed to comply with the ensuing obligation of making a payment of Rs. 50,000/= prior to her premature departure from service at the Pannipitiya Nursing Home.

An analysis of the evidence presented before the learned District Judge is necessary to determine whether the Plaintiff is entitled in law to the relief of liquidated damages against the Defendant.

There is in my view cogent evidence on the following matters: On 16th October 2004, the Defendant had been recruited by the Plaintiff as a 'Trainee Laboratory Technician'. Following her recruitment as a 'trainee', the Plaintiff has provided some form of training to the Defendant. As opposed to providing to the Defendant a formal training programme, I am inclined to agree with the submission of the learned Counsel for the Appellant that, what was provided was an *'on the job training'*. Though the learned Counsel for the Defendant during cross-examination of the witness of the Plaintiff and the Defendant during her testimony had sought to impeach the case for the Plaintiff on the footing that a formal training programme was not provided to the Defendant, it is my view that as the Agreement marked "P1" does not specify the nature and the content of the training programme that the employer (Plaintiff) was obligated to provide the trainee (Defendant), it cannot be successfully proved that the Plaintiff breached "P1" by not making arrangements for the Defendant to follow a 'formal training programme', and for having provided only a *'on the job training'*.

As depicted in "P7", "P8" and "P9", on 18th March 2008, the Defendant had been subjected to an 'assessment' by two Consultant Pathologists and a Consultant Microbiologist / Virologist. Though not established in the form of direct evidence, from the date appearing immediately below the signature on "P7", it can be inferred that this

examination had been held on 18th March 2008. Out of the three assessors, while Consultant Pathologist Dr. Geethika Jayaweera and Consultant Microbiologist and Virologist Dr. Geethani Wickramasinghe have in their report under the category 'comment' reported that they recommend the *"promotion"*, Consultant Pathologist Dr. A. Eleyperuma has reported that the Defendant *"needs to improve in the theoretical knowledge"*. The Agreement ("P1") provides clearly that, following a *"training programme"* of 24 months duration, the employer would subject the trainee to a *"written and oral examination"*. It is thus clear that, whereas Agreement "P1" requires an assessment to be conducted upon the expiry of 24 months of training, the afore-stated assessment had been held following a period of approximately 40 months. Furthermore, the nature of the assessment to be conducted upon the expiry of 24 months of training has been described in "P1" as a *"written and oral examination"*. However, the assessment carried out by the three medical specialists regarding the Defendant can only be described as a 'viva voice' or an 'oral examination'. The Plaintiff has offered no evidence that a 'written examination' was held. Thus, both as regards the time at which the assessment ought to have been carried out, as well as the nature of the assessment, it is clear that the Plaintiff has acted in breach of Clause 1 of the Agreement.

The position of the Plaintiff is that, as the Defendant was not successful at the afore-stated examination held on 18th March 2008, the 'training period' of the Defendant was extended. The Plaintiff sought to justify the extension of the training period of the Defendant, based on the comment made by Dr. A. Eleyperuma. It seems that, it was Dr. A. Eleyperuma's comment that resulted in the Plaintiff deciding to extend the 'on the job training'. The Plaintiff's position is that at some stage thereafter, they deemed that the Defendant had successfully completed the training. Though the witness for the Plaintiff has taken up that position, it appears that no formal assessment similar to the assessment carried out on 18th March 2008 had been held thereafter. No explanation in that regard has been provided, either. Further, witness Shakila Nayana Kumari has also taken up the position that the head of 'laboratory services' reported that the Defendant had developed to a stage where she could face a re-examination. Nevertheless, a re-examination has not been conducted. Nor had a formal entry been made reflecting that the Defendant had successfully completed the extended period of training. Furthermore, the Plaintiff has also failed to acknowledge the fact that the Defendant had successfully completed the training, by issuing the Defendant a certificate of completion of training or a formal letter

of appointment signaling the completion of her training period and or completion of the period of probation. In fact, the position of the Plaintiff as provided by the Administrative Officer is that, a letter of appointment was not issued to the Defendant, because she had not successfully completed the training. Thus, this Court must necessarily conclude that, there is no cogent evidence that the Defendant had successfully completed the extended period of training, and thereby assumed duties of the substantive post of 'Laboratory Technician', at any time preceding her having ceased to report for work.

Be that as it may, Clause 2 of the Agreement specifically provides as to what the employer should do, if the trainee is unsuccessful at the 'written and oral examination'. It provides that should the trainee be unsuccessful, the trainee shall accept a different appointment that will be given by the employer to her. "P1" does not provide for an extension of the training programme. Therefore, in terms of the Agreement, the employer (Plaintiff) was not contractually entitled to extend the period of training on the premise that the trainee was unsuccessful at the examination. Thus, the afore-stated 'extension' of training period also amounts to a breach of the terms of the Agreement marked 'P1'.

According to Clause 2 of the Agreement, the obligation cast on the trainee (Defendant) to serve the employer (Plaintiff) for a period of 5 years arises only upon the trainee successfully passing the afore-stated 'written and oral examination'. The Plaintiff has not presented any evidence at the trial to establish that the Defendant passed such an examination at any point of time subsequent to the extension of the training period. Thus, there is no basis in terms of the Agreement to allege that the Defendant breached "P1" by not serving the Plaintiff for a period of 5 years following successful passing of the 'written and oral examination'.

In view of the foregoing, I conclude that the Agreement between the Plaintiff and the Defendant had been breached by the Plaintiff by its failure to comply with a substantial part of his obligations towards the Defendant, prior to the impugned failure on the part of the Defendant taking place. The impugned breach on the part of the Defendant is intrinsically linked and indivisible with the obligations on the part of the Plaintiff which the Plaintiff failed to fulfill. The fulfilment of the obligation cast on the Defendant contained in clause 2 of the Agreement is founded upon the Plaintiff fulfilling his obligations contained in clause 2 of the Agreement, which as pointed above by me was

not fulfilled. The failure to either treat the Defendant as having been successful at the assessment and appoint her as a Laboratory Technician or in the alternative treat her as having been unsuccessful at the assessment and appointed her to an alternate position, goes into the root of the Agreement and is necessarily linked to the obligation cast on the Defendant to serve the Plaintiff for the stipulated time period. The breach on the part of the Plaintiff is inseparable with obligation cast on the Defendant to serve the Plaintiff. Therefore, I hold that, the Plaintiff had breached the Agreement well before the impugned failure on the part of the Defendant. In the circumstances, the Defendant was entitled to treat herself as having been discharged from her contractual obligations and thus was contractually entitled unilaterally terminate working at the Pannipitiya Nursing Home prior to the expiry of the stipulated 5 years period.

In this instance, the Plaintiff has sought liquidated damages as provided for in Clause 4 of the Agreement marked "P1". The grant of relief in the nature of liquidated damages arise only in instances where the Plaintiff had fulfilled his contractual obligations towards the Defendant and not breached the Agreement. As pointed out above, it is evident that in this instance, the Plaintiff had breached the Agreement well before the impugned breach by the Defendant. In such circumstances, the Plaintiff would not be entitled for liquidated damages.

In this regard, it is pertinent to recall an observation made by Justice Sisira De Abrew in *Wickrema Pathiranage Mahesh Ruwan Pathirana v. Ginthota Sarukkale Vitharange Hemalatha Piyathilaka Ginthota* (SC Appeal 218/2014, SC Minutes 15.02.2017) wherein he has held as follows: *"It is an accepted principle in law that the wrongdoer is not permitted to take advantage of his own wrongful acts. This principle is applicable to a case of breach of contract".*

It would also be seen that the learned High Court Judge was quite correct in holding that the Plaintiff – Respondent had acted in breach of the Agreement marked "P1" by not conducting a 'written and oral examination'. As explained by me above, the assessment held on 8th March 2008 carried out by three medical specialists, can only be recognized as an 'oral examination' which is short of the nature of the examination provided for by the Agreement marked "P1". Thus, I must answer the question of law referred to above, in the negative.

In the foregoing circumstances and the conclusions reached by me, I dismiss this Appeal, while upholding the Judgment pronounced by the learned High Court Judge.

Accordingly, the Appeal Dismissed.

JUDGE OF THE SUPREME COURT

Priyantha Jayawardena, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

P. Padman Surasena, J.

I agree.

JUDGE OF THE SUPREME COURT

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. 75/2012

SC/HC/LA 04/2011

HC (Central Province) ALT 18/2009

LT-09/NE/11/2005

Ceylon Bank Employees' Union,
(on behalf of B. D. Niroshan),
No. 20, Temple Road,
Maradana,
Colombo 10.

APPLICANT

Vs.

Hatton National Bank PLC,
Head Office,
No. 479, T. B. Jayah Mawatha,
Colombo 10.

RESPONDENT

AND THEN BETWEEN

Hatton National Bank PLC,
Head Office,
No. 479, T. B. Jayah Mawatha,
Colombo 10.

RESPONDENT-APPELLANT

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Ceylon Bank Employees' Union,
(on behalf of B. D. Niroshan),
No. 20, Temple Road,
Maradana,
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APPLICANT-RESPONDENT-APPELLANT

-Vs-

Hatton National Bank PLC,
Head Office,
No. 479, T. B. Jayah Mawatha,
Colombo 10.

RESPONDENT- APPELLANT-RESPONDENT

Before: BUWANEKA ALUWIHARE PC J

P PADMAN SURASENA J

E. A. G. R. AMARASEKARA J

Counsel: Uditha Egalahewa PC with Amaranath Fernando and Miyuru Egalahewa for the Applicant-Respondent-Appellant.

Shammil Perera PC with Duthika Perera for the Respondent-Appellant-Respondent instructed by Thushari Ranaweera.

Argued on: 15 - 09 - 2020

Decided on: 14 - 10 - 2021

P Padman Surasena J

The Applicant-Respondent-Appellant (hereinafter sometimes referred to as the Applicant) filed an application for and on behalf of B. D. Niroshan (hereinafter sometimes referred to as the Employee) in the Labour Tribunal of Nuwara Eliya complaining that the Respondent-Appellant-Respondent (hereinafter sometimes referred to as the Employer) had unreasonably terminated the service of the Employee. The Applicant, through its application sought reinstatement of the service of the Employee and also sought for him, compensation for the complained termination of service, the consequential loss of promotions, increments and other benefits.

The Employee was serving as a Banking Assistant of the Nuwara Eliya Branch of the Employer. The Employer by the letter dated 07-09-2004 produced marked **R 11**, asked the Employee to show cause as to why he should not be disciplinarily dealt with, in relation to the charges set out therein. The said charges revolve around an incident in which the Employee was alleged to have removed from the counter, three cheques drawn from his own current account, to prevent them being presented for payment, as there were no sufficient funds in his current account to make the payment for the said cheques.

In the Labour Tribunal, the learned President, after considering the evidence presented before him, had concluded by his order dated 27-03-2009, that the counts 1, 2 and 3 set out in **R 11** have been proved by the Employer on a balance of probability. The said counts are as follows.

1. *While assigned to Nuwara Eliya Branch of the Bank as a Banking Assistant on 10th August 2004, you did wrongfully and dishonestly remove the following cheques drawn on your Current Account No. 87011 and presented for payment by 03 constituents of the Bank thereby denying the said constituents of the*

Bank receiving credit they were entitled to receive to the debit of your account on that day.

Constituent	***Cheque No.***	***Date drawn***	***Amount (Rs.)***
Mayura Trade Centre	*809113*	*10.08.2004*	*4,000/-*
Pushpa Hardware	*816427*	*10.08.2004*	*3,830/-*
Siraj Stores	*816434*	*10.08.2004*	*500/-*

2. *You did improperly remove the cheques described in Charge 01 above for your personal gain as you did not deposit adequate funds in your current account to honour the said cheques.*

3. *You did issue the cheques described in Charge 01 above without depositing sufficient funds in your current account to meet such commitments thereby acting in contravention of the rules of discipline applicable to employees of the Bank.*

The learned President of the Labour Tribunal in his order, had formed the view that the proof of the above charges is serious enough to warrant the dismissal of the Employee. However, the learned President of the Labour Tribunal had thereafter concluded in the same order, that the decision by the Employer to terminate the service of the Employee is not a just and equitable order. The learned President seems to have based the said decision on the following reasons.

i. *There is no evidence to establish that the Employer had taken any disciplinary action against the Trainee Banking Assistant Sirisoma although said Sirisoma had abetted the Employee to commit one or more instances of misconduct referred to in the charge sheet marked* ***R 11****.*

ii. *The documents marked* ***A 9*** *and* ***A 10*** *produced by the Employee have revealed that even the manager of the bank had deposited money into his account when the funds were insufficient to make payments to the cheques drawn.*

iii. *The documents produced by the Employee marked **A 10**, **A 11** and **A 12** have shown that W H Warakapola who had testified before the Labour Tribunal also had issued cheques from his account when the balance was not sufficient for the payment of those cheques.*

iv. *The evidence adduced before the Labour Tribunal does not reveal any prejudice being caused to the customers of the bank by the action of the Employee.*

v. *The money due to the customers has been duly credited to their account and no fraud has taken place.*

vi. *The document produced marked **A 13** shows that the Employee had previously discharged his duties honestly.*

vii. *As per the document produced marked **A 16** (dated 11-06-2004) the Personnel Manager of the Employer had even commended the Employee.*

viii. *The Employee who had joined the Employer in the year 1993 had not been subjected to any disciplinary proceedings before this incident.*

ix. *The dismissal from service is the maximum punishment that could be imposed on an employee.*

x. *As the employer-employee relationship is a human relationship, the seriousness of the misconduct must be considered as a question of fact when deciding the reasonableness of the punishment.*

The learned President of the Labour Tribunal had ordered the reinstatement of the Employee in service but had decided not to award him the back wages. This is because the learned President of the Labour Tribunal has concluded that the Employer has established that the Employee had directly induced the Trainee Banking Assistant Sirisoma to act contrary to the rules of the Employer bank and that the Employee is directly responsible for the said inducement.

Being aggrieved by the order of the learned President of the Labour Tribunal, the Employer had appealed to the Provincial High Court. The learned Provincial High Court Judge after conclusion of the argument of the said appeal, by his judgment dated 09-12-2010, had set aside the part of the order of the Labour Tribunal containing the direction to reinstate the Employee in service and affirmed the rest of the order of the

Labour Tribunal including the conclusion that the Employee was not entitled to compensation.

Being aggrieved by the judgment of the learned Provincial High Court Judge, the Employee sought Leave to Appeal from this Court and accordingly, on the 28-03-2012, this Court granted Leave to Appeal on the questions of law set out in paragraph 10 (b) and (d) of the Petition dated 06-01-2011. The said questions of law are reproduced below.

i. *Was the judgment of the Honourable Judge of the High Court just and equitable?*
ii. *Did the Honourable Judge of the High Court err in law by not evaluating the provisions of Section 31B (6) (c) of the Industrial Disputes Act?*

Although the reinstatement of the Employee in service without back wages was ordered, the President of the Labour Tribunal in unequivocal terms has held; that the Employer has proved the acts of misconduct referred to in the first, second and third charges set out in **R 11**; and that the seriousness of the said charges is grave enough to warrant the termination of the service of the Employee. As has already been mentioned, the learned President of the Labour Tribunal has also concluded that the Employee had directly induced the Trainee Banking Assistant Sirisoma to act contrary to the rules of the Employer bank and that the Employee is directly responsible for the said inducement.

The Labour Tribunal has pronounced its order on 27-03-2009. The service of the employee was terminated with effect from 03-09-2004. The learned President of the Labour Tribunal has not directed in his order, to reinstate the Employee from the date of the termination of his service. Thus, the reinstatement of the Employee as per the order of the Labour Tribunal, would clearly result in a break in the Employee's service from 03-09-2004 to the date of reinstatement which could have been a date after 27-03-2009 which is approximately a loss of four and a half years of his service. Despite the above, the Employee has not challenged the order of the Labour Tribunal. This means that the Employee for all purposes has accepted the conclusions arrived at by the learned President of the Labour Tribunal.

The case of Peoples' Bank Vs Lanka Banku Sevaka Sangamaya[1] is directly on the above point. Further, the facts of that case also involve some incidents in which the workman in that case had issued several cheques to third parties from his account without sufficient funds in his account. In that case, the workman was a clerk attached to the Peoples' Bank who had served the bank for twenty-five years. On an application made by him to challenge the termination of his service, the Labour Tribunal had held that the termination of his service was justified, but ordered payment of compensation. He then appealed to the Provincial High Court but the Provincial High Court dismissed his appeal and affirmed the order of the Labour Tribunal. He thereafter did not appeal against the Provincial High Court judgment to any Superior Court. However, the Peoples' Bank appealed to the Supreme Court against the judgment of the Provincial High Court on the question whether the Provincial High Court had erred in affirming the order of the Labour Tribunal to pay compensation to the workman even when he was found guilty of misconduct and the termination of his service was held to be justified. This Court held that the workman had accepted the order of the Labour Tribunal which held that the termination of his employment was justified, since the workman had not appealed against the orders of the lower courts. The following two excerpts from the judgment of His Lordship Justice Sisira J. de Abrew would show how this Court looked at the relevant issues in that case.

"… The workman was a clerk attached to the Peoples' Bank (Appellant Bank) and served the bank for 25 years. He appealed to the High Court against the order of the Labour Tribunal and his appeal was dismissed by the High Court. He did not appeal against the said order to any Superior Court. Thus, the order of the Labour Tribunal which held his termination justified has been accepted by him. …."

"…… The Appellant Bank, after an inquiry, terminated his services for the said acts of misconduct. The Labour Tribunal however ordered compensation amounting to Rs.584,425/25 to be paid to him by the Appellant Bank. It is established that his services were terminated for the acts of misconduct committed by him. Then why should the Appellant Bank pay compensation to a person who was found guilty of

[1] SC Appeal 106/2012 decided on 09-06-2015

misconduct and violated disciplinary circulars of the bank. This was the question that was presented, at the hearing of this appeal, to this court by learned counsel for the Appellant Bank. The most important question that must be decided in this case is whether the workman whose termination of services was held to be justified by the Labour Tribunal is entitled to compensation especially when he was found guilty of acts of misconduct. When considering this question, I must consider the following matters.

1. *The workman had not caused any monetary loss to the Appellant Bank and the acts of misconduct committed by him are private transactions.*
2. *Whether the workman had an unblemished record.*

I now advert to these matters. It is correct to say that acts of misconduct committed by him are private transactions between him and third parties and that he had not caused any monetary loss to the Appellant Bank. As I pointed out earlier the cheques issued by him have been dishonored by the bank on the grounds that there were no sufficient funds in his account and that the cheques were issued after the account had been closed. These acts clearly demonstrate that he was dishonest when he issued the cheques. When an employee of the Appellant Bank committed the above-mentioned dishonest acts, they will affect the reputation of the bank and such acts would undoubtedly erode the confidence of the people that they have towards the bank. Needless to say, that the existence of a bank depends on public confidence. When employees of the Appellant Bank behave in this manner, it will affect the reputation of the Bank and therefore the Bank must take disciplinary actions against such employees. In my view such persons cannot function in Banks. When compensation is awarded to the employees who committed the above acts of misconduct, such a decision can be construed as an encouragement to commit further acts of misconduct. ….."

In the instant case, the Employer has issued specific instructions to the members of the staff by way of a circular as to how they should maintain current accounts in the Employer bank. This circular dated 08th March 1984 has been produced marked **R 7**.

Reproducing at least some of the rules contained therein would be relevant. They are as follows.

i. *All current accounts should be segregated and kept in one ledger or in one section of the ledger.*
ii. *Members of the staff should maintain their current accounts at the Branch to which they are attached.*
iii. *All credits to staff accounts should be referred to the Manager of the Branch and satisfactory explanation given for the source of such deposit and thereafter the credit slip must be authorized by him by placing his signature on the credit slip and only thereafter should the cheque or cash be deposited. The Manager should not delegate this authority to any other officer of the branch.*
iv. *Managers should not UNDER ANY CIRCUMSTANCES grant members of the staff any temporary overdraft. Any request for temporary overdrafts should be referred by the Manager to the Loans Committee at Head Office with his recommendation. The facility may be granted only after approval is received.*
v. *Cheques issued by members of the staff without adequate funds in their accounts should be returned 'UNPAID' just like any other customers in the normal course of business. Disciplinary action will be taken against those who flout these instructions regarding grant of temporary overdrafts including the Manager who approved the unauthorized temporary overdraft.*
vi. *Current accounts of staff members should be closed on the first cheque returned by the branch for lack of funds.*

The Employer bank had issued the above circular as far back as 08-03-1984. Thus, the Employee knew very well about the above rules and the seriousness of the actions he was engaged in. He therefore had taken upon himself, the risk of the Employer taking disciplinary action against him, when he issued the relevant cheques without sufficient funds in his current account. Moreover, as has been held by both the Labour Tribunal and the Provincial High Court, the Employee had induced Trainee Bank Assistant Sirisoma to achieve the results he had desired. The way he had chosen to achieve the expected results is exactly what his employer has sought to stop by issuing the circular **R 7**. Conclusion arrived at, by the learned President of the Labour Tribunal

in that regard is that the Employee had directly induced the Trainee Banking Assistant Sirisoma to act contrary to the rules of the Employer bank and that the Employee is directly responsible for the said inducement. This is in addition to the conclusion that the proof of the acts of misconduct in the first, second and third charges is sufficient to warrant the termination of the service of the Employee. It is opportune at this stage to see how this Court has approached the question of termination of an employee of a bank. The following instances would shed more light on the said question.

In M Sithamparanathan Vs. People's Bank,[2] the workman was a Grade IV officer of the People's Bank who functioned as a ledger officer. He was served with a charge sheet setting out seven charges relating to an incident of authorizing payment of a fraudulent withdrawal of Rs. 4500/= from a savings deposit account. Although he was only found negligent regarding the said withdrawal, His Lordship Justice Siva Sellaiah in the judgment pronounced in the Court of Appeal, underscored in the following excerpt, the importance of taking into consideration, the element of a bank losing confidence in its employees.

"*….. It is needless to emphasize that the utmost confidence is expected of any officer employed in a Bank. Not only has he to transact business with the public but also he has to deal with money belonging to customers in the safe custody of the Bank. As such he owes a duty both to the Bank to preserve its fair name and integrity and to the customer whose money lies in deposit with the Bank. Integrity and confidence thus are indispensable and where an officer has forfeited such confidence and has been shown up as being involved in any fraudulent or questionable transaction, both public interest and the interest of the bank demand that he should be removed from such confidence. …."*

The above excerpt in the judgment of His Lordship Justice Siva Sellaiah was cited with approval, by His Lordship the then Chief Justice G P S de Silva in his judgment in the case of Bank of Ceylon Vs. Manivasagasivam.[3] The workman in that case was a Grade II Clerk in the Personnel and Administration Division of the Bank of Ceylon at the time of the termination of his service. The case for the bank of Ceylon was that there was

[2] 1986 (1) SLR 411.
[3] 1995 (2) SLR 79.

a loss of confidence in the workman by reason of the part he had played in an attempt made by certain other persons to fraudulently transfer a sum of money from Sri Lanka to accounts which had been opened in a Swiss Bank. The evidence led on behalf of the bank had clearly shown that the certification of the signature of the person intending to open an account in a foreign bank by an "Approved Bank" is an essential requirement and that the Bank of Ceylon is one such "Approved Bank". The evidence had also clearly shown that it was by reason of the intervention of the workman in that case, that two other persons were able to secure the certification of their signatures by an "Approved Bank" in Sri Lanka. The said workman had been in the service of the bank of Ceylon for eleven years. His Lordship the then Chief Justice in his judgment holding that the High Court had failed to address its mind to a significant fact namely the kind of institution in which the workman was employed, cited the above excerpt from the judgment of His Lordship Justice Siva Sellaiah in M Sithamparanthan's case,[4] and stated as follows.

"…. It seems to be that by reason of the part played by the applicant in two transactions which, to say the least, were questionable, he has clearly forfeited the confidence reposed in him as an employee of the Bank. In these circumstances, the Bank should not and cannot continue to employ him. …"

In National Savings Bank Vs. Ceylon Bank Employees' Union,[5] the bank had dismissed a clerk in its service for an alleged misconduct at an examination conducted by the Banker's Training Institute as the said clerk (workman) was detected having in his possession, notes relevant to the question paper he was answering, by the supervisor at the examination hall. The Banker's Training Institute reported the matter to the bank. The National Savings Bank then called for explanation from the workman. The workman admitted having committed an offence by having in his possession, the notes relevant to the paper he was answering at the said examination but pleaded for mercy. The National Savings Bank however terminated his service. Upon an application filed by the workman, the Labour Tribunal after the inquiry, directed the reinstatement of the workman but did not award the back wages. The National Savings Bank appealed

[4] Supra.
[5] 1982 (2) SLR 629.

to the Court of Appeal against the said order of the Labour Tribunal. The Court of Appeal affirmed the order of the President of the Labour Tribunal. The National Savings Bank then appealed to the Supreme Court against the said order. His Lordship Justice Soza in his judgment had the following to say about the honesty of the employees of a bank.

"…. The public have a right to expect a high standard of honesty in persons employed in a bank and bank authorities have a right to insist that their employees should observe a high standard of honesty. This is an implied condition of service in a bank. Conduct on the part of a bankman which tends to undermine public confidence amounts to misconduct. Whether the misconduct relates to the discharge of his duties in the bank or not, if it reflects on the bankman's honesty, it renders him unfit to serve in a bank and justifies the dismissal…"

"….. The learned President found that Amarasuriya has innocently taken the examination notes into the hall but in the same breath he declared that an offence has been committed, and a serious offence at that. He went on to hold that Amarasuriya was guilty of misconduct at an examination but not of misconduct at his workplace and ordered reinstatement. The learned President has failed to appreciate the fact that he was considering the case of an employee of a bank which is under a special duty to ensure that the honesty of its servants is not open to question. The dismissal of Amarsuriya was therefore justified. The order of the learned President cannot be allowed to stand. …"

In the case of D L K Peiris Vs Celltell Lanka Ltd.[6] the workman held the post of Assistant Manager - Credit Collections for the respondent (Celltell Lanka Ltd.), until his service was terminated. The said workman had prayed for reinstatement with back wages or in the alternative a payment of a reasonable compensation for the loss of his employment. The workman in that case had been ordered to proceed to Matale on official duty on 07-08-2003 and was ordered to stay in Kandy overnight, as was required to properly fulfill his duties there and return to Colombo only on 08-08-2003. The said workman had presented a hotel bill to the respondent (Celltell Lanka Ltd.)

[6] SC Appeal 30/2009, decided on 24-11-2010.

for reimbursement. However, upon investigation it was revealed that the said workman in fact had not stayed in Kandy that night. To substantiate this position, the respondent (Celltell Lanka Ltd.) had led the evidence of three witnesses and produced as documentary evidence, several computer prints out of call records showing particulars of all calls made from that workman's cellular phone on the night the said workman claimed to have spent in Kandy. Her Ladyship Justice S. Thilakawardane when holding that it was not erroneous in law for the learned President of the Labour Tribunal to arrive at a conclusion that the workman in that case had engaged in misconduct and, most importantly, that the respondent (Celltell Lanka Ltd.) was reasonable in ceasing to repose trust in the workman, which is a basic trust that was necessary for the performance of the duties required of him, stated in her judgment as follows.

"*The Appellant was an Assistant Manager, Credit Collections (outstation), a position of responsibility which demands integrity, competency, reliability and independence. Given the nature of the Appellant's services which was to independently handle the Respondent's work in the outstation districts, there was without a doubt an expectation by the Respondent that the Appellant was to act with the utmost integrity and honesty, arguably even more so than that required of an employee without such autonomy.*

Once the Appellant fell short of this expectation it is perfectly reasonable, by any reasonable standard, that the Respondent would cease to continue to repose any confidence in the Appellant. Loss of confidence arises when the employer suspects the honesty and loyalty of the employee. It is often a subjective feeling or individual reaction to an objective set of facts and motivation. It should not be a disguise to cover up the employer's inability to establish charges in a disciplinary inquiry but must be actually based on a bona fide suspicion against the employee making it impossible or risky to the organization to continue to keep him in service. The employer-employee relationship is based on trust and confidence both in the integrity of the employee as well as his ability or capacity. Loss of confidence however, is not fully subjective and must be based on established grounds of misconduct which the law regards as

sufficient. The concept of loss of confidence has been well expressed in the following terms:

> *"the contractual relationship as between employer and employee so far as it concerns a position of responsibility is founded essentially on the confidence one has in the other and in the event of any incident which adversely affects that confidence the very foundation on which that contractual relationship is built should necessarily collapse…. Once this link in the chain of the contractual relationship…. snaps it would be illogical or unreasonable to bind one party to fulfill his obligations towards the other. Otherwise, it would really mean an employer being compelled to employ a person in a position of responsibility even though he has no confidence in the latter." (vide Democratic Workers' Congress vs De Mel and Wanigasekera ….)"*

In the instant case, although the learned President of the Labour Tribunal has stated in his order that W H Warakapola had testified before the Labour Tribunal it is not factually correct. Evidence of only three witnesses namely, Thalindu Niranja Sirisoma who was working as a Banking Assistant at the Bank at the time of the said incident, Wasanthi Hemamala who was working as a Junior Executive at the Bank and Neil Christopher Rasiah who was working as the Manager of the Branch has been led on behalf of the Employer, while evidence of only the Employee has been led on behalf of the applicant.

In any case, even if one is to consider that both the Manager of the Branch and said W H Warakapola have issued cheques without sufficient funds in their accounts, the misconduct that the Employee in the instant case has committed is not confined to a mere issuance of cheques without sufficient funds in his account. It is much more serious as the Employee in the instant case had directly induced the Trainee Banking Assistant Sirisoma to act contrary to the rules of the Employer bank. Therefore, even if the documents produced marked **A 9** to **A 10** have established that the Manager of the Branch and said W H Warakapola have issued cheques without sufficient funds in their accounts, that cannot form a basis for the learned President of the Labour Tribunal to order the reinstatement of the Employee in the instant case in the given circumstances.

Another basis for the reinstatement of the Employee as per the order of the learned President of the Labour Tribunal, is the fact that the Employer had not taken any disciplinary action against the Trainee Banking Assistant Sirisoma. However, it is the finding by the learned President of the Labour Tribunal himself that the Employee in the instant case had directly induced the Trainee Banking Assistant Sirisoma to act contrary to the rules of the Employer bank. Sirisoma gave evidence before the Labour Tribunal and explained in detail how he was induced by the Employee. In those circumstances, the Employer is justified in deciding that it is the Employee who had flouted the rules of the circular marked **R 7** and not Sirisoma who was just a Trainee Banking Assistant at that time. In any case, Sirisoma had never issued any cheque. Thus, the said basis used by the learned President of the Labour Tribunal to order the reinstatement of the Employee in the instant case, cannot be accepted as valid.

The facts and the circumstances of the instant case, clearly justifies the decision of the Employer to discontinue the service of the Employee. The said circumstances are sufficient for the Employer to have lost confidence in the Employee. As has been discussed in the cases cited above, the banks would not be able to function with Employees in its staff who are not prepared to strictly adhere to the rules put in place by the banks to safeguard the trust reposed in them by their customers. When customers lose confidence in the bank, the bank would no longer attract business. When the bank does not attract business, it would not survive any further. Thus, in the instant case, the Employer bank is justified in terminating the service of the Employee. In the given circumstances, as held by the Provincial High Court, the Employee cannot justifiably claim compensation while the Employer cannot justifiably be compelled to pay compensation. Thus, I hold that the Employee in the instant case, is not entitled to receive any compensation from the Employer.

Therefore, I answer the question of law No. (i) in respect of which this Court has granted Leave to Appeal, in the affirmative.

The question of law No. (ii) in respect of which this Court has granted Leave to Appeal, questions whether the learned Judge of the High Court was obliged in law, to consider the provisions of section 31B (6) (c) of the Industrial Disputes Act. The relevance (if any), of that section to the instant case, would be only to the issue whether an order

relating to payment of compensation to the workman, should have been made by the High Court.

For the reasons already set out above in this judgment, I have already held that the Employee in the instant case, is not entitled to receive any compensation from the Employer. Further, I have already answered in the affirmative, the question of law No. (1) (i.e., *Was the judgment of the Honourable Judge of the High Court just and equitable?).* This means that the said judgment of the High Court, which does not contain a direction to pay compensation to the Employee, is a just and equitable one. Thus, when the non-payment of compensation has been held to be a just and equitable order, the learned High Court Judge is not obliged to again consider section 31B (6) (c).

Moreover, in the instant case, I too would repeat the rhetoric question posed by His Lordship Justice Sisira J. de Abrew, in the case of Peoples' Bank Vs Lanka Banku Sevaka Sangamaya[7]: *'when it is established that the workman's service was terminated for the acts of misconduct committed by him, then why should the Bank pay compensation to a person who was found guilty of misconduct and violated disciplinary circulars of the bank.'*

Having posed the above question, I too would concur with the view taken by His Lordship Justice Abrew, that awarding of compensation to the employees who had committed the acts of misconduct, would operate as an encouragement to the commission of such acts of misconduct.

Therefore, I hold that the learned High Court Judge is correct when he did not make any order granting compensation and hence, I am unable to hold that he was obliged to again consider Section 31B (6) (c) of the Industrial Disputes Act which would only be an irrelevant exercise in the face of the just and equitable order (as afore-stated) already made by him.

For those reasons, I answer the question of law No. (ii) in respect of which this Court has granted Leave to Appeal, in the negative.

[7] Supra.

I affirm the judgment of the Provincial High Court dated 09-12-2010 and proceed to dismiss this appeal 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

Weerasinghe Thilakaratne,
Indilanda, Galpatha.
Plaintiff

SC APPEAL NO: SC/APPEAL/75/2013
SC LA NO: SC/HCCA/LA/452/2012
HCCA KALUTARA NO: WP/HCCA/K/2/2005/F
DC KALUTARA NO: 4333/L

Vs.

1. Mathota Arachchige Shiran Mahinda,
   Indilanda, Galpatha.
2. Vinietha Chandralatha Edussuriya,
   Dapiligoda, Agalawatta.
   Defendants

AND BETWEEN

1. Mathota Arachchige Shiran Mahinda,
   Indilanda, Galpatha.
2. Vinietha Chandralatha Edussuriya,
   Dapiligoda, Agalawatta.
   Defendant-Appellants

Vs.

Weerasinghe Thilakaratne,
Indilanda,
Galpatha.
Plaintiff-Respondent

AND NOW BETWEEN

Weerasinghe Thilakaratne,
Indilanda,
Galpatha.
Plaintiff-Respondent-Appellant

Vs.

1. Mathota Arachchige Shiran Mahinda, (Deceased)
1A. Gamage Dona Kamani Chandra Kumari,
Both of
Indilanda, Galpatha.
2. Vinietha Chandralatha Edussuriya,
Dapiligoda, Agalawatta.
Defendant-Appellant-Respondents

Before: P. Padman Surasena, J.
K.K. Wickramasinghe, J.
Mahinda Samayawardhena, J.

Counsel: Harsha Soza, P.C., with Anuruddha Dharmaratne for the Plaintiff-Respondent-Appellant.

Dr. Jayatissa De Costa, P.C., with Chanuka Ekanayake for the Defendant-Appellant-Respondents.

Argued on: 27.04.2021

Written submissions:

by the Plaintiff-Respondent-Appellant on 01.07.2013

by the Defendant-Appellant-Respondents on 28.10.2013

Decided on: 10.06.2021

Mahinda Samayawardhena, J.

The Plaintiff filed this action in the District Court of Kalutara against the two Defendants seeking a declaration in the prayer to the plaint that he has obtained a permanent servitude to use the road described in the third schedule to the plaint, ejectment of the Defendants from the encroached area of this road, and damages.

As I will explain below, instead of stating "he has obtained a permanent servitude to use the road described in the third schedule to the plaint", it would have been clearer had the Plaintiff simply stated that he has the right to use the road described in the third schedule to the plaint.

At the request of the Plaintiff, the District Court issued a commission to depict the encroached portion of the said road.

Plan No. 717B produced in evidence as P1 through the Court Commissioner shows the encroached portion marked Lot X.

After receipt of the said Plan and before filing the answer, the Defendants also moved for a commission. In execution of this commission, Plan No. 732 was received by Court. However, the Defendants did not produce this Plan in evidence.

Having studied both Plans, the Defendants filed answer stating that they have prescribed to the portion marked X in Plan No. 717B and therefore the Plaintiff's action shall be dismissed.

After trial, the District Court entered Judgment for the Plaintiff except for damages.

On appeal to the High Court of Civil Appeal, the High Court set aside the Judgment of the District Court but did not say the Defendants were entitled to their cross-claim of prescriptive title over the encroached portion of the road.

Being dissatisfied with the Judgment of the High Court, the Plaintiff preferred this appeal to this Court.

The High Court set aside the Judgment of the District Court on the ground that the Plaintiff failed to identify the subject matter in dispute:

> *[T]he Plaintiff has failed to show the exact width of the road that was there before the encroachment and the present width of the road that is existing now. Hence the Plaintiff has totally failed to prove the width of the road which should be depicted on the said roadway. Hence*

the Plaintiff has failed to identify the subject matter in dispute.

The identity of the subject matter was never in controversy before the trial Court. There was no issue raised by the Defendants to that effect. Before the District Court, "the subject matter in dispute" was identified by both parties and the Court as Lot X in Plan No. 717B.

The Plaintiff's position was that the said Lot X was a portion of the road depicted as part of the western boundary of Lot 1 in the Final Partition Plan No. 2824 marked P3, whereas the Defendants' position was that they had prescribed to that portion of the road.

Notwithstanding the Defendants' appeal was allowed on the said ground, the High Court also raised some concerns about the presence of trees over 10 years of age and an electricity post fixed to draw an electricity line to the Plaintiff's house in the portion marked X in Plan No. 717B. The High Court states that the Plaintiff did not explain how such old trees came into being on this road if he had been using that road over the years.

In my view, the presence of old trees within the encroached area is beside the point. Let me explain.

The Plaintiff filed the partition action No. 4834/P in the District Court of Kalutara to partition Lot Nos. 1C and 10 in Partition Plan No. 934 marked P9 among the Plaintiff and several Defendants. The Preliminary Plan No. 2693 marked P6A and the Report marked P7 were prepared for the said partition action. According to this Preliminary Plan and Report, the disputed road in the instant action was part of

the corpus in the said partition action. This Plan and Report further go to prove that a portion of this disputed road had been encroached by the 1st Defendant in the instant action at that time. The Court Commissioner had shown the encroached portion as Lot C in the said Preliminary Plan. However the 1st Defendant had not made an application to be added as a party to that action, which he ought to have done if he had a claim to that portion. The Final Partition Plan is Plan No. 2824 marked P3 where the now disputed full road is shown as part of the western boundary of Lot 1, which was allotted according to the Final Decree dated 21.02.1984 marked P4 to the Plaintiff in the instant action. Hence, the Plaintiff has every right to use this road as part of the subject matter in that partition action. He does not need to show any other right to use this road.

What the Court Commissioner did in the instant action was to superimpose the said roadway in Plan No. 2824 on his Plan No. 717B and show the existing encroachment. This is similar to what the Court Commissioner in partition case No. 4834/P did when he prepared the Preliminary Plan No. 2693 marked P6A.

Admittedly, the Final Decree in partition case No. 4834/P marked P4 was entered on 21.02.1984 and, according to her own police statement marked P11, the 2nd Defendant in the instant action put up a barbed wire fence enclosing the encroached area on 25.04.1994.

It is irrelevant to give unwanted prominence or importance to the ages of trees found on the encroached portion of the road. The Court Commissioner carried out the survey in the instant action in 1995. According to the Report, one tree is about 20

years old and the other about 15 years old. This means when the Final Partition Decree P4 in partition case No. 4834 was entered in 1984, the trees were already on that portion of the road. The Defendants cannot say that they planted these trees after the Final Decree P4 because the trees are much older than 11 years. Nor can they claim any prescriptive rights to that portion because the Final Decree P4 wiped out all such rights, if they had any.

The electricity post, which has been fixed to draw an electricity line to the Plaintiff's house is also within the portion marked X in Plan No. 717B. The 2nd Defendant in her evidence admits that the area the electricity post is fixed onto belongs to the Plaintiff. Electricity posts are not fixed on lands belonging to outsiders. They are fixed either on the side of the road or on the customer's land.

There is no evidence acceptable to Court that the Defendants acquired prescriptive title to the encroached area marked X in Plan No. 717B as required by section 3 of the Prescription Ordinance. Even the High Court did not come to such a finding.

The High Court set aside the Judgment of the District Court on the completely erroneous basis of non-identification of the subject matter of the dispute.

This Court granted leave to appeal against the Judgment of the High Court on the following questions of law:

Have the learned Judges of the High Court erred in law by:

(a) arriving at the finding that the Plaintiff has failed to identify the subject matter of the action?

(b) arriving at the finding that the Plaintiff has not established a right to the use of the said roadway described in the third schedule to the plaint?

(c) setting aside the Judgment of the District Court dated 06.01.2005?

I answer all three of these questions in the affirmative.

I set aside the Judgment of the High Court and restore the Judgment of the District Court. The appeal is allowed with costs payable by the Defendants to the Plaintiff in all three Courts.

Judge of the Supreme Court

P. Padman Surasena, J.
I agree.

Judge of the Supreme Court

K.K. Wickramasinghe, J.
I agree.

Judge of the Supreme Court

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

In the matter of an Appeal against an Order of the Civil Appellate High Court of the North Western Province holden in Kurunagala.

Weherage Joan Rohini Peiris
Nilwala Estate, Akkara Panaha,
Kimbulapitiya Road, Negombo.

Plaintiff

Vs.

SC Appeal No. 79/2017
SC/HCCA/LA No. 572/2016
NWP/ HCCA/KUR/59/2012(F)
DC Puttlam Case No. 95/08/P

1. Weherage Herbert Stanely Peiris
2. Weherage Helan Chandani Peiris
3. Chakrawarthige Dona Mary Inoka
   all of Palawiya, Puttlam
4. Hatton National Bank
   No.482. T.B. Jaya Mawatha,Colombo.
5. Weherage Christy Lionel Peiris
6. Weherage Roy Maxwell Peiris
   Palawiya, Puttlam.

Defendants

AND

Weherage Christy Lionel Peiris
Palawiya, Puttlam.

5th Defendant- Appellant

Vs.

Weherage Joan Rohini Peiris
Palawiya, Puttlam.

Plaintiff-Respondent

1.Weherage Herbert Stanly Peiris
2.Weherage Helan Chandani Peiris
3.Chakrawarthige Dona Mary Inoka Dilrukshi
Both of Palawiya, Puttlam.
4.Hatton National Bank
No.482. T.B.JayaMawatha,Colombo.
5.Weherage Roy Maxwell Peiris
Palawiya, Puttlam.

Defendants – Respondents

AND NOW BETWEEN

Weherage Joan Rohini Peiris
Palawiya, Puttlam.

Plaintiff-Respondent-Petitioner/Appellant

Vs.

Weherage Christy Lionel Peiris
49/5, Palawiya,
Colombo Road, Palawiya, Puttlam.

5th Defendant-Appellant-Respondent

1.Weherage Herbert Stanly Peiris
No.41, Colombo Road, Palawiya, Puttlam.

2.Weherage Helan Chandani Peiris
No.41, Colombo Road, Palawiya, Puttlam.

3.Chakrawarthige Dona Mary Inoka Dilrukshi.
No.40, Colombo Road, Palawiya, Puttlam.

4.Hatton National Bank
No.482. T.B.Jaya Mawatha,Colombo

5.Weherage Roy Maxwell Peiris
No.189, Chillaw Road, Daluwatotawa,
Kochchikade

Defendants-Respondents- Respondents

Before: Buwaneka Aluwihare, PC J
L.T.B. Dehideniya, J and
Murdu N.B. Fernando, PC J.

Counsel: Ravindranath Dabare with S. Ponnamperuma for the
Plaintiff- Respondent-Appellant
M. Wanniappa for the 5th Defendant-Appellant-Respondent
1st to 4th Defendants-Respondents-Respondents absent and unrepresented

Argued on: 31.01.2020

Decided on: 11.11.2021

Murdu N.B. Fernando, PC. J.

The Plaintiff-Respondent-Petitioner/Appellant ("the plaintiff/appellant") came before this Court being aggrieved by the judgement of the Civil Appellate High Court of the North Western Province, holden in Kurunegala ("the High Court").

By the said judgement, the High Court upheld the appeal of the 5th Defendant-Appellant-Respondent ("the 5th defendant/respondent") and set aside and dismissed the judgement entered by the District Court of Puttlam, permitting the partitioning of the land as prayed for by the plaintiff.

To state the facts of this appeal in brief, the plaintiff filed action in the District Court of Puttlam, in the year 2008, seeking to partition a divided southern portion of a land called and

known as Amanakkangkadu in Kuruvikulam, Puttlam, in extent 0A 2R 4P described morefully and referred to in schedule 'B' to the plaint.

The land was to be partitioned among the plaintiff, the 1st, 2nd and 3rd defendants in the following manner.

- plaintiff – 13/14th share of the land less 30.70 perches
- 1st defendant – 1/14th share of the land
- 2nd defendant - 23.94 perches
- 3rd defendant - 06.76 perches

The plaintiff's case was that by a **deed bearing No. 1457 dated 01-01-1985**, executed by A.M.M. Abdul Cader N.P., the plaintiff became entitled to an undivided 13/14th share of the land to be partitioned, which is morefully described in schedule 'B' to the plaint.

Out of the said undivided land, 30.70 perches was transferred by the plaintiff to her sister, the 2nd defendant. The 2nd defendant transferred 06.76 perches of the said portion of land to her daughter the 3rd defendant and the 3rd defendant, mortgaged the undivided portion of land in extent 06.76 perches, to the 4th defendant bank.

The plaintiff further pleaded, that prior to the execution of the aforesaid deed in 1985, **in the year 1963, the total extent of the land was transferred to the plaintiff** by one George Leopold de Silva Wikkramatilake by a deed bearing No. 9736 dated 04-07-1963 executed by S.M.M. Cassim N.P. and the plaintiff and her family was in possession of the said land, from such date.

In 1968, upon the plaintiff's father's request, this land was transferred to the plaintiff's father by the plaintiff in order to raise a loan. In 1973, the plaintiff's father died interstate and the rights to the land vested on the heirs, namely the plaintiff's mother and the seven siblings. The said heirs, except, the 1st defendant, in 1985, transferred their entitlement to the plaintiff by the deed bearing No. 1457 dated 01-01-1985 referred to earlier. Thus, the plaintiff became entitled to 13/14th share of the said land morefully referred to in schedule B to the plaint. The plaintiff thereafter, from her share entitlement transferred an undivided portion of the land to the 2nd defendant, as referred to earlier.

The plaintiff in 2008, filed the instant partition action in the District Court of Puttlam and the 1st defendant [who did not part with his entitlement of 1/14th share to the land] did not oppose the application. The 2nd and 3rd defendants accepted the plaintiffs title and moved that the land be partitioned as prayed for by the plaintiff. The 4th defendant bank in its statement of claim referred to the chain of title of the parties *viz-a-viz* the mortgaged land.

The 5th and 6th defendants who are siblings of the plaintiff and who were also executors to the aforesaid deed No 1457 dated 01-01-1985, filed a joint statement of claim. The 6th defendant claimed the property and the house built therein, on the ground of prescription and the 5th defendant claimed Rs.1.5 million for improvements, in the event the land is partitioned as prayed for by the plaintiff.

Thus, this application was opposed only by the 5th and 6th defendants. At the trial, the plaintiff, the Surveyor and the Notary Public who attested the aforesaid deed bearing No. 1457 gave evidence. The 5th and the 6th defendants failed to give evidence or lead any documentary evidence to establish the plea of prescription or the claim for improvements, taken up by the said defendants.

Having considered the evidence led and being satisfied that the plaintiff has proved the chain of title and established the identity of the land, the District Court permitted the partitioning of the land as prayed for by the plaintiff. The issues pertaining to prescription and improvements raised by the 5th and 6th defendants were answered in the negative and the 5th defendant's monetary claim was rejected by the District Court.

Being aggrieved by this judgement, the 5th defendant invoked the jurisdiction of the High Court and urged that the district judge has failed to investigate title in the said case.

It is a matter of interest, that the 5th defendant who did not claim an entitlement to the land to be partitioned, filed appeal papers and took up an entirely new ground and abandoned the claim for improvements pleaded before the District Court. The 6th defendant who jointly filed a statement of claim with the 5th defendant at the trial court, did not pursue the appeal to the High Court nor associate himself with the 5th defendants appeal.

The High Court accepted the contention of the 5th defendant pertaining to the title and upheld the appeal and the case of the plaintiff was dismissed with costs and the judgement and the interlocutory decree entered by the District Court was set aside.

The High Court, in its judgement held, that the District Court failed to perform its obligations in terms of Section 25(1) of the Partition Law No 21 of 1997 as amended ("the Partition Act") and repeatedly pronounced that *the district judge failed to address its judicial mind to the mode of acquisition of title of Leopold De Silva Wikkramatilake the alleged predecessor in title of the plaintiff.*

Being aggrieved by this judgement, the plaintiff invoked the jurisdiction of this Court and obtained Leave to Appeal on five questions of law.

The said questions referred to in paragraph 27(a) (b) (c) (d) and (i) of the Petition of Appeal are as follows: -

a) Did the High Court err in deciding that examination of title is only examining paper title excluding the title gained by prescription?
b) Did the High Court err by failing to consider that the 5th Defendant- Appellant-Respondent is estopped in raising doubts in the title of the Plaintiff- Respondent-Petitioner as he was also a party who executed the title deed in favor of the Plaintiff-Respondent- Petitioner?
c) Did the High Court err in failing to appreciate the fact that no other party other than the 5th Defendant- Appellant- Respondent had appealed against the Order of the District Court of Puttlam?
d) Did the High Court err in deciding that the evidence given in prescriptive rights accrued by the Plaintiff- Respondent- Petitioner and her predecessors cannot be considered as a title valid before the law?
i) Did the High Court err in deciding that paper title more than 50 years and prescriptive title more than 50 years is insufficient to establish the title and ownership of a land?

I wish to consider the above referred five questions of law, under two segments.

Firstly, the 1st, 2nd, 4th and 5th questions of law which pertains to the plaintiff's right and entitlement to the land to be partitioned; and

Secondly, the 3rd question which refers to the appeal filed by the 5th defendant and his right to challenge the interlocutory decree and the judgement given by the District Court in the instant application.

The four questions in the first segment in my view are interwoven and revolve around the title and investigation of such title *viz* paper title and prescriptive title, and goes to the root of a partition action.

Hence, I wish to analyze the questions of law raised before this Court, pertaining to title *viz-a-viz* the provisions of the Partition Act, with special emphasis on investigation of title by a court of law, as laid down in Section 25(1) of the Act.

Section 25(1) of the Partition Act reads as follows: -

> *".... the court shall examine the title of each party and shall hear and receive evidence in support thereof and shall try and determine all questions of law and fact arising* ***in that action in regard to the right, share or interest of each party to, of, or in the land to which the action relates****...."* (emphasis added)

The aforesaid provision in the present Partition Act, as well as similar provisions in the earlier Partition Act of 1951 and the Partition Ordinances have been extensively analyzed by this Court on numerous occasions and the duty of a court to examine and investigate title has been repeatedly emphasized. **[see Juliana Hamine v. Don Thomas (1957) 59 NLR 546; Cooray v. Wijesuriya (1958) 62 NLR 158; Jane Nona v. Dingiri Mahathmaya (1968) 74 NLR 105]**

With the far reaching effects of the provisions of Section 48 of the Act, which speaks of final and conclusiveness of a partition decree, this Court has observed, that in the event the investigations are defective, a decree could be set aside in appeal. [**see Mohamedaly Adamjee v. Hadad Sadeen (1956) 58 NLR 217**]

Whilst observing the sacred duty of court to investigate title, the Appellate Courts have held, that no higher standard of proof is required in a partition action than in any other civil suit, where balance or preponderance of probability is the standard of proof and that the court could investigate title, only within the limits of pleadings, admissions and issues and evidence led before court and cannot go on a voyage of discovery **[see Cynthia de Alwis v. Marjorie de Alwis and others [1997] 3 Sri LR 113; Karunaratne v. Sirimalie (1951) 53 NLR 444; Thilagaratnam v. Athpunathan and others (1996) 2 Sri LR 66]**

Similarly, our Courts have emphatically held that clarity with regard to the identity of corpus is a fundamental factor to be considered in a partition application. **[see SopiNona v. Pitipanaarachchi and others (2010) 1 Sri LR 87]**

With regard to a person who pivots his title on 'adverse possession' and claims prescription, this Court has held that such adverse possession should be established by clear and unequivocal evidence and the burden is on the party who invokes prescription to establish such fact. Where a person's possession was originally not adverse but subsequently, became adverse, onus is on the person who claims that fact to prove such fact. **[see De Silva v. Commissioner General of Inland Revenue (1973) 80 NLR 292; Sirajudeen and others v. Abbas [1994] 2 Sri LR 365]**

Having referred to the legal position, pertaining to proof of title and chain of title, let me now examine the said legal provisions, in the light of the factual matrix of this case.

In the instant appeal, the plaintiff sought to partition the land in issue, between four parties, namely, the plaintiff and the 1st, 2nd, 3rd defendants who co-owned the property in suit and there was no contest by the said parties with regard to the partitioning of the land, identity of the corpus and the chain of title.

As discussed earlier, the plaintiff's case was that she became entitled to the entire land to be partitioned in extent 0A 2R 4P depicted in schedule B to the plaint, initially in the year 1963 and possessed the land from then onwards. The said land was transferred in the manner described earlier in this judgement and in 1985 the plaintiff became entitled to an undivided 13/14th shares

of the said land out of which the plaintiff transferred an undivided portion of the land to the 2nd defendant as described.

Hence, the Plaintiff's case was, that the land morefully described in schedule B to the plaint be partitioned as prayed for in the plaint between the plaintiff, 1st, 2nd and 3rd defendants subject to the mortgage of the 4th defendant.

Thus, I cannot see any error in the judgement of the district judge permitting the partitioning of the land in the manner prayed for by the plaintiff, after investigating the title and being satisfied of the identity of the land and the chain of title. In fact, the district judge in the judgement, had referred to each and every deed, in the chain of title of the plaintiff as well as the 1st, 2nd, 3rd defendants respectively.

Similarly, the district judge cannot be faulted in disallowing the 5th and 6th defendant's claims made in the partition action either. The 5th defendant did not lead any evidence, oral or documentary to substantiate his claim for improvements or the 6th defendant with regard to his claim on prescription. Thus, even with regard to the contention of the 5th and 6th defendants, I am of the view, that the district judge properly investigated their claims and rejected same.

Moreover, it is observed that both the **5th and 6th defendants were executants to the deed bearing No. 1457 dated 01-01-1985**. This is the deed by which the plaintiff obtained title to 13/14th shares of the corpus, [when plaintiff's mother transferred her 1/2 share and the plaintiffs seven siblings (excluding one) transferred their individual 1/14th share (1/7th of 1/2 share), being the intestate rights and entitlements flowing from the plaintiff's deceased father.

Thus, it is ironic that the 5th defendant who transferred his share entitlement to the plaintiff in 1985 and had no interest in the land, preferred a claim against the plaintiff, in the event the land was partitioned, for a sum of Rs.1.5 million and thereafter failed to pursue such claim before the trial court. The 6th defendant too, did not pursue his claim on prescription. Further it is observed, that the 5th and 6th defendants did not challenge the chain of title of the plaintiff either, at the trial.

Hence, in my view, the district judge quite rightly rejected the 5th defendants claim and answered the issues raised by the 5th defendant as well as the 6th defendant, in the negative.

However, it is not necessary for me to delve further into this aspect of prescription and improvements in this appeal, since the 5th defendant's principal ground of appeal before the High Court was that the District Court failed to examine the title to the land in issue. It is observed that the High Court judge upheld the appeal upon this basis, paying much attention to the fact that *the learned District Judge failed to address the acquisition of title by the plaintiff's predecessor.*

Thus, the High Court went a step ahead and investigated the plaintiff's predecessor's title not at the time of the transfer of the land in 1963, but many years earlier and with regard to the manner of acquisition of title by the plaintiff's predecessor. It is also a matter of concern that the High Court did not examine the 1985 deed by which the 5th defendant and other siblings transferred title to the plaintiff or the fact that the plaintiff, having obtained title upon the 1963 deed, held and possessed the land to be partitioned for a period of 45 years.

In the light of the findings of the High Court, I would now move on to examine the plaintiff's title in detail.

The land to be partitioned is in extent 0A 2R 4P and is described and referred to in schedule B to the plaint. This land is said to be a divided and defined portion of a larger land in extent 2A 2R 20P. The larger land is referred to and described in schedule A to the plaint.

The plaintiff relied on three deeds to establish the chain of title and the identity of the land to be partitioned.

The said deeds were;

1. **Deed No.9736 executed on 04-07-1963 (P1),** whereby the plaintiff became entitled to the entire land to be partitioned, in extent 0A 2R 4P (Schedule B);
2. Deed No. 12062 executed on 06-08-1968 (P2) whereby the said extent of land was transferred by the plaintiff to plaintiff's father; and

3. **Deed No. 1457 executed on 01-01-1985 (P4)** wherein the plaintiff's mother and her six siblings [excluding the 1st defendant] transferred their entitlement, totaling 13/14th share to the plaintiff. The 5th and 6th defendants were also executants to this deed.

The metes and bounds and the extent of the land referred to in the two schedules, A and B of the plaint, correspond with the schedules referred to in the three deeds mentioned above.

The **Plan and the Surveyors Report prepared on a Commission issued by the District Court** tallies with the description of the land and gives the extent and the metes and bounds as at that date. No party to the partition action, including the 5th defendant disputed the identification of the land, the extent and description of the land to be partitioned either by producing oral or documentary evidence or by challenging the evidence given by the plaintiff or on behalf of the plaintiff by the Surveyor or the Notary Public or any other witnesses. Thus, the identity of the land to be partitioned in my view, was not in dispute before the trial court. Similarly, the prescriptive possession of the plaintiff was also not challenged before the District Court and that too was not in dispute.

The plaintiff also marked in evidence, the three deeds referred to above without a challenge or objection being raised by any of the defendants, including the 5th defendant. Thus, the said deeds which refer to the plaintiff's entitlement and the chain of title was led unhindered and unchallenged.

Upon perusal of the aforesaid three deeds and the dates of execution, it is observed that the chain of title clearly runs back to the year 1963, i.e., 45 years prior to filling of the partition action.

By the deed (P1) executed in the year 1963, the title to the said corpus in extent 0A 2R 4P (morefully referred to in schedule B to the plaint) was transferred to the plaintiff by one George Leopold de Silva Wikkramatillake, (i.e. plaintiff's predecessor) and the said **George Leopold De Silva Wikkramatilake held and possessed the said land by right of inheritance from his mother Mary Girtrude,** widow of William Moses de Silva Wikkramatilake.

The deed P1, further indicates that Mary Girtrude, the mother of plaintiff's predecessor, held and possessed a larger land in extent 2A 2R 20P (morefully referred in schedule A to the plaint), by virtue of a deed executed on 05-07-1904 bearing No. 915. The land to be partitioned or the corpus in extent 0A 2R 4P was carved out from the southern portion of the larger land. Thus, the paper title of the land to be partitioned can be traced back to 1904, a period exceeding 100 years, prior to filling of the instant partition action.

The plaintiff, also led in evidence a communique received from the Puttlam Land Registry to establish that the aforesaid deed executed in 1904 had decayed. In the District Court judgement, reference is also made to the said fact which prevented the plaintiff to mark in evidence the deed of 1904 to establish the chain of title of the plaintiff running back to 100 years or the beginning of the 20th century.

Thus, it is observed that the district judge took cognizance of the aforesaid facts in investigating the title of the plaintiff and came to the correct conclusion, that the chain of title was proved by the plaintiff, with regard to the corpus in issue.

However, as stated earlier, the High Court upheld the appeal of the 5th defendant, upon the basis, that *the plaintiff has failed to address the* ***acquisition of title by the plaintiff's predecessor.***

It is observed that the High Court judge when coming to the above conclusion held, in the light of the ratio in **Cooray v. Wijesinghe** (supra) that the plaintiff failed to adduce clear and unequivocal evidence to prove the following factors.

- *the corpus was 1/5th part of the larger land;*
- *Mary Girtrude was the sole owner of the larger land;*
- ***Mary Girtrude sold and transferred*** *an undivided 1/5th share of the larger land to George Leopold de Silva Wikkramatilake the "alleged predecessor" in title of the plaintiff; and*
- *the "alleged predecessor" of the plaintiff, acquired exclusive title by prescription to the corpus, to the exclusion of other co-owners and therefore became the sole owner of the portion of land referred to in schedule B to the plaint.*

It is further observed, that the High Court judge elaborated the above factors at great length and came to the finding, that the plaintiff could succeed in the partition action, only if the plaintiff could establish the entire pedigree beginning from Mary Girtrude and continuously used the term *"alleged predecessor"* when referring to George Leopold de Silva Wikkramatilake, contrary to the contents and wording in the 1963 deed (P1) which clearly denotes him being the vendor and the plaintiff's predecessor.

Similarly, the High Court also failed or did not venture to examine or consider the evidential value of the deed executed in the year 1963 by the plaintiff's predecessor or the rights and entitlements flowing from the said deed, especially the prescriptive rights and possession of the plaintiff of the said land from the year 1963 running into a period of 45 years.

In any event, the High Court did not examine or consider the effect and consequences of the other deeds, executed after 1963 and marked in evidence at the trial and especially the deed bearing No. 1457 executed on 01-01-1985 (P4) by which the 5th defendant himself (the appellant before the High Court) transferred his share entitlement together with his siblings to his own sister, the plaintiff. The High Court failed to evaluate the stand of the 5th defendant at the trial court i.e., not to challenge the partition action but only to obtain a monetary sum in the event the land was partitioned.

Further, it is observed, having failed to refer to the aforesaid deeds and its effects on the title of the plaintiff's pedigree, *viz* plaintiff paper title and prescriptive title to the land from 1963, the High Court Judge repeats, *ad nauseam* and harps on the fact that *the learned district judge has totally failed and not given his judicial mind to investigate title and obligations imposed on him under Section 25(1) of the Partition Act* and only emphasizes on the fact that the acquisition of title by the plaintiff's predecessor has not been proved before the trial court.

This Court in **Cooray v. Wijesuriya** (supra) and other cases discussed earlier in this judgement, observed that Section 25(1) of the Partition Act imposes an obligation on the court to examine the title of each party to, of, or in the land, to which the action relates.

In the instant application, the trial court referred to the title of each party to, of, or in the land to which the action relates, during the last 45 years, i.e. the deed executed in 1963 (P1), the

deed executed in 1985 (P4), the deed executed by the plaintiff when transferring an undivided portion to the 2nd defendant, the deed executed by the 2nd, 3rd and 4th defendants respectively.

The High Court on the other hand, did not refer to the district judges examination of title, especially in relation to the deeds marked P1, P2 or P4, but faulted the trial judge for not examining the acquisition of title of the plaintiff's predecessor, which would have taken place very much prior to the execution of the 1963 deed (P1).

Thus, in my view the High Court did not refer to the District Court finding on the corpus, the ownership and title of the land in issue or the legal status of the parties before court, but ventured to examine the position prior to 50 years i.e. prior to execution of the 1963 deed (P1). The High Court paid more emphasis on the status of the plaintiff's predecessor and his exclusive title to the corpus, to the exclusion of other co-owners, who are not parties to this action. The said co-owners have no interest in the corpus nor are parties who challenged or intervened in this action. The High Court also failed to address its mind to the prescriptive possession of the plaintiff or the rights accrued by the plaintiff from 1963 to the date of partition action i.e. a period of 45 years, but went onto hold that the plaintiff's pedigree should begin from, George Leopold de Silva Wikkramatilake's mother, Mary Girtrude and plaintiff should establish that Mary Girtrude sold and transferred the land to George Leopold de Silva Wikkramatilake.

In **Karunaratne v. Sirimalie** (supra) and **Thilagaratnam v. Athpunathan and others** referred to earlier in this judgement, the Appellate Courts observed, that no higher standard of proof is required in a partition action than in any civil proceeding and the court could investigate title, only within a limited sphere and cannot go on a voyage of discovery. Thus, the standard of proof is the balance of probability with regard to the evidence led before the trial court.

Having considered the aforesaid judicial pronouncements and the evidence led and the documents marked at the trial in the instant matter, I am convinced that the district judge investigated the title of each and every party before court, i.e. the plaintiff and the 1st to 6th defendants with regard to the corpus and came to a correct conclusion.

On the other hand, the High Court, in my view went on a voyage of discovery and upheld the appeal, paying much attention of the plaintiff's predecessor, George Leopold de Silva

Wikkramatilake's title, his mother Mary Girtrude's title and the plaintiff's failure to adduce evidence with regard to plaintiff's predecessor acquiring title to the corpus way before 1963, an event which would have occurred 50 years prior to the plaintiff initiating partition proceedings before the District Court.

In a partition action, according to judicial pronouncements discussed at the beginning of this judgement, what is required from a trial court is to investigate and examine title of each party to the land to which the action relates. In the instance matter, as discussed above, the plaintiff's chain of title together with prescriptive title running back to 50 years, in my view, has been clearly and fairly established. Similarly, no party has raised or adverted to any adverse possession or prescriptive rights as against the rights and interests of the plaintiff. Thus, I see no merit in the submission made by the 5th defendant before this Court.

Nevertheless, in view of the finding of the High Court that acquisition of the plaintiff's predecessors title is the most crucial element in a partition action, I wish to delve into the said fact now.

The land to be partitioned in extent 0A 2R 4P (the land referred to in schedule B to the plaint) was transferred to the plaintiff by George Leopold de Silva Wikkramatilake by deed bearing No.9736 executed on 04-07-1963 (P1).

The recital to the deed reads:

> *"that the vendor sold and transferred the land and premises held and possessed by the said vendor* ***by right of inheritance from his mother Mary Girtrude*** *wife of William Moses de Silva Wickramatileke late of Puttlam who held same under and by virtue of deed No 915 dated 05-07-1904..."*

The schedule of the deed reads;

> *"that of all that land called and known as Amankkangkadu situate at Kuruvikulam in Puttlam Pattu [....] bounded on [....] containing in extent 2A 2R 20P,* ***in lieu of an undivided ⅕ share a divided***

southern portion of the aforesaid land divided with the mutual consent of the other co-owners *containing in extent 2R 4P and bounded on [....]".*

The plain reading of the above narrative in the deed executed in 1963 (P1), appears to be that,

- the larger land referred to in schedule A to the plaint was owned and possessed by Mary Girtrude by virtue of a deed executed in the year 1904 [i.e. the deed that is now decayed - vide (P1a), the communique issued by the Puttlam Land Registry];
- George Leopold de Silva Wikkramatilake held and possessed the said land, **upon the right of inheritance of his mother, Mary Girtrude,** together with other beneficiaries and thus co-owned the said land;
- George Leopold de Silva Wikkramatilake's entitlement to the said co-owned land was 1/5th share;
- in lieu of George Leopold de Silva Wikkramatilake's 1/5th share to the said larger land, **with the mutual consent of the other co-owners**, a portion to the south of **the land was carved out and such carved out area was held and possessed by George Leopold de Silva Wikkramatilake;**
- the said carved out portion of the land is defined by metes and bounds and is in extent of 0A 2R 4P and is the land referred to in schedule B to the plaint; and
- the said defined portion of the land was transferred by George Leopold de Silva Wikkramatileke (plaintiff's predecessor) to the plaintiff by deed bearing No 9736 executed on 04-07-1963 (P1).

Thus, in my view, the said deed executed in 1963 establishes the title of the plaintiff's predecessor to the land to be partitioned. This deed (P1) was led in evidence without any objection at the trial and the district judge pivoted the chain of title of the plaintiff with reference to this deed.

Similarly, there was no challenge to the prescriptive right of the plaintiff who held and possessed the said land, from the date of execution of the deed (P1) i.e. from 04-07-1963 for a

period of 45 years. Undisputedly, by the deed executed in 1985 (P4), the 5th defendant himself granted his share of interest in the land to the plaintiff and did not put forward a case of adverse possession *viz-a-viz* the plaintiff.

Thus, I see no reason to cast any doubt with regard to the plaintiff's predecessor's title or to burden the plaintiff to establish the manner upon which the plaintiff's predecessor acquired title.

I am of the view that the judges of the High Court erred with regard to this factor, when it held, in order for the plaintiff to succeed, the "*plaintiff should establish the entire pedigree beginning from Mary Girtrude and that Mary Girtrude was the sole owner of the larger land and that Many Girtrude had sufficient title vested in her to sell and transfer1/5th share or part therefrom to George Leopold de Silva Wikkramatilake."*

The High Court, further erred when it proclaimed *"that the plaintiff should establish that George Leopold de Silva Wikkramatilake acquired or prescribed to 1/5th share of the larger land, to the exclusion of other co-owners who owned 4/5th share"* and *"if the deed executed in 1904 was decayed, that the plaintiff should have led encumbrance sheets maintained at Puttlam Land Registry"* and *"the failure to prove the pedigree would inevitably result in the dismissal of the plaint."*

I find the above reasoning of the High Court erroneous, misconceived, incomprehensible and outrageous and with respect, I cannot agree with the said finding.

The obligation imposed on a court by the Partition Act, I emphasize, is to examine the title of each party to, of, or in the land to which the action relates *viz* identification of corpus and chain of title and the District Court has full-filled such obligation and allotted shares accordingly.

The High Court sitting in appeal has not considered the relevant legal position and case law relating to such factors, but gone on a voyage of discovery, chartering through archaic history and going beyond the pleadings, to dismiss an application based on the failure to investigate acquisition of plaintiff's predecessor's title and has thus, in my view missed the wood for the trees.

This Court has time and time again held, that a party cannot be permitted to present in appeal, a case different from that presented before the trial court where matters of fact are involved which were not in issue at the trial. **[see Candappa nee Bastian v. Ponnambalampillai (1993) 1 Sri LR 184; Setha v. Weerakoon (1948) 49 NLR 225]**

Civil Procedure Code in the explanation to Section 150 of the Code states, that a case enunciated must reasonably accord with the party's pleadings.

Thus, the basis upon which the 5th defendant filed appeal papers and the extent to which the High Court judge traversed to uphold the appeal, in my view is not in accordance with the law and specifically the provisions of the Partition Act, which only requires a trial court to consider relevant and material evidence with regard to title of each party to the land to which the action relates.

Therefore, in my view, the High Court erred in its determination pertaining to examination of title of parties in the instant case.

In the aforesaid circumstances, I answer the 1st, 2nd,4th and 5th Questions of Law raised before this Court in the affirmative and in favour of the appellant.

Similarly, there is not an iota of doubt, that it was only the 5th defendant who went up in appeal against the judgement of the District Court and the 5th defendant did not claim any share of the land to be partitioned or any right in the District Court. Hence, the 3rd Question of Law raised before this Court, is also answered in the affirmative and in favour of the appellant.

Thus, I answer all five Questions of Law raised before this Court in favour of the appellant.

Therefore, for reasons enumerated herein, the judgement of the Civil Appellate High Court holden in Kurunegala dated 13th October, 2016 is set aside.

The judgement of the District Court of Puttlam dated 23rd April, 2012 is upheld. The Order allowing the partitioning of the land described in schedule B to the plaint, in the manner referred to in the said judgement of the District Court is also affirmed.

In the aforesaid circumstances this Court further holds, that the Plaintiff-Respondent-Appellant is entitled to a sum of Rs. 100,000/= payable by the 5th Defendant-Appellant-Respondent. This sum is payable to the Plaintiff-Respondent-Appellant in addition to the costs of the courts below.

Appeal is allowed with costs.

Judge of the Supreme Court

Buwaneka Aluwihare PC, J

I agree

Judge of the Supreme Court

L.T.B. Dehideniya, J.

I agree

Judge of the Supreme Court

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

Liyana Arachchige Sujatha
Hatnapitiya Wijesundara,
"Sujeewa", Watappitiya,
Parakaduwa.
Plaintiff

SC APPEAL NO: SC/APPEAL/81/2020
SC LA NO: SC/HCCA/LA/43/2020
HCCA AVISSAWELLA NO: WP/HCCA/AV/09/2019/RV
DC AVISSAWELLA NO: 19679/P

Vs.

1. Hatnapitiya Gamaethi Ralalage
   Elisabeth Weerasinghe,
   (Deceased)
   "Sinha Niwasa", Watappitiya,
   Parakaduwa.

1A. Wijesinghe Arachchillage Pushpa
   Ranjanie Dharmaratne
   Wijesinghe,
   "Siri Niwasa", Parakaduwa.

2. J.M. Dayananda, (Deceased)
   Pothgul Vihara Mawatha,
   Muwagama, Ratnapura.

2A. Manori Samarakoon,
No.8, Pothgul Vihara Mawatha,
Muwagama, Ratnapura.

3. Weerasinghe Arachchillage
Pushpa Ranjanie Dharmaratne
Wijesinghe,
"Sisila Niwasa", Parakaduwa.

4. Weerasinghe Arachchillage
Sujatha Nandanie Weerasinghe,
Pathberiya, Parakaduwa.

5. Kuruwita Gamalathge Priyanka
Gamlath,
Thalavitiya,
Parakaduwa.
Defendants

AND BETWEEN

Liyana Arachchige Sujatha
Hatnapitiya Wijesundara,
"Sujeewa", Watappitiya,
Parakaduwa.
Plaintiff-Appellant

Vs.

1A. Wijesinghe Arachchillage Pushpa
Ranjanie Dharmaratne
Wijesinghe,
"Siri Niwasa",
Parakaduwa.

2A. Manori Samarakoon,
No.8, Pothgul Vihara Mawatha,
Muwagama, Ratnapura.

3. Weerasinghe Arachchillage
Pushpa Ranjanie Dharmaratne
Wijesinghe,
"Sisila Niwasa", Parakaduwa.

4. Weerasinghe Arachchillage
Sujatha Nandanie Weerasinghe,
Pathberiya, Parakaduwa.

5. Kuruwita Gamalathge Priyanka
Gamlath,
Thalavitiya,
Parakaduwa.
Defendant-Respondents

AND BETWEEN

4. Weerasinghe Arachchillage
Sujatha Nandanie Weerasinghe,
Pathberiya, Parakaduwa.
4th Defendant-Respondent-
Appellant

Vs.

Liyana Arachchige Sujatha
Hatnapitiya Wijesundara,
"Sujeewa", Watappitiya,
Parakaduwa.
Plaintiff-Appellant-Respondent

1A. Wijesinghe Arachchillage Pushpa Ranjanie Dharmaratne Wijesinghe,
"Siri Niwasa",
Parakaduwa.

2A. Manori Samarakoon,
No.8, Pothgul Vihara Mawatha,
Muwagama,
Ratnapura.

3. Weerasinghe Arachchillage Pushpa Ranjanie Dharmaratne Wijesinghe,
"Sisila Niwasa",
Parakaduwa.

5. Kuruwita Gamalathge Priyanka Gamlath,
Thalavitiya,
Parakaduwa.

1st to 3rd and 5th Defendant-Respondent-Respondents

AND NOW BETWEEN

4. Weerasinghe Arachchillage Sujatha Nandanie Weerasinghe,
Pathberiya, Parakaduwa.

4th Defendant-Respondent-Appellant-Appellant

Vs.

Liyana Arachchige Sujatha
Hatnapitiya Wijesundara,
"Sujeewa", Watappitiya,
Parakaduwa.
Plaintiff-Appellant-Respondent-Respondent

1A. Wijesinghe Arachchillage Pushpa Ranjanie Dharmaratne Wijesinghe,
"Siri Niwasa", Parakaduwa.

2A. Manori Samarakoon,
No.8, Pothgul Vihara Mawatha,
Muwagama, Ratnapura.

3. Weerasinghe Arachchillage Pushpa Ranjanie Dharmaratne Wijesinghe,
"Sisila Niwasa", Parakaduwa.

5. Kuruwita Gamalathge Priyanka Gamlath,
Thalavitiya, Parakaduwa.
1st to 3rd and 5th Defendant-Respondent-Respondent-Respondents

Before: P. Padman Surasena, J.
Achala Wengappuli, J.
Mahinda Samayawardhena, J.

Counsel: Thishya Weragoda with Sewwandi Marambe, Sanjaya Marambe and Prathap Welikumbura for the 4th Defendant-Respondent-Appellant-Appellant.

Indika Jayaweera for the Plaintiff-Appellant-Respondent-Respondent.

Priyantha Alagiyawanna with Isuru Weerasooriya for the 5th Defendant-Respondent-Respondent-Respondent.

Argued on : 07.07.2021

Further written submissions:

by the 4th Defendant-Respondent-Appellant-Appellant on 27.01.2021.

by the 5th Defendant-Respondent-Respondent-Respondent on 02.02.2021.

Decided on: 15.10.2021

Mahinda Samayawardhena, J.

The plaintiff filed this action seeking to partition the land described in the schedule to the plaint between the plaintiff and the 1st defendant in equal shares. After trial, the District Judge dismissed the action. On appeal, the High Court of Civil Appeal set aside the Judgment of the District Court and directed the District Court to enter the Interlocutory Decree as prayed for by the plaintiff (½ share of the land to the plaintiff and ½ share to the 1st defendant).

The 1st plaintiff in her statement of claim *inter alia* stated that she transferred her undivided ½ share to her two daughters (the 3rd and 4th defendants) by deed No. 8474. This was reiterated in the statement of claim of the 4th defendant. The deed was produced at the trial marked 4V1 through the evidence of the plaintiff.

Unfortunately, the existence of this deed escaped the attention of the High Court of Civil Appeal when it delivered the Judgment dated 29.06.2016.

Thereafter the 4th defendant filed a revision application in the High Court of Civil Appeal seeking to rectify this error. By Judgment dated 16.12.2019, the High Court of Civil Appeal dismissed this application on the basis that it is settled law that the rights of the parties shall be determined at the institution of the action and, as this deed had been executed after the institution of the partition action, the Court could not give effect to it.

The 4th defendant is before this Court against this Judgment of the High Court of Civil Appeal. This Court granted leave to appeal on the question whether the High Court of Civil Appeal erred in law when it dismissed the application of the 4th defendant on the basis that the rights of the parties in a partition action shall be determined at the institution of the action.

The High Court of Civil Appeal has clearly misdirected itself in law on this point. A partition action cannot be equated to an ordinary civil action.

Section 5 of the Civil Procedure Code defines "*action*" as "*a proceeding for the prevention or redress of a wrong*" and "*cause of action*" as "*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*". Partition actions are considered actions which fall not under section 5 of the Civil Procedure Code but under section 6 of the Civil Procedure Code which enacts "*Every application to a court for relief or remedy obtainable through the exercise of the court's power or authority, or otherwise to invite its interference, constitutes an action.*"

Every action is based on a cause of action, but partition actions are not based on a cause of action as defined in section 5 of the Civil Procedure Code. If at all there is a cause of action in a partition action, it is based on the inherent right of every co-owner to have a divided portion of the land in lieu of common ownership, or to have his proportionate share in the proceeds of the sale of the land in the event a sale is ordered instead of partition. *(Abeysundara v. Babuna (1925) 26 NLR 459, Marshal Perera v. Elizabeth Fernando (1956) 60 NLR 229, Kiribanda v. Weerappu Chettiar (1948) 50 NLR 490)*

I must also add that although on the face of the record there are plaintiffs and defendants in a partition action, all parties in a partition action play the dual role of plaintiff and defendant. This is made clear, *inter alia*, by sections 19, 25 and 70 of the Partition Law, No. 21 of 1977. Partition actions are *sui generis* and unique.

According to section 66 of the Partition Law, voluntary alienations are void if they have been effected "*after a partition*

action is duly registered as a lis pendens under the Registration of Documents Ordinance".

The registration of the *lis pendens* is a significant milestone in a partition action. It is after the registration of the *lis pendens* that the attorney-at-law for the plaintiff is required to file the section 12 declaration which ensures that all persons involved in transactions affecting the land to be partitioned up to the point of the registration of the *lis pendens* are made parties to the action. In terms of section 13, even summonses are issued to the defendants only after the *lis pendens* is registered.

The High Court of Civil Appeal admits that this deed was executed after the institution of the action but before the *lis pendens* was registered. Hence this is not an invalid deed in terms of the Partition Law. The deed 4V1 is not a disputed deed. Nor does any party object to the application of the 4th defendant.

I answer the question of law in the affirmative and set aside the Judgment of the High Court of Civil Appeal dated 16.12.2019 and direct the learned District Judge to amend the Interlocutory Decree giving effect to the deed 4V1. In the result, the plaintiff is entitled to ½ share and the 3rd and 4th defendants are each entitled to ¼ share in the corpus. No costs.

Judge of the Supreme Court

P. Padman Surasena, J.
I agree.

Judge of the Supreme Court

Achala Wengappuli, J.

I agree.

Judge of the Supreme Court

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

Naomi Leela Elizabeth Perera,

No.17, Mendis Mawatha,

Moratuwa.

PLAINTIFF

SC Appeal 87/2017

SC.HC.CA.LA NO. 345/2016

WP/HCCA/COL/No. 327/2008(F)

D.C.Colombo Case No.18887/L

-Vs-

J.W.C. Hemamali Botheju Vithanage,

No.31, Kotuwegoda,

Rajagiriya.

DEFENDANT

AND

J.W.C. Hemamali Botheju Vithanage,

No.31, Kotuwegoda,

Rajagiriya.

DEFENDANT-APPELLANT

-Vs-

Naomi Leela Elizabeth Perera,

No.17, Mendis Mawatha,

Moratuwa.

PLAINTIFF-RESPONDENT

AND NOW

Naomi Leela Elizabeth Perera,

No.17, Mendis Mawatha,

Moratuwa.

PLAINTIFF-RESPONDENT-

PETITIONER-APPELLANT

-Vs-

J.W.C. Hemamali Botheju Vithanage,

No.31, Kotuwegoda,

Rajagiriya.

Presently of No. 95/39,

Donald Obeysekera Mawatha,

Rajagiriya Road, Rajagitiya.

DEFENDANT-APPELLANT-

RESPONDENT-RESPONDENT

Before: Sisira. J. de Abrew J
Kumudini Wickramasinghe J &
Janak de Silva J

Counsel: Palitha Kumarasinghe President's Counsel

With Asanka Ranasinghe for the Plaintiff-Respondent-

Petitioner-Appellant

Dr. Jayatissa de Costa President's Counsel with Wijerathne Hewage

for the Defendant-Appellant-Respondent-Respondent

Argued on : 15.2.2021

Decided on: 25.3.2021

Sisira. J. de Abrew J

The Plaintiff-Respondent-Petitioner-Appellant (hereinafter referred to as the Plaintiff- Appellant) filed case Number 18887/L in the District Court of Colombo against the Defendant-Appellant-Respondent-Respondent (hereinafter referred to as the Defendant-Respondent) seeking, inter alia, a declaration that he (the Plaintiff-Appellant) is the owner of the property described in the schedule to the plaint (hereinafter referred to as the property in question) and ejectment of the Defendant-Respondent and his agents from the said property and to keep the Plaintiff-Appellant in the vacant possession of the said property.

After trial the learned District Judge by his judgment dated 5.12.2008 granted relief claimed by the Plaintiff-Appellant in his plaint. Being aggrieved by the said judgment of the learned District Judge, the Defendant-Respondent appealed to the Civil Appellate High Court. The learned Judges of the Civil Appellate High Court by their judgment dated 6.6.2016, set aside the judgment of the learned District Judge dismissing the action of the Plaintiff-Appellant and declaring that the Defendant-Respondent is the owner of the property in question. Being aggrieved by the said judgment of the Civil Appellate High Court, the Plaintiff-Appellant has appealed to this court. This court by its order dated 2.5.2017, granted leave to appeal on questions of law set out in paragraph 18 of the Petition of Appeal dated 14.7.2016 which are set out below.

1. Did the Civil Appellate High Court err in law ignoring the effect of such Admission in holding that the Respondent has meant to be admitted was only the fact of execution of the Deed of Gift No.1161 dated 18th May 1990 by recording Admission No.1 when there is no such claim by the Respondent in evidence or any other pleading?

2. Did the Civil Appellate High Court err in holding that J.W.T.M.P. Vithanage nee Botheju (the mother of the Respondent) has acquired prescriptive right to the land by commencing the adverse possession from September 1977, in the circumstances of this case?

3. Did the Civil Appellate High Court err in entering a judgment in favour of the Respondent and allowing her appeal when there is no issue on prescription, when the Answer of the Respondent is on the basis that the

prescriptive possession commenced 30 years prior to the institution of this action and when there is no cogent evidence of prescriptive title to defeat the title of the Petitioner who became the owner by a Final Partition Decree?

4. Did the Civil Appellate High Court err in law holding that J.W.T.M.P. Vithanage nee Botheju (the mother of the Respondent) had a valid title to convey the Respondent by Deed of Gift No.1161 dated 18th May 1990 attested by N. Chelliah, Notary Public marked "V4"?

Since the Plaintiff-Appellant sought a declaration of title to the property in question, the burden of proof is on him to prove that he is the owner of the property. This view is supported by judicial decision in the case of D.A.Wanigaratne Vs Juwanis Appuhamy 65 NLR 167 wherein this court held that in action rei vindication the plaintiff must prove and establish his title.

In the case of Dharmadasa Vs Jayasena [1997] 3 SLR 327 this court at page 330 held that in a rei vindicatio action the burden is clearly on the plaintiff to establish the title pleaded and relied on by him.

In the case of Pathiran Vs Jayasundera 58 NLR 169 wherein His Lordship Gratiaen J at page 172, held that 'in rei vindicatio action proper, the owner of immovable property is entitled, on proof of his title, to a decree in his favour for the recovery of the property and for the ejectment of the person in wrongful occupation.'

In Peiris Vs Savunahamy 54 NLR 207 it was held that where in an action for declaration of title to land, the defendant is in possession of the land in dispute the burden is on the plaintiff to prove that he has dominium.

In the case of De Silva Vs Goonetileke 32 NLR 217 Macldonell CJ at page 219 held that "there is abundant authority that a party claiming a declaration of title must have title himself."

In the case of Jamaldeen Abdul Lathiff Vs Abdul Majeed Mohamad [2010] 2 SLR 333 this court held that to succeed in an action rei vindicatio, the owner must prove on a balance of probabilities, not only his or her ownership in the property, but also that the property exists and is clearly identifiable.

Considering the above legal literature, I hold that in a rei vindicatio action the plaintiff must establish that he is the owner of the property.

I will now consider whether the Plaintiff-Appellant has proved his title to the property in question. In DC Colombo case No.11215/P which was a partition case, the 20th Defendant Neemi Leela Elizabath Perera who is the Plaintiff-Appellant in this case was allocated Lot No 12 in Plan No.1524 A dated 20.11.1970 made by A.R.Dias Abeygunawardena Licensed Surveyor which is the Final Partition Plan in DC Colombo partition case No 11215/P. This is established by Final Decree in DC Colombo case No.11215/P marked as P23 in the trial in this case. This lot No 12 is the property described in the plaint. Therefore, the Plaintiff-Appellant has proved that she is the owner of the property in question. In an action for rei vindicatio, once the plaintiff established that he is the owner of the property in question, the burden shifts to the defendant to prove that his possession of the land is legal or he possesses the land on a legal basis. This view is supported by the judicial decision of the Privy Council in the case of Siyaneris Vs Jayasinghege Udenis Silva 52 NLR 289 wherein the Privy Council held that in an action for declaration of tile to property, where the legal title is in the Plaintiff but the property is in the possession of the defendant, the burden of proof is on the Defendant.

It has to be noted here that the mother of the Defendant-Respondent Jayawardena Welathanthrige Thelma Manel Phylis Vithanage was the 18th defendant in the said partition case No.11215/P and no share was allocated to her in the partition case. This is clear when the Final Decree in DC Colombo case No.11215/P marked as P23 is examined. The date of the decree of the said partition case is 14.9.1977. The Defendant-Respondent in her answer [paragraph 8(a)] filed in the District Court takes up the position that her mother was in possession of the property in question for a period of thirty years prior to this action being filed. The action in this case was filed on 12.5.2000. If the paragraph 8(a) of the answer of the Defendant-Respondent is true, then her mother had been in possession of the property in question from 1970 onwards. The date of the decree of the said partition case is 14.9.1977. But the mother of the Defendant-Respondent was allocated no share in the partition case. This establishes that prescription claimed by the mother of the Defendant-Respondent had not been proved and is a false claim. The Defendant-Respondent in her answer claims prescription on the basis of her mother's claim for prescription. Since the Defendant-Respondent's mother's claim for prescription had not been proved and is a false claim, her (Defendant-Respondent) claim for prescription has not been established. For the above reasons, I hold that the Defendant-Respondent has not established prescription to the property in question. The learned Judges of the Civil Appellate High Court have concluded that the mother of the Defendant-Respondent had acquired title to the property in question by prescription. I have earlier pointed out that the claim of the Defendant-Respondent for prescription on the basis of her mother's claim for prescription had not been established. For the above reasons, I hold that the conclusion of the learned Judgers of the Civil Appellate High Court is wrong. On this ground alone the judgment of the Civil Appellate High Court should be set aside.

The mother of the Defendant-Respondent, by Deed No.1161 dated 18.5.1990 marked V4 attested by Nagarajah Chelliah had transferred several allotments of land inclusive of Lot 11 and 12 of Plan No. 1524A dated 20.11.1970 made by A.R.Dias Abeygunawardena Licensed Surveyor which is the Final Partition Plan in DC Colombo partition case No 11215/P to the Defendant-Respondent. The learned Judges of the Civil Appellate High Court in their judgment dated 6.6.2016 concluded that the mother of the Defendant-Respondent had a valid title (on the basis of prescription) to convey the property to the Defendant-Respondent. I have earlier pointed out that the claim of the Defendant-Respondent for prescription on the basis of her mother's claim for prescription had not been established. Further I have pointed out earlier that the Defendant-Respondent's mother's claim for prescription had not been proved and is a false claim. The learned Judges of the Civil Appellate High Court by the said judgment declared that the Defendant-Respondent was the owner of the property in question. But the learned Judges of the Civil Appellate High Court have failed to appreciate the fact that mother of the Defendant-Respondent was not given any share in the said partition case where she was the 18th Defendant although she (the mother of the Defendant-Respondent) claimed prescription to the property in question.

When I consider all the above matters, I hold that the mother of the Defendant-Respondent did not have any title to the property in question to convey the property in question to her daughter who is the Defendant-Respondent.

There was no issue raised in the present case with regard to the prescription. But the learned Judges of the Civil Appellate High Court decided the case in favour of the Defendant-Respondent on the basis of prescription. Can a court of law decide to give title of property in suit on the basis of prescription without an issue being

raised on prescription? At this juncture I would like to consider the following judicial decisions. In the case of Haniffa Vs Nallamma [1998] 1 SLR 73 at page 77 His Lordship GPS de Silva CJ held as follows.

"What is relevant for present purposes and what needs to be stressed is that once issues are framed, the case which the court has to hear and determine become crystallized in the issues. It is the duty of the court "to record the issues on which the right decision of the case appears to the court to depend" (section 146 (2) of the Civil Procedure Code). Since the case is not tried on the pleadings, once issues are raised and accepted by the court the pleadings recede to the background. The Court of Appeal was in error in harking back to the pleadings and focusing on the "validity" and the "legality" of the pleadings."

If a party in action fails to raise an issue on prescription at the trial, his failure shows that he does not depend on prescription. In such a situation it is not correct for the court to give title of the property in suit on the basis of prescription. It has to be noted here that the Defendant-Respondent did not raise an issue in this case on prescription. But The learned Judges of the Civil Appellate High Court have concluded that the mother of the Defendant-Respondent had acquired title to the property in question by prescription. I have earlier pointed out that the claim of the Defendant-Respondent for prescription had not been established. In my view, court cannot decide to give title of the property in suit on the basis of prescription without an issue on prescription.

The Defendant-Respondent at page 286 of the brief admitted in evidence that she even did not know the boundaries of the land in question. When it was suggested to the Defendant-Respondent that she has no any title to the land in question, she said that she did not know about it (page 287 of the brief). The above evidence

shows that her claim for prescription to the property in question could not be accepted.

For the aforementioned reasons, I hold that the learned Judges of the Civil Appellate High Court were wrong when they decided the case in favour the Defendant-Respondent. I hold that the learned District Judge was correct when he decided the case in favour of the Plaintiff-Appellant.

For the above reasons, I set aside the judgment of the Civil Appellate High Court dated 6.6.2016 and affirm the judgment of the learned District Judge dated 5.12.2008.

In view of the conclusion reached above, I answer the 2nd,3rd and 4th questions of law in the affirmative. The 1st question of law does not arise for consideration.

The Plaintiff-Appellant is entitled to costs in all three courts.

Appeal allowed.

Judge of the Supreme Court.

Kumudini Wickramasinghe J

I agree.

Judge of the Supreme Court.

Janak de Silva J

I agree.

Judge of the Supreme Court.

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

In the matter of an application for Leave to Appeal under and in terms of Article 128 of the Constitution read with Section 5(c) of the High Court of the Provinces (Special Provisions) Act as amended by the High Court of the Provinces (Special Provisions) (Amendment) Act No.54 of 2006.

SC. Appeal No.88/2011
SC.HC.CALA NO.424/10
HCCA/ WP/COL/LA Application No.67/2009
D.C. Colombo Case No.19606/L

Palani Muruganandan
No.538/5, Aluthmawatha Road,
Colombo 15.
Plaintiff

Vs.

Inconvelt Ifisharans Lafabar
No.560/1, Aluthmawatha Road,
Colombo 15.
(Presently Deceased)

Liyana Mohottige Liyani Bernadeck Kabral
Presently foreign by her lawful Attorney,
Mervyn Joseph de Silva,
Gongithota Road,

Enderamulla and presently of,
560/1, Aluthmawatha Road,
Colombo 15.
Substituted Defendant

AND BETWEEN

Palani Muruganandan
No.538/5, Aluthmawatha Road,
Colombo 15.
Plaintiff-Respondent-Petitioner

Vs.

Inconvelt Ifisharans Lafabar
No.560/1, Aluthmawatha Road,
Colombo 15.
(Presently Deceased)

Liyana Mohottige Liyani Bernadeck Kabral,
Presently foreign by her lawful Attorney,
Mervyn Joseph de Silva,
Gongithota Road,
Enderamulla, and presently of,
560/1, Aluthmawatha Road,
Colombo 15.
Substituted Defendant-Petitioner-Respondent

AND NOW BETWEEN

Inconvelt Ifisharans Lafabar
No.560/1, Aluthmawatha Road,
Colombo 15.
(Presently Deceased)

Liyana Mohottige Liyani Bernadeck Kabral,
presently foreign by her lawful Attorney,
Mervyn Joseph de Silva,
Gongithota Road,
Enderamulla, and presently of,
560/1, Aluthmawatha Road,
Colombo 15.
Substituted Defendant-Petitioner-Respondent Petitioner

Vs.

Palani Muruganandan
No.538/5, Aluthmawatha Road,
Colombo 15.
Plaintiff-Respondent-Petitioner-Respondent

BEFORE : **SISIRA J. DE ABREW, J.**
MURDU N.B. FERNANDO, PC, J. &
S. THURAIRAJA, PC, J.

COUNSEL : J.M. Wijebandara and Ms.Y.S. Shohani & Kalpani Kalpani Pathirage for the Substituted Defendant-Petitioner-Respondent-Petitioner.

V. Thevasenathipathy for the Plaintiff-Respondent-Petitioner-Respondent.

ARGUED &

DECIDED ON: 13.02.2021.

SISIRA J. DE ABREW, J.

Heard both Counsel in support of their respective cases. This is an appeal against the judgment of the Civil Appellate High Court dated 15.11.2010. This Court by its order dated 29.06.2011 granted Leave to Appeal on questions of law set out in paragraph 21 (i), (ii) and (iii) of the Petition of Appeal dated 21.12.2010 which are set out below,

1. Has not the learned Additional District Judge of Colombo erred in law and fact in setting aside that the consent decree which had been entered without precision of the corpus?

2. Have the honorable Judges of the High Court of Civil Appeal erred in law and fact in affirming the consent decree which had been entered without a subject matter (the roadway) being ascertained in terms of law?

3. Have the honorable Judges of the High Court of Civil Appeal misconceived in law and fact in concluding that the roadway is depicted in Plan bearing No.829?

Facts of this case may be briefly summarized as follows;

The Plaintiff-Respondent-Appellant-Respondent (hereinafter referred to as the Plaintiff-Respondent) filed a case in the District Court of Colombo stating that his roadway has been blocked by the Defendant-Petitioner-Respondent-Appellant (hereinafter referred to as the Defendant-Appellant). The parties

entered into a settlement. The learned District Judge entered the consent decree on the terms of settlement suggested by the parties. The consent decree of the learned District Judge contained the following conditions;

1ඈ සංශෝධිත පැමිණිල්ලේ ආයාචනයේ "ආ" ඡේදයේ ඉල්ලා ඇති පරිදි පැමිණිලිකරුගේ වාසියට නඩුව තීන්දු කිරීම සම්බන්ධයෙන් විත්තිකරුවන් එකගත්වය පලකර සිටිඈ

2ඈ තවදුණී විත්තිකරුවන් විසින් සඳහන් කර සිටින එකි ප්‍රවේශ මාර්ගයට බාධා අවහිර වන ආකාරයට දැනට කිසිදු කටයුත්තක් කර නොමැති බවත්ණී ඉදිරියටත් බාධා අවහිර කිරීම් නොකරන බවටත් විත්ති කරුවන් එකගතාවය පල කරයිඈ

3ඈ වෙනත් දිමනා හෝ නඩු ගාස්තු නොමැති බවටත් පාර්ශවකරුවන් එකග වේ.

This consent decree was entered on 17.08.2006. After the consent decree was entered the Defendant-Appellant filed papers in the District Court to vacate the said consent decree. Then the learned District Judge by order dated 29.06.2009 vacated the consent decree.

Being aggrieved by the said order of the learned District Judge dated 29.06.2009 the Plaintiff-Respondent appealed to the Civil Appellate High Court. The Civil Appellate High Court by its judgment dated 15.11.2010 set aside the said order of the learned District Judge dated 29.06.2009. Being aggrieved by the said judgment of the Civil Appellate High Court the Defendant-Appellant has appealed to this Court.

The main argument of the learned Counsel for the Defendant-Appellant is that there is no corpus in this case. Therefore, he contends that the consent decree was a mistake. I now advert to this contention. Was there a mistake in the consent decree? Learned Counsel contended that there is no corpus in this case. But the Defendant-Appellant in paragraph 4 of his amended answer dated 14.02.2006 has admitted that there is an access road. Thus, the contention of learned Counsel for the Defendant-Appellant that there is no corpus fails in limine. Further, the Defendant-Appellant in the consent decree has admitted that there is an access road. Thus, even on the basis of condition

No.2 of the consent decree, the contention of learned Counsel fails. Therefore, the contention that there was a mistake in the consent decree is hereby rejected.

In the case of Gunasekara Vs. Leelawathie Srikantha Law Report Volume 5 page 86 Court of Appeal held as follows;

> "*A compromise decree is but a contract with the command of a judge superseded to it. It can therefore be set aside on any of the grounds, such as fraud, mistake, misrepresentation etc., on which a contract may be set aside."*

The main argument of the learned Counsel for the Defendant-Appellant is that there was a mistake in the consent decree. I have rejected the said contention. Thus, applying the principle laid down in the case of Gunasekara Vs. Leelawathie (supra), I hold that the learned District Judge could not have set aside the consent decree in this case. We therefore hold that the learned Judge was in error when he set aside the consent decree. For the above reasons, we answer the 1st question of law as follows,

"The learned District Judge has erred in law".

We answer the 2nd question of law in the negative. The 3rd question of law does not arise for consideration. For the above reasons, we hold that the learned Judges of the Civil Appellate High Court were correct when they set aside the learned District Judge's order dated 29.06.2009.

For the aforementioned reasons, we affirm the judgment of the learned Judges of the Civil Appellate High Court and dismiss this appeal with costs fixed at

Rs100,000/-. In addition to this cost the Plaintiff-Respondent is entitled to recover the cost ordered by the Civil Appellate High Court.

Appeal dismissed.

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

Mks

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

SC. Appeal No. 92/2017

SC (SPL) LA No. 121/2015

High Court Colombo Case
No: HCMCA 222/2013

Magistrate's Court Colombo Fort
Case No: B 148/09

In the matter of an application for Special Leave to Appeal in terms of Section 09 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990.

Sri Lanka Insurance Corporation,
No. 21, "Rakshana Mandiraya",
Vauxhall Street,
Colombo 02.
Virtual-Complainant-Claimant-Appellant-Appellant

Vs.

Darshana Rajitha Hallabagamage,
70B, Kosnathota,
Godakawela.
1st Suspect-Claimant-Respondent-Respondent

Officer-in-Charge,
Crimes Division,
Police Station,
Slave Island.
Complainant-Respondent-Respondent

Hon. Attorney General,
Attorney General's Dept,
Colombo 12.
Respondent-Respondent

BEFORE : **SISIRA J. DE ABREW, J.**
K.K. WICKRAMASINGHE, J.
JANAK DE SILVA, J.

COUNSEL : Anil Silva, PC. with Leon Fernando and Isuru Jayawardena for the Virtual -Complainant-Claimant-Appellant-Appellant.

Asoka Weerasooriya with Arumugam Dhanushan for the 1st Suspect-Claimant-Respondent-Respondent.

Ms. Ganga Wakishta Arachchi, SSC. For the Hon. Attorney General.

ARGUED &
DECIDED ON : 12.02.2021

SISIRA J. DE ABREW, J.

Heard Counsel for both parties in support of their respective case. This is an appeal filed against the judgment of the learned High Court Judge of Colombo dated 04.06.2015 wherein he has dismissed the appeal and the revision application filed by the Virtual-Complainant-Claimant-Appellant-Appellant

(hereinafter referred to as the Virtual-Complainant-Appellant). This Court on 08.05.2017 granted Leave to Appeal on the questions of law set out in paragraph 25(d), (e), (f) and (g) of the Petition of Appeal dated 14.07.2015 which are set out below;

1. Did the learned Magistrate as well as the Learned High Court Judge fail to consider that in the Statement made by the Claimant-Respondent to the police he categorically stated that the recovered items belonged to the Petitioner Corporation and it was stolen from the Petitioner Corporation?

2. Did the Learned High Court Judge misdirect himself in law in not considering at all the voluntary statement made by the Claimant-Respondent to the Police and its significance to the inquiry pertaining in disposal of the stolen jewellery?

3. Did the Learned High Court Judge and the Learned Magistrate misdirect themselves in law when they failed to appreciate that in view of the matters set out in the statement made by the Claimant-Respondent it is clear that there was a criminal element involved in his possession of the goods and therefore has misinterpreted the authorities referred to in the order of the Learned Magistrate?

4. Did the Learned High Court Judge misdirect himself in law when he failed to consider the facts that the affidavits also disclose that the Claimant-Respondent's possession had a criminal element?

Facts of this case may be briefly summarized as follows;

The 1st Suspect-Claimant-Respondent-Respondent (hereinafter referred to as the Suspect-Claimant-Respondent) was arrested by Police in Galle. When he was arrested, Police found melted gold in his possession. He was produced before the Magistrate, Galle on 19.01.2009. Later, Galle Police informed the matter to the Slave Island Police. Slave Island Police filed a case bearing No. B 148/09 in the Magistrate's Court of Fort. The Suspect-Claimant-Respondent was cited as an Accused. Later, the learned Magistrate, Colombo-Fort discharged the Accused on the advice of the Attorney General. It has to be noted here that after he was discharged by the Magistrate on the advice of the Attorney General, he is no longer an Accused in the case. Thereafter, an inquiry was held under Section 431 of the Criminal Procedure Code to decide the person entitled to possession of the production in the case. Parties agreed to file affidavit at the inquiry. It has to be noted here that no person gave evidence in the witness box. After considering the affidavits filed by the parties, the learned Magistrate, Colombo-Fort by order dated 19.08.2013 decided to hand over the production in the case which is melted gold to the Suspect-Claimant-Respondent.

Being aggrieved by the said order of the learned Magistrate, Sri Lanka Insurance Corporation (the Virtual-Complainant-Appellant) filed an appeal and a revision application in the High Court and the learned High Court Judge by his order dated 04.06.2015 dismissed both the appeal and the revision application. Being aggrieved by the said order of the learned High Court Judge, the Virtual-Complainant-Appellant has appealed to this Court. This Court has granted Leave to Appeal. I have earlier set out the questions of law on which Leave to Appeal was granted. At the inquiry, before the Magistrate the Suspect-Claimant-Respondent filed an affidavit. The said Suspect-Claimant-Respondent filed a statement made by him to Galle Police along with his affidavit marked 'P9'. It

has to be noted here that the Suspect-Claimant-Respondent, in the said statement marked 'P9', admitted that he had stolen jewellery from the possession of the Sri Lanka Insurance Corporation (the Virtual-Complainant-Appellant). The Suspect-Claimant-Respondent was an Audit Trainee of the Sri Lanka Insurance Corporation. The question that should be considered in this case is whether the said statement marked 'P9' made by the Suspect-Claimant-Respondent to Galle Police can be used as evidence in this inquiry. In considering this question, it has to be noted here that at the time of the inquiry conducted by the learned Magistrate, the Suspect-Claimant-Respondent had been discharged from the criminal case by the learned Magistrate on the advice of the Attorney General. Therefore, he is no longer a person accused of any offence. In this connection Section 25 of the Evidence Ordinance should be considered, which states as follows;

> "No confession made to a Police Officer shall be proved as against a person accused of any offence"

When the person who made the confession to a Police Officer has been discharged from the criminal case, he is not accused of any offence in the inquiry where the court is called upon to decide to whom the production should be handed over. Since the Suspect-Claimant-Respondent had been discharged from the criminal case at the time of the said inquiry, Section 25 of the Evidence Ordinance does not operate as a bar to use the confession of the Suspect-Claimant-Respondent at the inquiry. At this juncture, it is important to consider the judgment of Justice Wijeyawardene in the case of **Joseph Vs. Attorney General** ***47 NLR page 446*** wherein Court held that; "Where an Accused is acquitted on the ground that the evidence to prove the alleged offence is insufficient the Court can, nevertheless, by virtue of section 413(1) of the Criminal

Procedure Code, make an order for disposal of the property produced before it by directing its delivery to a person entitled to its possession if the Court considers that an offence has been committed in respect of that property. The opinion of Court as to the ownership of the property may be based on a confession made by the accused; section 24 of the Evidence Ordinance which makes confessions "irrelevant in a criminal proceeding" does not prevent a court from acting on them in an application under section 413(1) of the Criminal Procedure Code. His Lordship Justice Wijeyawardene at page 448 and 449 made the following observation.

> "It is true that this Court has held these statements to be inadmissible in the criminal case against the accused. But section 24 of the Evidence Ordinance which makes those statements "irrelevant in a criminal proceeding" does not prevent a Court from acting on them in an application under section 413(1) of the Criminal Procedure Code which is not a "criminal matter".

Considering all the above matters, I hold that a confession made by a suspect to a Police Officer can be used as evidence in an inquiry where the Court is called upon to decide to whom the production in the case should be handed over if the Suspect has been discharged from the criminal case. In the present case when the inquiry was being conducted by the learned Magistrate, the Suspect-Claimant-Respondent had been discharged from the criminal case. Considering all these matters, I hold that his confession made to the Police Officer can be used in the inquiry where the Court is called upon to decide to whom the production should be handed over.

Next question that must be considered is whether the property seized by a Police Officer should be handed over to the person from whose custody it was taken or the Court has the power to hand it over to any other person. In early judicial decisions it had been settled that the property seized by a Police Officer should be handed over to the person from whose custody it was taken. In **Punchinona Vs. Hinniappuhamy** ***60 NLR page 518*** it has been held that where the seizure by a Police Officer or property alleged or suspected to have been stolen is reported to a Magistrate under Section 419 of the the Criminal Procedure Code, the Magistrate, if he does not consider official custody to be necessary, has no alternative but to order the property to be delivered back to the person from whose possession it was seized and that the Magistrate has no power to order the property to be given to any other person on the ground that the latter is the true owner. But the judicial decision in the above case was not followed in **Balagalla Vs Somarathne** ***70 NLR page 383*** wherein it was held that where a person after discovering the stolen property has been sold to him, surrenders the property to the Police, the Magistrate has power under Section 419(1) of the Criminal Procedure Code to order the property to be handed over to the true owner and not to the person from whom it was taken by the Police.

In **Silva and Others Vs. O.I.C. Police Station, Thambuththegama** ***[1991] 2 SLR 83*** His Lordship Justice S N Silva considering Section 431 of the Criminal Procedure Code held that there are limitations to the principle that property must be delivered to the person from whose possession it was seized, since it may result in the property being delivered to a person who may have obtained possession through criminal means. In such an event, Magistrate has to consider the question of title. In the said case His Lordship Justice S N Silva at page 91 made the following observation.

> "However, there are obvious limitations to its general application, because it may result in the property being delivered to a person having no legal right to possession but obtained possession through criminal means. Hence in the later cases starting from the Judgment of Sri Skandarajah, J in *Sugathapala v. Thambirajah, 67* N.L.R. 91 certain modifications of this principle were evolved. This trend was followed by Sirimanne, J. in the case of *Balagalla v. Somaratne, 70 NLR 382* and by *Samarawickreme, J* in the case of *Thirunayagam v.Inspector of Police Jaffna 74 NLR 161, in* the case of *Freudenberg Industries Ltd v. Dias Mechanical Engineering Ltd.*, C.A. Application No. 69/79, CA Appeal No. 102/82, Court of Appeal Minutes of 14.7.1983. Seneviratne, J. examined the two lines of authority and observed that the principle that property be delivered to the person who had possession of it at the time of seizure will not apply if there is an "unlawful" or "criminal" element in such possession."

In this connection Section 431(1) of the Criminal Procedure Code must be considered, which reads as follows:

> " The seizure by any police officer of property taken under section 29 or alleged or suspected to have been stolen or found under circumstances which create suspicion of the commission of any offence shall be immediately reported to a Magistrate who shall forthwith make such order as he thinks fit respecting the delivery of such property to the person entitled to the possession thereof, or if such person cannot be ascertained respecting the custody and production of such property."

After considering the above legal literature, I hold that the Magistrate, under Section 431(1) of the Criminal Procedure Code, has the power to make an order to hand over the property seized by a Police Officer to a person other than the person from whose custody it was taken. I further hold that on the material placed before the Magistrate, if the Magistrate can decide that the person claiming the property has got it by way of stealing the property, the Magistrate has no authority to give it to the said person.

In this case, the statement made by the Suspect-Claimant-Respondent to the Police marked 'P9' must be considered. In the said statement, the Suspect-Claimant-Respondent has admitted that he had stolen jewellery (the production in the case) from the cupboards of the Sri Lanka Insurance Corporation (the Virtual-Complainant-Appellant). Therefore, on the strength of 'P9' itself, the Suspect-Claimant-Respondent is not entitled to claim the production in the case and the Magistrate could not have handed over the production in the case to the Suspect-Claimant-Respondent especially in view of the contents in document marked 'P9'. If there is material before Court that the person claiming the production has obtained the production by dishonest way, can the Court hand over such production to the said person? In this connection, I would like to consider the judgment of His Lordship Justice Sansoni in **Kanapathipillai Vs. Meerasaibu** in **58 NLR page 41,** His Lordship Justice Sansoni in the said case (supra) at page 43 has made the following observation;

> "There is well established rule that the law will presume in favour of honesty and against fraud"

In this case, it is clear from the statement made by the Suspect-Claimant-Respondent marked 'P9', that he has stolen the jewellery from the cupboards of

the Sri Lanka Insurance Corporation (the Virtual-Complainant-Appellant). Therefore applying the principles laid down in **Kanapathipillai Vs Meerasaibu (supra),** I hold that that the learned Magistrate could not have come to the conclusion that the Suspect-Claimant-Respondent was entitled to receive the production (melted gold) and that the learned Magistrate was clearly wrong when he, by his order dated 19.08.2013, came to the above conclusion.

The learned High Court Judge was wrong when he affirmed the above order of the learned Magistrate.

Considering all the above matters, I set aside the judgment of the learned High Court Judge dated 04.06.2015 and the order of the learned Magistrate dated 19.08.2013. The Suspect-Claimant-Respondent has admitted that he had stolen the said property (melted gold) from the cupboards of the Sri Lanka Insurance Corporation. The Internal Auditor of the Virtual-Complainant-Appellant in his affidavit filed in the Magistrate's Court has stated that clients of State Banks and Private Banks have pawned jewellery to the said Banks; that the Sri Lanka Insurance Corporation (the Virtual-Complainant-Appellant) has issued insurance policies in respect of the said jewellery; and that said jewellery was kept in the cupboards of Sri Lanka Insurance Corporation.

For the above reason, I hold that the Sri Lanka Insurance Corporation (the Virtual-Complainant-Appellant) is entitled to receive the production in the case (melted gold). The learned Magistrate, Fort is directed to act in accordance with this judgment.

We appreciate the submissions made by Mr. Anil Silva, PC, Mr. Asoka Weerasooriya and Ms. Ganga Wakishta Arachchi, SSC.

In view of the conclusion reached above, I answer the 1st and 4th questions of law in the affirmative. 2nd and 3rd questions of law do not arise for consideration.

JUDGE OF THE SUPREME COURT

K.K. WICKRAMASINGHE, J.

I agree

JUDGE OF THE SUPREME COURT

JANAK DE SILVA, 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 in terms of section 754(2) of the Civil Procedure Code read with section 5(2) of the High Court of Provinces (Special Provisions) Act No. 10 of 1996

Trans Orbit Global Logistics (Pvt) Limited,
No. 260/5B, 1st Floor,
Dr. Danister De Silva Mawatha,
Colombo 09.

S.C. Appeal No. 92/2020 **Plaintiff**

S.C.H.C.L.A. No. 05/2020

HC/Civil/640/17 (MR)

Vs.

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

Defendant

AND NOW BETWEEN

Trans Orbit Global Logistics (Pvt) Limited,
No. 260/5B, 1st Floor,
Dr. Danister De Silva Mawatha,
Colombo 09.

Plaintiff-Appellant

Vs.

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

Defendant-Respondent

Before: S. Thurairaja, P.C., J.

A.L.Shiran Gooneratne, J.

Janak De Silva, J.

Counsel:

Sumedha Mahawanniarachchi with Indika Weerasinghe for the Plaintiff -Appellant

Jaliya Bodinagoda for the Defendant-Respondent

Written Submissions tendered on:

27.01.2021 and 29.07. 2021 by the Plaintiff -Appellant

28.09.2020 by the Defendant-Respondent

Argued on: 14.07.2021

Decided on: 13.12.2021

Janak De Silva, J.

The Plaintiff-Appellant (hereinafter referred to as "Appellant") instituted the above styled action in the Commercial High Court of the Western Province (Exercising Civil Jurisdiction) Holden in Colombo (hereinafter referred to as "Commercial High Court") against the Defendant-Respondent (hereinafter referred to as "Respondent") praying for damages in a sum of Rupees Twenty-Five Million (Rs. 25,000,000.00). The damages are claimed as a result of the alleged negligence of the Respondent.

After the framing of admissions and issues, the Respondent suggested that issue nos. 8(a) and 8(b) be determined as preliminary issues of law. Since the Appellant did not object to this application, the learned judge of the Commercial High Court decided to rule on the following issues as preliminary issues of law:

8 (අ) උත්තරයේ 1 වන ඡේදයේ සඳහන් කරුණු 1 ක් සහ/හෝ සමහරක් හේතු කොටගෙන මෙම නඩුව මෙම ගරු අධිකරණයේ පැවරීමට අධිකරණ බලයක් නොමැතිද?

(ආ) ඉහත විසඳිය යුතු ප්‍රශ්නයට විත්තිකරුගේ වාසියට පිළිතුරු ලැබේ නම් මෙම නඩුව නිෂ්ප්‍රභා සහ/හෝ ප්‍රතික්ෂේප කළ යුතුද?

The learned judge of the Commercial High Court held that the Court did not have jurisdiction to hear and determine the action as it is not an action to enforce any commercial transaction and that the cause of action is based on negligence and/or breach of duty of care and not on contract. Consequently, the action of the Appellant was dismissed.

Aggrieved by the dismissal of the action, the Appellant applied for permission to appeal. The Court has granted leave to appeal on the following question of law:

> "Has the learned High Court Judge misdirected himself by holding that the Commercial High Court does not have jurisdiction to hear the Petitioner's case?"

This appeal raises an important question of law concerning the jurisdiction of the Commercial High Court.

By virtue of Article 154P of the Constitution, a High Court was established for every Province in the country. Several constitutional provisions and other laws specify the jurisdiction conferred on this High Court.

The High Court of the Provinces (Special Provisions) Act No. 10 of 1996 (hereinafter referred to as the "Act") sought to expand its jurisdiction in certain civil actions and matters specified therein.

The long title of a statute is part of it and, as such, is considered an aid to its construction. In *Union of India v. Elphinstone Spinning and Waving Co Ltd & Ors* [AIR (2001) Supreme Court 724] the Supreme Court of India held that a long title along with the preamble is a good guide regarding the object, scope or purpose of the statute. However, the long title of the Act is hardly of assistance in identifying its object, scope or purpose. There is no preamble to the Act.

However, the following excerpt from the speech made by the Minister at the Second Reading of the Bill in Parliament provides a clear understanding of the object, scope and purpose of the Act:

> *"Mr. Speaker, the Bill that is now before the House relates to commercial litigation specifically. I do not think that there is any doubt that this is one of the impediments and constraints that has been identified with regard to investments and in our country. Sometimes there is a reluctance on the part of persons to invest in our country because of the awareness that when problems arise it takes such a long time to sort out these problems. There is no efficient machinery available for the rapid resolution of commercial disputes. This is of interest not only to foreign investors but to people who engage in entrepreneurial and commercial activity in our own country. One of the reasons for the exacerbation of this problem, Mr. Speaker, is a very wide jurisdiction of the District Courts. These commercial matters have to be adjudicated upon by the District Courts of our country and the District Courts are already burdened with a great variety of work involving money chums, contracts, frauds, testamentary jurisdiction, a whole variety of matters. So, commercial matters are just one among many items that they have to deal within the course of their day to day work. We think the time has come to make a departure from that practice and to bring into existence a separate forum which has special responsibility for the resolution of commercial disputes. Mr. Speaker, that is why we propose that this jurisdiction should henceforth be exercised by the High Court of the country."*
>
> [Parliamentary Debates (Hansard), Volume 104 – No. 10, 22nd March, 1996, 1174]

Hence the Commercial High Court was established to reduce the jurisdiction of the District Court and vest exclusive jurisdiction over commercial matters in the Commercial High Court with a view to provide speedy resolution to such disputes.

Section 2(1) of the said Act reads:

> "Every High Court established by Article 154P of the Constitution for a Province shall, with effect from such date as the Minister may, by Order published in the *Gazette* appoint, in respect of such High Court have exclusive jurisdiction and shall have cognizance of and full power to hear and determine, in the manner provided for by written law, all actions, applications and proceedings specified the First Schedule to this Act, if the party or parties defendant to such action resides or reside, or the cause a action has arisen, or the contract sought to be enforce was made, or in the case of applications or proceeding under the Companies Act, No 17 of 1982 the registered office of the Company is situated, within the Province which such High Court is established."

The jurisdiction so vested in the Commercial High Court has two components, namely:

(1) Subject Matter Jurisdiction

(2) Territorial Jurisdiction

The subject matter jurisdiction is set out in the First Schedule to the Act while the territorial jurisdiction is set out in section 2(1) of the Act. The resulting jurisdiction is rendered exclusively to the Commercial High Court.

The territorial jurisdiction depends upon where the party or parties defendant to such action resides or reside, or the cause of action has arisen, or the contract sought to be enforced was made, or in the case of applications or proceeding under the Companies Act, No. 17 of 1982 the registered office of the Company is situated.

The matter before the Court does not involve the territorial jurisdiction of the Commercial High Court. The only issue is its subject matter jurisdiction.

Therefore, the decision in this case revolves around the interpretation to be given to Item (1) of the first schedule to the Act which, as amended, reads as follows:

> "All actions where the cause of action has arisen out of commercial transactions (including causes of action relating to banking, the export of merchandise, services affreightment, insurance, mercantile agency, mercantile usage and the construction of any mercantile document) in which the debt, damage or demand is for a sum exceeding twenty million rupees or such other amount as may be fixed by the Minister from time to time, by Notification published in the Gazette, other than actions instituted under the Debt Recovery (Special Provisions) Act, No. 2 of 1990."

The fundamental requirement for the Commercial High Court to have jurisdiction is that *the cause of action* must have *arisen out of a commercial transaction*.

The learned counsel for the Respondent drew our attention to the decision of this Court in *D.A.D. Engineering (Pvt) Ltd. v. Subhasinghe* (S.C. Appeal 45/2015, S.C.M. 15.12.2017] where it was held that the jurisdiction assigned to the Commercial High Court is a special jurisdiction and therefore the provisions of the Act will have to be strictly adhered to when the Commercial High Court is exercising the jurisdiction conferred on it. I do not believe the Court intended that the provisions of the Act should be interpreted narrowly.

On the contrary, the Court has consistently held that the jurisdiction of the Commercial High Court must be interpreted broadly [*Cornel & Company Limited v. Mitsui and Company Limited and Others* [2000] 1 Sri.L.R. 57]. In *Seneviratne and Another v. State Bank of India* [S.C. (C.H.C.) Appeal 53/2006, S.C.M. 17.12.2014] the Court held that the term "commercial" should be interpreted in a broad sense having regard to the many activities which are an integral part of banking and commerce.

Accordingly, in my view, the words *cause of action has arisen out of commercial transactions* in Item (1) must be given a broad interpretation. It is further supported by the use of the word "All".

The genus of Item (1) is a *commercial transaction*. Item (1) sets out certain classes of cause of actions which by definition falls within it. It is not intended to be comprehensive, as the term used is "including". One such class of cause of action is *cause of action relating to banking*. When the cause of action *relates* to banking, by definition it becomes a cause of action arising out of commercial transactions.

The learned counsel for the Respondent submitted that the Commercial High Court is vested with, what I refer to as subject matter jurisdiction, only where the cause of action arises from a commercial transaction as set out in the Schedule to the Act i.e., cause of action which arises pertaining to a contract. He further contended that in a delictual action, the cause of action consists of three conditions, namely:

(1) The defendant owed a duty of care towards the plaintiff

(2) The defendant breached this duty of care negligently

(3) As a result, the plaintiff suffered damages

On this basis, he submitted that the action of the Respondent is not a commercial transaction but delictual.

When examining the pleadings before the Court, the following facts appear to be uncontested between the parties:

(1) Appellant maintained an account with the Respondent.

(2) From time-to-time money was transferred to and from this account.

(3) Somewhere in 2016, the Appellant instructed the Respondent to transfer a certain sum of money from this account to the account of Passion Shipping Company Limited maintained at Standard Chartered Bank, Hong Kong.

Admittedly the Appellant's cause of is delictual. Nonetheless the right question is whether the cause of action *relates* to banking and not whether the cause of action is delictual. In answering this question Court will have to look not to the mere form, but to the grounds of the plaint and to the media on which the plaintiff asks for judgment.

The Appellant claims that the instructions given as a customer to its bank, the Respondent, was negligently breached in the transfer of funds from its account to the account of Passion Shipping Company Limited maintained at Standard Chartered Bank, Hong Kong.

The expression *'banking'* embraces every transaction coming within the legitimate business of a banker [*Tennant vs. Union Bank of Canada* (1894 AC 31)]. In *Indian Bank vs. Acuity Stock Brokers (Pvt) Limited* [(2011) 2 Sri.L.R. 149 at 155-6] Suresh Chandra J. held:

> "*There is no clear-cut demarcation of the transactions that one has with a Bank being classified as Banking Transactions. It is usual to consider lodging money into a bank account, withdrawing money, adding interest to an account, direct debits, deducting bank charges, basically any sort of activity involving a change of money in an account is a banking transaction which are usually listed in a bank account statement."*

Clearly the transaction upon which the Appellant bases its cause of action is a banking transaction. The damages are claimed for breach of an alleged duty of care based on the banker-customer relationship. Hence the media upon which the Appellant has instituted this action is no doubt a banking transaction.

Applying the broader interpretation to Item (1), I hold that all causes of action relating to banking in which the debt, damage or demand is for a sum exceeding twenty million rupees or such other amount as may be fixed by the Minister from time to time, by notification published in the Gazette, is within the subject matter jurisdiction of the Commercial High Court except actions instituted under the Debt Recovery (Special Provisions) Act, No. 2 of 1990.

Accordingly, I hold that the cause of action of the Appellant is related to banking and falls within the subject matter jurisdiction of the Commercial High Court.

This conclusion is supported by the incongruous consequences of upholding the submissions of the Respondent.

In terms of section 3 of the Civil Law Ordinance No. 05 of 1852, in all questions or issues which may hereafter arise or which may have to be decided in Sri Lanka with respect to the law of banks and banking, the law to be administered shall be the same as would be administered in England in the like case, at the corresponding period, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any enactment now in force in Sri Lanka or hereafter to be enacted.

In general, English law recognizes concurrent liability for breach of contract as well as tort. According to Burrows on *Remedies for Torts and Breach of Contract* (2nd Ed., page 4, Butterworths, 1994), on the same facts and in relation to the same loss, the plaintiff may be able to show not only that the defendant has broken his contract but also that he has committed the tort of negligence. He goes on to state that (at page 5) if the standard of liability is not more onerous, there should be in principle be no objection to the plaintiff choosing to obtain judgment either for the breach of contract or for the tort of negligence, depending on which is more favorable to him.

In *Henderson v. Merrett Syndicates Ltd.* [(1995) 2 A.C. 145 at 193-4 (HL)] Lord Goff held:

> "*..the common law is not antipathetic to concurrent liability, and that there is no sound basis for a rule which automatically restricts the claimant to either a tortious or a contractual remedy. The result may be untidy: but, given that the tortious duty is imposed by the general law, and the contractual duty is attributable to the will of the parties, I do not find it objectionable that the claimant may be entitled to take advantage of the remedy which is most advantageous to him, subject only to ascertaining whether the tortious duty is so inconsistent with the applicable contract that, in accordance with ordinary principle, the parties must be taken to have agreed that the tortious remedy is to be limited or excluded."*

This general principle has been applied in relation to law of banking. Under English law, there are many situations where a Bank is liable to its customer for breach of contract as well as in tort.

For example, in *Barclays Bank plc v. Quincecare Ltd. and Another* [(1992) 4 All ER 363 at 375-6] Steyn J. held:

> "*Primarily, the relationship between a banker and customer is that of debtor and creditor. But quoad the drawing and payment of the customer's cheques as against the money of the customer's in the banker's hand the relationship is that of principle and agent: see Westminister Bank Ltd v Hilton (1926) 43 TLR 124 at 126 per Lord Atkinson. Similarly, when the bank in the present case acted on an order to transfer by immediate money transfer money from Quincecare current account to Philip Evans & Co in Bournemouth, the bank was acting as Quincecare's agent. As agent the bank owed fiduciary duties to Quincecare: see Bowstead on Agency (15th edn) pp 156-160. Prima facie every agent for reward is also bound to exercise reasonable care and skill in carrying out the instructions of his principal. Bowstead p 144. There is no logical or sensible reason for holding that bankers are immune from such elementary obligation. In my judgement it is an implied term of the contract between the bank and the customer that the bank orders. Moreover, notwithstanding what was said in Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd [1985] 2 All ER 947 at 957, [1986] AC 80 at 107, a banker may in a case such as present be sued in tort as well as in contract: See Midland Bank Trust Co Ltd v Hett Stubbs & Kemp (a firm) [1978] 3 All ER 571, [1979] Ch 384. But the duties in contract and tort are coextensive, and in the context of the present case nothing turns on the question whether the case is approached as one in contract or tort.*"

Furthermore, according to Odgers on *Paget's Law of Banking* [15th Ed., page 662, LexisNexis] wrongful dishonour of payment order will usually render the bank liable to the customer for breach of contract, and it may also constitute the tort of libel.

Therefore, upholding the Respondent's submission creates uncertainty and confusion in the way the system works. A customer who may have a cause of action for breach of contract and a delictual claim against a bank relating to a banking transaction, will have to institute action in the District Court if he chooses the delictual claim and in the Commercial High Court if he chooses the breach of contract claim. The District Court

action will provide for two appeals while the Commercial High Court action will provide only for one appeal.

In *Shannon Realties Ltd. v. Ville de St. Michel* [(1924) A.C. 185, 192-3] it was held:

> *"Where the words of a statute are clear they must, of course, be followed; but, on their Lordships' opinion, where alternative constructions are equally open, that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating: and that alternative is to be rejected which will introduce uncertainty, friction or confusion into the working of the system."*

Moreover, the jurisdiction of the District Court will not be reduced in relation to commercial matters as intended by the legislature. Instead of a speedy resolution of commercial disputes, there will be a multiplicity of proceedings in both original and appellate courts which runs contrary to the legislative intent.

For example. there may be banking transactions between a customer and a bank where by contract the delictual liability of the bank is sought to be limited or avoided. Where the customer seeks to sue on the delictual liability, he will have to institute an action in the District Court. If the Bank wants to avoid delictual liability based on the contractual stipulations that may have to be done in a separate action in the Commercial High Court as any cross claim in the District Court action based on the exclusion of liability by contractual terms will be a matter for the Commercial High Court according to the Respondent.

For all the foregoing reasons, I answer the question of law in the affirmative and set aside the judgment of the Commercial High Court dated 19.12.2019.

I answer issue Nos. 8 as follows:

8 (අ) අධිකරණ බලය ඇත

(ආ) පැන නොනගී

The Appellant is entitled to the costs of this appeal.

Appeal allowed.

JUDGE OF THE SUPREME COURT

S. Thurairaja, P.C., J.

I agree.

JUDGE OF THE SUPREME COURT

A.L. Shiran Gooneratne, J.

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an Application for Leave to Appeal from the Judgment of their Lordships of the Civil Appellate High Court of the Central Province holden at Kandy dated 18/12/2013 made in Case No. CP/HCCA/KANDY/80/2008(F), under and in terms of Article 127 of the Constitution read together with Section 5C of the High Court of the Provinces (Special Provisions) Act No 19 of 1990 as amended by High Court of the Provinces (Special Provisions) (Amendment) Act No 54 of 2006.

SC Appeal No. 93/2015

SC/HCCA/LA/40/14

CP/HCCA/KANDY/80/2008(F)

DC Matale Case No. 2951/L

Meezan Estates Limited

No. 8 and 10,

Harrison Jones Road,

Matale.

Plaintiff

Vs.

Seayed Ismail Mohamed Mohideen
(Deceased)

Ahmed Faisal
No. 166. Main Street,

Matale.

Presently at

No. 24/A, Pallidora Road,

Kawdana,

Dehiwala.

Substituted Defendant

And Between

Ahmed Faisal

No. 166, Main Street

Matale

Presently at

No. 24/A, Pallidora Road,

Kawdana,

Dehiwala.

Substituted Defendant – Appellant

Vs.

Meezan Estates Limited

No. 8 and 10,

Harrison Jones Road,

Matale.

And Now Between

Meezan Estates (Private) Limited

No. 392, Main Street

Matale

Plaintiff – Respondent – Petitioner

Vs

Ahmed Faisal

No. 166, Main Street

Matale

Presently at

No. 24/A, Pallidora Road,

Kawdana,

Dehiwala.

Substituted Defendant- Appellant Respondent

Before : Sisira J. de Abrew J

S. Thurairaja PC, J,

E. A. G. R. Amarasekara J

Counsel : Gamini Marapana PC with Nalin Marapana PC, Saumya Amarasekara PC, Keerthi Sri Gunawardena and Shihan Gunawardena for the Plaintiff – Respondent – Appellant.

Amarasiri Panditharathne instructed by K. K. Farouq for the Substituted Defendant – Appellant – Respondent.

Argued on : 25/02/2020

Decided on : 31/05/2021

E. A. G. R. Amarasekara J

The plaintiff – respondent – petitioner (hereinafter sometimes referred to as the plaintiff or plaintiff- petitioner) which is a limited liability company instituted an action in the District Court of Matale on 8th October 1981, seeking a declaration of

title to the land more fully described in the second schedule to the plaint, and ejectment of the defendants and damages as stated in the plaint.

The defendant by his answer dated 15th October 1981 sought a dismissal of the action of the plaintiff.

As per the plaint dated 08.10.1981, the plaintiff company's position was that;

- The original owner of the land more fully described in the 1st schedule to the plaint, namely Ihalagedarawatte and Nithulgahagedarawatte of one rood and 8.8 perches in extent and depicted in plan no. 1128 dated 24.08.1928 of S.S. Kandasamy licensed surveyor, was one Maulana.
- Said Maulana by deed no. 1292 dated 02.07.1933 had transferred the same to one Junus Lebbe, who then transferred the same by deed No. 1475 dated 19.01.1940 to one S.A.C.H. Mohammadu Mohideen.
- Said Mohammadu Mohideen by deed No. 1054 dated 01.02.1975 transferred the same to the plaintiff company.
- The plaintiff has prescriptive title owing to undisturbed, independent possession of the corpus for over 50 years.
- The defendant without any title, from 01.10.1981, has forcibly taken a portion towards the south of the said land to his possession on the strength of a purported deed no.4902 dated 17.01.1976 executed by the aforesaid Moulana's children, who did not have any right to execute such a deed since Moulana already had transferred the land by the aforesaid deed no.1292.
- The extent of land in the forcible possession of the defendant is more fully described in the 2nd schedule to the plaint which is 9 perches in extent as shown in plan no. 288 dated 29.10.1975 of K. S. Samarasinghe, licensed surveyor, and the said plan 288 had been made using the details extracted from the aforesaid plan no. 1128 of S.S Kandasamy, licensed surveyor.

It is pertinent to note here that the plaintiff company has not taken a stance in its plaint that the original owner Moulana had separated 2/3rd of the land called Ihalagedarawatte and amalgamated it with Nithulgahagedarawatte.

The defendant in his answer admitted that aforesaid Moulana was the original owner of the land described in the 1st schedule to the plaint and inter alia stated;

- That the aforesaid Moulana did not transfer the entirety of the said land called Ihalagedarawatte and what he had in fact sold was only a 2/3rd share of the said Ihalagedarawatte which is more fully described in the 1st schedule to the answer.
- That with the demise of the said Moulana in 1964, the remaining 1/3rd share (9 perches) of the land devolved on his children.
- The aforesaid children by deed no. 4902 dated 17.01.1976 attested by S. Theivanayagam Notary public, transferred the aforesaid 1/3rd share to the defendant which is more fully described in the 2nd schedule to the answer.
- That the defendant is entitled to the aforesaid land described in the 2nd schedule to the answer by prescriptive possession from 1947.
- That the defendant, exercising his right to 1/3rd of the land, had already constructed a garage on it and denied that the plaintiff's position that he was attempting to make a garage or any building on the said land.

Thus, the defendant prayed for the dismissal of the plaint. However, in the 1st schedule to the answer, it is stated that the plaintiff's 2/3rd is shown in the aforesaid plan no.1128 and as per the body of the answer and 2nd schedule to it, it is indicated that defendant's 1/3rd is shown in the aforesaid plan no.288. It can be noted that nothing is mentioned in the answer relating to an existing co-ownership.

On 11.02.1982, issues nos. 1 to 6 were raised by the Plaintiff and 7 to 14 were raised by the defendant and during the trial on 16.02.2006, issues nos. 15 to 21 were raised on behalf of the substituted defendant and issues nos.22 and 23 were raised for the plaintiff. However, issues nos. 15 and 16 were not allowed by the original court. As per the issues raised at the beginning of the trial, the plaintiff's contention was that the land in the second schedule to the plaint is a portion of the land in the 1st schedule to the plaint and the plaintiff is entitled to the said land on the strength of the deeds referred to in the plaint and by prescription, and the defendant was in forcible occupation disputing its entitlement in the manner explained in the plaint. The defendant's contention through issues at the commencement of the trial was that he was entitled to the prescriptive title of the land in the 2nd schedule to the plaint and however, the plaintiff company only got undivided 2/3rd share of the land named Ihalagedarawatte from the original owner Moulana and, the defendant became entitled to the balance 1/3rd of the

Ihalagedarawatte as a co-owner through the deed no. 4902 executed by the children of Moulana.

The issues raised later on during the trial queried whether the plaintiff had already transferred the subject matter and as such, not the owner of the land as averred in the plaint by that time or whether the plaintiff had re-acquired the land by deed no. 7053 and whether the plaintiff could maintain the action and further, whether the district court had ordered on 26.08.2003 that the plaintiff could proceed with plaint only to recover damages. Anyway, such transfer by the plaintiff has not been proved which caused the framing of said issues during the trial and thus, as found by the learned High Court Judges trial judges answers to those issues cannot be faulted.

As per the plaint and the issues raised by the plaintiff, the action filed in the district court can be identified as a rei vindicatio action since the position of the plaintiff was that it is the title holder and the defendant has to be evicted from the possession of the portion of the land which is unlawfully and forcibly occupied by the defendant without any right. It is trite law that in a rei vindication action, the plaintiff must prove his title to get the reliefs prayed and defendant need not prove anything until that burden is satisfied.[1] Thus, the burden in proving that the land in the 2nd schedule to the plaint is a portion of the land in the 1st schedule to the plaint and that the plaintiff has the title to the land in the 1st schedule to the plaint including the land in the 2nd schedule to the plaint was on the plaintiff. Subsequent to the trial, the learned district judge delivered the judgment on 21.01.2008, in favour of the plaintiff company.

As mentioned above, this court observes that the defendant in his answer, on one hand claimed prescriptive title to the 1/3rd of Ihalagedarawatte and on the other hand, it appears contradictorily claim coownership to the said land based on his entitlement to an undivided one third. If he claims co-ownership with the plaintiff, he cannot claim prescription against the plaintiff. However, in the issue no.7 raised, he claims prescriptive title generally but has not specifically claimed against the plaintiff. Thus, it may be a claim of prescription as a co-owner generally against the 3rd parties but not against the other co-owners. However,

[1] Abeykoon Hamine V Appuhamy 52 NLR 49, Peeris V Savunhamy 54 NLR 207, De Silva V Goonetilake (1931) 32 NLR 217, Wanigaratne V Juwanis Appuhamy 65 N L R 167

since this is a rei vindicatio action, the plaintiff must first prove its title to the land it claims.

Being aggrieved by the aforesaid Judgment of the learned district Judge, the substituted defendant preferred an application to the civil appellate high court of Kandy. The judgment of the civil appellate high court of Kandy was delivered on 18.12.2013 in favour of the defendant, setting aside the Judgment of the learned district judge of Matale and dismissing the action of the plaintiff company.

Being aggrieved by the said judgment of the high court, the plaintiff preferred a leave to appeal application to this court and this court, as per the journal entry dated 19.05.2015, granted leave on the following questions of law as set out in paragraph 16 (i) to (vii) of the petition dated 24.01.2014;

"(i). Are the statements of their Lordships stating that,

"a party is not entitled to plead legal or paper title and prescriptive title together in the same action" and the statement in the Judgment after quoting S.3 of the Prescription Ordinance wherein Their Lordships state "It is clear from the above provisions that one cannot plead prescriptive title against one's own legal or paper title" accurate statements of law?

(ii). Have Their Lordships of the Civil Appellate High Court erred in Law by failing to recognize the fact that the original owner of the lands called Nithulgahagederawatte and Ihalagederewatte namely the said Moulana was entitled to demarcate and depict in Plan 1128 dated 28.8.1928 (P2) an amalgamated block of land comprising of the entirety of Nithulgahagederawatte and 2/3rd of Ihalagederewatte?

(iii). Thus was the finding of Their Lordships that "a co-owner cannot without the consent of the other co-owners or by instituting partition proceedings bring the co-ownership to an end" was without any factual basis in the present case?

(iv). Have Their Lordships of the Civil Appellate High Court erred in Law and misunderstood the point in dispute in the said case by stating that "the main question for determination here is whether "Ihalagederewatte" still remains co-owned or by the amalgamation of the two lands as stated in the schedules to the title deeds the co-ownership to "Ihalagederewatte" came to an end"?

(v). Have Their Lordships misdirected themselves in stating "it is not clear whether the property means the land described in the 1st Schedule to the Plaint or the entire Ihalagederewatte and the entire Nithugahagedarawatte"?

(vi). Have Their Lordships erred in Law in holding that the Petitioner who was claiming title to a defined extent of land so defined and divided by the original owner of the land himself had to prove an ouster against anyone else claiming a portion of the same land when it was nobody's case that there was any question of co-ownership involved?

(vii). Are the findings of Their Lordships in conflict with the following statement in the Judgment which states "however, it is not clear whether Moulana was entitled to the entirety of "Ihalagederewatte""

The main reliefs prayed for in the petition of appeal are to vacate the judgment of the civil appeal high court and to affirm the judgment of the learned district judge. To see whether the learned high court judges erred or whether the district court judgment can be restored it is necessary to see first the viability and correctness of the reasons given by or the findings of the learned district court judge.

As per the answer to issue no. 8 given by the learned district judge, he has come to a finding that Moulana was the original owner of the land called Ihalagedara watte. I do not find any dispute as to the original ownership of the said land among the parties as per the evidence led at the trial. Even the stance taken on behalf of the defendant was that undivided 2/3rd of the said land was transferred to the predecessors of title of the plaintiff by Moulana and the balance 1/3rd was transferred to the original defendant by the heirs of Moulana, and the defendant's argument on co-ownership apparently is not based on the fact that there are other people who has co-ownership to this land but owing to their stance that Moulana transferred only undivided 2/3rd of the said Ihalagedarawatte to the predecessors of the plaintiff creating a co-ownership between them. The plaintiff also appears to argue that, since Moulana was the original owner, it had the right to separate 2/3rd of the Ihalagedarawatte[2] and transfer it along with the other land, namely Nitulgahagedarawatte as per the plan no.1128 marked P2 and as such, there is no co-ownership and the plaintiff is

[2] Vide paragraph 47 of the written submission tendered on 29.06.2015

entitled to the entirety of the amalgamated land depicted in the said plan without any co-ownership attached to it. One of the plaintiff's witnesses has stated in evidence that Moulana was the original owner of the land described in the 1st schedule to the plaint.[3] Thus, it is common ground between the parties that Moulana was the original owner of the Ihalagedarawatte. Thus, the finding of the learned district Judge that Moulana was the original owner of Ihalagedarawatte cannot be assailed.

Issue no.1 raised at the trial query whether the land in the 2nd schedule to the plaint is part of the land in the 1st schedule to the plaint and the learned district judge has answered it in the affirmative. This finding of the learned district judge also cannot be faulted as it is clear from the evidence led at the trial that the land in the 1st schedule is the land depicted in plan no 1128 marked P2 and land in the 2nd schedule is the land depicted in plan no.288, marked P1 and the latter was made without a survey on the ground but using details extracted from the P2. Further K.S. Samarasinghe, the licensed surveyor who made the plan marked P1 has clearly admitted in his evidence that entirety of P1 falls within P2 and P1 is the south end of P2.[4]

This being a rei vindicatio action, the plaintiff company to be successful, as per its stance taken through its pleadings and the issues, it has to prove that it has title to the entire land shown in plan marked P2 through deeds or prescription or at least to the land shown in plan marked P1 through deeds or by prescriptive possession.[5] Otherwise, plaintiff shall fail in establishing its case. However, no deed that the plaintiff relies on has any reference to plan marked P1. In fact, the defendant has got that plan prepared for him.[6] If the plaintiff is successful in establishing its title to the disputed land, then only the defendant needs to establish better title or his right to remain in the land. In this context, the crucial issues raised at the trial were issues no. 2,3, 9, 10, 13 and 14. Issues no.2and 3 raised by the plaintiff query whether the land in the 2nd schedule of the plaint belongs to the plaintiff on deeds cited in the plaint or by prescriptive possession while issues no.9 and 10 raised by the defendant query whether the plaintiff is

[3] Vide page 486 of the brief.
[4] Vide pages 480 and 481 of the brief.
[5] Vide plaint and the issues no. 1 to 3 raised by the plaintiff.
[6] Vide evidence at page 481 of the brief.

entitled to the entirety of Ihalagedarwatte as claimed in the plaint or whether the plaintiff is entitled only to an undivided 2/3 share of the Ihalagedarawatte as stated in the answer. Issues no.13 and 14 query whether parties are co-owners and if so, whether the defendant could be evicted. It must be noted that there is no clear averment in the plaint where the plaintiff claims entitlement to the entirety of Ihalagedarawatte but it has claimed title to the entirety of amalgamated land shown in plan marked P2 which consists of 2 allotments of land Nitulagahagedarawatte and Ihalagedarawatte.

As per the judgment, the learned District Judge has answered issues no. 1and 2 in the affirmative indicating that the plaintiff is entitled to the land depicted in P2 and the 1st schedule to the plaint by deeds as well as by prescription, and has answered the issues no. 9 and 10 to say that the plaintiff has got an undivided 2/3rd of Ihalagedarawatte as a divided 2/3rd portion as per the plan. Issue no.13 and 14 has been answered rejecting the stance that parties are co-owners and giving the plaintiff entitlement to damages. As per the answers given, it appears that the learned district judge has come to the conclusion that what the plaintiff is entitled from Ihalagedarawatte was a divided 2/3rd as per the plan. It appears the plan refers here in these answers by the learned district judge is plan no. 1128 marked as P2. It is necessary to peruse why the learned district judge came to the said findings contained in the said answers to issue no.2,3,9,10,13 and 14 as evidenced by the contents of the district court judgment and see whether they are supported by acceptable evidence given by the witnesses or documents tendered at the trial. In this regard, it appears the learned district judge has come to certain inferences. Those inferences and this court's observations with regard to those inferences are mentioned below;

- **Inference 1**; The original owner Moulana had retained the service of S. Kandasamy licensed surveyor to prepare the plan no 1128 dated 24.08.1928, marked P2 and by making the said plan he had amalgamated two adjoining lands namely, Nithulagahagedarawatte of 21.6 perches and Ihalagedarawatte of 27.2 perches.[7]
- **Inference 2**; As per the deed no.1592 dated 02.07.1933, marked P4, executed after the making of aforesaid plan Moulana had sold the amalgamated land to

[7] Vide page 6 of the said judgment.

Junus Lebbe and as per the said deed what has been amalgamated with Nithulagahagedarawatte as shown in the said plan was 2/3rd of the said Ihalagedarawatte and both lands have become one land of 1 rood 8.08 perches.[8]

- **Inference 3;** Moulana being the sole owner at that time, had all the rights to separate 2/3 of Ihalagedarawatte and to make a plan accordingly and make one land as amalgamated in plan marked P2.[9]
- **Inference 4;** Due to the execution of deeds marked P4 and P5, title to the land shown in P2 passed from Moulana to Junus Lebbe and then to Mohamadu Mohideen and the description of the land is same in the schedules of P4 and P5, and by deed marked P6 title devolved on the plaintiff company.[10]
- **Inference 5;** If, as per what the defendant states, Moulana had 1/3rd after transferring 2/3rd it should be situated outside the land in P2.[11]

Observations of this Court; The notes on the plan marked P2 does not state that it was made on the request of Moulana. In fact, there is no reference to Moulana on the face of it. Neither Moulana nor S. S. Kandaswamy, licensed surveyor has given evidence to say that it was Moulana who got the plan made through the said surveyor, S. Kandaswamy.; K. Kumaraswamy, licensed surveyor, son of aforesaid S. Kandaswamy, licensed surveyor was only 59 years old when he gave evidence, and he was the only witness born prior to the making of plan marked P2. He would have been about 5 years old when his farther made P2 and however, nowhere in his evidence has he stated that his farther made P2 on the request made by Moulana and his farther in making the said plan amalgamated an identified 2/3rd of Ihalagedarawatte with the other land Nithulagahagedarawatte on a request made by said Moulana. K. S. Samarasinghe, licensed surveyor who has given evidence for the plaintiff has not revealed any knowledge with regard to the making of P2. What he has stated in evidence is that he used P2 in making his plan no.288 marked P1. Police officer Karunaratne is a witness who went for the inspection after a complaint made to the police but has not stated anything

[8] Vide page 6 of the said judgment.
[9] Vide page 8 of the said judgment.
[10] Vide pages 6 and 7 of the said judgment.
[11] Vide page 9 of the said judgment.

with regard to the making of P2. Other lay witnesses who gave evidence for the plaintiff were born after 1950 as per their age at the time they gave evidence for the plaintiff in 1982 and as per P14.[12] Hence, none of the plaintiff's witness can state from their personal knowledge that in 1928, Moulana separated an identified 2/3rd of Ihalagedarawatte and amalgamated it with Nithulagahagedarawatte and got the service of S. Kandaswamy, licensed surveyor to make the plan marked P2 accordingly. Further, none of them have said that Moulana got the service of S. Kandasamy, licensed surveyor to amalgamate divided 2/3rd of Ihalagedarawatte with Nithulagahagedarawatte and accordingly to make the plan marked P2. None of the witnesses of the defendant has stated that Moulana got the service of S. Kumarasamy, licensed surveyor to amalgamate divided 2/3rd of Ihalagahagedarawatte with Nithulagahagedarawatte. Defendant's stance as said before is that only undivided 2/3rd of Ihalagahagedarawatte was sold to Junus Lebbe, one of the plaintiff's predecessors in title but not that the said plan marked P2 contains an identified 2/3rd of Ihalagedarawatte.

The certified copy of plan marked P2 found at page 384 of the brief, which appears to have been initialed by the trial judge when it was marked, only indicates that it was made by S. Kandaswamy, licensed surveyor in 1928, and it shows an amalgamated two allotments of land, one called Nitulagahagedarawatte and the other called Ihalagedarawatte. Nowhere does it state that only 2/3rd of Ihalagedarawatte was amalgamated in making the said plan. It is also observed that the total extent given in the plan is 1 Rood and 8.8 Perches, in other words 48 perches. As per the diagram, the portion shown as Nitulgedarawatte is 21.6 perches and the portion shown as Ihalagedarawatte is 27.2 perches. The said certified copy of plan P2 shows a protruded portion towards South, and as per the evidence that area seems to be the disputed area in the action filed in the district court. (However, there is a photo copy of the original of the same plan found at page 433 of the brief which is not initialed by the trial judge indicating that it was not the one marked at the trial. Anyhow, for the purpose of this decision this court has to consider the copy that appears to have been initialed by the trial judge). It appears that, prior to filing of the plaint, the plaintiff's witness K.

[12] Vide their age mentioned prior to the recording of evidence and P14 where witness Sihabdeen Ahamed Mohideen had revealed his age.

Kumarasamy, licensed surveyor, had surveyed a part of the amalgamated land on 11.12.1978, and made the plan no.7597 marked P3 which depicts the relevant area including the protruded portion but P3 indicates that the extent as 35 perches. In this plan, the surveyor has inserted a "clitch" mark to indicate that the protruded portion to the south is part of the portion shown to the north. K. Kumarasamy, licensed surveyor has admitted that he did not do a superimposition of P3 with the plan marked P2. Thus, the increase of the extent may be due to the change of location of the boundaries. However, it is evidenced from this plan that even though the plaintiff had put up buildings on the northern part, it has not done any construction on the disputed area though they claimed that they have possessed it. Hence, the possession of the parties of the disputed area has to be decided on other evidence.

It appears that the learned District Judge has heavily relied on the contents of the schedules in the deeds relied on by the plaintiff and interpreted the said schedule to come to his conclusions.[13] In fact, he has quoted a part of the said schedule in the deed marked P4 by which Moulana transferred the land as described in the said schedule to Junus Lebbe. The learned high court judges have quoted all the relevant parts of the said schedule in their judgment and even the plaintiff's counsel too have quoted the said schedule in their written submissions tendered to this court on 29.06.2015. The relevant schedule is quoted below and the portion quoted by the learned district judge is highlighted in bold letters for easy perusal.

"THE SCHEDULE REFERRED TO

1. *All that land called and known as Nithugahagedarawatte bearing assessment no. 57(a) and (b) containing in extent one seer kurakkan sowing situated at Gongawela within Urban District Council limits Matale Town Matale district Central province aforesaid and bounded on the east by the garden called Nitulgahagedarawatte belonging to Wappu Lebbe south by limit of Nithulgahagedarawatte belonging to Kandu Umma and Neina Tamby west by the stone fence of the land belonging to Mohammado Tamby Vidane aratchy and others and the wall of Thakya and on the north*

[13] Vide page 124 and 125 of the brief and page 6 and 7 of the district court judgment

by deweta now high road together with the houses plantations and everything thereon and

2. An undivided two thirds share (2/3) of the land called and known as Ihalagedarawatte in extent one Seer kurakkan sowing bearing assessment No.56 situated at Gongawela aforesaid and bounded to the east by the jak fence of Sinnetamby's garden now Gogawela road south by the fence of Mohammado Tamby Vidane aratchy's garden and Koopa Thambi Neina Tamby's garden and on the west and north by the limit of the garden of Sinnado pulle Pakir Tamby Lebbe now on the west by the limit of Nithulagahagedarawatte (Land No.1 above) and the limit of Ismail Lebbe's and his brother's property and on the North by Harrison Jones road

Which said premises adjoining each other now form one property of the extent of one rood eight perches and eighty upon hundred of a perch (0-1.8 80/100) and bounded on the north by Thakkya and Harrison Jones road east by Gongawela road west by the land of Deen Usman and others and south by the land of H.M.M.Ibrahim do Ismail and do Cassim and land of P.T.L. Mohamed Thamby Vidane and another, according to the plan of survey No.1128 dated 24th August 1928 made by S.S. Kandasamy Licensed Surveyor annexed hereto." (highlighted by bold letters by me***)***

The second part of the afore quoted schedule clearly indicates what was contemplated there is an undivided 2/3rd of Ihalagedarawatte. Nowhere in the afore quoted schedule or in the body of the deed, it is stated that Moulana separated the said undivided 2/3rd share to a divided portion of the land and made the plan referred to therein the later part of the schedule. However, it appears that the learned district judge quoting the afore quoted highlighted portion, has interpreted the deed to indicate that what had been transferred by the deed is a one land as depicted by the said plan 1128(P2) and as such Moulana had given away a divided 2/3rd portion of the land called Ihalagedarawatte which 2/3rd formed the one land contained in the said plan along with Nithulagahagedarawatte.[14] It is pertinent to see whether the

[14]Vide pages 6 and 7 of the district court judgment.

phraseology "***Which said premises adjoining each other now form one property of the extent ……..according to the plan of survey No.1288…….***" can be interpreted to give the meaning given by the district judge without any supporting evidence in that regard. There is no doubt that the words "**which said premises adjoining each other"** refers to the premises described in the part 1 and part 2 of the schedule. In interpreting the schedule, now it is important to recognize the premises described in those two parts of the schedule. There cannot be any ambiguity that the premises described in the 1st part of the schedule is Nithulagahagedarawatte within the four boundaries described therein as it is an identifiable land described therein the 1st part of the schedule. However, the second part of the schedule refers to an undivided 2/3rd of Ihalagedarawatte and boundaries to Ihalagedarawatte has been mentioned there in the second part of the schedule. When it refers to an undivided 2/3rd, it does not indicate an identifiable portion of a land. Thus, an unidentifiable portion cannot mean a premises that can be amalgamated with another property to form one property. Only premises that can be identifiable in the second part of the schedule is the land called Ihalagedarawatte mentioned therein with the four boundaries to identify it. Thus, this court opines that what is meant by the words "**Which said premises adjoining each other now form one property of the extent ……..according to the plan of survey No.1288……."** is that Nithulagahagedarawatte and Ihalagedarawatte now form one property as depicted in plan 1288. To give another meaning to say that Moulana separated undivided 2/3rd as a divided 2/3rd and get it to form one land by amalgamating it with the other land called Nithulagahagedarawatte as depicted in plan 1288 amounts to an addition of words which are not there in the schedule. Thus, the interpretation given by the learned district judge to the schedule of the said deed cannot be accepted and the learned district judge erred in understanding and interpreting the schedule of the said deed.

As observed above there was no other oral or documentary evidence acceptable to court that Moulana separated divided 2/3rd from Ihalagedarawatte and amalgamated it with Nithulagahagedarawatte and got S.S. Kandasamy, licensed surveyor to depict in his plan as one land.

What the evidence led at the trial indicate is that the original owner Moulana transferred to Junus Lebbe entirety of Nithulagahagedarawatte and undivided

2/3rd of Ihalgedarawatte from the amalgamated land of Nithulagahagedarawartte of 21.6 perches and Ihalgedarawatte 27.2 perches but not the entirety of Ihalagedarawatte and, Moulana used the plan made in 1928 by S. Kandasamy, licensed surveyor to described the main land when he transferred as aforesaid to Junus Lebbe in 1933. It is true that plan marked P2 depicts an amalgamated land of the two lands mentioned above but there is nothing to say that it was only 2/3rd of Ihalagedarawatte contained in plan forming the amalgamated land. If 1/3rd of Ihalagedarawatte was left out in making that, one boundary adjoining Ihalagedarwatte in the said plan should have been described as the remaining part of Ihalagedarawatte belonging to Moulana but such description is not found among the description of boundaries in P2. Description of boundaries in the plan marked P2 around the land identified as Ihalagedarawatte tallies with the boundaries given to Ihalagedarawatte in the second part of the schedule quoted above indicating that there cannot be any left out 1/3rd portion of Ihalagedarawatte adjoining the land depicted in P2.

Thus, certain matters contained in the inferences of the learned district judge mentioned above are not supported by evidence led at the trial. Especially the parts of the said inferences that indicate that Moulana got the service of the said surveyor to separate an identified 2/3rd of Ihalagedarawatte to form a one property with Nithulagahagedarawatte and the balance 1/3rd of Ihalagedarawatte shall lie outside the land shown in plan marked P2 are mere conjectures and surmises which are not supported by the evidence led. If the said plan was made to transfer Nithulagedarawatte and identified 2/3rd of Ihalahedarawatte to Junus Lebbe, it is very unlikely to have a five-year gap between the plan and the transfer deed. Thus, it is the view of this Court that Moulana transferred the entirety of Nithulagahagedarawatte in plan marked P2 and an undivided 2/3rd only of Ihalagedarawatte shown in P2 to Junus Lebbe by P4. Anyway, it appears from the contents of P4 that Moulana had mortgaged the same property to Junus Lebbe in 1928 and certain payments were pending and the vendor and vendee agreed to execute a conditional transfer of the property as per P4, but there is no sufficient material to decide that in 1928 for the purpose of the mortgage Moulana separated 2/3rd of Ihalagedarawatte and made the plan P2.

It is true that, as the learned district judge observed, Moulana being the sole owner had the right and capacity to transfer a divided portion of Ihalagedarawatte but as per the documents, what he had transferred to Junus Lebbe was an undivided 2/3rd share. By that Moulana remained a co-owner to the land named Ihalagedarawatte even after he executed P4. Hence, through the other deeds marked by the plaintiff company, namely P5 to P6 the plaintiff company only gets title to Ihalagedarawatte as a co-owner along with Moulana and with his demise along with his heirs. As per the documentary evidence placed before the district court, plaintiff has been able to prove only a co-ownership to the land called Ihalagedarwatte.

The defendant claim title to 1/3rd owing to a deed of transfer no. 4902 from the children of Moulana which was marked as P10. It must be noted that there was no dispute that vendors of that deed were children of Moulana. Even the plaintiff's stance in paragraph 6 of their plaint was that the defendant claims title through the said deed marked P10 executed by the children of Moulana where those children had no right to execute such a deed. No issue had been raised challenging P10 as a deed not executed by the children of Moulana. Hence, the learned district judge's comment that it was not proved that vendors of P10 are the children of Moulana is irrelevant as it was not a matter that parties were at variance, even to raise an issue. Further, one of the plaintiff's witnesses had admitted in evidence that P10 was executed by Moulana's children.[15] Thus, as per the documents tendered in evidence parties were co-owners to Ihalagedarawatte. One co-owner cannot file a rei vindication action to evict another co-owner since all the co-owners have title to the land and since rei vindicatio is an action based on title. Even the learned high court judges have correctly stated that a co-owner cannot successfully maintain an action against another co-owner.[16] Thus, unless the plaintiff company could prove prescriptive title to the disputed area or to the whole land named Ihalagedrawatte found in P2, its action should fail.

[15] Vide page488 of the brief.

[16] Vide page 7 of the High Court Judgment.

One co-owner's possession is the possession of other co-owners,[17] and if one's possession may be referable to a lawful title, it can be presumed that it/he/she possess by virtue of that lawful title and further, if one entered in to possession in one capacity, it is presumed that it/he/she continue to possess in the same capacity. A co-owner cannot put an end to the co-ownership by a secret intention in his mind.[18] Hence, the plaintiff company being a co-owner as per its paper title, has to prove ouster or something equivalent to ouster and adverse possession for ten years to claim prescriptive title. It has to prove an overt act or circumstances that a happening of an overt act could be presumed along with adverse possession over 10 years from such an event. Since this is a rei vindicatio action this court has to first see whether the plaintiff was successful in proving his case first. As indicated above he failed in proving exclusive title to Ihalagedarawatte on deeds. Therefore, now it is important to consider whether the plaintiff had proved its title by prescription against the defendant. The two surveyors and the police officer who came for inspection after the police complaint were not competent to give any evidence regarding ouster or of an overt act as they had come to give evidence on the plans they made and the inspection done as per the said police complaint respectively. Other lay witnesses called by the plaintiff, namely Mohomad Nasar Mohideen, Yathi Samul Huk Mohideen and Siabdeen Ahamaed Mohideen do not speak of any ouster or of an overt act or any adverse possession against the plaintiff. Some of them had just stated that before the dispute started, they possessed the disputed portion.[19] However, they do not reveal how they possessed the disputed area. Such mere statements of possession are not sufficient to prove even possession of the disputed area. As said before as per the plan marked P3, it is visible that there are no buildings constructed by the plaintiff on the disputed area and one witness of the plaintiff has stated in evidence that the disputed area is barren.[20] Hence there is no construction or plantation by the plaintiff to prove its possession with regard to the disputed area. The learned district judge has referred to V2, entries in the land registry, and has stated that the plaintiff

[17] Corea V Appuhamy !5 N L R 65
[18] Ibid and Tilekaratne V Bastian 21 N L R 12
[19] Vide pages 486,488,497 and 503 of the brief.
[20] Vide page 489 of the brief.

had mortgaged the land in dispute in 1972, and it establishes that plaintiff exercised its rights and possession to the entire land. However, it appears V2 also refers to a mortgaging of undivided 2/3rd of Ihalagedarawatte, and such execution of a deed cannot consider as an ouster or an evidence of an overt act which might have taken place in an office of a Notary. Thus, there is no sufficient evidence even to prove possession of the disputed area by the Plaintiff. In such circumstances, a court cannot come to a conclusion that there was ouster or an overt act that changed the nature of possession of the plaintiff in relation to the disputed area.

On the other hand, the defendant claim he possessed the disputed area. The defendant, in his answer has claimed prescriptive possession from 1947 and the learned district judge has criticized this as the defendant got title through a deed in 1976, but the learned district judge has not considered that when one claim prescriptive possession that he can add the possession of his predecessors in title. However, the defendant being a co-owner as per the deeds, he also cannot claim prescriptive title against the plaintiff without proving ouster and adverse possession. As per P7 and P8 police complaints, the witnesses of the plaintiff company had complained to the police with regard to the premises 107 and the police officer who came to give evidence for the plaintiff had stated in his evidence that he went to the premises 107 for inspection and the disputed portion was in front of a house and there was no separate number for the disputed portion where the garage was made. Assessment clerk of the Matale Municipal Council who gave evidence for the defendant had stated that assessment number 107 was in the name of the defendant, and the witness Abdul Assis had stated that his residence is 107/1 and 107 is close to his premises and it was in the possession of the defendant and not with the plaintiff. However, even the defendant had not disclosed the manner he enjoyed the possession of the disputed portion prior to the dispute. It is true that there are certain weaknesses and contradictory stances in the defendant's case. As per the answer, the defendant had not taken a position that he is a co-owner but appears to have claimed a separated 1/3rd portion of Ihalagedarawatte and he appears to have admitted the plaintiff's

entitlement to separated 2/3rd of Ihalagedarawatte.[21] Nevertheless, when issues were raised, the defendant has queried whether he is a co-owner and no objection has been taken against the relevant issues. Issues of a civil action need not be limited to the pleadings. Once issues are raised the pleadings recede to the background and the court has to hear and determine the case as crystalized in the issues.[22] Through the issues co-ownership of parties has been put in issue.

The counsel for the plaintiff tried to point out that as per the schedules of the answer the land claimed by the defendant is outside the plan marked P2. However, as the defendant has referred to the plan no.288 which is made from details extracted from the plan referred to in the schedule 1 and also due to the manner, the boundaries are described in the both schedules, this argument cannot be accepted. What the defendant had attempted to express in those schedules is to describe the 2/3rd portion and 1/3rd portion as separate entities. On the other hand, whatever may be the weaknesses in the defendant's case, as this is a rei vindicatio action, the burden to prove its title is with the plaintiff. The plaintiff had failed in proving exclusive title to the land called Ihalagedarawatte by deeds or by prescription but had proved that it was only a co-owner to an undivided 2/3rd of the land called Ihalagedarawatte and there was sufficient evidence to indicate that the defendant is the other co-owner. Hence, the learned district judge could not have entered the judgment in favour of the plaintiff. Thus, it appears that the final conclusion of the learned high court judges to allow the appeal and enter a judgment dismissing the plaint is correct. In that backdrop, now this court would consider the questions of laws allowed at the support stage.

The 1st question of law queries whether the statement made by the learned high court judges that "a party is not entitled to plead legal or paper title and prescriptive title together in the same action" is an accurate statement of law; This court also observes a misstatement of law here. A person who has paper title possesses the land as the owner and in a manner adverse to others without accepting anyone else as the owner, there cannot be any obstacle for

[21] Vide the averments and the schedules of the answer.
[22] Vide Haniffa V Nallamma (1998) 1 Sri L R 73.

him to plead prescriptive title coupled with the paper title. Even if his paper title fails for some reason such as technical or defect in the title, if he has possessed the property as the owner against others without accepting anyone else as the owner for 10 years or more, he may be successful in his claim on prescriptive title. Further, it is also queried whether the statement of the learned high court judges which connote that as per section 3 of the Prescription Ordinance that one cannot plead prescriptive title against one's own legal or paper title is an accurate statement of law. It is pertinent to note that, said section 3 does not contemplate a situation where a person claims prescriptive title against his own paper title. It contemplates where a defendant claim prescription on a title adverse to the plaintiff or a claimant and in the like manner a plaintiff or an intervenient party claims on a title adverse to the others. In fact, if one has paper title, his possession relates that title and it can be an adverse possession against others but not against his own paper title. On the other hand, if one has paper title, he needs not plead prescription against his own title. In the case at hand, plaintiff has not pleaded prescription against its own title but has pleaded it coupled with paper title against the defendant. Thus, making the said statement it appears that the learned high court judges have misunderstood the pleading of the plaintiff. However, as for the reasons indicated in the discussion above, this misstatement or misunderstanding cannot make the final conclusion of the learned high court judges faulted. Thus, the answer to the 1st question of law is "yes there seems to be a statement which is inaccurate and a statement made without proper understanding of the pleadings but the final conclusion need not be varied or set aside due to them".

The second question of law queries whether the learned Civil Appellate High Court Judges erred in law by failing to recognize the fact that the original owner of the lands called Nithulgahagederawatte and Ihalagederewatte namely the said Moulana was entitled to demarcate and depict in Plan 1128 dated 28.8.1928 (P2) an amalgamated block of land comprising of the entirety of Nithulgahagederawatte and 2/3rd of Ihalagederewatte. In this regard as observed above by this court, there was no acceptable evidence to say that Moulana separated 2/3rd of Ihalagedarawatte and made the plan marked P2 other than he used the said plan which amalgamated those two lands to

describe the main land that contained what was transferred by P4. It is true that the original owner was entitled to separate identified 2/3rd of one land and to amalgamate it with the other but what was lacking was evidence to establish that. Hence this court cannot find that the learned high court judges erred in that regard. Thus, the answer to 2nd question of law is in the negative.

The 3rd question of law queries whether the finding of the learned high court judges that "a co-owner cannot without the consent of the other co-owners or without instituting partition proceedings bring the co-ownership to an end" was without any factual basis in the present case. As per the observation made above by this court, the plaintiff failed in proving that he got a divided portion of 2/3rd of Ihalagedarawatte and failed to prove prescriptive title to the disputed area. Thus, there is a factual basis for this statement as the plaintiff remained a co-owner. Thus, answer is in the negative.

The fourth question of law queries whether the civil appellate high court erred in Law and misunderstood the point in dispute in the said case by stating that "the main question for determination here is whether "Ihalagederewatte" still remains co-owned or by the amalgamation of the two lands as stated in the schedules to the title deeds the co-ownership to "Ihalagederewatte" came to an end. As per the observations and discussion made above by this court, it is clear that co-ownership was put in issue by the issues raised and the evidence also indicate that the co-ownership still exists. Thus, answer for this question of law is in the negative.

The 5th question of law asks the question whether the learned high court judges misdirected themselves in stating "it is not clear whether the property means the land described in the 1st Schedule to the plaint or the entire Ihalagederewatte and the entire Nithugahagedarawatte". The property described in the 1st schedule to the plaint was the land in plan marked P2. As observed and elaborated above by this court, there is no evidence to indicate that land in P2 contains only a divided portion 2/3rd of Ihalagedarawatte along with the other land. Thus, P2 appears to contain entire Ihalagedarawatte and Nithulagahagedarawatte. Hence there cannot be any difference in the 1st schedule to the plaint and the amalgamation of entire

Nithulagahagedarawatte and entire Ihalagedarawatte as per the evidence led. On the other hand, said statement in the high court Judgment refers to the word "Property" in the 5th paragraph in the plaint. When it is read with the previous paragraphs it is clear that the said word refers to the land in the 1st schedule to the plaint. Thus, the answer to the 5th question of law is 'yes, there seems to be some confusion".

The 6th question of law questions whether the high court erred in Law in holding that the petitioner who was claiming title to a defined extent of land so defined and divided by the original owner of the land himself had to prove an ouster against anyone else claiming a portion of the same land when it was nobody's case that there was any question of co-ownership involved. As mentioned before, in the original court, issues have been raised with regard to the co-ownership and issues need not be limited to the pleadings. No objection has been raised against such issues. Thus, now no one can say that it was no body's case. However, evidence was not available to state that the original owner transferred a defined lot of land of Ihalagedarawatte. Thus, the learned high court judges did not err when they mentioned the need to prove ouster. As such the answer to 6th question of law is in the negative.

The question of law no.7 queries whether the findings of the learned high court judges are in conflict with the following statement in the Judgment which states "however, it is not clear whether Moulana was entitled to the entirety of "Ihalagederewatte. It appears that the learned high court judges came to the conclusion that 1/3rd of Ihalagedarawatte belongs to the defendant and 2/3rd of the same belongs to the plaintiff and they are co-owners. Both sides get their title from Moulana or his heirs. Thus, there seems to be a conflict, but as observed before, learned district judge's decision cannot be allowed to stand and the final conclusion to set aside that judgment and to dismiss the plaintiffs action by the learned high court judges is correct. Thus, the answer is 'yes there seems to be a conflict between the said statement and the findings, but it does not warrant the setting aside of the final conclusion reached by the high court'.
As indicated above there are some misstatements, misunderstandings, and conflicting statements in the learned high court Judges' judgment but the

finding of the learned high court judges that the plaintiff cannot maintain a rei vindicatio action against another co-owner is valid and sufficient to vacate the original court judgment and dismiss the plaintiff's action. This court also shall not intervene in appeal when the substantial rights are not affected by the parties by the lower court judgment, even though there are obvious errors.

Hence this appeal is dismissed with costs.

……..
Judge of the Supreme Court

Sisira J de Abrew, 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

Geethani Nilushika
Samarawickrama,
Polgedara,
Denipitiya.
Plaintiff

SC APPEAL NO: SC/APPEAL/93/2017
SC LA NO: SC/HCCA/LA/186/2016
HCCA KEGALLE NO: SP/HCCA/MA/RA/5/2015
DC MATARA NO: 20891/P

Vs.

1. Waruni Harshani
   Samarawickrama,
   No. 15/2,
   Gomas Park,
   Colombo 05.
2. Dilhar Agasha Jinadasa,
   No. 260, Park Road,
   Colombo 05.
3. Nishamani Serosha Jinadasa,
   No. 260, Park Road,
   Colombo 05.
4. Indrani Samarawickrama,
5. Nanda Samarawickrama,
6. Adarawathi Samarawickrama,
7. Malani Samarawickrama,
8. Eujin Samarawickrama,

9. Kananke Suriarachchi
   Liyanage Indika Thilak
   Kumara,
   All of
   Elagawa Gedara,
   Eluwawila, Denipitiya.
10. Nihal Ranjith
    Samarawickrama,
    No. 13/3,
    Sri Mahabodhi Road,
    Dehiwala.

Defendants

AND BETWEEN

4. Indrani Samarawickrama,
5. Nanda Samarawickrama,
6. Adarawathi Samarawickrama,
7. Malani Samarawickrama,
8. Eujin Samarawickrama,
9. Kananke Suriarachchi
   Liyanage Indika Thilak
   Kumara,
   All of
   Elagawa Gedara,
   Eluwawila, Denipitiya.
10. Nihal Ranjith
    Samarawickrama,
    No. 13/3, Sri Mahabodhi Road,
    Dehiwala.

4th-10th Defendant-Petitioners

Vs.

Geethani Nilushika
Samarawickrama,
Polgedara,
Denipitiya.
Plaintiff-Respondent

1. Waruni Harshani
   Samarawickrama,
   No. 15/2,
   Gomas Park,
   Colombo 05.
2. Dilhar Agasha Jinadasa,
   No. 260, Park Road,
   Colombo 05.
3. Nishamani Serosha Jinadasa,
   No. 260, Park Road,
   Colombo 05.

   1st–3rd Defendant-Respondents

AND NOW BETWEEN

4. Indrani Samarawickrama,
5. Nanda Samarawickrama,
6. Adarawathi Samarawickrama,
7. Malani Samarawickrama,
8. Eujin Samarawickrama,
9. Kananke Suriarachchi
   Liyanage Indika Thilak
   Kumara,
   All of

Elagawa Gedara,
Eluwawila,
Denipitiya.
4th-9th Defendant-Petitioner-Appellants

Vs.

Geethani Nilushika
Samarawickrama,
Polgedara, Denipitiya.
Plaintiff-Respondent-Respondent

1. Waruni Harshani
Samarawickrama,
No. 15/2, Gomas Park,
Colombo 05.
2. Dilhar Agasha Jinadasa,
No. 260, Park Road,
Colombo 05.
3. Nishamani Serosha Jinadasa,
No. 260, Park Road,
Colombo 05.
1st–3rd Defendant-Respondent-Respondents

10. Nihal Ranjith
Samarawickrama,
No. 13/3, Sri Mahabodhi Road,
Dehiwala.
10th Defendant-Petitioner-Respondent

Before: Buwaneka Aluwihare, P.C., J.
Murdu Fernando, P.C., J.
Mahinda Samayawardhena, J.

Counsel: Nuwan Bopage with Manoj Jayasena for the 4th-9th Defendant-Petitioner-Appellants.

H. Withanachchi with Shantha Karunadhara for the Plaintiff-Respondent-Respondent.

Argued on: 24.03.2021

Written submissions:

By the 4th-9th Defendant-Petitioner-Appellants on 22.09.2017.

No written submissions filed by the Plaintiff-Respondent-Respondent.

Decided on: 18.06.2021

Mahinda Samayawardhena, J.

The Plaintiff filed this action naming the 1st to 3rd Defendants as parties to partition the land described in the schedule to the plaint among them on the pedigree set out in the plaint. The 4th to 10th Defendants were later added as parties. The 4th to 8th Defendants filed a joint statement of claim seeking to partition the land among those Defendants on a different pedigree, and also claiming prescriptive title to the land. After trial, the District Court rejected the 4th to 8th Defendants' pedigree and their prescriptive claim and partitioned the land as prayed for by the Plaintiff. The revision application filed against this Judgment by the 4th to 8th Defendants was dismissed by the High Court of Civil

Appeal. Hence this appeal by the 4th to 8th Defendants (Appellants).

This Court granted leave to appeal against the Judgment of the High Court on two questions of law: whether the High Court failed (a) to investigate title of the parties to the land, and (b) to consider the prescriptive title of the Appellants.

The High Court dismissed the revision application of the Appellants on procedural impropriety as well as on its merits.

Let me now consider the nature of the revision application filed before the High Court and the Judgment of the High Court thereon.

The Judgment of the District Court was delivered on 22.08.2014. The Appellants did not appeal against the Judgment as they were statutorily entitled to do if they were dissatisfied with the Judgment. Instead, they filed a revision application on 16.03.2015 – about 07 months after the delivery of the Judgment.

Revision is a discretionary remedy. A party cannot invoke this extraordinary jurisdiction of the Appellate Court as of right.

When a right of appeal is available against a Judgment or an Order, a party seeking to come before Court by way of revision shall explain in the petition why he did not exercise his right of appeal.

In the revision application filed before the High Court there was no such explanation at all.

Unlike in an appeal, there is no stipulated time limit within which a revision application may be filed in Court. The Petitioner must come to Court within reasonable time from the date of the impugned Judgment or Order. What constitutes reasonable time is a question of fact to be determined on the facts and circumstances of each individual case. In essence, the party seeking revision shall come to Court without undue delay. If there is a delay, he shall explain it in the petition.

However I must hasten to add that if the Judgment or Order sought to be challenged is palpably wrong, perverse, made without jurisdiction or suffering from a similar grave infirmity, the Court shall not dismiss a revision application on the ground of delay alone.

In the instant case, there was no explanation whatsoever for the undue delay in filing the revision application.

The existence of exceptional circumstances is a *sine qua non* for the invocation of revisionary jurisdiction. Such exceptional circumstances, albeit briefly, shall be averred in the petition for the Court to be satisfied on *prima facie* basis that notice in the first instance be issued on the Respondents.

In the instant case, the main ground urged under exceptional circumstances was the failure of the District Court to identify the corpus to be partitioned.

This assertion is simply devoid of merit. At the trial, when the Plaintiff raised the first issue of whether the land to be partitioned is depicted in the Preliminary Plan, counsel for the Appellants informed Court that there was no necessity to

raise such an issue as the corpus was admitted by the Appellants. The Appellants, obviously, did not raise an issue on the identification of the corpus. The 7th Defendant-Appellant who gave evidence on behalf of all the Appellants in the District Court admitted the corpus in her evidence. Having taken up such a clear position in the lower Court, the Appellants cannot take up a diametrically opposite position in the Appellate Court. The doctrine of estoppel, and the doctrine of approbate and reprobate (which is one of the species of estoppel) forbit this.

The Appellants also stated in the revision application that the presumption of prescriptive title created in favour of them on the basis of their long possession had not been rebutted by the Plaintiff. In my view, the Appellants made this claim in passing.

By reading the impugned Judgment of the High Court, it is clear that the Appellants did not pursue this ground at the argument before the High Court, and the only ground urged before the High Court was the failure to identify the corpus.

Be that as it may, the Appellants do not in fact affirmatively state that they proved prescriptive title to the land against the Plaintiff but instead attempt to shift the burden of disproof onto the Plaintiff.

I accept that a presumption of ouster can be drawn on long exclusive possession in the unique facts and circumstances of a case. *(Tillekeratne v. Bastian (1918) 21 NLR 12 at 24)* But the well-established general principle is that the burden of proof of prescriptive title (as against the party who is able to

point to a paper title) rests fairly and squarely upon the party who asserts such prescriptive title.

The Appellants must understand that what was filed before the High Court was not a final appeal but a revision application and they cannot clutch at straws for survival.

The purpose of revisionary jurisdiction is to promote the due administration of justice and correct miscarriage of justice. But it is well to remember that unlike in an appeal, not every error of fact or law may be corrected in revision. In short, the general ground that the Judgment is incorrect, which is sufficient to invoke the statutory right of appeal, does not *per se* constitute an exceptional ground to invoke the extraordinary jurisdiction of revision. The error complained of shall shock the conscience of the Court.

In a revision application, unlike in a statutory right of appeal, there is a threshold or vetting process before the applicant is afforded a full hearing.

In the facts and circumstances of this case, it is my considered view that the revision application should have been dismissed *in limine* without notice being issued on the Respondents.

The High Court, having taken the view that the Petitioner did not pass the gateway, nevertheless considered the merits of the application notably on the limited ground urged, i.e. failure to identify the corpus, before it dismissed the application.

The Judgment of the High Court is flawless.

Let me now consider the appeal before this Court.

Learned counsel for the Appellants stated at the argument that he confines his argument only to the question of prescription.

As I have already stated, in my view, the Appellants did not vigorously pursue the plea of prescriptive title before the High Court. Therefore the High Court did not consider it. Hence the Appellants cannot complain that the High Court failed to consider their prescriptive title to the land, and therefore this Court shall now consider it and allow the appeal.

What is before this Court is not a revision application but a final appeal. The Appellants have come before this Court not against the Judgment of the District Court but against the Judgment of the High Court.

Nonetheless, as this is the final Court, I thought I must consider the Appellants' plea of prescriptive title.

At the trial, the Plaintiff's father gave evidence on behalf of the Plaintiff and produced deeds and documents from the Land Registry marked P1-P4 and 1V1. He also marked the Preliminary Plan and the Report as X and X1, respectively. The 7th Defendant-Appellant gave evidence on behalf of the Appellants. In her evidence, she only marked the Death Certificate of her mother, which is an admitted fact.

According to the Plaintiff's pedigree:

The original owner of the land is Jamis Samarawickrama. By deed No. 11825 dated 28.02.1933, he alienated this property to his daughter Emalia Samarawickrama. The fact that this

deed was registered at the Land Registry and is now destroyed is established by P1 issued by the Land Registry. Emalia Samarawickrama was the elder sister of Dinoris Samarawickrama who was the Plaintiff's grandfather. Emalia Samarawickrama gifted this land together with several other lands by deed No. 1588 dated 19.03.1967 marked P2 to Dayaratne Jinadasa and Nandawathie Jinadasa who are her two children, and to the 2nd and 3rd Defendants who are her grandchildren, in the proportion of 1/3 share each to her two children and the balance 1/3 share equally to her two grandchildren. Dayaratne Jinadasa married Rupa Jinadasa and his 1/3 share devolved on their children Lakkhi Jinadasa, Omala Jinadasa and Tissanath Jinadasa. Thereafter, by deed No. 1532 dated 27.02.2001 marked P3, they donated this 1/3 share to the Plaintiff. The aforesaid Nandawathie Jinadasa transferred her 1/3 share by deed No. 201 dated 18.01.1991 marked 1V1 to the 1st Defendant. The Land Registry extracts relevant to these transactions were marked P4. According to the Plaintiff's pedigree, the Plaintiff and the 1st Defendant are each entitled to 2/6 share, and the 2nd and 3rd Defendants are each entitled to 1/6 share.

The learned District Judge accepted this pedigree.

Conversely, the Appellants unfolded a different pedigree but did not mark any deeds in evidence. Deeds executed after the *lis pendens* was registered were not marked.

According to the Appellants' pedigree as described in the evidence of the 7th Defendant-Appellant:

The original owner of the land is Thiloris Samarawickrama who is the younger brother of Jamis Samarawickrema (the

original owner of the land according to the pedigree of the Plaintiff). Thiloris Samarawickrama had four children and one of them is the 7th Defendant-Appellant's father Jinoris Samarawickrema who married Angurukankanamlage Upona. After the death of Jinoris Samarawickrema and Angurukankanamlage Upona, the entire land devolved on their five children, the 4th to 8th Defendant-Appellants.

This pedigree was not accepted by the learned District Judge and the Appellants do not canvass it before this Court.

The 7th Defendant-Appellant admits in her evidence that Jamis Samarawickrema and Thiloris Samarawickrema were brothers, and her father Jinoris Samarawickrema was the son of Thiloris Samarawickrema; and that Emalia Samarawickrema (who executed the deed P2) was the daughter of Jamis Samarawickrema; and that Emalia Samarawickrema and Jinoris Samarawickrema had been on good terms throughout their lives as cousins.

On this basis, it is the submission of learned counsel for the Plaintiff that Emalia Samarawickrema, admittedly an affluent lady who had gifted 71 parcels of land by deed P2, allowed Thiloris Samarawickrema to possess the land that is the subject matter of this action.

The 7th Defendant-Appellant states that her father Jinoris Samarawickrema and her grandfather Thiloris Samarawickrema both lived on this land, the 4th to 8th Defendant-Appellants were born on this land, and there are three houses on the land where she, the 4th Defendant-Appellant and his son are living. The Plaintiff's father admits these facts in his evidence.

The 7th Defendant-Appellant has not seen her grandfather Thiloris Samarawickrema and says she does not know how her grandfather and father came into possession of the land. She does not dispute the Plaintiff's deeds but says she was unaware of those deeds and further says neither the Plaintiff nor anybody in the Plaintiff's pedigree ever possessed the land.

It is not possible to believe that the Appellants did not at least know that Emaliya Samarawickrema was the owner of the land at one point in time. The Appellants cannot say that their grandfather came to a no-man's-land. The Appellants shall explain how they came into possession of someone else's land.

In *Sirajudeen v. Abbas [1994] 2 Sri LR 365 at 371,* G.P.S. De Silva C.J. stated that a facile story of walking into abandoned premises after the Japanese air raid constitutes material far too slender to found a claim based on prescriptive title.

The only submission of learned counsel for the Appellants is that the Appellants and their predecessors have been in physical possession of the land since 1948. But long possession alone does not amount to prescriptive possession. In order to claim prescriptive title under section 3 of the Prescription Ordinance, possession for over ten years is only one requirement. Such possession shall not only be "*undisturbed and uninterrupted*", but also, more importantly, "*by a title adverse to or independent of that of the claimant or plaintiff*". The possession shall be of a character incompatible with the title of the true owner.

The commencement of prescriptive possession can coincide with the commencement of possession itself if the possessor enters the land in a capacity inconsistent with the owner's title. If not, the possessor shall signify the change in the character of possession by an overt act or a series of acts indicative of a challenge to the owner's title. The prescriptive period begins to run only from that point and not from the date of entry to the land. (*Sirajudeen v. Abbas [1994] 2 Sri LR 365, Reginald Fernando v. Pabilinahamy [2005] 1 Sri LR 31 at 37, Chelliah Vs. Wijenathan (1951) 54 NLR 337 at 342, Mitrapala v. Tikonis Singho [2005] 1 Sri LR 206 at 211-212*)

Where the relationship between the two parties is very close such as in the instant case, the proof of change in the character of possession from innocuous to adverse is greater than in a case where the two parties are total outsiders. (*De Silva v. Commissioner of Inland Revenue (1978) 80 NLR 292, Podihamy v. Elaris [1988] 2 Sri LR 129*)

In the instant case, the Appellants have failed to prove that they commenced adverse possession from the outset or that they changed their character of possession subsequently. The evidence of the 7th Defendant-Appellant is that the Appellants continued their possession without any objection from the Plaintiff or the other co-owners. This is not sufficient to claim prescriptive tittle.

In the facts and circumstances of the case, the learned District Judge cannot be found fault with for rejecting the prescriptive claim of the Appellants.

I answer the questions of law in respect of which leave was granted in the negative.

The appeal is dismissed but without costs.

Judge of the Supreme Court

Buwaneka Aluwihare, P.C.J.
I agree.

Judge of the Supreme Court

Murdu 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 Appeal

Thammahetti Mudalige
Don Nobert Peiris
Mudukatuwa,
Marawila.

Plaintiff

SC Appeal 97/2015
SC (HC CA) LA. No. 109/2014
Civil Appellate High Court Kurunegala
NWP/HCCA/KUR/2007(F)
D.C. Marawila Case No.742/L

Vs-

1. Kulasinghe Arachchige Emalka Melani
2. Warnakulasooriya Aloysius Perera
   Both of St. Bridget, Bolawatta Road,
   Dankotuwa.
3. Gearad Desmond
   Mudukatuwa,
   Marawila.

Defendants

AND BETWEEN

Thammahetti Mudalige
Don Nobert Peiris
Mudukatuwa,
Marawila.

Plaintiff-Appellant

Vs

1. Kulasinghe Arachchige Emalka Melani
2. Warnakulasooriya Aloysius Perera
   Both of St. Bridget, Bolawatta Road,
   Dankotuwa

3. Gearad Desmond
   Mudukatuwa,
   Marawila.

Defendant-Respondents

AND NOW BETWEEN

1.Kulasinghe Arachchige Emalka Melani
(Deceased)
1A. Dissanayakage Aloysius Perera
2. Dissanayakage Aloysius Perera
Both of St. Bridget, Bolawatta Road,

Dankotuwa

1A & 2nd Defendant-Respondent-Appellants

Vs

Thammahetti Mudalige
Don Nobert Peiris (Deceased)
Mudukatuwa,
Marawila.

Plaintiff-Appellant-Respondent

Herath Mudiyanselage Somawathi
Mudukatuwa, Marawila

(Substituted) Plaintiff-Appellant-Respondent

Gearad Desmond
Mudukatuwa,
Marawila.

3rd Defendant-Respondent-Respondent

Before: Sisira. J. de Abrew J
P. Padman Surasena J &
S.Thurairaja PC J

Counsel: Kuvera de Zoysa President's Counsel for the 1A & 2nd Defendant-

Respondent- Appellants

Romesh de Silva President's Counsel for the Plaintiff-

Appellant- Respondent

Argued on : 14.10.2020

Decided on: 12.2.2021

Sisira. J. de Abrew, J

This is an appeal against the judgment of the Civil Appellate High Court dated 8.1.2014 wherein the learned Judges of the Civil Appellate High Court set aside the judgment of the learned District Judge dated 1.3.2007 who held the case in favour of the 1st and the 2nd Defendant-Respondent-Appellants.

The Plaintiff-Appellant-Respondent (hereinafter referred to as the Plaintiff-Respondent) filed this action against the 1st, 2nd and 3rd Defendants seeking a declaration of title to the property in dispute on the basis of prescription. The Learned District Judge by his judgment dated 1.3.2007 dismissed the action of the Plaintiff-Respondent and decided that the 1st Defendant is the owner of the property in dispute. Being aggrieved by the said judgment of the learned District Judge, the Plaintiff- Respondent appealed to the Civil Appellate High Court. The learned Judges of the Civil Appellate High Court by their judgment dated 8.1.2014 set aside the judgment of the learned District Judge. Being aggrieved by the said judgment of the Civil Appellate High Court, the 1st and the 2nd Defendant-Respondent-Appellants (hereinafter referred to as the Defendant- Appellants) have appealed to this court. This court by its order dated 1.6.2015 granted leave to appeal on question of law set out in paragraphs 10(1), 10(2), 10(3), 10(4), and10(5) of the Petition of Appeal dated 17.2.2014 which are set out below verbatim. In

addition to the said questions of law, learned counsel for the 1st and 2nd Defendant-Appellants has raised a question of law which will be stated below as question of law No.6.

1. Have their Lordships in the Civil Appellate High Court of Kurunegala erred in Law by coming to the conclusion that the Respondent had prescribed to the land in question.

2. Have their Lordships in the Civil Appellate High Court of Kurunegala erred in Law by coming to the conclusion that the Appellant-Respondent clearly had more than 10 years of possession of the Corpus before he was evicted from the land on 20.08.1993.

3. Have their Lordships in the Civil Appellate High Court of Kurunegala erred in Law by failing to consider that the Respondent had adverse possession of the land against the Petitioners in determining that the Appellant-Respondent had prescribed to the land.

4. Have their Lordships in the Civil Appellate High Court of Kurunegala erred in Law by holding that the Respondent diligently defended his right to the land up to the time he was dispossessed on 20.08.1993 based on his evidence given before Court on 22.11.1982 (Respondent gave evidence before Court on 22.11.1982 showing that he was diligently defending his rights up to the time he was dispossessed on 20.08.1993)

5. Have their Lordships in the Civil Appellate High Court of Kurunegala erred in Law by holding that the Appellant-Respondent was entitled to damages as prayed for in the Prayer to the Plaint when there was no evidence to substantiate such damage.

6. Could the Plaintiff alleging prescriptive title to the corpus maintain this rei-vindicatio action against the 1st and the 2nd Defendant- Appellants?

Learned President's Counsel for the Plaintiff-Respondent contended that land described by the Plaintiff-Respondent and the land described by Defendant-Appellants are two different lands and that therefore the judgment of the Civil Appellate High Court was correct. I now advert to this contention. If these are two different lands why did the Plaintiff-Respondent file this action to eject the 1st and the 2nd Defendant-Appellants? The above contention of learned President's Counsel fails on this question. I therefore reject the above contention.

The Plaintiff-Respondent claims title to this land on the basis of prescription. Therefore, he should prove prescriptive title in terms of Section 3 of the Prescription Ordinance which reads as follows.

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

prevent encroachment or usurpation thereof, or to establish his claim in any other manner to such land or other property, proof of such undisturbed and uninterrupted possession as herein before explained, by such plaintiff or intervenient, or by those under whom he claims, shall entitle such plaintiff or intervenient to a decree in his favour with costs:

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

To claim prescriptive title in terms of Section 3 of the Prescription Ordinance, one of the conditions that the claimant should prove is that his possession to the land in dispute is adverse possession. The Plaintiff-Respondent in his evidence says that his father cultivated the land in dispute from 1935 to 1973 and from 1973 to 20.8.1993 he possessed the land in dispute. Was his alleged possession to the land in dispute an adverse possession? The Plaintiff-Respondent in his evidence says that he gave the land in dispute to a church in the area for the purpose of conducting wedding ceremonies, musical shows and carnivals. But there is no clear evidence to establish that it was the land in dispute which was given to the church for the above purposes. There is also no clear evidence to establish that it was the Plaintiff-Respondent who gave the land to the church.

Dissanayake Aloysius Perera who is the 2nd Defendant in this case says in his evidence that his wife is the 2nd owner of the land in dispute and prior to her ownership her father was the owner of the land in dispute and that from 1975 they were in possession of the land in dispute.

Warnakulasuriya Camilus Fernando who was called by the Defendants in his evidence says that he plucked coconuts in the land owned by the 1st and the 2nd Defendants which is the land in dispute for a period of 20 to 25 years and that Nobert Peiris who was the original Plaintiff in this case never objected to the plucking of coconuts in the land in dispute.

Reginold Julian Dondinu who was called by the Defendants says in his evidence that he was the Grama Niladhari in the area in which the land in dispute is situated; that he never received any complaint regarding the land in dispute; and that the Plaintiff-Respondent was not in possession of the land in dispute.

If the Plaintiff-Respondent did not object to the plucking of coconuts in the land in dispute, how does he claim that he had adverse possession of the land in dispute? The above evidence clearly shows that the Plaintiff-Respondent did not have adverse possession to the land in dispute.

When I consider the totality of the evidence led at the trial, I hold that the Plaintiff-Respondent has failed to prove that his alleged possession to the land in dispute was adverse possession. The learned District Judge has come to the conclusion that the alleged possession of the Plaintiff-Respondent was not an adverse possession.

Can it be contended that mere possession for a period of over ten years amounts to the possession discussed in Section 3 of the Prescription Ordinance? I now advert to this question.

In Tillekeratne Vs Bastian 21 NLR 12 it was held *"(a) that it is open to the court from lapse of time in conjunction with the circumstances of the case to presume that a possession originally that of a co-owner has since become adverse*

and (b) that it is a question of fact whenever long continued exclusive possession by one co-owner is proved to have existed, whether it is not just and reasonable in all the circumstances of the case that the parties should be treated as though it had been proved that separate and exclusive possession had become adverse at some date more than ten years before action brought."

The above judgment in the case of Tillekeratne Vs Bastian 21 NLR 12 was disapproved by the Privy Council in the case of I.L.M.Cadija Umma and Another Vs S.Don Manis Appu and other 40 NLR 392. Privy Council held that

"the words in section 3 of the Prescription Ordinance, viz., by a "title adverse to or independent of the claimant or plaintiff" cannot be construed as introducing the requirement known to the Roman law as Justus titulus or justa causa,.
The purpose of the parenthetical clause in the section, viz., "possession unaccompanied by payment of rent or produce or performance of service or duty or by any other act by the possessor from which an acknowledgment of a right existing in another person would fairly and naturally be inferred" is to explain the character of the possession which, if held without disturbance or interruption for ten years, will result in prescription.
The dictum of Bertram C. J. in Tillekeratne v. Bastian (21 N. L. R. 12) that the parenthesis has no bearing on the meaning of the words "adverse possession", disapproved."

Further Privy Council at page 395 of the above judgment has made the following observation. *"Bertram C. J. (in Tillekeratne v. Bastian) relying on Lord Macnaghten's language in Corea's case, held that "the parenthesis has no bearing on the meaning of the words ' adverse title': it may henceforth be left out of*

account in the discussion of the question". Their Lordships cannot accept this dictum of the learned Chief Justice."

In Mithrapala and Another Vs Tikonis Singho [2005] 1 SLR 206 at page 211Court of Appeal referring to an unreported judgment in Court of Appeal No.418/2002(6) observed as follows. *"But mere possession is not prescriptive title. A person in possession who claims title by virtue of prescription must prove that he had possessed the property in the manner and for the period set out in section 3 of the Prescription Ordinance".*

In Sirajudeen and Two Others Vs Abbas [1994] 2 SLR 365 at page 370 this court held as follows. *"But what needs to be stressed is that the fact of occupation alone would not suffice to satisfy the provisions of section 3 of the Prescription Ordinance. One of the essential elements of the plea of prescriptive title as provided for in section 3 of the Prescription Ordinance is proof of possession 'by a title adverse to or independent of that of the claimant or plaintiff.'"*

In the case of Hamidu Lebbe Vs Ganitha 27 NLR 33 forty to fifty-year period of possession of the defendant who was a co-owner was not accepted as adverse possession against the plaintiff who had purchased ½ share from the brother the defendant. Ennis ACJ (De Sampayo J agreeing) at page 35 held as follows. *"The defendant and his brother, Suddana, were clearly co-parceners in the land, and as such the possession per se of one could not be held as adverse to the other."*

In Seeman Vs David [2000] 3 SLR 23 at page 26 Weerasuriya J as follows. *"The learned District Judge had come to the finding that the Defendant-Respondents had acquired prescriptive rights to the entire property on the basis that along with their predecessors in title they had possessed the property for a period of 70 years*.

This appears to be an erroneous view. To claim prescriptive rights the Defendant-Respondents ought to prove adverse and uninterrupted possession for a period of ten years."

Considering the above legal literature, I hold that mere possession for a period of over ten years does not amount to possession discussed in Section 3 of the Prescription Ordinance; that a person claiming such possession is not entitled to succeed in a claim of prescription in terms of Section 3 of the Prescription Ordinance; and that in order to succeed in a claim of prescription, the claimant should prove that his possession is adverse, uninterrupted and undisturbed possession for a period of ten years.

The learned District Judge in his judgment dated 1.3.2007 decided that the Plaintiff-Respondent had failed to prove that his alleged possession to the land in dispute was adverse possession and that therefore the Plaintiff-Respondent had failed to prove his case. I have earlier held that the Plaintiff-Respondent has failed to prove that his alleged possession to the land in dispute was adverse possession. The learned District Judge was correct when he came to the above conclusion. The learned Judges of the Civil Appellate High Court without giving due consideration to the above matters, have set aside the judgment of the learned District Judge. The learned Judges of the Civil Appellate High Court were wrong when they set aside the judgment of the learned District Judge.

The learned District Judge after considering the Deed Nos. 1906 dated 15.12.1951, 4536 dated 18.8.1962 and 8922 dated 19.3.1988 came to the conclusion that the 1st Defendant-Appellant is the owner of the land in dispute on the basis of the above deeds. This decision is, in my view, correct. In view of the conclusion reached

above, I answer the 1st, 2nd and 3rd questions of law in the affirmative. The 4th,5th and 6th questions of law do not arise for consideration.

For the aforementioned reasons, I set aside the judgment of the learned Judges of the Civil Appellate High Court dated 8.1.2014 and affirm the judgment of the learned District Judge dated 1.3.2007. I allow the appeal of the 1st and the 2nd Defendant-Appellants with costs. The 1st and the 2nd Defendant-Appellants are entitled to costs in all three courts.

Appeal allowed.

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 for leave to appeal under Section 5C (i) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended by Act No. 54 of 2006.

SC/Appeal No. 101/ 2018

SC (HC) CALA Application No. 33/2018

WP/HCCA/KAL/70/14/F

DC Panadura Case No. 2224/L

Waduge Sumanasiri Fernando,
No. 7/1, D.S. Senanayake Mawatha,
Panadura.

Plaintiff.

Vs.

K. Dayananda Perera
No. 315, Suduwella Road,
Wekada, Panadura.

Defendant.

AND

K. Dayananda Perera
No. 315, Suduwella Road,

Wekada, Panadura.

Defendant – Appellant.

Vs.

Waduge Sumanasiri Fernando,

No. 7/1, D.S. Senanayake Mawatha,

Panadura.

Plaintiff – Respondent.

AND NOW BETWEEN

K. Dayananda Perera

No. 315, Suduwella Road,

Wekada, Panadura.

Defendant – Appellant – Petitioner.

Vs.

Waduge Sumanasiri Fernando,

No. 7/1, D.S. Senanayake Mawatha,

Panadura.

Plaintiff – Respondent – Respondent.

Before: Vijith K. Malalgoda, PC, J

P. Padman Surasena, J

E. A. G. R. Amarasekara J

Counsel: Ranjan Gunaratne for the Defendant – Appellant – Petitioner

Thishya Weragoda for the Plaintiff – Respondent – Respondent

Argued on: 04.10.2019

Decided on: 21.10.2021

E. A. G. R. Amarasekara J

The Plaintiff – Respondent – Respondent (hereinafter referred to as the Plaintiff – Respondent or the Plaintiff) instituted an action in the District Court of Panadura against the Defendant – Appellant – Petitioner (hereinafter referred to as the Defendant – Petitioner or the Defendant) by his plaint dated 21.04.2009, praying inter alia for a declaration that he be entitled to the land described in the 5th schedule to the plaint, and for the eviction of the Defendant, his agents and servants from the said land described in the 5th schedule to the plaint and for damages. The same reliefs were prayed in the amended plaint dated 17.01.2011 where the 5th schedule has been described as per the plan No.1778 made by T.D K.R.P. Pathegama, Licensed Surveyor. The Plaintiff – Respondent in his amended plaint inter alia averred that;

- Ismail Marikkar Mohamadu became the owner of the land described in the 1st schedule to the plaint by deed No. 1451 dated 24.11.1944 attested by M.M.A. Raheem Notary Public.
- Said Ismail Marikkar Mohamadu transferred his rights acquired by the aforesaid deed to Waduge Pedrick Premachandra Fernando by deed No. 4374 dated 14.02.1947 attested by W.P. Senevirathne, Notary Public.
- Said Premachandra Fernando transferred a part of the said land described in the 1st schedule to the amended plaint which is described in the 2nd schedule to the amended plaint by deed No. 11483 dated 12.09.1969 attested by Arthur Wijesuriya, Notary Public to the Plaintiff, Waduge Sumanasiri Fernando and the Plaintiff also acquired prescriptive title.
- The common access road (පොදු ප්‍රවේශ මාර්ගය) to the lands described in the 1st and 2nd schedules to the amended plaint was the land described in the 3rd schedule to the amended plaint.

- The Plaintiff's father purchased the soil rights (පොළවේ අයිතිවාසිකම්) of the road described in the 3rd schedule to the amended plaint from the original owner, Ismail Lebbe Marikkar Mohamadu by deed No. 3408 dated 29.11.1969 attested by Ranjith Weerasekara, Notary Public subject to the right of way to access only the land described as lot C in the plan No. 3812.
- At the demise of the plaintiff's father, Waduge Premachandra Fernando, his rights devolved on the plaintiff and his siblings and the said siblings of the Plaintiff conveyed all the rights of the said roadway to the plaintiff by deed of gift No. 773 dated 23.02.2008 attested by Upul Kumara Munasinghe, Notary Public. Thereby, the plaintiff became entitled to the soil rights of the road described in the 3rd schedule to the amended plaint.
- The Plaintiff alienated a portion of the land described in the 2nd schedule to the amended plaint, which is the 4th schedule to the amended plaint by deed No. 12145 dated 20.04.1998 attested by A.P. Fernando, Notary Public.
- The subject matter of this action is the remaining portion of the land described in the 2nd schedule to the amended plaint (subsequent to the said alienation), which is described in the 5th schedule to the amended plaint.
- On or about 16.12.2000, the defendant informed the plaintiff that a portion of the land described in the 5th schedule to the amended plaint forms a part of the roadway described in the 3rd schedule to the amended plaint.
- The Defendant prepared a plan without informing the plaintiff and by the said plan the defendant unlawfully seized a portion of the land described in the 5th schedule to the amended plaint which is described in the 6th schedule to the amended plaint.
- Accordingly, a cause of action arose for a declaration that the plaintiff is the owner of land described in the 5th schedule to the amended plaint and to eject the defendants and all under him from the said land and for damages. (The correct dates of deeds No.773 and 12145 mentioned above should be 23.12.2008 and 20.04.1988 respectively)

The Defendant –Petitioner filed his answer dated 16th May 2011 and by the said answer stated inter alia that;

- The right of way shown in plan No. 3812 as lot B was widened to 10 feet around 30 years ago.

- Defendant and his predecessors in title have used this road for over 20 years. Therefore, the defendant and his predecessors acquired a prescriptive right to the said 10 feet wide road as per the provisions of the Prescription Ordinance.
- Said 10 feet wide road is depicted in the plan No. 25/63 dated 14.12.2006 prepared by the licensed surveyor, D.R. Kumarage.
- In the Eastern Boundary of the said road there was a line of bricks and that was destroyed and removed by the plaintiff.
- As per the schedule of the deed No. 3408, plaintiff's father was not given the soil rights of Lot C. Therefore, there is no legal right for the plaintiff to proceed with this action.

Accordingly, the Defendant – Petitioner stated that there is no cause of action accrued against the Defendant - Petitioner and thereby prayed for the dismissal of the action with costs. However, it must be noted here that the Plaintiff has never claimed soil rights to Lot C of Plan no.3812, but as per paragraphs no.7,8,9 and 10 of the amended plaint he claims soil rights to the lot B of plan no. 3812 subject to the right of way to lot C. Nevertheless, it appears, when framing issues, the Defendant Petitioner has framed issues querying whether the Plaintiff's father had soil rights to said Lot B in Plan no. 3812.

The plaintiff has taken out a commission and accordingly A D K R P Pathegama, licensed surveyor has prepared plan no.1778 to depict the alleged encroachment by the defendant and this plan has been later marked as P 6 at the trial.

At the commencement of the trial, it was admitted that the right of way to the lands described in the 1st and 2nd schedules to the amended plaint was the roadway described in the 3rd schedule to the amended plaint. Thereafter, issues No. 1 to 5 were raised on behalf of the Plaintiff – Respondent and issues No. 6 to 11 were raised on behalf of the Defendant – Petitioner.

Issues raised for the Plaintiff – Respondent basically put in question whether the Plaintiff is the owner of the land described in the 5th schedule to the amended plaint and whether the said land is depicted in the aforesaid plan made by Mr. Pathegama, Licensed Surveyor as lot 1 and 2 and further, whether the Defendant has unlawfully encroached aforesaid Lot 1 on or around 16.11.2000. When considering aforesaid issues along with the prayers in the plaint which is to be

granted in case if the aforesaid issues are answered in favour of the Plaintiff, it is clear that the Plaintiff's case takes the form of a *Rei Vindicatio* action.

The Defendant – Petitioner framed issues and mainly queried;

- Whether the defendants became the owners of the road described in the Plan No. 3812 of John R. A. Rodrigo, licensed surveyor around 30 years ago?
- Whether this 10-feet wide road is depicted in the plan No. 25/63 dated 17.12.2006 prepared by D.R. Kumarage, Licensed Surveyor. (The correct date of the said plan should be 14.02.2006)
- Whether the defendant and his predecessors in title used this roadway and accordingly, whether the defendant and his predecessors acquired prescriptive title to the said 10 feet wide roadway as per the provisions of the Prescription Ordinance?
- Whether the plaintiff's father became entitled to the soil rights of the roadway as described in the paragraph 7 of the plaint?
    - If not, whether the plaintiff became entitled to the soil rights of this roadway subsequent to the demise of his father?
    - If not, whether the plaintiff can maintain this action?

As per the proceedings dated 05.10.2011 and order dated 16.02.2012 of the district court proceedings, there had been another 3 counter issues numbered as 12,13 and 14 raised by the Plaintiff and the Defendant respectively, but not answered in the judgment of the district court. However, no party has expressed their concern over not answering those three issues in their submissions in this appeal. On the other hand, I am also of the view that those three issues were not materially relevant to the matter that was in dispute before the learned district judge as the dispute was limited to the fact whether the Defendant has encroached a portion from the land described in the 5th schedule to the amended plaint by adding it to the right of way he already had over the land described in the 3rd schedule to the amended plaint.

Both the District Court and the Civil Appellate High Court held in favour of the Plaintiff and being aggrieved by the judgment of the learned High Court judges, the Defendant filed a leave to appeal application to this court and this court granted leave only on one question of law which is quoted below.

"*Did the learned Judges of the High Court of Civil Appeals err in law in failing to appreciate that the defendant and his predecessor-in-title had prescribed to a 10 ft wide road*?"- vide journal entry dated 10.07.2018.

Answer to this question of law will mainly depend on whether there were sufficient facts before the learned district judge to establish that the Defendant and his predecessor have prescribed to a 10 feet wide Road and whether the Learned High Court Judges failed to realize that the learned District Court Judge was erred in evaluating evidence in that regard.

The Plaintiff has marked P1 to P8 at the trial which includes some deeds and plans to prove his case. It must be noted that none of these documents were impeached through issues and only P2, P2A and P6 and P6A were marked subject to proof when they were tendered in evidence for the first time. P2 is the plan made by J R A Rodrigo, licensed surveyor and P2 A appears to be the field notes relevant to the said plan P2. P6 and P6A are the plan No.1778 and its report made by T D K R P Pathegama, Licensed Surveyor. T D K R P Pathegama, Licensed Surveyor has given evidence to prove the plan and the report he made. Since J R A Rodrigo, Licensed Surveyor is dead, it appears one Ajith Prassanna Silva, Licensed Surveyor, who has previously used plans made by said J R A Rodrigo and who has seen the signature of said J R A Rodrigo, has been summoned to prove the said plan marked P2. Furthermore, at the close of the plaintiff's case, the Defendant has not reiterated the objections made to those documents. Thus, when the decision of **Sri Lanka Ports Authority V Jugolinija Bold East (1981) 1 Sri L R 18** is considered together with section 154 of the Civil Procedure Code, all the documents marked by the plaintiff as P1 to P8 can be considered as evidence for all the purposes of the case filed before the District Judge. By tendering deed no. 11483 marked as P1, the Plaintiff has established how he became entitled to the land described in the second schedule to the plaint which is Lot A of the said plan marked P2 as stated in paragraph 4 of the amended plaint. As per the portion marked as P1A in the schedule of the said deed, the transferor of the said deed had acquired title through the deed No. 4373 dated 14.02.1947 attested by W.P. Senaviratne, Notary Public which supports the averments in the paragraph 3 of the amended plaint. Through P1 plaintiff has also acquired the right of way over the land described in the 3rd schedule to the plaint which is Lot B of the said Plan

marked P2. Further the Plaintiff had acquired title to Lot 3 and 4 of Gulugahawatte in plan no.1868 through the same deed marked as P1.

Facts stated in paragraph 6 of the amended plaint was admitted at the beginning of the trial. Thus, it is common ground that the land described in the third schedule to the plaint, which is lot B of the plan marked P2, was used as a common access road to the land described in the first schedule as well as to the land described in the second schedule to the plaint. To prove that the Plaintiff has later acquired soil rights of the said common access road subject to the right of way attached to Lot C in plan no.3812 as averred in paragraphs 7, 8,9 and 10 of the amended plaint, the Plaintiff has marked the deeds No. 3408 marked as P3, and 773 marked as P4 respectively. P3 and P4 establish the fact that the father of the Plaintiff bought the soil rights of the Lot B in P2 and after his demise the siblings of the Plaintiff transferred their rights to the Plaintiff. By tendering the documents marked P1, P2, P3 and P4 in evidence which were not challenged as aforesaid, the Plaintiff by a preponderance of evidence has shown that one time he was the owner of the land in the second schedule to the plaint and he gained soil rights to the land in the third schedule to the plaint subject to the right of way attached to lot C of P2 over the land in the third schedule to the plaint which is lot B of P2.

By deed no. 12145 marked as P5, the Plaintiff has transferred part of the land in the second schedule to the plaint while amalgamating that part with aforementioned Lot 3 and lot 4 of the plan no 1868 for which he acquired title through P1. The said amalgamation is depicted in the plan no.6575 made by Licensed surveyor L W L de Silva marked as P7. Lot B in P7 which is the land depicted in the 4th schedule to the plaint contains the said part of the land the plaintiff parted with by executing P5.

The Plaintiff has produced in evidence the plan no. 1778 made by T D K R P Pathegama, Licensed Surveyor which depicts the superimpositions of the lots A2 and B of plan no.3812 (marked as P2) and superimposition of Lot B in plan no.6575. Surveyor Pathegama has given evidence in support of the plan he made which has been marked as P6 at the trial along with its report marked as P6A. In his report marked P6A he states that his superimposition is correct due to the reason that 4 points identified as P Q R S coincides with the corresponding points

in plan no. 3812(P2). Nothing is at least suggested in cross examination of surveyor Pathegama to challenge the said preciseness of the plan made by the said surveyor. No evidence has been led by the defendant to challenge the accuracy of P6 and P6A. Thus, the deeds and the plans marked by the Plaintiff along with the evidence given by the surveyor Pathegama establish on balance of probability that the Plaintiff has the paper title to lot 1 and 2 of the plan marked P6 which is the remaining portion of the land in the 2nd schedule to the plaint after the execution of P 5 by the Plaintiff. Said Lot 1 and 2 of plan marked as P6 is the land in the 5th schedule to the plaint. Further, it was established that the plaintiff has soil rights to lot B of plan no.3812(P2) subject to the right of way attached to Lot C of the same plan. It is also proved that lot 1 of P6 is not a part of said Lot B of P2 (Common Access Road for which the Plaintiff has soil rights) and it is an encroached portion for which the Plaintiff has paper title as part of land described in the 5th schedule to the plaint. Since the Defendant's position is that he has prescriptive rights to it, it is more probable that he has the possession of that lot 1 of plan marked P6.

In this backdrop, to defeat the Plaintiff's claims, the Defendant must show that he has a legal right to this encroached portion shown as lot 1 in P6. The position of the Defendant in his answer was that the road access shown as B in plan no. 3812 (P2) was widened to a road of 10 feet width 30 years ago and he and his predecessors used this road way for more than 20 years. Thus, the Defendant states that he has gained prescriptive rights as per the provisions of Prescription Ordinance. Further, it appears that the Defendant has taken up the position that the soil rights of the said road way was not with the plaintiff's father and as such he cannot maintain this action indicating indirectly that as the Plaintiff is not the owner of soil rights of the disputed roadway, he cannot maintain this action. Even the issues raised at the trial by the Defendant were based on the same stances taken up in the answer. However, as shown above, the Plaintiff has proved paper title to the said lot B in P2 as well as to the disputed lot 1 which is the alleged encroached portion in the plan no.1778 made by Pathegama, Licensed surveyor marked P6. Furthermore, this is not an action to declare that the Defendant has no right of way over lot B in P2 but to evict the Defendant from the encroached portion of the land described in the 5th schedule.

Mr. Pathegama, licensed surveyor in his report marked P6A at paragraph 4:11 as well as in his evidence states that the Defendant is using a roadway one and half feet wider than the road way shown in plan marked P2 as Lot B. Thus, it is clear that the Defendant is now using the encroached portion shown as lot 1 in Plan marked P6 which is part of the land in schedule no 5 of the amended plaint as part attached to his roadway. Nevertheless, to prove prescriptive rights to this encroached portion or lot 1 in P6, the Defendant must show 10 years or more adverse possession or adverse user of this encroached portion as a right of way. The first witness called by the Defendant, one Premasiri Fernando has given evidence to prove the photographs (V1 to V3) and he has not given any evidence with regard to the user or possession of the encroached portion which is lot 1 of P6. Other than the said witness, only the Defendant and a Notary Public have given evidence in support of the version of the Defendant. Said notary public has given evidence with regard to the execution of deed No 2466 marked V4 and he was not a witness to establish the fact that the Defendant had adverse possession or user of the encroached portion which is lot 1 in P6 as part of a road access for more than 10 years. The Defendant in his evidence in chief has stated that he bought his land by aforesaid V4 and it was bought along with the right of way mentioned in that deed, and further that the said right of way is the matter in dispute. He has further testified that his predecessors in title said to him that the said right of way has been used by his predecessors in title for more than 15 years and even that the Plaintiff had admitted in evidence that the said road in V1 (though V1 has been referred to as a plan, in fact V1 is one of the photos tendered by the Defendant) was used for more than 60 years. However, it must be noted that the Plaintiff does not dispute the right of way given by deed marked V 4 which is lot B in P2 containing 3.20 perches. What is in dispute is part of the land described in the 5th schedule to the amended plaint which is shown as lot 1 in P6 and said lot 1 is found adjacent to aforesaid right of way, namely lot B of P2, on its west boundary as per the plan marked P6. The deed marked V4 has not given any soil right or right of way to this portion of land found outside along the west boundary of the said Lot B. Even if one assumes for the sake of argument that predecessors in title of the defendant acquired prescriptive rights to the said lot 1 in P6 or had commenced adverse possession or user of Lot 1 in P6, that area of land has not been conveyed to the Defendant by the said deed. The said deed conveyed only Lot C of P2 and the right of way over Lot B which does not contain

the area that falls within Lot 1 of P6 as established by the evidence of T. D. K. R. P. Pathegama. Therefore, the Defendant cannot get the benefit of the possession or adverse user of his predecessors in title, if there was any such possession or user by them with regard to lot 1 of P6, which is situated outside the boundaries of Lot B of P2. On the other hand, no predecessor in title to the Defendant was summoned to give evidence to state that they had prescriptive rights, or had adverse possession or user of the Lot 1 in P6 and conveyed those rights to the Defendant. The deeds marked as P9 and P10 during the cross examination shows that even the predecessors in title of the Defendant had their right of way only over Lot B of P2 which Lot B does not include Lot 1 of P6. It can be observed that in V4 which was executed in 2008, east boundary of lot C in P2 which is Lot B of P2 has been described as a 10 feet wide road but when it described the right of way which is Lot B in P2 in its second schedule has not indicated it is a 10 feet wide road way but the extent has been given as 3.2 perches. However, in P9 which was executed in 2007 by the Defendant's predecessors in title, the east boundary of lot C has not been described as a 10 feet wide roadway. Even in P10 which was executed in 1968, east boundary of lot C has not been described as a 10 feet wide road. Both these P9 and P10 deeds described Lot B in their second schedule as a right of way of 3.2 perches but not as a 10 feet wide roadway. Mr. Pathegama, Licensed Surveyor through his plan and report marked as P6 and P6A and his oral evidence has established that in fact Lot B in P2 is a right of way of 3.2 perches with a width of eight and half feet and with the encroachment of the portion shown as lot 1 in his plan marked p6, it has become 10 feet wide. Since this right of way has not been described as a10 feet roadway in marked deeds written up to 2007 and such description is only found in the deed V4 which was written in 2008 in describing the east boundary of Lot C in P2, it is more probable that the encroachment could have taken place close to the date of V4. However, the Defendant has not led any evidence of a predecessor in title to show that one of them encroached lot 1 in P6 or had adverse possession or user of that portion.

The Defendant has acquired title to Lot C and the right of way over lot B of P2 only in January 2008. He has admitted in evidence that he did not use this right of way for 10 years. The Plaint in this case was filed in April 2009. Hence, the Defendant has not placed sufficient material before the learned District Judge to prove on balance of probability that he has prescriptive rights to the said

encroached portion shown as lot 1 in P6. Therefore, this court cannot be satisfied that there were sufficient materials before the learned District Judge to hold that the Defendant and his predecessor have prescribed to a 10 feet wide Road and/or that the Learned High Court Judges failed to realize that the learned District Court Judge was erred in evaluating evidence in that regard.

For the foregoing reasons, the question of law allowed by this court has to be answered in the Negative.

However, this court observes that both the parties have made certain legal submissions in their written submissions that do not directly fall within the ambit of the aforesaid question of law allowed by this court and they are discussed below.

The Defendant in his written submissions quoting the following paragraph from **Kathirathamby V Arumagam 39 C L W 27** try to argue that the Plaintiff failed in proving that he was ousted from possession and, as such, his action filed as a *rei vindicatio* action must fail.

(quote)

"*When a person institutes an action asking to be restored to the possession of the land from which he has been forcibly ousted, the onus of proving ouster is on him. As the plaintiff has failed to prove ouster in this case, it must be necessarily be assumed that the possession of the defendant is lawful*." (unquote)

The above quoted paragraph indicates an alleged cause of action based on an ouster from possession of the plaintiff and the failure of the plaintiff since he failed to prove his cause of action but it does not indicate that proof of ouster as a necessary ingredient of a *rei vindicatio* action.

The Plaintiff in his written submissions has quoted **Wille's Principles of South African laws (9th edition-2007) at pages 539-540** as follows;

"*To succeed with the rei vindicatio, the owner must prove on balance of probabilities, first, his or her ownership in the property. Secondly, the property must exist, be clearly identifiable and must not have been destroyed or consumed. Thirdly, the defendant must be in possession or detention of the thing at the*

moment the action is instituted. The rationale is to ensure that the defendant is in a possession to comply with an order for restoration."

A *rei vindicatio* action was described by Voet as follows;

"*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"* [1]

It is well established in our law that what is necessary to be successful in a *rei vindicatio* action is the proof of title to the property and that the defendant is in the possession of it. [2] Even an owner with no more than a bare paper title (nuda Proprietas) who has never enjoyed possession could lawfully vindicate his property subject to any lawful defense such as prescription.[3]

On the other hand, the Defendant admits that he unlawfully seized a portion of the Plaintiff's property during his cross examination at page 191 of the brief. The Plaintiff's case as elicited by the issues is that whether the Defendant has grabbed a portion of his land which is described in the 5th schedule to the plaint. In this context, the argument of the Defendant that ouster is not proved and the case of the Plaintiff must fail holds no water.

In the written submissions filed on behalf of the Defendant, there is an attempt to indicate that the action that should have been filed by the Plaintiff was an actio negotoria to get a declaration that the property is free from a servitude. As indicated above, this also does not fall within the scope of the question of law allowed by this court. It must be noted that the Plaintiff does not dispute the right of way of the Defendant over lot B of plan marked P2. Same incident may give rise to different causes of action. The Plaintiff's position in the plaint was that there is a right of way given to Lot C in P2, the Defendant has encroached and seized a portion of his land and prepared a plan accordingly. Whether the intention of such encroachment was to expand the right of way or to claim soil rights to the

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[1] Voet 6.1.2.

[2] Leisa and another Vs Simon and another (2002) 1 Sri L R 148, Pathirana V Jayasundera 58 NLR 169, Luwis Singho Vs Ponnamperuma (1996) 2 Sri L R 320, De Silva V Goonetileke 32 NLR 217, Abeykoon Hamine V Appuhamy 52 NLR 49

[3] Jamaldeen Abdul Latheef and another V Abdul Majeed Mohamed Mansoor and another, S.C Appeal No. 104/05 decided on 27.10.2010, Punchi Hamy Vs Arnolis (1883) 5 S.C.C160, Allis Appu Vs Endiris Hamy (1894) 3SCR 87, Appuhamy Vs Appuhamy 3 S.C.C 61

encroached portion is not within the knowledge of the Plaintiff. What the Plaintiff knew was that a portion of his land has been grabbed by the Defendant. As mentioned before, even the Defendant in his evidence has admitted that he illegally seized a portion of the Plaintiff's land. In that backdrop, this court cannot find fault with the nature of the action filed by the Plaintiff. On the other hand, even if the said encroachment is not a total dispossession of the Plaintiff, it is clear that it affects the ownership rights of the Plaintiff as it deprives the Plaintiff of peaceful possession of the encroached portion. Such deprivation of a right falls within the interpretation of cause of action in terms of the section 5 of the Civil Procedure Code. Thus, he is entitled to file an action and get redress of the wrong done and ask for a decree to declare his right and to yield up the peaceful possession of the relevant immovable property in terms of section 217 of the Civil Procedure Code. Hence, it is the view of this court that the action filed by the Plaintiff is lawful.

As stated above, the question of law allowed by this court has to be answered in the negative, this appeal is dismissed with costs.

Judge of the Supreme Court

Vijith K. Malalgoda, PC, J

I agree

Judge of the Supreme Court

P. Padman Surasena J

I agree

Judge of the Supreme Court

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

Sri Lanka Mahaweli Authority,
No. 500, T.B. Jaya Mawatha,
Colombo 10.
Plaintiff

SC APPEAL NO: SC/APPEAL/101/2017
SC LA NO: SC/HCCA/LA/26/2017
HCCA ANURADHAPURA NO: NCP/HCCA/ARP/1076/2016
DC POLONNARUWA NO: 14798/M/12

Vs.

Dharshani Construction,
No. 42, Pothgull Road,
Polonnaruwa.
Under the sole ownership of
Amarasiri Masakorala,
No. 18, Habarana Road,
Polonnaruwa.
Defendant

AND BETWEEN
Sri Lanka Mahaweli Authority,
No. 500,
T.B. Jaya Mawatha,
Colombo 10.
Plaintiff-Appellant

Vs.

Dharshani Construction
No. 42, Pothgull Road,
Polonnaruwa.
Under the sole ownership of
Amarasiri Masakorala,
No. 18, Habarana Road,
Polonnaruwa.
Defendant-Respondent

AND NOW BETWEEN

Dharshani Construction,
No. 42, Pothgull Road,
Polonnaruwa.
Under the sole ownership of
Amarasiri Masakorala,
No. 18,
Habarana Road,
Polonnaruwa.
Defendant-Respondent-Appellant

Vs.

Sri Lanka Mahaweli Authority,
No. 500, T.B. Jaya Mawatha,
Colombo 10.
Plaintiff-Appellant-Respondent

Before: Murdu Fernando, P.C., J.
Achala Wengappuli, J.
Mahinda Samayawardhena, J.

Counsel: Senaka De Saram for the Defendant-Respondent-Appellant.

Rajitha Perera, S.S.C., for the Plaintiff-Appellant-Respondent.

Argued on : 05.07.2021

Written submissions:

by the Defendant-Respondent-Appellant on 14.07.2017.

by the Plaintiff-Appellant-Respondent on 16.08.2017.

Further written submissions:

by the Plaintiff-Appellant-Respondent on 14.07.2021.

Decided on: 15.10.2021

Mahinda Samayawardhena, J.

The plaintiff Mahaweli Authority and the defendant contractor entered into a written agreement marked P2 to make improvements to the spillway and tail canal of the Pimburattewa tank in the Polonnaruwa District. In terms of clause 59.2(a) of the agreement, the plaintiff terminated the agreement by letter

dated 01.03.2006 marked P10 on the basis that the defendant had stopped work for more than 28 days without authorisation.

Clauses 59.1 and 59.2(a) of the agreement read as follows:

> *59.1 The employer or the contractor may terminate the services under the contract if the other party causes a fundamental breach of the contract.*
>
> *59.2(a) Fundamental breach of contract shall include, but shall not be limited to, the contractor stops work for 28 days when no stoppage of work is shown on the current program and the stoppage has not been authorised by the engineer.*

By letter P10 the plaintiff also informed the defendant that in terms of clause 60.1 of the agreement steps would be taken to decide on "*the payment upon termination and completion of the balance work of the contract.*"

Clause 60.1 reads as follows:

> *If the services of the contractor under the contract is terminated because of a fundamental breach of contract by the contractor, the engineer shall issue a certificate for the value of the work done and materials ordered less advance payments remaining to be recovered at up to the date of the issue of the certificate and less the percentage to apply to the value of the work not completed. Additional liquidated damages shall not apply. If the total amount due to the employer exceeds any payment due to the contractor, the difference shall be a debt payable to the employer.*

Clause 60.1 shall be read with "*Contract Data*" as agreed upon by the parties which states "*The percentage to apply to the value of the work not completed, representing the employer's [plaintiff's] additional cost for completing the works, is 25%.*"

P10 further stated that the defendant would be informed of when he would be required to be present at the site for the final measurements in order to prepare the final payment bill subsequent to termination.

Notwithstanding the defendant was informed of the date, he was not present at the site inspection. The summary of the final payment prepared *ex parte* is marked P12, whereby it was calculated that the value of 25% of the incomplete work of the defendant in terms of clause 60.1 of the agreement is Rs. 2,150,000.

Thereafter by the letter of demand dated 26.04.2006 marked P14 the plaintiff demanded this sum from the defendant.

As the defendant failed to make this payment, the plaintiff filed this action against the defendant in the District Court of Polonnaruwa on 24.04.2012 seeking to recover the said sum with legal interest. The defendant filed the answer seeking dismissal of the plaintiff's action and also made a claim in reconvention to recover a sum of Rs. 3,000,000 from the plaintiff for the termination of the agreement.

After trial, the District Court dismissed the plaintiff's action on the basis that the action is prescribed in terms of section 6 of the Prescription Ordinance, as it was not instituted within six

years of the date of termination of the agreement. The District Court also dismissed the defendant's claim in reconvention.

Being aggrieved by this judgment, the plaintiff appealed to the High Court of Civil Appeal. The High Court of Civil Appeal set aside the judgment of the District Court and directed the District Court to enter judgment as prayed for in the prayer to the plaint on the basis that the cause of action accrued to the plaintiff against the defendant on the date the demand was made by P14 and, as the action was filed within six years of the date of the demand, the action is not prescribed in terms of section 6 of the Prescription Ordinance.

This court granted leave to appeal against the judgment of the High Court of Civil Appeal on the following questions of law:

(a) *Did the High Court of Civil Appeal fail to consider that the plaint filed on 24.04.2012 was prescribed in terms of section 6 of the Prescription Ordinance?*
(b) *Did the High Court of Civil Appeal misinterpret section 6 of the Prescription Ordinance?*
(c) *Did the High Court of Civil Appeal fail to consider that clause 60.1 of the agreement is part of the agreement and not a separate ground which triggers a separate cause of action upon termination of the agreement?*
(d) *Did the High Court of Civil Appeal misdirect itself when it decided that the cause of action against the defendant arose from the date the demand was made on 26.04.2006?*

Both parties rely on section 6 of the Prescription Ordinance in that the plaintiff's position is that the prescriptive period of six years starts to run from the date of the demand by P14 (which was accepted by the High Court of Civil Appeal) whereas the defendant's position is that the prescriptive period of six years starts to run from the date of the termination of the agreement by P10 (which was accepted by the District Court). It is common ground that if the plaintiff's interpretation is accepted the cause of action is not prescribed and if the defendant's interpretation is accepted it is.

Section 6 of the Prescription Ordinance 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.*

Learned counsel for the defendant strenuously submits that in terms of section 6 of the Prescription Ordinance, an action shall be brought within six years "from the date of the breach" of the agreement and, in terms of the letter of termination P10 read with clause 59.2(a) of the agreement, the breach of the agreement occurred on the date of the letter of termination since

discontinuing work for more than 28 days is a fundamental breach as per clause 59.2(a). This is no doubt an interesting argument in the literal application of section 6 but the legal application of the section in my view does not support the argument.

Let me explain. What is prescribed after the lapse of six years in terms of section 6 of the Prescription Ordinance? It is none other than the cause of action. Every action is based on a cause of action and section 40(d) of the Civil Procedure Code mandates the plaintiff to particularise his cause of action in the plaint. What is a cause of action? According to section 5 of the Civil Procedure Code, "*cause of action is 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*." What is the cause of action the plaintiff says accrued to him in paragraph 9 of the plaint? It is the recovery of the value of 25% of the incomplete work calculated in a sum of Rs. 2,150,000 in terms of clause 60.1 of the agreement. This sum which the defendant is obliged to pay in terms of the agreement was not paid notwithstanding a demand was made by P14 dated 26.04.2006.

The next question is when does the prescriptive period of six years in terms of section 6 begin to run? Learned counsel for the defendant claims that clause 60.1 is part of the agreement which cannot be considered in isolation. I totally agree. Learned counsel then develops his argument to say that a separate cause of action cannot accrue to the plaintiff upon clause 60.1 when

the cause of action has already accrued to the plaintiff upon the breach of the agreement which culminated in the termination of the agreement by P10. I cannot agree.

An agreement can give rise to several causes of action at different stages. The termination of the agreement under clause 59 gave rise to a technical cause of action but nothing flows from it. It is the next step set out in clause 60 that gives rise to a practical cause of action to either party. What is relevant is the breach of the agreement giving rise to a cause of action contemplated by section 6 of the Prescription Ordinance. The question at what point such a breach takes place depends upon the facts of the particular case.

In order for clause 60.1 to apply, the engineer shall prepare the final bill after the site inspection with the participation of the defendant. This is not possible at the termination of the agreement in terms of clause 59.1 although clause 59.1 is linked to clause 60.1.

The aforesaid argument of learned counsel would have succeeded if liquidated damages was the remedy the parties agreed upon after the breach of the agreement leading to its termination. In such an event, there is no further step to be taken to calculate damages as parties have already agreed pre-determined damages at the time of entering into the agreement. In the instant case, clause 60.1 expressly provides that apart from the calculated damages, "*Additional liquidated damages shall not apply*."

Although the cause of action is the wrong (in terms of section 5 of the Civil Procedure Code), the wrong is the combination of the right in the plaintiff and its violation by the defendant. In that context, I must further add that even if the remedy is liquidated damages, there shall be a demand and the refusal of that demand to constitute a breach of contract for the purpose of initiating the period of prescription.

Hence I take the view that the prescriptive period in the instant action begins to run from the date of the demand by P14, which is the date of the breach of the agreement insofar as the plaintiff's action is concerned.

For the aforesaid reasons, I take the view that the plaintiff's cause of action is not prescribed.

I answer the questions of law in respect of which leave to appeal was granted in the negative.

The judgment of the High Court of Civil Appeal is affirmed and the appeal is dismissed with costs.

Judge of the Supreme Court

Murdu Fernando, P.C., J.
I agree.

Judge of the Supreme Court

Achala Wengappuli, J.
I agree.

Judge of the Supreme Court

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

Disanayaka Mudiyanselage
Chandrapala Meegahaarawa,
Karandagamada,
Arawa.
Plaintiff

SC APPEAL NO: SC/APPEAL/112/2018
SC LA NO: SC/HCCA/LA/183/2017
HCCA BADULLA NO: UVA/HCCA/BA/09/2015/L
DC BADULLA NO: M/6700

Vs.

Disanayaka Mudiyanselage
Samaraweera Meegahaarawa,
Karandagamada,
Arawa.
Defendant

AND BETWEEN

Disanayaka Mudiyanselage
Samaraweera Meegahaarawa,
Karandagamada,
Arawa.
Defendant-Appellant

Vs.

Disanayaka Mudiyanselage
Chandrapala Meegahaarawa,
Karandagamada,
Arawa.
Plaintiff-Respondent

AND NOW BETWEEN

Disanayaka Mudiyanselage
Chandrapala Meegahaarawa,
Karandagamada,
Arawa.
Plaintiff-Respondent-Appellant

Vs.

Disanayaka Mudiyanselage
Samaraweera Meegahaarawa,
Karandagamada,
Arawa.
Defendant-Appellant-Respondent

Before: P. Padman Surasena, J.
S. Thurairaja, P.C., J.
Mahinda Samayawardhena, J.

Counsel: Mahinda Nanayakkara for the Plaintiff-Respondent-Appellant.
Malaka Herath for the Defendant-Appellant-Respondent.

Argued on: 24.02.2021

Further written submissions by the Appellant on: 08.03.2021

Further written submissions by the Respondent on: 10.03.2021

Decided on: 21.05.2021

Mahinda Samayawardhena, J.

The Plaintiff filed this action against the Defendant in the District Court of Badulla seeking to recover a sum of Rs. 872,000 with legal interest, on the basis that he sold 26,446.5 kg of paddy at a rate of Rs. 33 per kg to the Defendant in September 2009. According to the Plaintiff, at the time of the sale, the Defendant did not pay a single cent in cash but provided the Plaintiff with two post-dated cheques marked P1 and P2 – P1 for Rs. 20,000 and P2 for Rs. 850,000 – both of which were subsequently dishonoured. Although the action was not filed under the Bills of Exchange Ordinance or Chapter 53 of the Civil Procedure Code, the Plaintiff based his case on the aforesaid two cheques. The Defendant totally denies that he engaged in any paddy transaction with the Plaintiff and states that the Plaintiff was a money lender and that the Defendant borrowed Rs. 20,000 on P1, and P2 was additional security provided for the same. The Defendant sought dismissal of the Plaintiff's action. The District Court entered Judgment for the Plaintiff but, on appeal, the High Court of Civil Appeal set it aside and the appeal of the Defendant was allowed. Hence the Plaintiff before this Court. This Court granted leave to appeal to the Plaintiff on the following questions of law formulated by the Plaintiff:

(a) Is the judgment of the High Court of Civil Appeal wrong in law?

(b) Has the High Court of Civil Appeal failed to consider the fact that the District Court has considered all the ingredients which should be contained in a judgment as per section 187 of the Civil Procedure Code?

(c) Can the High Court of Civil Appeal dismiss the Plaintiff's action without setting aside the judgment of the District Court?

Let me consider these three questions one by one.

The first question of law formulated by the Plaintiff is broad and unspecific. It is not clear on what basis the Plaintiff says that the Judgment of the High Court of Civil Appeal is wrong in law. At the argument before this Court, learned counsel for the Plaintiff stated that the analysis of evidence by the District Court was correct whereas the analysis of evidence by the High Court was incorrect. In the facts and circumstances of this case, I do not think so. When the High Court stated the Plaintiff had not proved his case on a balance of probability and then opined that the Defendant's version was more probable than that of the Plaintiff, the High Court took *inter alia* the following matters into consideration:

(a) Admittedly, the Plaintiff is a money lender and the paddy transaction the Plaintiff speaks of is not believable.

(b) It is unlikely that a person seeking to buy a large stock of paddy would come without a rupee in cash but with two post-dated cheques.

(c) If the alleged paddy transaction is a single transaction which took place on one particular occasion, it was unnecessary for the Defendant to have provided two post-dated cheques – one for Rs. 20,000 and the other for Rs. 850,000 – instead of offering one post-dated cheque.

(d) The alleged paddy transaction took place in September 2009, but according to the document V6 dated 06.10.2010, the Defendant had not yet paid back a sum of Rs. 42,000 previously borrowed from the Plaintiff in 2006. Therefore, it is unlikely the Plaintiff would have sold the Defendant a large stock of paddy worth a sum of Rs. 872,734.50 on credit.

(e) Admittedly, the Defendant is illiterate. He can sign his name but cannot read or write. The Defendant admits his signature on the two cheques. The Plaintiff's own witness Susantha admitted in his evidence that he (Susantha) filled the cheques at the request of the Plaintiff and in the absence of the Defendant.

I cannot find fault with the analysis of the learned High Court Judge in deciding that the Plaintiff failed to prove his case.

Learned counsel for the Plaintiff accepts that if the Plaintiff fails to prove the paddy transaction, the Plaintiff's action shall fail. The finding of the High Court that on a preponderance of probability the paddy transaction was not proved is acceptable.

In the facts and circumstances of this case, the Defendant's version is more probable than that of the Plaintiff.

At the argument, learned counsel for the Plaintiff heavily relied on the failure of the Defendant to reply to the letter of demand sent prior to the institution of the action. Counsel vehemently submits that the Defendant is estopped from denying liability due to the failure to answer the letter of demand.

In business matters, if the party receiving a letter, email or the like, disputes the assertions contained in it, he must reply, for failure to do so can be regarded as an admission of the claim made therein.

In the oft quoted decision of *Saravanamuttu v. de Mel (1948) 49 NLR 529*, it was held:

> *In business matters, if a person states in a letter to another that a certain state of facts exists, the person to whom the letter is written must reply if he does not agree with or means to dispute the assertions. Otherwise, the silence of the latter amounts to an admission of the truth of the allegations contained in that letter.*

The following dicta of *Lord Esher M.R. in Wiedeman v. Walpole (1891) 2 Q.B. 534* was quoted with approval in *Colombo Electric Tramways and Lighting Co. Ltd v. Pereira (1923) 25 NLR 193* at 195:

> *Now there are cases—business and mercantile cases—in which the Courts have taken notice that, in the ordinary course of business, if one man of business states in a letter to another that he has agreed to do certain things, the person who receives that letter must answer it, if he means to dispute the fact that he did so agree. So, where merchants are in dispute one with the other in the course of*

> *carrying on some business negotiations, and one writes to the other, "but you promised me that you would do this or that", if the other does not answer that letter, but proceeds with the negotiations, he must be taken to admit the truth of the statement.*

The above has been quoted with approval in several cases, including *Seneviratne v. LOLC [2006] 1 Sri LR 230.*

However, I must add that although it is a general principle that failure to answer a business letter amounts to an admission of the contents therein, this is not an absolute principle of law. In other words, failure to reply to a business letter alone cannot decide the whole case. It is one factor which can be taken into account along with other factors in determining whether the Plaintiff has proved his case. Otherwise, when it is established that the formal demand, which is a *sine qua non* for the institution of an action, was not replied, Judgment can *ipso facto* be entered for the Plaintiff. That cannot be done. Therefore, although failure to reply to a business letter or a letter of demand is a circumstance which can be held against the Defendant, it cannot by and of itself prove the Plaintiff's case. The impact of such failure to reply will depend on the facts and circumstances of each case. *Vide* the Judgment of Weeramantry J. in *Wickremasinghe v. Devasagayam (1970) 74 NLR 80.*

In the instant case, there is no strong evidence in favour of the Plaintiff to support the alleged paddy transaction. It is admitted that the Defendant is illiterate and the Plaintiff is a money lender. Document V1 goes to prove that the Plaintiff had lent money to the Defendant prior to the alleged paddy transaction

and that loan remained unsettled. In the facts and circumstances of this case, the failure to answer the letter of demand P3 is not decisive.

The first question of law shall be answered in the negative.

The second question of law for me is meaningless. It is: "*the High Court of Civil Appeal failed to consider the fact that the District Court has considered all the ingredients which should be contained in a judgment as per section 187 of the Civil Procedure Code*". No argument in relation to the ingredients of a Judgment was advanced before the High Court by either party. The High Court did not consider such a matter in its Judgment; nor did the High Court set aside the Judgment of the District Court on the basis that the same did not contain all the requirements of a Judgment as per section 187 of the Civil Procedure Code.

This question shall be answered against the Plaintiff.

The third question of law is of a technical nature. The last paragraph of the High Court Judgment when translated into English reads: "*For the above-mentioned reasons, the Court decides to allow the appeal of the Defendant-Appellant. Accordingly, the appeal is allowed and the Plaintiff-Respondent's action is dismissed. No costs.*"

Learned counsel for the Plaintiff argues it is wrong to have dismissed the Plaintiff's action without setting aside the Judgment of the District Court. Although the High Court does not expressly state that it sets aside the Judgment of the District Court, the same is implicit in allowing the appeal of the Defendant-Appellant. After allowing the appeal, the High Court was correct, for the reasons set out in the Judgment, to have

stated that the Plaintiff's action in the District Court shall stand dismissed. Judgments need not be set aside on such flimsy technical grounds which have not prejudiced the substantial rights of the parties or occasioned a failure of justice.

I dismiss the appeal but without costs.

Judge of the Supreme Court

P. Padman Surasena, J.
I agree.

Judge of the Supreme Court

S. Thurairaja, P.C., J.
I agree.

Judge of the Supreme Court

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

In the matter of an application for Leave to Appeal against Judgment dated 18/11/2009 delivered by the High Court of the North Western Province in NWP/ HCCA/ KUR/49/2003 (F) D.C. Kuliyapitiya Case No. 7729/P.

SC/Appeal/113/2010

SC/HCCA/LA/345/09

NWP/HCCA/KUR/49/2003 (F)

D.C. Kuliyapitiya No. 7729/P

Asarappulige Solomon, of Bowatte, Yakwila

Plaintiff

~Vs.~

1. Herath Mudiyanselage Senaratne,
2. Herath Mudiyanselage Wijetilleke,
3. Herath Mudiyanselage Ran Menika,
4. Adhikari Mudiyanselage Wijesena,
5. Adhikari Mudiyanselage Jayasekera,

5a.Adhikari Mudiyanselage Ananda Jayaratne

All of Bowatte, Yakwila

Defendant

AND BETWEEN

Asarappulige Solomon, of Bowatte, Yakwila.

Plaintiff-Appellant

-Vs.-

1. Herath Mudiyanselage Senaratne,
2. Herath Mudiyanselage Wijetilleke,
3. Herath Mudiyanselage Ran Menika,
4. Adhikari Mudiyanselage Wijesena,
5. Adhikari Mudiyanselage Jayasekera,
5a. Adhikari Mudiyanselage Ananda Jayaratne

All of Bowatte, Yakwila.

Defendant-Respondents

AND NOW BETWEEN

Asarappulige Solomon (Deceased) of Bowatte, Yakwila

Plaintiff-Appellant-Appellant

Asarappulige Sisira Priyantha of Bowatte, Yakwila

1a Plaintiff-Appellant-Appellant

-Vs.-

1. Herath Mudiyanselage Senaratne,
2. Herath Mudiyanselage Wijetilleke,
3. Herath Mudiyanselage Ran Menika,
4. Adhikari Mudiyanselage Wijesena, (Deceased)

4a.Suriya Pathirannahalage Karunawathie,

4b.Adhikari Mudiyanselage Anusha Samanmalee,

4c.Adhikari Mudiyanselage Kumaranayake,

4d.Adhikari Mudiyanselage Punyawathie,

4e.Adhikari Mudiyanselage Kirthi Ashoka,

5.Adhikari Mudiyanselage Jayasekera,

5a.Adhikari Mudiyanselage Ananda Jayaratne

All of Bowatte, Yakwila

Defendant-Respondent-Respondents

Before: Buwaneka Aluwihare PC, J.

P. Padman Surasena J.

E.A.G.R. Amarasekara J.

Counsel: Mudithavo Premachandra for the Plaintiff-Appellant-Appellant.

W. Dayarathne PC with Ms. Ranjika Jayawardena for the substituted 4th Defendant- Respondent-Respondent.

Argued on: 15th September 2020

Decided on: 30th November 2021

JUDGEMENT

Aluwihare PC J.,

The Plaintiff-Appellant-Appellant (hereinafter referred to as the 'Plaintiff') filed action against the 1st to 4th Defendants in the District Court of Kuliyapitiya for the partition of a land called "Ihalawatte" which is in extent of about 2 Acres. The 5th Defendant was added as a party, subsequently.

By judgement dated 13th May 2003, the Learned District Judge dismissed the Plaint on the ground that the Plaintiff had failed to prove both his pedigree and his title to the land sought to be partitioned.

Aggrieved by the said judgement, the Plaintiff appealed to the Civil Appellate High Court of the North Western Province, which affirmed the judgement of the learned District Judge and dismissed the appeal.

Against the said judgement, the Plaintiff moved this court by way of Leave to Appeal and Leave was granted on the questions of law referred to in sub-paragraphs (a), (b), and (c) of paragraph 18 of the Petition of the Appellant (Plaintiff).

The questions of law in verbatim, are as follows;

a) *Has the District Court and the High Court erred in failing to hold that the chain of title relied on by the Plaintiff Appellant Petitioner had been proved in terms of deed P1, mortgage bond 4D1 and crown grant 4D4, in preference to the chain of title relied on by the 4th Defendant because the lands described in his deeds 4D2, 4D3, 4D5 clearly did not apply to the land sought to be partitioned.*

b) *Did the District Court and the High Court err in holding that the Plaintiff Appellant Petitioner had failed to prove title to the land sought to be partitioned in this action.*

c) *Did the District Court and the High Court errs in holding that the Plaintiff Appellant Petitioner had failed to prove the devolution of title to the corpus.*

The Corpus

The Plaintiff, instituted this action against the 1st to 4th Defendants seeking the partition of a land called "Ihalawatte" more fully described in the schedule to the Plaint. The Plaintiff claimed that he was entitled to an undivided ½ share of Ihalawatte, and that the 1st, 2nd and 3rd Defendants were entitled to 1/6 shares each.

The 1st, 2nd and 3rd Defendants did not have any contest with the Plaintiff. The 4th Defendant, however, claimed title to the entire land based on title deeds and the 5th Defendant took up the position that the corpus was co-owned by him and the 4th Defendant in equal shares and prayed for the dismissal of the action.

In the Petition dated 21st December 2009, the land is described as a single land consisting of an 'old plantation' and 'new plantation', which is in the extent of about 2 acres.

The land sought to be partitioned was surveyed by the Court Commissioner S.B. Abeykoon who submitted a preliminary plan bearing No. 626/85 along with a preliminary report to the Court. According to the said Court Commissioner, the land sought to be partitioned was shown to him by the Plaintiff and the 1st, 2nd and 4th Defendants. The Court Commissioner while giving evidence had stated that the preliminary plan depicts the land described in the schedule to the Plaint. He also had stated that it was a parcel of land. Further, he had added that no one produced any previous survey plans relating to the land and that he relied on the boundaries shown to him by the parties present on the land, for the purpose of carrying out the survey.

The Contention of the Plaintiff

The main argument on behalf of the Plaintiff was that the conclusion arrived at by the learned District Judge, as well as by the Judges of the High Court of Civil Appeal, to the effect that the Plaintiff failed to prove the devolution of title to the corpus, is erroneous.

The key point raised by the Plaintiff is that the Deed marked 'P1', mortgage bond marked '4D1' and crown grant marked '4D4' which the Plaintiff relied on, apply to the corpus for partition and show the devolution of title which is described in the Plaint. He argues that this is in stark contrast to the deeds produced by the 4th Defendant, marked '4D2', '4D3' and '4D5' which the Plaintiff claims have no application to the land sought to be partitioned.

The Questions of Law

I wish to consider the second and third questions of law [b & c], namely, whether the lower courts have misdirected themselves by holding that the Plaintiff has failed to establish, his title to the corpus [b] and the devolution of title to the corpus [c].

According to the pedigree relied on by the Plaintiff [annexed to the Plaint], in the year 1910, H.M. Davith Singho and H.M. Bandappu, had received a crown grant in equal shares to the land depicted in the survey plan No. 273672 which is in extent 3 Roods and 28 perches. After Bandappu's demise, Herath Singho, being the sole heir, had inherited the ½ share of the land owned by Bandappu. In the year 1984, Herath Singho by Deed No. 7260 [P1] sold his share to the Plaintiff, Solomon. According to the Plaintiff's pedigree, the Crown grant is 3 Roods and 28 perches in extent. The schedule to the Deed No. 7260, however, refers to, two allotments viz;

(1) land depicted in plan No. 273672, in extent of 3 roods and 28 perches and

(2) 1/3rd of another land, 1 and ¼ acre in extent, with distinct boundaries.

The Plaintiff has not produced a separate pedigree in relation to, either the 1st or the 2nd allotments of lands referred to above. Nor has he explained the basis of amalgamating the entitlement to an undivided land to another distinct separate land. The schedule to the Plaint, as stated earlier, refers only to a single parcel of land and nowhere in the Plaint is it said that the corpus is an amalgamated land. The Plaintiff, however, in the pedigree filed on his behalf, had made reference to a crown grant of 3 roods and 8 perches and possession for a long period of time and inheritance, vaguely giving the impression that the corpus contains in extent, more than what was given by the Crown grant. In his evidence, however, he has taken up the position that two parcels of land are involved. The Plaintiff had failed to explain as to how an undivided share in the second schedule of the Deed P1, became part of the 'amalgamated' land. Thus, the Plaintiff had presented a case that is materially different to what was pleaded, which is obnoxious to the provisions of the Civil Procedure Code [Section 150 explanation 2]. The Plaintiff had admitted that what he purchased was the land that was received by Herath Singho by way of a crown grant [page 126 of the District Court record].

The Plaintiff in an attempt to impress that the corpus consists of two amalgamated lands in extent of two acres, had executed a deed of mortgage, on March 1985, two months prior to filing the partition action in the District Court [Deed no. 346 marked and produced as 4V1]. Under cross examination, the Plaintiff admitted that he mortgaged the property as he was in need of money, to one Pausthina, as claimed by the Plaintiff, one of his neighbours. He also admitted that even by the date on which he testified he had not taken any steps to have the mortgage discharged. Probed further, the Plaintiff admitted that Pausthina is none other than his wife [pages 135 -137 of the District Court record].

Considering the above, both the learned District Judge as well as the High Court of Civil Appeal was correct in holding that the Plaintiff had failed to establish, both, the title to the land sought to be partitioned as well as the devolution of title to the same.

In the circumstances, I answer both the questions of law referred to in paragraphs (b) and (c) above in the negative. In view of these findings, I am of the view that it

would not be necessary to consider the question of law referred to in paragraph (a) above as the case for the Plaintiff is bound to fail.

Accordingly, the judgments of both the District Court as well as the High Court of Civil Appeal are affirmed and this appeal is dismissed subject to costs of Rs. 150,000/=.

Appeal dismissed

JUDGE OF THE SUPREME COURT

P. 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 application for leave to Appeal against the Judgment of the Provincial High Court of Western Province dated 18/03/2014 in Case No. WP/HCCA/GPH 162/2009(F) D.C. Gampaha Case No.37362/P.

In the District Court of Gampaha

Hewayalage Margaret,
Thalgasmote,
Veyangoda. **(Deceased)**

Plaintiff

Weerakkody Samaradivakarage
Hemachandra Manel Indika
No.6/58, Court Road,
Gampaha.

Substituted – Plaintiff

S.C. Appeal No.115/2015
SC Application No.SC/HCCA/LA No. .200/2014
WP/HCCA/Gampaha Case No. WP/HCCA/GPH/162/2009F
D.C. Gampaha Case No. 37362/P.

Vs.

1. Manikpura Dewage Soma,
"Claristan",
Helen Mawatha,
Wennappuwa.

2. Manikpura Dewage Sapin,
Thalgasmote,
Veyangoda. **(Deceased)**

2A. Manikpura Dewage Soma,
"Claristan",
Helen Mawatha,
Wennappuwa.

3. Manikpura Dewage Cyril
Piyaratne,
No.255,
Thalgasmote,
Veyangoda.

Defendants

And Between in the Provincial High Court of Western Province

Manikpura Dewage Cyril
Piyaratne,
No.255,
Thalgasmote,
Veyangoda.
3rd Defendant-Appellant

Vs.

Weerakkody
Samaradivakarage
Hemachandra Manel Indika
No.6/58, Court Road,
Gampaha.
Substituted – Plaintiff-Respondent

1. Manikpura Dewage Soma,
"Claristan",
Helen Mawatha,

Wennappuwa.,
Presently at 'Shrinath',
Sandalankawa,
Sandalankawa.

2A. Manikpura Dewage Soma,
"Claristan",
Helen Mawatha,
Wennappuwa;
Presently at 'Shrinath',
Sandalankawa,
Sandalankawa.

1st and 2A Defendant-Respondents

And Now Between in the Supreme Court

Manikpura Dewage Cyril Piyaratne,
No.255,
Thalgasmote,
Veyangoda.

3rd Defendant-Appellant-Petitioner

Vs.

Weerakkody Samaradivakarage Hemachandra Manel Indika
No.6/58, Court Road,
Gampaha.

Substituted – Plaintiff-Respondent-Respondent

1. Manikpura Dewage Soma,
"Claristan",
Helen Mawatha,
Wennappuwa.
Presently at 'Shrinath',
Sandalankawa,
Sandalankawa,

2A. Manikpura Dewage Soma,
"Claristan",
Helen Mawatha,
Wennappuwa.
Presently at 'Shrinath',
Sandalankawa,
Sandalankawa,
1st and 2A Defendant-Respondent- Respondents

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BEFORE : L.T.B. DEHIDENIYA, J.
P. PADMAN SURASENA, J.
ACHALA WENGAPPULI, J.

COUNSEL : Ms. Sudarshani Coorey for the 3rd Defendant- Appellant-Appellant
M.C.Jayaratne with H.A. Nishani H. Hettiarachchi instructed by M.D.J. Bandara for the 1st and 2A Defendant-Respondent-Respondents.

ARGUED ON : 03rd May, 2021

DECIDED ON : 05th November, 2021

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ACHALA WENGAPPULI, J.

The Plaintiff-Respondent-Respondent (later referred to as the Substituted Plaintiff- Respondent-Respondent and hereinafter referred to as the Plaintiff) instituted the instant action, under Section 2(1) of the Partition Law No. 21 of 1977, before the District Court of Gampaha on 11.05.1994, primarily seeking to partition a commonly held land called *Batadenikele* alias *Baddehikele*, which is in an extent of two Roods and 8.53

Perches and morefully described in the schedule to her plaint, according to the pedigree set out therein. Having claimed a ½ share entitlement of the corpus on a deed of gift, the Plaintiff had also conceded to the entitlement of the 1st Defendant-Respondent-Respondent (hereinafter referred to as the 1st Defendant), to the remaining ½ share of the corpus. Both the Plaintiff and the 1st Defendant relied on two deeds of gift, in proof of their respective entitlement. These two deeds of gift, Nos. 9854 of 18.09.92 and 7194 of 25.01.1993 were executed by the 2nd Defendant-Respondent-Respondent (later substituted by 2A Defendant-Respondent-Respondent and hereinafter referred to as the "2nd Defendant") and attested by Notary Public *Pathiratne*. The 3rd Defendant Appellant-Appellant (hereinafter referred to as the "3rd Defendant") was added to the said partition action on 29.11.1995, as a disclosed party, upon him making a claim before the surveyor as to the improvements effected to the dwelling house, during the preliminary survey of the corpus.

It is admitted by the parties that the 2nd Defendant is the original owner of the corpus, who had received his title upon a final decree of the partition case No. 18122/P, dated 12.05.1981. The 2nd Defendant had gifted a ½ share of the corpus to his 2nd wife, the Plaintiff and the balance ½ share to his eldest daughter, the 1st Defendant. The 3rd Defendant, who was in possession of the house standing on the corpus, is the only son of the 2nd Defendant.

In his statement of claim, the 3rd Defendant sought dismissal of partition action or, in the alternative, sought compensation for *bona fide* improvements made to the land as well as to the house, quantified at Rs. 950,000.00 and a declaration of Court to his entitlement to *Jus Retentionis*.

The District Court, having accepted that the 3rd Defendant is only entitled to compensation for improvements made to his paternal house by making additions to the existing building, further held that since he failed to prove the stated amount of compensation and owing to their very reason had desisted itself in awarding any compensation. The Court also held that he is not entitled to *Jus Retentionis* as well. The trial Court had thereupon decreed that the corpus be partitioned, with each of the half share, allocated to Plaintiff and the 1st Defendant.

Being aggrieved by the said judgment of the trial Court for its failure to award any compensation, the 3rd Defendant preferred an appeal to the High Court of Civil Appeal, which had allowed his appeal and awarded him Rs. 300,000.00 for *bona fide* improvements, instead of Rs. 850,000.00 which he sought. He then preferred the instant appeal to this Court, challenging the judgment of the High Court of Civil Appeal, on the basis that it had awarded a lesser sum as compensation for the *bona fide* improvements than the amount and thereupon seeking an enhancement of the amount of compensation awarded to him by the said appellate Court.

This Court, having afforded a hearing to the contesting parties on 30.06.2015, thought it fit to grant leave to the following questions of law, that had been formulated by the 3rd Defendant in sub paragraphs I, II and III of the paragraph 14 of his Petition, dated 28.04.2015.

I. Did the learned High Court err when deciding that in the District Court a full trial was conducted, whereas on the 1st date of evidence of the 3rd Defendant-Appellant-Petitioner, a further date had been refused?

II. Did the learned High Court err in failing to assess the evidence adduced by the parties, where all parties admitted that the 3rd Defendant-Appellant-Petitioner was a *bona fide* improver?

III. Did the learned High Court err in failing to assess the evidence adduced by the parties, whereas the actual amount of compensation should be at least Rs. 800,000/- for the fully completed house?

Learned Counsel for the 3rd Defendant, in her submissions before this Court in support of the appeal, contended that since it was absolutely essential for him to establish the value of the improvements and developments he has carried out to the house, at the conclusion of his evidence before the trial Court, made an application seeking an adjournment to call another witness, in order to discharge that burden. Calling of this witness was necessitated due to an objection raised by the Plaintiff, that the documents relied on by the 3rd Defendant, are only to be admitted in evidence 'subject to proof'.

The said application for adjournment was refused by the trial Court and the 3rd Defendant therefore contends before this Court that, in view of the provisions of Section 25(1) and Section 76(1) to (3) of the Partition Law, although a wide discretion was conferred on the trial Court to allow such an application for an adjournment, it did not exercise its discretion reasonably in this particular instance, resulting in an adverse impact on his claim.

Learned Counsel for the 1st and 2A Defendants, in seeking to counter the submissions of the 3rd Defendant that the final decree of the

partition action, on which the original owner (2nd Defendant) was allocated a share, was pronounced only on 10.03.1981 and therefore, the 3rd Defendant cannot claim any compensation for improvements that claims to have been effected prior to 1981. They further contend that, although the 3rd Defendant claimed "*at least Rs. 800,000.00 for the fully completed house*" in his petition seeking leave from this Court, his amended statement of claim to the trial Court, he limited the amount only to Rs. 350,000.00.

Thus, the issue of whether the trial Court's order of refusal to grant the 3rd Defendant an adjournment, depriving him an opportunity to call witness/witnesses on his behalf, was made erroneously, will have to be considered at the outset, in view of the scope of the 1st question of law.

In refusing the application of the 3rd Defendant for an adjournment, the trial Court noted that the instant action being a partition action, its trial had taken over 8 years to reach that stage of the proceedings. It also noted that the 3rd Defendant, in presenting his case, had failed to take any steps at all to call his witnesses, and not even made an attempt at least by moving for summons on them, in spite of having had the full knowledge of the requirement to prove the documents that he himself had tendered to Court during his evidence, as they were marked 'subject to proof'.

The legal question presented before this Court therefore revolves around the question whether the refusal to grant an adjournment is an erroneously made order or not. In support of his contention that it is an order erroneously made, the 3rd Defendant relied on the provisions

contained in Section 76 of the Partition Law, which deals with adjournments.

Provisions of subsection 76(3) deals with trials as it states that "*the Court may, for sufficient cause, either on the application of the parties or of its own motion, advance or postpone the trial to any other day, upon such terms as to costs or otherwise as to it shall seem proper.*" Once a partition action had been fixed for trial, there must be a 'sufficient cause' for the trial Court, for it to make an order to advance or to postpone an already fixed trial date.

The proceedings relating to the application of the 3rd Respondent, in seeking an adjournment for further trial, indicate that he made an application seeking permission of the trial Court to call the witnesses, who have already been listed by him, in relation to the documents marked V13, V14 and V15. He had thus made an application for adjournment to Court.

Perusal of the appeal brief reveals that the instant partition action had been instituted on 11.05.1994 and the trial Commenced on 28.02.2001 with the acceptance of the points of contest, by the trial Court. The Plaintiff had closed her case on 01.06.2007 and the Defendant's case commenced on 01.08.2007 with the 1st Defendant giving evidence. She called a witness on her behalf. That witness concluded his evidence on 08.12.2008. The trial adjourned to 11.05.2009 for further trial of Defendant's case and the 3rd Defendant had commenced his evidence. He was cross examined and re-examined on the same day and then only the application for adjournment was made. With the refusal of the application for an adjournment, the 3rd Defendant had decided to close his case with the available evidence. At that stage, the Plaintiff again

moved trial Court to reject the documents, relied on and marked by the 3rd Defendant as V1, V2, V13, V14, V15 and V16, on the basis they were not proved.

The documents V1, V2, V13, V14, V15 and V16, included the two documents issued by the relevant bank branches, indicating that the 3rd Defendant had obtained loans to carry out repair work on a dwelling house. The remaining documents concern purchases of hardware items. It is also evident that the 3rd Defendant had, despite the objection, tendered these documents along with his written submissions and the trial Court too had considered the contents of those documents, in holding that he did in fact carry out renovation work to his father's house. Thus, his interests were not prejudiced at all, merely because the trial Court had not allowed an adjournment to call a witness.

In the list of witnesses filed by the 3rd Defendant he had cited 14 witnesses including himself. The 1st Defendant, who presented her evidence before Court had cited only four witnesses and called only one of them. When the trial was adjourned to 11.05.2009, the 1st Defendant and her witness had already concluded their evidence and it was for the 3rd Defendant to place his evidence on that day. When the 3rd Defendant sought to mark documents through the witness for the 1st Defendant, it was objected to and marked subject to proof. On 11.05.2009, the 3rd Defendant gave evidence and concluded his evidence. Clearly, he had not taken any steps to secure attendance of any of his witnesses on that date, although he knew very well that it was for him to prove the documents, that were marked subject to proof, by calling relevant witnesses on that day, to which step he had more than sufficient time to take.

The trial Court, after rejecting the 3rd Defendant's application to permit to call witnesses, had decided to proceed with the case. The 3rd Defendant thereafter closed his case on that day.

The judgment of the High Court of Civil Appeal clearly indicates the several grounds of appeal that had been urged before it by the 3rd Defendant at the hearing of his appeal. The ground of appeal under "F", contained in the impugned judgment of the High Court of Civil Appeal, had been raised only on the premise that the trial Court had erred, in its failure to award compensation for *bona fide* improvements to the house. The appellate Court had referred to the submissions of the 3rd Defendant, in which he submitted that if afforded an opportunity he could have proved these documents. None of these factors indicate that the 3rd Defendant ever did challenge the said refusal of an adjournment.

In these circumstances, I am not convinced that the order of the trial Court had been made erroneously since there was no sufficient cause for it to exercise its discretion conferred on it by section 76(3) of the Partition Law, in favour of the 3rd Defendant in granting the adjournment. No interlocutory appeal was taken by the 3rd Defendant against the said refusal to grant an adjournment and strangely, in prosecuting the final appeal preferred against the judgement of the trial Court to the High Court of Civil Appeal, the 3rd Defendant had failed to raise a ground of appeal on this particular order.

I propose to deal with the remaining questions of law formulated by learned Counsel in relation to the award made by the High Court of Civil Appeal on the entitlement of the 3rd Defendant on the question of compensation for *bona fide* improvements at this stage.

The question of law whether the High Court of Civil Appeal "err in failing to assess the evidence adduced by the parties where all parties admitted that the 3rd Defendant-Appellant-Petitioner was a *bona fide* improver", had been formulated, apparently on the presumption of fact that the status of the 3rd Defendant as a *bona fide* improver had not been disputed by the parties and therefore admitted by the parties. The question then proceeds to the remaining segment where it raises the issue whether the appellate Court had fallen into error in assessing the evidence led by the parties on his entitlement, when he in fact a *bona fide* improver.

There is no such admission that was marked before the trial Court at the commencement of the trial nor was there any admission by the Plaintiff or by the 1st Defendant that the 3rd Defendant is a *bona fide* improver. On the contrary none of the opposing parties even accept that he made any improvement to the house built by their father, the 2nd Defendant. When they were cross examined by the 3rd Defendant, it was suggested to them that he did carry out renovations to the house. But the Plaintiff, the 1st Defendant and her witness have strenuously denied any contribution by the 3rd Defendant in that respect. The parties, although disputed as to who made the improvements, only agree that there were certain renovations carried out to their father's house, in and around 1984.

During the trial, the 3rd Defendant conceded to the share entitlement of both the Plaintiff and the 1st Defendant and proceeded only with his claim for compensation. It was his evidence that he was promised ownership of the family house by his late father, the 2nd Defendant and therefore in that belief he had made improvements to it periodically by renovating the old paternal house and by planting many

trees by spending Rs. 850,000.00, commencing from about 1974. He described the extent of the improvements he had effected by stating that he made the existing wattle and daub house, belonged to his father, a brick walled one with walls plastered in cement. He also had added on a verandah, a kitchen and a toilet. He had relied on documentary proof in support of loans obtained to carry out these improvements and receipts issued by a hardware store.

The trial Court had correctly arrived at the conclusion in favour of the 3rd Defendant that he had in fact made certain improvements to his father's house and therefore is entitled to compensation on that account. This conclusion was reached on the basis that the house 'D' as shown in the preliminary plan 'X' had been altered by adding new constructions to it and the trial Court noted that the 3rd Defendant's entitlement to compensation limits to those new additions. In appeal, the High Court of Civil Appeal too has held in favour of the 3rd Defendant by holding that the evidence clearly points to the fact that it was he who made the new constructions. However, the High Court of Civil Appeal, in determining the quantum of compensation that should be awarded to the 3rd Defendant, stated that the evidence does not support his claim that Rs. 850,000.00 was spent on those additions to the house and therefore limited its award to Rs. 300,000.00.

The High Court of Civil Appeal, in determining the amount to be awarded as compensation for improvements to the 3rd Defendant, considered the contents of the documents marked V15 and V16, that had been issued by the respective banks, in confirmation of the loans taken by him in relation to construction work on home improvement. The appellate Court, having accepted the two documents on the footing there was no challenge mounted by opposing parties as to its

genuineness, had considered them in favour of the 3rd Defendant. Thereafter, the Court had proceeded to award Rs. 300,000.00 as compensation to the 3rd Defendant, based on the "*evidence and circumstances*" that were available before it, despite of his demand of Rs. 850,000.00. The answer given by the trial Court to issue No. 10 was accordingly amended by the High Court of Civil Appeal to reflect its reasoning in favour of the 3rd Defendant and conclusion it had reached on the point.

It was submitted by the learned Counsel at the hearing that the main point of argument is the quantum of compensation awarded by the High Court of Civil Appeal, to which he seeks enhancement.

In a partition action, a party claiming compensation for *bona fide* improvements, the applicable principle of law has stated by Pereira J, in ***Perera v Pelmadulla Rubber & Tea Company et al*** (1913) 16 NLR 306 as follows:

> *"In the case of a bona fide possessor, what he is entitled to receive as the value of improvements effected by him is the amount by which the value of the whole property on which the improvements have been effected has been enhanced by reason of the improvements, or the actual expenditure incurred in effecting the improvements, whichever is less."*

When the surveyor visited the corpus, in making the preliminary plan, the 3rd Defendant claimed that he had lived in the house since his birth and made improvement to it commencing from 1970 until 1991 with his own funding but did not quantify it. The assertion of the 3rd Defendant that he made improvements since 1970 was effectively

refuted by his opponents when he admitted the fact that he was employed only in 1975. This resultant situation leaves with weak evidence as to the value of the improvements that are attributed to the 3rd Defendant who thereby left the Courts with insufficient evidence to decide on the quantum of his claim.

The documents that the 3rd Defendant referred to in his submissions as the items of evidence he was 'deprived' of an opportunity to 'prove' (V1, V2, V13, V14, V15 and V 16) would only add up to Rs.43,019.15, which the High Court of Civil Appeal in fact did consider in his favour in determining the amount at Rs. 300,000.00. As the learned Counsel for the 1st Defendant contends, these were the only documents that the 3rd Defendant relied on to prove his claim of compensation, in order to establish the varying amounts, which he cited from time to time. In the amended statement of claim the compensation was quantified by the 3rd Defendant at Rs. 850,000.00 but did not put that position to the Plaintiff. During cross examination of the 1st Defendant, it was suggested to her that he spent Rs. 500,000.00 to construct the 'new' house, which she denied. He then suggested he made improvements to the value of 350,000.00 to that house. That suggestion too was denied by the 1st Defendant. In cross examining the witness called by the 1st Plaintiff, it was suggested that he had spent Rs. 350,000.00 to add a room, a storeroom and a kitchen to the house. Strangely, the 3rd Defendant did not mention any specific amount as compensation for improvements and offered an explanation to his inability to produce any documentary proof of expenditure on the improvements and renovations that were made to the house on the basis that he had accepted his father's oral promise that he would have the ownership of the house and, having acted on that verbal assurance, he

did not keep a record of the expenditure made on improvements. In advancing yet another position before this Court, the 3rd Defendant relied on the third question of law based on his perceived entitlement to Rs. 800,000.00 as compensation for the 'fully completed' house.

I have carefully considered the quantum of compensation awarded by the High Court of Civil Appeal, in the light of the available evidence that had been placed before the trial Court by the parties to the instant partition action, and find that there is no error on the part of the appellate Court made either on evidence or on the law, in determining the quantum of entitlement.

The District Court as well as the High Court of Civil Appeal had considered the available evidence on the entitlement of compensation for *bona fide* improvements to the 3rd Defendant. The High Court of Civil Appeal had corrected the judgment of the original Court, when it had quantified the entitlement of the 3rd Defendant to compensation for improvements at Rs. 300,000.00. It is clear from the evidence that the 3rd Defendant had opted for the mode in which he is expected to prove "*the actual expenditure incurred effecting the improvements*" rather than proving "*the amount by which the value of the whole property on which the improvements have been effected has been enhanced by reason of the improvements*." The 3rd Defendant had however failed to establish his proclaimed entitlement to compensation of Rs. 800,000.00, since "*the actual expenditure incurred effecting the improvements*" only points to the sum awarded by the High Court of Civil Appeal and therefore his entitlement is limited to Rs. 300,000.00.

In view of the forgoing, I proceed to answer all three questions of law against the 3rd Defendant and in the negative. Since all questions

were answered in the negative, I accordingly affirm the judgment of the High Court of Civil Appeal and dismiss the appeal of the 3rd Defendant with 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

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

Mohomad Mohideen Mohomad
Shakeer Mohideen,
No. 57,
Kandy Road,
Thihariya.
Plaintiff

SC APPEAL NO: SC/APPEAL/116/2013
SC LA NO: SC/HCCA/LA/346/2010
HCCA GAMPAHA NO: WP/HCCA/30/2003 (F)
DC GAMPAHA NO: 36607/L

Vs.

Warnakulasuriya Mahawaduge
Emalin Peiris,
No. 593,
Havelock Road,
Pamankada,
Colombo 05.
Defendant

AND BETWEEN

Warnakulasuriya Mahawaduge
Emalin Peiris, (Deceased)
No. 593, Havelock Road,
Pamankada,
Colombo 05.
Defendant-Appellant

Wannakuwatta Mitiwaduge Agnes
Sirimawathie,
No. 593, Havelock Road,
Pamankada, Colombo 05.
Substituted Defendant-Appellant

Vs.

Mohomad Mohideen Mohomad
Shakeer Mohideen,
No. 57, Kandy Road, Thihariya.
Plaintiff-Respondent

AND NOW BETWEEN

Wannakuwatta Mitiwaduge Agnes
Sirimawathie,
No. 593, Havelock Road,
Pamankada,
Colombo 05.
Substituted Defendant-Appellant-
Appellant

Vs.

Mohomad Mohideen Mohomad
Shakeer Mohideen, (Deceased)
No. 57,
Kandy Road,
Thihariya.
Plaintiff-Respondent-Respondent

1. Sithy Fareeda,
2. Fathima Fareesha,
3. Mohamed Rukshan,
4. Mohamed Mizran,
   All of,
   No. 66/17/2,
   Ali Jinnah Maatha,
   Thihariya.
   Substituted Plaintiff-Respondent-Respondents

Before: P. Padman Surasena, J.
Achala Wengappuli, J.
Mahinda Samayawardhena, J.

Counsel: Rasika Dissanayake with Sandun Senadhipathi for the Substituted Defendant-Appellant-Appellant.

Ikram Mohamed, P.C., with Lal Matarage and Vinura Jayawardene for the Substituted Plaintiff-Respondent-Respondents.

Argued on: 21.10.2021

Written submissions:

by the Substituted Defendant-Appellant-Appellant on 06.11.2013.

by the Substituted Plaintiff-Respondent-Respondents on 09.12.2013.

Further written submissions:

by the Substituted Defendant-Appellant-Appellant on 25.10.2021.

by the Substituted Plaintiff-Respondent-Respondents on 25.10.2021.

Decided on: 26.11.2021

Mahinda Samayawardhena, J.

The plaintiff filed this action seeking a declaration of title to the land described in the schedule to the plaint, ejectment of the defendant therefrom and damages. The defendant filed answer seeking dismissal of the action. After trial the District Court entered judgment for the plaintiff. On appeal, the High Court affirmed it. This appeal is from the judgment of the High Court. This court granted leave to appeal on the following two questions of law:

(a) *Did the District Court err in entering judgment despite the plaintiff failing to discharge the burden that his title deeds relate to the land occupied by the defendant?*
(b) *Did the High Court fail to appreciate that the District Court entered judgment for the plaintiff notwithstanding the plaintiff failed to identify the corpus?*

In essence, leave to appeal was granted on the question whether the land in suit has been properly identified.

The identification of the land is of paramount importance for the plaintiff to succeed in a *rei vindicatio* action. The examination of title does not arise until the land which the plaintiff claims title to is properly identified. The burden is on the plaintiff, not on the defendant, to identify the land in suit.

In this case, the defendant who is in possession of the land known as "Millagahawatta" did not contest the plaintiff's title deeds. Throughout the action her position was that the plaintiff's title deeds relate to a different land, not to the land which she is in possession of. The defendant clearly stated in her answer that she purchased lots 1, 2, 3 and 5 in plan No. 1067/1967 of 25.04.1967 by deed No. 34 of 25.11.1970 and she is in possession of that land. Admittedly that land is different from the land the plaintiff claims title to and seeks the ejectment of the defendant from. The defendant attached a copy of her title deed (D1) and a copy of the plan (D2) to the answer, and the originals were produced at the trial. Her transferor's title deed (P19) also identifies the land according to the said old plan. The land the defendant claims title to as described in these deeds is as follows:

> *All that divided and defined parcel of land called Millagahawatta comprising of Lots 1, 2, 3 and 5 (excluding Lot 4) depicted in Plan No. 1067/1967 dated 25th April 1967 made by H.L. Croos Da Brera, Licensed Surveyor situated at Thihariya in the Meda Pattu of Siyane Korale in the District of Colombo (now Gampaha) Western Province and bounded on the North the land of P.L. Mumeena Umma and Lot 4 shown on the said Plan No.1067/1967 on the East by the P.W.D. Road from*

Warapalana to Thihariya on the South by land of A.T. Razeem and others and on the West by land of C.L. Abdul Samad, land of A.L. Segu Mohomed and others and land of U.L. Abdul Rahiman containing in extent one Acre Three Roods Two Perches (A1. R3. P2) according to the said Plan No. 1067/ 1967.

It is clear from the above description that "Millagahawatta" is a larger land and the defendant claims a divided and defined potion of that larger land.

The plaintiff purchased his land, a portion of "Millagahawatta", about 22 years after the defendant had purchased her land. The land described in the schedule to the plaint as described in the plaintiff's title deed No. 6952 of 06.09.1992 (P8) is as follows:

Southern portion of Millagahawatta situated at Thihariya in the Meda Pattu of Siyane Korale in the District of Gampaha of the Western Province bounded on the North by a portion of the same land belonging to Ali Lebbe Pakir Lebbe, on the East by cart road to Thihariya, on the South by Dangaha Ovita belonging to Ali Thambi Lebbe Ama Lebbe, on the West although it says Ovita belonging to Ahamadu Lebbe Ali Lebbe and others, in fact, the land belonging to Ali Thambi Machcham Ahamadu Lebbe Machcham in extent 1A 3R 0P.

It is clear from the above description also that "Millagahawatta" is a larger land and the plaintiff claims a portion ("southern portion") of the larger land (1 acre and 2 roods), and that portion is bounded on the north by a portion of the larger land.

There is no plan prepared to identify this portion of land at or before the execution of the plaintiff's deed or after the institution of this

action despite the defendant having raised the issue of identification of the land at the earliest possible opportunity.

The plaintiff marked the title deeds of his predecessors in title. According to the schedule to the first deed No. 16855 marked P2, "Millagahawatta" comprises more than 10 acres.

The transferor of the plaintiff's deed No. 6952 (P8), Riyal, became entitled to the land by deed of gift No. 2934 (P7) from his father, Shariiff. Shariiff became entitled to the land by deed No. 23381 (P6). It is to be noted that although Shariiff gifted the entire southern portion of "Millagahawatta" within those boundaries in extent of 1 acre and 2 roods by P7, according to deed P6 Shariiff had got only an undivided 2/3 share of that portion.

Learned President's counsel for the plaintiff quoting *Balasooriya v. Neelakanthi [2017] BLR 202* and *Punchiappuhamy v. Dingiribanda [2016] BLR 40* contends that if a plaintiff claims the entire land but establishes title to a portion of the land, he is entitled to have the trespasser ejected from the entire land. In these two cases there was no question of identification of the land whereas in the instant case the issue is the identification of the plaintiff's land on the ground. Hence those two cases are inapplicable here.

The plaintiff admits that the plaintiff's land is registered at the Land Registry in one folio (page 384 of the brief) and the defendant's land is registered in a different folio (page 473).

During the course of the argument, learned President's Counsel for the plaintiff stated that the question of identification of the land can be addressed at the execution of the decree and the fiscal can obtain the assistance of a surveyor to identify the land and hand over possession to the plaintiff. I am afraid I cannot agree. In the

execution of the decree the fiscal cannot purport to identify the land in order to eject the defendant from it when the defendant has contested the case of the plaintiff on the premise that she is not in possession of the land described in the schedule to the plaint. Under such circumstances, in the first place, there is no executable decree. *(David v. Gnanawathie [2000] 2 Sri LR 352, Gunasekera v. Punchimenike [2002] 2 Sri LR 43)*

The District Judge entered judgment for the plaintiff on the basis that the land claimed by the plaintiff is different from the land claimed by the defendant. If the solution is so straightforward, the District Judge could have entered judgment for the plaintiff with consent soon after the defendant filed the answer because the defendant categorically stated in her answer that the land claimed by the plaintiff is different from the land claimed by the defendant: in fact, that is her defence against ejectment from the land and rightly so.

The High Court affirmed the judgment of the District Court on the grounds that (a) the defendant has not been in possession of "the land in suit"; (b) the plaintiff has established title to the land described in the schedule to the plaint; and (c) "the defendant has failed to identify the land he claims and prove his title to the same."

The High Court states the defendant has not been in possession of the land in suit. What is "the land in suit"? Has it been identified on the ground? This is the pivotal issue before court. The defendant need not prove that she is not in possession of the land described in the schedule to the plaint. The onus lies on the plaintiff to prove his case. As I stated previously, the defendant at the first opportunity tendered a copy of her plan and stated that she is not in possession of the land the plaintiff claims title to. Then the burden is on the

plaintiff who filed the action to eject the defendant from the land to take out a commission to prepare a plan to depict the land he claims and to superimpose the defendant's plan thereon. This has not been done.

If the plaintiff fails to identify the land he claims dominium over, his action must fail. In the instant case the defendant has a strong case: she has title deeds, a plan and she is in possession of the land. She is presumed to have title to the land she is in possession of, and it was for the plaintiff to rebut that presumption which he has failed to do. *(Peeris v. Savunhamy (1951) 54 NLR 207)*

Marsoof, J. in *Latheef v. Mansoor [2010] 2 Sri LR 333 at 378* stated:

> *The identity of the subject matter is of paramount importance in a rei vindicatio action because the object of such an action is to determine ownership of the property, which objective cannot be achieved without the property being clearly identified. Where the property sought to be vindicated consists of land, the land sought to be vindicated must be identified by reference to a survey plan or other equally expeditious method. It is obvious that ownership cannot be ascribed without clear identification of the property that is subjected to such ownership, and furthermore, the ultimate objective of a person seeking to vindicate immovable property by obtaining a writ of execution in terms of Section 323 of the Civil Procedure Code will be frustrated if the fiscal to whom the writ is addressed, cannot clearly identify the property by reference to the decree for the purpose of giving effect to it. It is therefore essential in a vindicatory action, as much as in a partition action, for the corpus to be identified with precision.*

I answer the questions of law on which leave to appeal was granted in the affirmative and set aside the judgments of the District Court and the High Court and allow the appeal. The plaintiff's action shall stand dismissed. The defendant is entitled to costs in all three courts.

Judge of the Supreme Court

P. Padman Surasena, J.

I agree.

Judge of the Supreme Court

Achala Wengappuli, J.

I agree.

Judge of the Supreme Court

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

In the matter of an application for Leave to Appeal under and in terms of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka read with Section 5C of the High Court of the Provinces (Special Provisions) Act as amended by the Act No. 54 of 2006.

SC/APPEAL/118/18

SC/HCCA Application No. 35/2016

CP/HCCA/Kandy 94/2013 (F)

D.C Nuwaraeliya Case No. 1446/9/L

Walpola Liyanage Premarathne,

No. 131/1, Udamadura,

Talawa.

Plaintiff

Vs.

Abeydeera Arachchige Charlotte Kalamawathie

No. 15,

Nildannahinna

Defendant

AND

Abeydeera Arachchige Charlotte Kalamawathie

No. 15,

Nildannahinna

Defendant – Appellant

Vs.

Walpola Arachchige Premarathne,

No. 131/1, Udamadura,

Talawa.

Plaintiff – Respondent

AND

Abeydeera Arachchige Charlotte Kalamawathie

No. 15,

Nildannahinna

Defendant – Appellant - Petitioner

Vs.

Walpola Arachchige Premarathne,

No. 131/1, Udamadura,

Talawa.

Plaintiff – Respondent – Respondent

AND NOW

Abeydeera Arachchige Charlotte Kalamawathie

No. 15,

Nildannahinna

Defendant – Appellant – Appellant

Vs.

Walpola Arachchige Premarathne,

No. 131/1, Udamadura,

Talawa.

Plaintiff – Respondent - Respondent

(Deceased)

1a. M.M.G. Karunawathie,

1b. W.L. Nandawathie,

1c. W.L. Rupawathie,

1d. W.L. Kamalawathie,

1e. W.L. Ariyawathie

1f. W.L. Gunarathne,

1g. W.L. Thusarika Kumari,

1h. W.L. Chandra Kumari,

1i. W.L. Lalitha Kumari,

1j. W.L. Devika Kumari

All at No. 48, Udamadura,

Talawa,

Nildannahinna.

1(a) to 1(j) Plaintiff – Respondent – Respondents

Before	:	Sisira J. de Abrew J
		Murdu N. B. Fernando, PC J,
		E. A. G. R. Amarasekara J
Counsel	:	Gamini Hettiarachchi for the Defendant – Appellant – Appellant
		Bimal Rajapakse with Amrit Rajapakse and Muditha Perera for the Plaintiff – Respondent - Respondent
Argued on	:	24/09/2020
Decided on	:	02/06/2021

E. A. G. R. Amarasekara J

The Plaintiff – Respondent – Respondent (hereinafter sometimes referred to as the Plaintiff or the Plaintiff - Respondent) instituted the action no. L1446 in the District Court of Nuwaraeliya by plaint dated 02.07.2009 against the Defendant – Appellant – Appellant (hereinafter sometimes referred to as the Defendant or Defendant - Appellant). This Court observes that even though as per the plaint, name of the defendant is Abeydeera Arachchige Charlotte Kamalawathie, in certain papers filed and in the last amended caption her name is mentioned as Abeydeera Arachchige Violet Kamalawathie. The caption above states the name as appearing in the original plaint.

As per the Plaint;

- The original owner of the land in the schedule to the plaint, namely, Hewawalpitage Madawattegedara Appuhami transferred the said property to one Abeydeera Arachchige John Singho by deed bearing no. 6275 dated 07.05.1946 attested by D.E. Samarasekara, Notary Public.

- Said John Singho departed his life leaving his children Somawathie, Mahindadasa, Nimaladasa and Mithradasa as heirs and the said heirs transferred the said land to Abeydeera Arachchige Charotte Kamalawathie (the Defendant) by deed bearing no. 292 dated 30.09.1980 attested by C.A. Wanigasuriya, Notary Public.

- Thereafter, the defendant transferred the said land to the plaintiff by deed bearing no. 3008 dated 05.05.2008 attested by Edmand S. Rajapakse, Notary Public.

- However, despite the said transfer and requests to handover the possession, the defendant has been in forcible and unlawful possession of the said land since 05.05.2008 without handing it over to the plaintiff causing damages at the rate of Rs.25000.00 per month.

The plaintiff prayed that the defendant be evicted from the land described in the schedule to the plaint and the plaintiff be given the possession of the said land with damages till he is given the possession.

As per the answer dated 12.03.2009 filed by the defendant;

- The defendant denied that she transferred the land in question to the plaintiff by deed No. 3008 as stated in the plaint, and thus, she is not in forcible or unlawful possession of the said land and further, the land belongs to her and no damage is caused to the plaintiff.

- The defendant has stated that she never transferred the said land but only mortgaged it. And also stated that her signature was taken on blank papers at the office of the Notary Public.

- The defendant has further stated that the plaintiff has no right whatsoever over the property in question and no cause of action can be accrued against the defendant.

Thus, the defendant prayed for a dismissal of the plaint, for a declaration that the defendant is the lawful owner of the land described in the schedule to the

answer, a declaration that the defendant is entitled to the possession of the land and to revoke the deed No. 3008 as it was not lawfully executed.

As per the details given in the schedules to the plaint and the answer both schedules describe the same land.

The plaintiff filed a replication on the 16th February 2010 and denied the defendant's cross claim in the answer.

At the commencement of the trial, followings were recorded as admissions, namely;

- The jurisdiction of the court.
- The land in dispute is the land described in the scheduled to the plaint.
- The flow of title from the original owner to the defendant.

The trial proceeded on 10 issues raised by both the parties; first five issues were raised by the plaintiff and the rest by the defendant.

Subsequent to the trial, the learned District Judge delivered her judgment on 31.10.2013 in favour of the plaintiff, granting relief prayed in prayer (a) of the plaint, that is to evict the defendant from the land and to place the plaintiff in possession. The learned District Judge found that the deed no. 3008 was proved by the plaintiff since an attesting witness testified to the execution as well as there was no reiteration of objection to the said deed at the close of the plaintiff's case. As per the issues raised by the defendant, the sale of property by this deed was impeached. Thus, it was necessary to prove this deed as per section 68 of the Evidence Ordinance and the plaintiff has done it by calling one attesting witness who knew the defendant and, even the Notary has mentioned in his attestation that this witness knew the vendor of the said deed, the defendant. The learned District Judge disbelieved the defendant as unreliable due to the contradictory nature of her stances in giving evidence and also with the answer, and due to the other reasons given in the judgment. The learned District judge who had the opportunity to observe the witnesses has given sufficient reasons for not accepting the defendant's story. It is not necessary to analyse the reasons given by the learned District Judge in disbelieving the defendant and accepting the plaintiff's version since the question of law allowed by this court relates to a different matter. With the proof of the aforesaid deed in the backdrop of the

admissions made, the plaintiff's title to the land was proved and as it was an undisputed fact that the defendant was in possession, the plaintiff obtained the judgment in his favour from the District Court.

Being aggrieved by the Judgment of the District Court, the Defendant preferred an appeal to the Civil Appellate High Court of Kandy, and the learned High Court Judges dismissed the appeal by the Judgment on 14.12.2015, stating that the learned District Judge had correctly evaluated the evidence led at the trial.

When the leave to appeal application against the judgment of the High Court was supported before this Court, only one question of law was allowed which reads as follows;

"Whether the learned Judges of the High Court of Civil Appeal erred in law by failing to appreciate that the action filed by the Plaintiff is not an action for a declaration of title and without first praying for a declaration of title the Plaintiff cannot seek for the ejectment of a Defendant from land?"

It appears that both the courts below considered this as a rei vindicatio action. In this regard, it can be observed that the learned District judge had referred to the cases of **D. Sarathchandra V Dingirimenike and Others CA 304/93F** and **Luwis Singho and Others V Ponnamperuma (1996) 2 Sri L R 320** and had discussed the burden of proof and related matters in a rei vindicatio action and even the High Court Judges have mentioned the said decision in **Luwis Singho and Others V Ponnamperuma** in relation to the burden of proof and, confirmed the view of the learned District Judge. However, even though the learned District Judge in quoting text in English language relating to the burden of proof in rei vindicatio actions from the above decisions, in Sinhala had used the term "'අයිතිය ප්‍රකාශ කර ගැනීමේ නඩුවක්' literaly meaning an 'action for declaration of title' " to describe the action filed in the District Court. The term "අයිතිය ප්‍රකාශ කර ගැනීමේ නඩුවක්' or ' an action for declaration of title'" may not perfectly represent the correct nature of a rei vidicatio action. That is because, even though a prayer for a declaration of title is generally included in a rei vindicatio action, there may be other declaration of title cases which may not fall within rei vindicatio actions in its proper sense, such as a case where declaration of title is pleaded but the defendant is prevented from challenging the title due to estoppel taking place owing to section 116 of the Evidence Ordinance. In such cases, strict proof of title

by the plaintiff is not required like in a proper rei vindicatio action. In **Pathirana V Jayasundara (1955) 58 NLR 169 at 171** it was held that if the essential element of a rei vindicatio action 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.

Even though, the said question of law contemplates the judgment of the learned High Court Judges, it appears nowhere in the High Court judgment, the learned judges have referred to the action as a declaration of title action but as said before they also have referred to **Luwis Singho and Others V Ponnumperuma** (supra) referred to by the learned District Judge to indicate that in this type of cases burden of proving the case is on the plaintiff. This is an indication that learned High Court judges considered this as a rei vindicatio action.

As per the averment of the plaint, the plaintiff had pleaded the chain of title and as the last deed, the plaintiff had referred to the deed executed by the defendant to transfer the title to him and further averred facts relating to forcible and unlawful possession of the defendant by not handing the possession over to him. Thus, on the face of the plaint there were sufficient material to describe the action as a rei vindicatio action. As said before, the learned High Court Judges have affirmed the District Court Judgment without making any comment on the term used in Sinhala to indicate a rei vindicatio action, namely 'අයිතිය ප්‍රකාශ කර ගැනීමේ නඩුවක්' which literally means an action for declaration of title" when there was no relief in the plaint praying for a declaration of title.

It appears that the use of Sinhala words "අයිතිය ප්‍රකාශ කර ගැනීමේ නඩුවක්' or "action for declaration of title" as aforesaid has paved the way for suggesting the above question of law which this court allowed. Nevertheless, as it has been used with quoted English texts from some superior court decisions by the learned District Judge, it is understandable that the said Sinhala phraseology had been used by the learned District Court Judge to mean a rei vindicatio action.

The argument of the counsel for the defendant is that;

- there are two types of actions that corresponds to rei vindicatio actions; namely declaration of title cases and ejectment cases.

- the present case is an ejectment case and not an action for declaration of title.
- in an action for ejectment, title of the plaintiff is not disputed but the right of the defendant to the possession is contested.
- in the instant action the defendant has disputed the title of the plaintiff and an action for ejectment could not be proceeded.

Thus, it appears now he takes up the position that without a prayer for declaration of title the plaintiff could not have proceeded with the case. This stance has not been taken in the original court through issues. It appears that this position was neither taken up in the petition of appeal to the High Court nor in written submissions to the High Court. However, as it is a question of law, this court will consider it later in this judgment.

The counsel for the defendant further submits that requisites of a vindicatory action consist of proof;

- that the plaintiff is the owner of the property
- that the property is in the possession of the defendant.

While referring to **De Silva V Goonenetileke 32 N L R 217, Abeykoon Hamine V Appuhamy 52 N LR 49, Peeris V Savunhamy 54 N L R 207** , the counsel of the defendant states that in a rei vindicatio action or a declaration of title action, the plaintiff must have title and the initial burden is on the plaintiff to prove his dominium and the defendant is in the possession. It appears that in **Peeris V Savunhamy** (supra) even the superior courts sometimes used the term “action for declaration of title” to a rei vindicatio action, perhaps due to the nature of relief prayed therein.

I do not think that there is anything to disagree with what is said above with regard to the requisites and proof of a rei vindicatio action but nothing is shown on those grounds to blame the Judgments of the lower courts. The aforesaid cases have not addressed the matters raised in the question of law mentioned above. As per the question of law, lower court judgments are challenged on two grounds, namely;

- The judges failed to consider that the plaintiff’s action is not an action for declaration of title.

- Without first praying for a declaration of title, plaintiff could not have asked for the ejectment of the defendant.

As explained above there may be declaration of title cases that may not fall within the scope of a rei vindicatio action in its proper sense. However, a party in a rei vindicatio action, as per its wish, may ask for a declaration of title or ejectment of the defendant or both the relief. One may be able to categorize rei vindicatio actions accordingly as per the prayer, but what is necessary to consider at this moment is the validity and the relevance of the aforementioned two grounds contained in the question of law.

As said before, though the Sinhala term used was 'අයිතිය ප්‍රකාශ කර ගැනීමේ නඩුවක්' or 'action for declaration of title,' it has been used with certain extracts in English taken from some decided cases, in the context, it appears that the learned District Judge used the said words to mean a rei vindicatio action. Even the judgment of the High Court when consider as a whole, indicates that it considered the case at hand as a rei vindicatio action, even though in confirming the lower court judgment it did not make any comment on the said Sinhala term the lower court used to name the case at hand. On the other hand, even if there is an error in identifying or naming the nature of the action, this court has to see whether it is sufficient to vacate or vary the order since if substantial rights are not affected this court need not interfere. In this regard, now this court will consider whether the court can grant the relief of ejectment without a prayer for declaration of title in a rei vindicatio action, where the title has been disputed but the title is proved at the end.

In **Attanayake V Aladin (1997) 3 Sri L R 386** 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 stating that prayer for ejectment is only a consequential relief to the declaratory relief, but 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 that 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 L R 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 the court on the title so pleaded. In the case at hand title has been pleaded in the plaint and there was an admission as to the flow of title from the original owner to the defendant and the first issue was raised to query whether the defendant sold the property to the plaintiff to show that the title at the end came to the plaintiff and the second issue was raised to show that the defendant was in possession of the property. Both those issues were answered in favour of the plaintiff and proved the plaintiff's entitlement for an ejectment of the defendant as supported by the decisions in **T.B.Jayasinghe V Kiriwanegedara Tikiri Banda** (supra) and **Dharmasiri V Wickramatunga** (supra).

In **Pathirana V Jayasundara (1955) 58 N L R 169 at 172** Gratian J quoted Maasdorp to state that the plaintiff's ownership of the thing is the very essence of the rei vindicatio. In **Luwis Singho and Others V Ponnamperuma** (supra) it was held that in a rei vindicatio action the cause of action is based on the sole ground of violation of the right of ownership. Thus, if the title holder is deprived of the possession, he can file a rei vindicatio.

In terms of section 5 of the Civil Procedure Code an action means a proceeding for 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 invites its interference.[1] 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[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 states that he is entitled to possess as the owner. In terms of the section 188 of the said Code, after the judgment the court has to enter decree specifying the relief granted or other determinations of the actions, and in terms of section 217(c) and (g), such a decree among other things may include an order of court commanding to yield up possession of immovable property as well as a declaration of a right or status respectively. Each relief under section 217 of the said Code can be given as a separate relief. Thus, once the plaintiff's title to the land is proved and it is established that the possession is

[1] Vide section 6 of the Civil Procedure Code.
[2] Vide section 5 of the Civil Procedure Code.

with the defendant, plaintiff is entitled to his relief. Mere misnomer, if any, of the action done by a judge, cannot disentitle the plaintiff of his right for the judgment in his favour to evict the defendant when he is successful in proving the necessary requisites of a rei vindicatio action. In my view, **Attanayake V Aladin** (supra) does not represent the correct position of law.

Further, as per **Hanaffi V Nallamma (1998) 1 Sri L R 73** , once the issues are raised the pleadings recede to the background. The issues raised by the plaintiff query whether the defendant sold the land to the plaintiff and whether the defendant is in unlawful possession causing damages. Therefore, what was put in issue by the plaintiff was his right to possession as per the contract of sale of the land between him and the defendant. The plaintiff successfully proved that it was sold to him and the defendant was in possession except the damage caused. The defendant failed in proving her case. Thus, the plaintiff is entitled to the relief given by the district court.

For the foregoing reasons, I answer the question of law in the negative and dismiss the appeal with costs.

……

Judge of the Supreme Court

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

In the matter of an application for Leave to Appeal under and in terms of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka read with Section 5C of the High Court of the Provinces (Special Provisions) Act as amended by the Act No. 54 of 2006.

SC/APPEAL/118/18

SC/HCCA Application No. 35/2016

CP/HCCA/Kandy 94/2013 (F)

D.C Nuwaraeliya Case No. 1446/9/L

Walpola Liyanage Premarathne,

No. 131/1, Udamadura,

Talawa.

Plaintiff

Vs.

Abeydeera Arachchige Charlotte Kalamawathie

No. 15,

Nildannahinna

Defendant

AND

Abeydeera Arachchige Charlotte Kalamawathie

No. 15,

Nildannahinna

Defendant – Appellant

Vs.

Walpola Arachchige Premarathne,

No. 131/1, Udamadura,

Talawa.

Plaintiff – Respondent

AND

Abeydeera Arachchige Charlotte Kalamawathie

No. 15,

Nildannahinna

Defendant – Appellant - Petitioner

Vs.

Walpola Arachchige Premarathne,

No. 131/1, Udamadura,

Talawa.

Plaintiff – Respondent – Respondent

AND NOW

Abeydeera Arachchige Charlotte Kalamawathie

No. 15,

Nildannahinna

Defendant – Appellant – Appellant

Vs.

Walpola Arachchige Premarathne,

No. 131/1, Udamadura,

Talawa.

Plaintiff – Respondent - Respondent

(Deceased)

1a. M.M.G. Karunawathie,

1b. W.L. Nandawathie,

1c. W.L. Rupawathie,

1d. W.L. Kamalawathie,

1e. W.L. Ariyawathie

1f. W.L. Gunarathne,

1g. W.L. Thusarika Kumari,

1h. W.L. Chandra Kumari,

1i. W.L. Lalitha Kumari,

1j. W.L. Devika Kumari

All at No. 48, Udamadura,

Talawa,

Nildannahinna.

1(a) to 1(j) Plaintiff – Respondent – Respondents

Before	:	Sisira J. de Abrew J
		Murdu N. B. Fernando, PC J,
		E. A. G. R. Amarasekara J
Counsel	:	Gamini Hettiarachchi for the Defendant – Appellant – Appellant
		Bimal Rajapakse with Amrit Rajapakse and Muditha Perera for the Plaintiff – Respondent - Respondent
Argued on	:	24/09/2020
Decided on	:	02/06/2021

Murdu N. B. Fernando, PC. J,

I have had the benefit of reading in draft the judgment of my brother Amarasekara J and Sisira J. de Abrew J., disallowing this appeal for reasons stated therein.

I concur with the said findings. Appeal is dismissed.

……

Judge of the Supreme Court.

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

In the matter of an Appeal

Walpola Liyanage Premarathne,
No. 131/1, Udamadura,
Talawa.

Plaintiff

SC Appeal 118/2018
SC. HC. CA. LA. Application No. 35/2016
CP/HCCA/Kandy 94/2013(F)
D.C. Nuwaraeliya Case No. 1446/9/L

Vs-

Abeydeera Arachchige Charlet
Kamalawathie,
No. 15, Nildannahinna.

Defendant

AND

Abeydeera Arachchige Charlet

Kamalawathie,
No. 15, Nildannahinna.
Defendant-Appellant

Vs

Walpola Liyanage Premarathne,
No. 131/1, Udamadura,
Talawa.
Plaintiff-Respondent

AND

Abeydeera Arachchige Charlet
Kamalawathie,
No. 15, Nildannahinna.
Defendant-Appellant-Petitioner

Vs.

Walpola Liyanage Premarathne,
No. 131/1, Udamadura,
Talawa.
Plaintiff-Respondent-Respondent

AND NOW

Abeydeera Arachchige Charlet,
Kamalawathie,

No. 15, Nildannahinna.

Defendant-Appellant-Appellant

Vs.

Walpola Liyanage Premarathne,
No. 131/1, Udamadura,
Talawa.

Plaintiff-Respondent-Respondent (deceased)

1a. M.M.G. Karunawathie

1b. W.L. Nandawathie

1c. W.L. Rupawathie

1d. W.L. Kamalawathie

1e. W.L. Ariyawathie

1f. W.L. Gunarathne

1g. W.L. Thusarika Kumari

1h. W.L. Chandra Kumari

1i. W.L. Lalitha Kumari

1j. W.L. Devika Kumari

All at No. 48, Udamadura, Talawa, Nildannahinna.

1(a) to 1(i) Plaintiff-Respondent-Respondents

Before: Sisira. J. de Abrew J

Murdu Fernando PC J

Gamini Amarasekara J

Counsel: Gamini Hettiarchchi for the Defendant-Appellant-Appellant
Bimal Rajapaksha for the substituted Plaintiff-Respondent-Respondent

Argued on : 24.9.2020

Decided on: 2.6.2021

Sisira. J. de Abrew, J

The name of the Defendant in the original plaint is Abeydeera Arachchige Charlet Kamalawathie. But in the Petition of Appeal filed in this court it has been typed as Abeydeera Arachchige Violet Kamalawathie. I have, in this judgment, stated the name appearing in the original plaint.

I have read the draft judgment of His Lordship Justice Gamini Amarasekara. I agree with His Lordship when he decided to dismiss the appeal.

This is an appeal against the judgment of the Civil Appellate High Court Kandy dated 14.12.2015. The learned District Judge by her judgment dated 31.10.2013, held the case in favour of the Plaintiff-Respondent-Respondent (hereinafter referred to as the Plaintiff-Respondent). Being aggrieved by the said judgment of the learned District Judge, the Defendant-Appellant-Appellant (hereinafter referred to as the Defendant-Appellant) appealed to the Civil Appellate High Court Kandy. The learned Judges of the Civil Appellate High Court Kandy by their judgment

dated 14.12.2015, affirmed the said judgment of the learned District Judge. Being aggrieved by the said judgment of the Civil Appellate High Court, the Defendant-Appellant has appealed to this court. This court by its order dated 4.7.2018, granted leave to appeal on the following question of law.

"Whether the learned Judges of the Civil Appellate High Court erred in law by failing to appreciate that the action filed by the Plaintiff is not an action for a declaration of title and without first praying for a declaration of title, the Plaintiff cannot seek for the ejectment of a defendant from the land?"

The facts of this case may be briefly summarized as follows. The Plaintiff-Respondent filed action in the District Court of Nuwara Eliya seeking the ejectment of the Defendant-Appellant from the land in question. The Defendant-Appellant filed answer seeking to dismiss the Plaintiff-Respondent's action; for a declaration that she is the owner of the land in question; and for a declaration that that Deed No.3008 is null and void. The Defendant-Appellant stated in her evidence that she did not sign the Deed No.3008. The Plaintiff-Respondent stated in his evidence that he became the owner of the land in question in terms of Deed No.3008 dated 5.5.2008 attested by Edmond Rajapakshe Notary Public. One of the important questions that must be decided in this case is whether the Deed No.3008 dated 5.5.2008 marked P1 attested by Edmond Rajapakshe Notary Public has been proved or not. The Plaintiff-Respondent stated in his evidence that the Defendant-Appellant signed Deed No.3008 dated 5.5.2008 marked P1 attested by Edmond Rajapakshe Notary Public and transferred the land in question to him. The Defendant-Appellant stated in her evidence that she signed only blank papers but did not sign Deed No.3008 dated 5.5.2008 marked P1. However, she accepts the position that she received a sum of Rs.200,000/- from the Plaintiff-Respondent at

the time she placed her signature on blank papers. The learned District Judge has noted that the Deed No.3008 dated 5.5.2008 marked P1 is a printed form and that her signature is also found near printed letters. I have examined the Deed No.3008 dated 5.5.2008 marked P1 and it is a printed form and the words Charlet Abeydheera (written in Sinhala language) have been written in pen near the printed letters of the said Deed. Thus, the learned District Judge was correct when she made the above observation. The Defendant-Appellant has further stated in her evidence that the signature found in her proxy given to her own Attorney-at-law is not her signature but similar to her signature. This proxy was marked as P2. The learned District Judge has noted in her judgment that that words Charlet Abeydheera(written in Sinhala language) are found in the proxy. I have examined the proxy marked P2 and the above mentioned observation made by the learned District Judge, in my view, is correct. The learned District Judge after considering the totality of the evidence has, in her judgment, rejected the evidence of the Defendant-Appellant but relied on the evidence of the Plaintiff-Respondent.

The Plaintiff-Respondent, in his evidence, states that the Defendant-Appellant, two attending witnesses and Edmond Rajapakshe the Notary Public signed the Deed No.3008 dated 5.5.2008 marked P1. One of the attesting witnesses in the Deed No.3008 dated 5.5.2008 marked P1is Wamuni Wasimalay. The Plaintiff-Respondent called Wamuni Wasimalay. He, in his evidence, confirmed the signatures found in the Deed No.3008 dated 5.5.2008 marked P1 and identified his signature and the signatures of Charlet Abeydheera (the executant of the Deed), Irsha one of the attesting witnesses and Edmond Rajapakshe the Notary Public. He further stated in his evidence that he knew the Defendant-Appellant for the last 25 to 30 years. Edmond Rajapakshe the Notary Public who attested the Deed No.3008 dated 5.5.2008 marked P1 in his attestation has stated that he knew the two

attesting witnesses and they (the two attesting witnesses) knew Charlet Abeydheera, the executant of the Deed.

Section 68 of the Evidence Ordinance reads as follows.

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

When I consider the above evidence and Section 68 of the Evidence Ordinance, I hold that the Deed No.3008 dated 5.5.2008 marked P1 has been proved in accordance with Section 68 of the Evidence Ordinance and that the learned District Judge was correct when she accepted the said Deed.

When I consider all the aforementioned matters, I hold that the title to the property in question has been proved and that the Plaintiff-Respondent has proved that he is the owner of the property in question.

The next question that must be considered is whether the Plaintiff-Respondent in this case could seek the ejectment of the Defendant-Appellant without a specific prayer for a declaration of title. I now advert to this question. In order to find an answer to this question it is necessary to consider certain judicial decisions. In the case of Jayasinghe Vs Tikiri Banda [1988] 2 CALR 24 Viknaraja J held that 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 that 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."*

In an action of this nature (Plaintiff seeks the ejectment of the Defendant without a specific prayer for a declaration of title), if it is established that the Plaintiff is the owner of the property in question, it becomes the duty of the Judge to declare that the Plaintiff is the owner of the property in question. This duty of the Judge cannot be obstructed by action or non-action of the parties. Thus, the failure on the part of the Plaintiff to state a prayer in the plaint for a declaration of title to the property in question does not and cannot prevent the Judge from declaring that the Plaintiff is the owner of the property in question when the Plaintiff's title to the property in question has been established at the trial. If the court fails to follow the above observation, then the Plaintiff will have to file another action for a declaration of title. If that is so, the principle enunciated by Sansoni CJ in the case of H.A.M. Cassim Vs Government Agent Batticaloa in 69 NLR 403 that 'there must be finality in litigation' would be violated. Considering the above observation and the legal literature, I hold that in an action for ejectment of the defendant from the property in question, once the plaintiff's title is proved, he (the plaintiff) is entitled to ask for ejectment of the defendant from the property in question even though there is no prayer in the plaint for a declaration of title.

In the present case, the Plaintiff-Respondent in the body of the plaint has pleaded his title to the property in question and the issue No.1 at the trial was whether the Defendant-Appellant, by the Deed No.3008 dated 5.5.2008, transferred the property in question to the Plaintiff-Respondent. The learned District Judge has answered this issue in the affirmative. When I consider the evidence led at the trial, I hold that the above decision of the learned District Judge is correct and that the Plaintiff-Respondent is the owner of the property in question.

For the above reasons, I answer the question of law raised in this case in the negative.

For the aforementioned reasons, I hold that the learned District Judge was correct when she decided the case in favour of the Plaintiff-Respondent and that the learned Judges of the Civil Appellate High Court were correct when they dismissed the appeal of the Defendant-Appellant. I therefore affirming the judgment of the Civil Appellate High Court dismiss this appeal of the Defendant-Appellant with costs.

Appeal dismissed.

Judge of the Supreme Court.

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

In the matter of an Appeal against an Order of the Civil Appellate High Court of the Central Province holden in Kandy.

Yasasiri Kasturiarachchi

No.19, Nugegoda Road,

Pepiliyana,

Boralasgamuwa.

Plaintiff

-Vs-

Peoples' Bank

No. 75, Sir Chittampalam A Gardiner

Mawatha,

Colombo 2.

Defendant

SC Appeal No: 127/2014

SC HCCA LA No: 371/2013

HCCA Kandy LA No: 09/2013

DC Nuwara Eliya Case No: 1633/L

AND BETWEEN

Yasasiri Kasturiarachchi

No.19, Nugegoda Road,

Pepiliyana,

Boralasgamuwa.

Plaintiff-Petitioner

-Vs-

People's Bank
No. 75, Sir Chittampalam A Gardiner
Mawatha,
Colombo 2.

Defendant- Respondent

AND NOW BETWEEN

Yasasiri Kasturiarachchi
No.19, Nugegoda Road,
Pepiliyana,
Boralasgamuwa.

Plaintiff- Petitioner- Petitioner/ Appellant

-Vs-

People's Bank
No. 75, Sir Chittampalam A Gardiner
Mawatha,
Colombo 2.

Defendant-Respondent-Respondent

Before: **Sisira J. de Abrew, J.,**
Murdu N.B. Fernando, PC J. and
Yasantha Kodagoda, PC J.

Counsel: Chatura Galhena with Manoja Gunawardena for the Plaintiff -Petitioner - Appellant.

S.A. Parathalingam PC with Kushan D'Alwis PC and Hiran Jayasuriya for the Defendant- Respondent-Respondent.

Argued on: 02.03.2020.

Decided on: 02.06.2021

Murdu N.B. Fernando, PC. J.

This Appeal arises from the Order of the Civil Appellate High Court of the Central Province holden in Kandy dated 30.07.2013. By the said Order, the Civil Appellate High Court ("the High Court") refused to grant Leave to Appeal and dismissed the Leave to Appeal Application filed in the High Court, challenging the Order made by the District Court of Nuwara Eliya dated 26.02.2013.

On 23.07.2014, this Court granted Leave to Appeal to the Plaintiff-Petitioner-Appellant, upon the said Order of the High Court on the following two Questions of Law:

I. Have their Lordships of the High Court of Civil Appeal erred in law by failing to recognize the legal principle enunciated in the case of Ramachandran and Another; Anandasiva and Another vs Hatton National Bank 2006 [1] SLR 393, that property liable to be sold under the Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990 as amended is limited to the property mortgaged

by the borrower himself and it would exclude the property mortgaged by a third party on behalf of the actual borrower/ debtor?

II. Have their Lordships of the High Court of Civil Appeal erred in law by failing to consider that the Certificate of Sale does not transfer any title to the subject land from the plaintiff to the defendant under and in terms of Section 29 (N) (1) of the Peoples' Bank Act as amended?

The Plaintiff- Petitioner- Appellant ("the Plaintiff / Appellant") filed a "**Land Case**" against the Defendant-Respondent-Respondent ("the Defendant/ Defendant bank") in the District Court of Nuwara Eliya on 11.02.2013 seeking *inter alia* a **declaration of title** to six lots of land ("the land") more fully referred to in the plaint filed in the said case and to **restrain the Defendant bank from evicting the Plaintiff** and other persons occupying the said land under him and thereby taking possession of the said land, by way of **an Enjoining Order, Interim Injunction and a Permanent Injunction**. The Plaintiff also sought a declaration from Court that the Certificate of Sale dated 14.07.2010 annexed to the plaint is null and void and /or voidable and moved for an order to quash such Certificate of Sale.

The learned Judge of the District Court of Nuwara Eliya having heard Counsel for the Plaintiff **rejected the application for issuance of an Enjoining Order as well as notice of Interim Injunction** for reasons stated in the Order therein and only issued summons on the Defendant bank returnable on a given date.

Being aggrieved by the said Order, the Plaintiff went before the High Court in a Leave to Appeal application and the **High Court refused to grant Leave to Appeal to the Plaintiff** and dismissed the application. Thus, the Plaintiff is now before this Court having obtained Leave to Appeal on the two Questions of Law referred to earlier.

Prior to discussing the Questions of Law raised before this Court, I wish to look at the chequered history *albeit* brief which instrumented the Plaintiff to file this action in the District Court of Nuwara Eliya as revealed by the pleadings and documents filed before this Court.

1. The Plaintiff Yasasiri Kasturiarachchi is the Chairman and Managing Director of Yasodha Holdings (Pvt) Limited, a member of the Yasodha Group of Companies and was the lawful owner of the six lots of land, "the land" more fully referred to in the plaint.

2. In or around the years 1994 and 1995, the said Yasodha Holdings (Pvt) Limited ("Yasodha Holdings") obtained many banking facilities from the Defendant bank on several mortgage bonds executed, which were secured by the Plaintiff by pledging the six lots of land referred to earlier.

3. Yasodha Holdings failed to repay the monies due to the Defendant bank on the facilities obtained and on **10.07.1997 the Defendant bank adopted a resolution** in terms of section 29D of the People Bank Act No. 29 of 1961 as amended, **to sell by public auction 'the land' mortgaged by the Plaintiff** in order to recover the monies due to the Defendant bank from Yasodha Holdings.

4. Yasodha Holdings challenged the said resolution by way of a Writ Application in the Court of Appeal. The principle ground of challenge was that the resolution was ultra vires as it related to a third party mortgage. The said **Writ Application bearing No. 1268/98** was dismissed by a Divisional Bench of three Judges of the Court of Appeal on 29.02.2008.

5. Being aggrieved by the said Court of Appeal judgement, Yasodha Holdings then came before this Court by way of a **Special Leave to Appeal application bearing No. SC/SPL/LA 60/2008** and on 03.12.2008 the Supreme Court **refused to grant**

Special Leave to Appeal to Yasodha Holdings and dismissed the said Special Leave to Appeal application.

6. Whilst the above stated Writ Application filed by Yasodha Holdings was pending before the Court of Appeal, the Defendant bank resorted to execute the mortgage bonds by way of filing a **regular action** dated 09.07.2007 in the **Commercial High Court of Colombo**. According to the Defendant bank, such a course of action was initiated in order to overcome the period of prescription with regard to filling an action upon a mortgage bond.

7. Consequent to the **Supreme Court rejecting the Application No. SC/SPL/LA/60/08** filed by Yasodha Holdings for Special Leave to Appeal against the judgement of the above said Court of Appeal Writ Application bearing No.1268/98 on 03.12.2008, **the Defendant bank proceeded with the summery procedure** by publishing notice to sell by public auction the land referred to in the resolution dated 10.07.1997. The position of the Defendant bank was that by rejection of the Special Leave to Appeal application, the Supreme Court, upheld the Court of Appeal judgement that the resolution was a valid resolution in the eyes of the law and capable of execution.

8. On 25.03.2009, Yasasiri Kasturiarachchi, the Managing Director of Yasodha Holdings (the same appellant before this Court), challenged the above said course of action of the Defendant bank, by going before the Court of Appeal in yet another **Writ Application bearing No.188/09**. The main grievance of Yasasiri Kasturiarachchi before the Court of Appeal was that the Defendant bank, having resorted to regular action by filling an action before the Commercial High Court to adjudicate the dispute between the parties cannot usurp and nullify the judicial process already initiated in filling regular action by proceeding with the summary procedure and moving to parate execute, “the land” mortgaged by him, a third party,

and to sell by public auction the said land, to recover the monies due from Yasodha Holdings to the Defendant bank.

9. On 15.06.2009, the said Writ Application bearing No. 188/09 was supported before the Court of Appeal for granting of notice and interim relief by the learned Counsel for Yasasiri Kasturiarachchi. The Defendant bank strenuously objected to the application filed on the ground that it was a blatant attempt to challenge and assault the same resolution which was upheld as a valid resolution by the Court of Appeal and the Supreme Court through the due process of law.

10. The Court of Appeal having reserved Order, thereafter granted notice only and refrained from granting interim relief as prayed for in the Writ Application. It is observed, although an interim order was not issued by the Court of Appeal restraining the sale of the land, the Defendant bank did not proceed with the sale on the scheduled date.

11. Consequent to filling its objections to the said **Writ Application bearing No. 188/09**, the Defendant bank proceeded with the summary procedure and re-fixed the sale for 07.11.2009. At that stage, Yasasiri Kasturiarachchi once again moved court for interim relief against the said sale and the **Court of Appeal** on 05.11.2009 **granted an interim order as prayed for by Yasasiri Kasturiarachchi staying the impugned sale of the land** fixed for 07.11.2009.

12. Being **aggrieved by the said interim order,** the Defendant bank came before this Court in a Special Leave to Appeal application, bearing No. **SC/SPL/LA 294/2009,** and on 11.02.2010, **this Court granted Special Leave to Appeal** to the Defendant bank with regard to the issuance of the above said interim order by the Court of Appeal restraining the Defendant bank from proceeding with the auction sale of the land in issue.

13. Thereafter, the said Special Leave to Appeal application, now bearing **SC/Appeal No. 11/2010** was heard before this Court and on 09.07.2010, **the Supreme Court allowed the Appeal and set aside the Court of Appeal Order and permitted the Defendant bank to proceed with the sale of the land by public auction.**

14. Consequent to same, on 14.07.2010, **the Defendant bank auctioned the mortgaged land** and there being no bidders **purchased the said land** as signified by the Certificate of Sale annexed to the proceedings.

15. Thereafter, on 11.01.2011, the Defendant bank filed an action in the **District Court of Colombo** bearing No. **DLM 10/2011** against Yasasiri Kasturiarachchi, (the Plaintiff in the instant case) moving for a Direction of Court, by virtue of section 29P of the People's Bank Act, **to evict the said Yasasiri Kasturiarachchi** and others occupying the land in issue under him and to take possession of the land purchased by the Defendant bank.

16. On 31.01.2012, Yasasiri Kasturiarachchi filed objections to the said case before the District Court of Colombo and the case proceeded *inter partes*.

17. Whilst the above case was progressing in the District Court of Colombo, the Plaintiff, Yasasiri Kasturiarachchi filed the instant **"Land Case" bearing No.1633/L before the District Court of Nuwara Eliya seeking a declaration of title to the very same land and moving for restrainment of the Defendant bank**, by way of an Enjoining Order, an Interim Injunction and a Permanent Injunction.

18. **The District Court of Nuwara Eliya did not grant the Enjoining Order or notice of Interim Injunction restraining the Defendant bank from evicting the Plaintiff Yasasiri Kasturiarachchi and the Plaintiff filed a Leave to Appeal application** against the said Order **in the High Court of Kandy**. That application was also

rejected by the High Court and dismissed with costs, which culminated in the present appeal to this Court.

Hence, the Appellant Yasasiri Kasturiarachchi is now before this Court challenging the very same resolution upheld by this Court, in a subtle manner.

From the foregoing multitude of cases filed, it is amply demonstrated,

- that **the land** morefully referred to in the resolution dated 10.07.1997 to be parate executed was **sold by public auction consequent to the judgement of the Supreme Court in case No. SC/Appeal 11/2010 dated 09.07.2010 wherein this Court permitted the Defendant bank to proceed with the sale;**

- that thereafter, by virtue of the provisions of the Peoples' Bank Act, **the Defendant bank went before the District Court of Colombo** on the Certificate of Sale issued in its favour **to obtain an eviction order against Yasasiri Kasturiarachchi** from possessing the said land;

- that **whilst the said case was pending,** Yasasiri Kasturiarachchi **went before the District Court of Nuwara Eliya** praying for a declaration of title to the very same land and also to restrain the Defendant bank from dispossessing him and the District Court refused the said application for an Order of restrainment; and

- the **High Court** refused to grant leave and **dismissed the Leave to Appeal application** filed against the Order of the District Court.

It is observed that the High Court dismissed the Leave to Appeal application on three main grounds.

Firstly,

Yasasiri Kasturiarachchi, is not entitled to and estopped in challenging the resolution dated 10.07.1997 in any manner, as the Supreme Court, being the apex court of the country has settled the validity and legality of the said resolution.

Secondly,

The instant case has been filed by Yasasiri Kasturiarachchi in order to negate or delay the process contemplated by law, and being very well aware that the Defendant bank has filed action in the District Court of Colombo based on the Certificate of Sale and its entitlement to obtain possession of the said land by virtue of the provisions of the law.

Thirdly,

Yasasiri Kasturiarachchi, has failed to establish a prima facie case and no justifiable ground exist to interfere with the Order of the learned District Judge.

Having referred to the background, history, facts and circumstances which culminated in the Appellant filing a land case in the District Court of Nuwara Eliya which paved the way for the Appellant to come before this Court once again, I would now examine the first ground referred to by the learned judges of the High Court in refusing to entertain the Leave to Appeal application filed in the High Court, namely ***the appellant is estopped in challenging the validity and legality of the resolution dated 10.07.1997.***

As correctly held by The High Court, this Court in **SC Appeal 11/2010** (stemming from Court of Appeal Writ Application bearing No. 188/09) now reported as **Peoples' Bank and Seven others v Yasasiri Kasturiarachchi [2010] 1 SLR page 227 at page 235** observed as follows:

"The main issue in this case which was the validity of the Parate Resolution dated 10.07.2010 was raised in the Writ Application 1268/98 and the Court of Appeal by its decision dated 29.02.2008 held the Resolution was valid and refused a Writ of Certiorari to quash the said Resolution. The Supreme Court on the 03.12.2008 denied Leave to Appeal against the judgement of the Court of Appeal. Therefore, the resolution dated 10.07.1997 has been determined conclusively to be valid and executable by the decision of this Court on 03.12.2008. This is final and conclusive and cannot be reviewed and / or rescinded by any other Court."

In the said judgement, this Court considered the main argument put forward that whilst the **Petitioner in CA 1268/98** (the 1st writ application) was the company **Yasodha Holdings**, in **CA 188/09** (the 2nd writ application) the Petitioner was not the company but **Yasasiri Kasturiarachchi** the Managing Director of the company, who was not a party to the 1st writ application but a separate individual who mortgaged his land to the Defendant bank and thus, a third party in the eyes of the law and the matter revolved around a 3rd party mortgage, and went onto observe as follows:

"The Petitioner – Respondent (i.e Yasasiri Kasturiarachchi) is the same Chairman / Managing Director of the Company Yasodha Holdings and the Company is fully owned and controlled by Petitioner-Respondent (i.e Yasasiri Kasturiarachchi). All the benefits from the Company accrue to Yasasiri Kasturiarachchi and his family. Despite the corporate veil, the Company Yasodha Holdings and Yasasiri Kasturiarachchi are in fact one and the same entity and represent the same interest. Clearly this was the pith and substance of the finding of the Court of Appeal" (page 236)

> *"Yasasiri Kasturiarachchi cannot be considered as a third party against the Company Yasodha Holding.*[ ] ***the judgement of this Court in SC/ SPL/ LA 60/2008 [CA Appeal 1268/98] acts as a complete bar*** *to a proceeding by the same party which once again seeks to question the validity of the Parate Resolution dated 10.07.1997* [ ] *in light of the judgement of this Court in SC(SPL)LA 60/2008, the later application in CA/ Writ 188/99 cannot also succeed in view of the* ***principle of 'collateral estoppel' whereby a party is barred re-litigating an issue already finally determined against such party in an earlier decision".*** *(page 237)* (emphasis added)

Thus, it is observed that in the instant case, the High Court correctly relied upon the *ratio decidendi* of the afore said judgement of this Court in **SC/Appeal 11/2010**, in holding ***that the legality and validity of the Resolution dated 10.07.1997 cannot be impugned nor can it be challenged on any ground or on any basis, before any Court.***

It is further observed in the instant case, the High Court correctly analyzed and came to the finding that there was no merit in the contention of the Petitioner (Yasasiri Kasturiarachchi) that the learned District Judge erred in its Order by following the decision in **Hatton National Bank v. Jayawardhana and others [2007] 1 SLR 181** instead of the decision in **Ramachandran and another v. Hatton National Bank [2006] 1 SLR 393**, based on the above reasoning and finding of the High Court, which is that the Petitioner cannot and is estopped in challenging before the District Court the Resolution dated 10.07.1997, since the Petitioner *Yasasiri Kasturiarachchi has already canvassed the said Resolution before the Supreme Court in an earlier instance and has not been successful and thus, legally not entitled to attack the said decision once again.* In my view, the afore said reasoning of the learned High Court Judges is legally valid and correct and cannot be faulted.

Hence, I see no reason to interfere with the Order of the High Court on the said ground too.

As discussed earlier, consequent to the sale of the land and issuance of the Certificate of Sale, the Defendant bank filed action in the District Court of Colombo on 11.01.2011, to evict Yasasiri Kasturiarachchi. Prior to the said case coming to a final conclusion, Yasasiri Kasturiarachchi co-laterally challenged and filed the instant land case, in the District Court of Nuwara Eliya on 11.02.2013. Eight long years have already passed and still the said case is at summons returnable stage. Hence, I am of the view that the finding of the learned Judges of the High Court was correct, when holding, that the ***Appellant filed the case in the District Court of Nuwara Eliya only to negate and delay the process*** begun by the Defendant bank in resorting to the due process of law as clearly laid down in the Peoples' Bank Act, and by going before the District Court of Colombo to evict the Appellant from the land more fully referred to in the Certificate of Sale.

Similarly, the finding of the High Court that the Appellant has also failed to establish a prima facie case against the Defendant bank, in order to obtain interim relief from the District Court of Nuwara Eliya is also ex-facie correct and cannot be faulted, for the reasons already discussed in this judgement.

Therefore, upon the said ground too, I see no reason to interfere with the Order made by the High Court in refusing to grant Leave to Appeal to the Plaintiff, on the Order made by the District Court of Nuwara Eliya dated 26.02.2013.

The Law Courts of Sri Lanka have been structured for administration of justice and the primary object of a judicial officer is to dispense justice to the citizenry who come before courts, without fear or favour and in terms of the Rule of Law. This does not mean that the citizenry are given the freedom of the wild ass to abuse the said process, at their whim and fancy and attack and challenge the statutory process by filling multiple actions before numerous courts, in the length and breadth of Sri Lanka.

In the instant matter**, the Supreme Court** has twice over **in SC/SPL/LA 60/2008 and in SC/Appeal 11/2010** categorically upheld;

- **that the resolution dated 10.07.1997**, **is legal and valid and is enforceable in law,**
- **such decision is final and conclusive and cannot be reviewed and/or rescinded by any other court; and**
- **the parties are estopped in collaterally challenging the said decision of the Supreme Court.**

In terms of the Resolution dated 10.07.1997 (issued more than two decades ago) the land has now been sold. A Certificate of Sale has been issued. By virtue of the provisions of the Peoples' Bank Act, an action has been filed to evict the occupiers of the land. In such a background, the Appellant filling a **'Land Case'** to obtain a declaration of title and in the interim, restraining order, in my view is not in good faith and tantamount to an abuse of the process of the law. Such action is reeling with bad taste. It is not an instance of coming to court with clean hands. Hence, the course of action resorted to by the Plaintiff, in my view, is with an ulterior motive. It is to de-rail and delay the actions initiated by the Defendant bank in accordance with the provisions laid down in the Peoples' Bank Act.

The District Court and the High Court has quite correctly refused to issue a restraining order, by way of an Enjoining Order or an Interim Injunction or even notice of an Interim Injunction against the Defendant bank.

This Court too, did not issue any Interim Orders, although Leave to Appeal was granted on 23.07.2014.

The scope of this appeal is very limited. The Appellant is before this Court only to obtain an Order of Restrainment, an issuance of an Enjoining Order and/or notice of Interim Injunction. There is no substantive relief prayed for from this Court.

Hence, I see no merit in this appeal. The Appellant has failed to show any good ground or reason to set aside the Orders of the High Court and the District Court. Similarly, the Appellant has failed to substantiate the relief prayed for in the Petition of Appeal, in order for this Court to issue an Enjoining Order and/or notice of Interim Injunction.

Therefore, based on the factual matrix discussed in this case, I am of the view that the appeal should stand dismissed.

Nevertheless, this Court granted Leave to Appeal to the Appellant on two questions of law in this application. Hence, I would now move onto consider the said questions referred to in full at the beginning of this judgement.

The 1st Question of Law relates to the failure of the High Court to recognize the legal principles enunciated in the case of **Ramachandran and another, Anandasiva and another v. Hatton National Bank** which is **reported in [2006] 1 SLR at page 39,** pertaining to third party mortgages. (herein after referred to as "**Ramachandran v. HNB** case")

In the above referred **Ramachandran v. HNB** case, a Divisional Bench of this Court by a majority decision held that the property liable to be sold under the Recovery of Loans by Banks (Special Provisions) Act No 4 of 1990 as amended, is limited to the property mortgaged by the borrower himself and it would exclude the property mortgaged by a third party on behalf of the actual borrower/debtor.

In the said case, **the sureties of a loan** came before Court challenging the resolution adopted by the bank to sell by public auction, the land referred to in the surety bond and the Court held that the said land cannot be sold under the afore maintained Act No 4 of 1990 as it was mortgaged not by the borrower but by a third party and more so **as the said third party is completely unaware of the borrowers acts and has no access to the bank or to the information pertaining to the monies paid by the borrower or the sum in default, whereas**

a borrower who has continuous transactions with the bank is very much aware of the amount paid and the sum in default.

It is observed that in the instant case, although the learned Judges of the High Court, in its Order did not refer, analyze and examine in detail the findings of the aforesaid **Ramachandran v. HNB** case, it heavily relied on *the decisions of the apex court pertaining to the validity and legality of the Resolution dated 10.07.1997.*

Hence, at this juncture, I wish to look at the *"said decisions of the apex court"* in greater detail.

As discussed earlier in this judgement, this Court in the case of **Peoples' Bank V. Yasasiri Kasturiarachchi SC/APP 11/2010 S.C. minutes 09.07.2010**, now reported in **[2010] 1 SLR 227** categorically held, that the judgement of this Court in **SC /SPL/ LA 60/2008** stemming from CA App 1268/98, namely, **Yasodha Holdings V. Peoples' Bank,** *act as a complete bar to a proceeding by the same parties to attack and challenge the very same Resolution.*

In **SC/SPL/LA 60/2008** referred above, this Court dismissed the Leave to Appeal application filed by Yasodha Holdings and **upheld the judgement in CA/1268/98**, the judgement of a three judge bench of the Court of Appeal, given in favour of the Defendant bank.

Hence, I wish to delve into the said Court of Appeal judgement bearing no**. CA 1268/98**, in greater detail now.

In the said **Court of Appeal judgement, CA 1268/98,** the Court exhaustively considered the **Ramachandran v. HNB case** (supra) as well as the judgement in **Hatton National Bank v. Samathapala Jayawardhana and two others SC/CHC/Appeal 06/2006**

of S.C minutes 11.07.2007 (now reported as **Hatton National Bank v. Jayawardhana [2007] 1 SLR 181)**, and came to the following finding:

> "*Yasodha Holdings, the Petitioner in the said case cannot claim that the mortgage of the property of Yasasiri Kasturiarachchi which secured facilities from the respondent bank falls within the category of 'third party mortgages'* (vide page 12 of the Court of Appeal judgement) **Yasodha Holdings v. Peoples' Bank CA 1268/98 decided on 29.02.2008.**

In the aforesaid **CA 1268/98 judgement,** the Court of Appeal examined the four mortgage bonds wherein Yasodha Holdings and Yasasiri Kasturiarachchi are referred to as the 'obligor' and 'mortgagor' respectively and the said 'obligor' and the 'mortgagor' requested the Peoples' Bank to lend and advance monies and grant accommodation and facilities to the 'obligor' Yasodha Holdings, and the 'obligor' in consideration thereof mortgaged as security the properties owned by the 'mortgagor' Yasairi Kasturiarachchi in his personal capacity.

The Court of Appeal also considered the significance of the signatories to the mortgage bonds, namely Yasasiri Kasturiarachchi and J. Kasturiarachchi being Directors of Yasodha Holdings and Yasasiri Kasturiarachchi on his own volition being the 'mortgagor' together with the specific reference given to the said wording in the attestation clause of the Notary Public.

The Court of Appeal in its well-reasoned out judgement went onto refer to the following facts:

- that Yasodha Holding is a family concern;
- that there are only three share-holders in the said Company, Yasodha Holdings, namely Yasasiri Kasturiarachchi, his brother Jagath

Kasturiarachchi and Yasasiri Kasturiarachchis' wife Udayangana Kasturiarachchi, each holding one share each;

- that the said three shareholders are also the only Directors of the Company;
- that Yasasiri Kasturiarachchi is the Chairman and Managing Director of the Company; and
- that the Company was incorporated on 30.03.1992 and within 18 months the impugned mortgage bonds were executed to obtain financial facilities running into millions by mortgaging the property of Yasasiri Kasturiarachchi.

Thus, the Court of Appeal came to the finding that *Yasasairi Kasturiarachchi cannot be treated as a 'third party', as per the ratio decidendi* of **Ramachandran v. HNB case.**

Furthermore, in order to arrive at its decision, the Court of Appeal extensively relied upon another judgement of the Supreme Court, namely the case of **Hatton National Bank v. Jayawardhana** (supra). In the said case, this Court held that the two Respondents therein, (Husband and Wife) cannot hide behind the veil of incorporation of the Company Nalin Enterprises (Pvt) Limited and referred to the Directors being the ***alter ego*** of the company. In the said case, the 1st Respondent (husband) was the Managing Director of Nalin Enterprise and the second Respondent (wife) was the other sole Director of Nalin Enterprise (pvt) limited and the Court held that in an appropriate circumstance, **the court can lift the veil of incorporation**.

Thus, the Court of Appeal in CA 1268/98, having referred to the above propositions, a number of landmark English authorities on Company Law and the correspondence Yasasiri Kasturiarachchi had with the Defendant bank, unreservedly went onto hold, that **Yasasiri Kasturiarachchi cannot claim that he is a third party** and rely upon the judgement of **Ramachandran v. HNB**, to evade responsibility.

Thus, it could be seen that the Court of Appeal, in its unanimous judgement exhaustively looked into all aspects of 3rd party mortgagers and came to the conclusion that the Resolution dated 10.07.1997 is legal and valid and enforceable.

This judgement was upheld by the Supreme Court by dismissing the Special Leave to Appeal application filed by Yasodha Holdings, in SC/SPL/LA 60/2008 as already adverted to and in SC/Appeal 11/2010, upholding that the Resolution was final and conclusive and **unequivocally and without any ambiguity holding that the Resolution cannot be reviewed and/ or rescinded and / or challenged collaterally.**

I see no reason to deviate from such finding. The circumstances of this intricate and interwoven case is such that the Court could and the Court should **lift the veil of incorporation and ascertain the true identity of the person** behind the scene, is it an innocent 3rd party or a not so innocent party, in order to mete out justice and come to a correct finding as to who the actual borrower or the debtor is.

Thus, I am of the view, that the High Court did not err in law in coming to its findings and correctly relied on the *'decisions of the apex court'* and dismissed the Leave to Appeal application filed therein.

Further **the said decisions** of the apex court, although not specifically mentioned by the Learned Judges of the High Court, **SC/Appeal 11/2010 and SC/SPL/LA 60/2008 stemming from CA 1268/98** clearly and precisely considered the legal principles enunciated in the Divisional Bench decision in **Ramachandran v. HNB** and came to the correct finding that the **property mortgaged by Yasasiri Kasturiarachchi does not fall within the four corners of a third party mortgage**. The High Court categorically held that on the strength of the Resolution dated 10.07.1997, the legality of which was confirmed by the Supreme Court, that the Plaintiff-Petitioner Yasasiri Kasturiarachchi i.e. the Appellant before this Court, has not established a prima facie case against the Defendant bank to obtain relief from the said court and dismissed the Leave to Appeal application filed therein with costs fixed at Rs. 25,000/=.

Thus, I am of the view, that the learned Judges of the High Court correctly came to the finding, that the **property of Yasasiri Kasturiarachchi** liable to be sold under the provisions of the Peoples' Bank Act, **cannot be excluded as a 3rd party mortgage** as adverted to by the Appellant and no Restrainment Order can be obtained to prevent evicting the Appellant from the impugned property. Hence, the High Court correctly refrained from issuing a Restrainment Order as prayed for by the Appellant.

In the aforesaid circumstance, **I answer the 1st Question of Law raised before this Court in the negative.**

The **2nd Question of Law** relates to the Certificate of Sale and passing of title to the Defendant bank.

In my view, an answer to this question does not arise in this case as the District Court and the High Court did not consider nor examine this issue.

As discussed earlier in this judgement, the scope of this appeal is very limited. It only pertains to issuance of Restraining Orders, specifically, an Enjoining Order until the final determination of the Interim Injunction Inquiry and notice of Interim Injunction on the Defendant bank.

The Appellant has not sought any substantive relief from this Court. The District Court has only issued summons on the Defendant bank. The matters pertaining to Certificate of Sale and passing of title of the properties will have to be first determined by the relevant District Court.

In the said circumstance, **an answer to the 2nd Question of Law raised before this Court in my view, does not arise.**

Therefore, for reasons more fully adumbrated in this judgement, the appeal of the Plaintiff- Petitioner- Appellant is dismissed. The Order of the Civil Appellant High Court

holden in Kandy dated 30.07.2013 and the Order to the District Court of Nuwara Eliya dated 26.02.2013 is affirmed.

The appeal is dismissed with costs fixed at Rs. 500,000/=.

Judge of the Supreme Court

Sisira J de Abrew, 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 Appeal from the order of the High Court (Civil Appeal) Western Province Holden at Avissawella in WP/HCCA/AV/01/2014 (Rev) dated 18.12.2014

Keragalage Aron Perera (Deceased),
Nakadamulla, Ranala.

Plaintiff

Pathmalatha Keragala,
Nakadamulla, Ranala.

Substituted Plaintiff

S.C. Appeal No. 128/2016
WP/HCCA/AV/01/2014 (Rev)
D.C. Homagama Case No. 221/1536/P

Vs.

1. Meeriyagallage Soidahami (Deceased),
   Nakadamulla, Ranala.

1A. Keragalage Caroline Perera
(Deceased),
No. 43, Sumanasekarapura,
Walipillawa, Dadigamuwa.

1B. M.D. Somasiri,
No. 43, Sumanasekarapura,
Walipillawa, Dadigamuwa.

2. Keragalage Luwis Singho,
   Nakadamulla, Ranala.

3. Keragalage Misihami,
   Nakadamulla, Ranala.

4. Keragalage Asinona (Deceased),
   Nakadamulla, Ranala.

4A. W. Mahawatta,
   Nakadamulla, Ranala.

5. Keragalage Alis Nona (Deceased),
   Nakadamulla, Ranala.

5A. Edirisinghe Arachchige Chintha
   Nilmini Edirisinghe,
   No. 157, Nakadamulla, Ranala.

6. Keragalage Julis Singho (Deceased),
   Nakadamulla, Ranala.

6A. Sujeewa Janak Prasanna Keragala,
   Nakadamulla, Ranala.

7. Lokuhiraluge Podihami,
   Nakadamulla, Ranala.

8. Meeriyagallage Jane Nona (Deceased),
   Nakadamulla, Ranala.

8A. Horana Gamage William Singho
   (Deceased),
   Nakadamulla, Ranala.

8B. Horana Gamage Caroline Nona,
   Nakadamulla Ranala.

9. T.K. Magi Nona (Deceased),
   Nakadamulla, Ranala.

9A,10. D.W. Meeriyagalla
No. 287/B, Galahitiyawa,
Ganemulla.

11. Rupawathie Meeriyagalla (Deceased),
No. 767/5, Millagahawatta Road,
Thalangama North, Malabe.

11A. Pushpa Gamage,
No. 767/5, Millagahawatta Road,
Thalangama North, Malabe.

12. Horana Gamage Piyadasa,
Nakadamulla, Ranala.

13. M. Saranelis Perera (Deceased),
Kottawa, Pannipitiya.

13A,14. H. Eugine Perera,
Kottawa, Pannipitiya.

15. Kalupahanage Shanthilatha (Deceased),
Nawalamulla, Ranala.

15A. Arambawattage Karolis alias Gunadasa Rodrigo,
No. 37/2, Walawwatta, Ranala.

16. Habarakada Saranelis Perera (Deceased),
745, Katukurunda,
Kottawa, Pannipitiya.

16A. Habarakada Eugine Perera,
No. 981, Katukurunda, Kottawa,
Pannipitiya.

Defendants

AND BETWEEN

Henadirage Chandrasiri,
No. 202, Nakadamulla, Dedigamuwa,
Ranala.

Petitioner

Vs.

Keragalage Aron Perera (Deceased),
Nakadamulla, Ranala.

Plaintiff-Respondent

Pathmalatha Keragala,
Nakadamulla, Ranala.

Substituted Plaintiff-Respondent

1. Meeriyagallage Soidahami (Deceased),
   Nakadamulla, Ranala.

1A. Keragalage Caroline Perera (Deceased),
   No. 43, Sumanasekarapura,
   Walipillawa, Dadigamuwa.

1B. M.D. Somasiri,
   No. 43, Sumanasekarapura,
   Walipillawa,
   Dadigamuwa.

2. Keragalage Luwis Singho,
   Nakadamulla, Ranala.

3. Keragalage Misihami,
   Nakadamulla, Ranala.

4. Keragalage Asinona (Deceased),
   Nakadamulla, Ranala.

4A. W. Mahawatta,
Nakadamulla, Ranala.

5. Keragalage Alis Nona (Deceased),
Nakadamulla, Ranala.

5A. Edirisinghe Arachchige Chintha
Nilmini Edirisinghe,
No. 157, Nakadamulla, Ranala.

6. Keragalage Julis Singho (Deceased),
Nakadamulla, Ranala.

6A. Sujeewa Janak Prasanna Keragala,
Nakadamulla, Ranala.

7. Lokuhiraluge Podihami,
Nakadamulla, Ranala.

8. Meeriyagallage Jane Nona (Deceased),
Nakadamulla, Ranala.

8A. Horana Gamage William Singho
(Deceased),
Nakadamulla, Ranala.

8B. Horana Gamage Caroline Nona,
Nakadamulla Ranala.

9. T.K. Magi Nona (Deceased),
Nakadamulla, Ranala.

9A,10. D.W. Meeriyagalla
No. 287/B, Galahitiyawa,
Ganemulla.

11. Rupawathie Meeriyagalla (Deceased),
No. 767/5, Millagahawatta Road,
Thalangama North, Malabe.

11A. Pushpa Gamage,
No. 767/5, Millagahawatta Road,
Thalangama North, Malabe.

12. Horana Gamage Piyadasa,
Nakadamulla, Ranala.

13. M. Saranelis Perera (Deceased),
Kottawa, Pannipitiya.

13A,14. H. Eugine Perera,
Kottawa, Pannipitiya.

15. Kalupahanage Shanthilatha (Deceased),
Nawalamulla, Ranala.

15A. Arambawattage Karolis alias Gunadasa Rodrigo,
No. 37/2, Walawwatta, Ranala.

16. Habarakada Saranelis Perera (Deceased),
745, Katukurunda,
Kottawa, Pannipitiya.

16A. Habarakada Eugine Perera,
No. 981, Katukurunda, Kottawa,
Pannipitiya.

Defendant-Respondents

AND BETWEEN

Henadirage Chandrasiri,
No. 202, Nakadamulla, Dedigamuwa,
Ranala.

Petitioner-Petitioner

Vs.

Keragalage Aron Perera (Deceased),
Nakadamulla, Ranala.

Plaintiff-Respondent-Respondent

Pathmalatha Keragala,
Nakadamulla, Ranala.

Substituted Plaintiff-Respondent-Respondent

1. Meeriyagallage Soidahami (Deceased),
   Nakadamulla, Ranala.

1A. Keragalage Caroline Perera
(Deceased),
No. 43, Sumanasekarapura,
Walipillawa, Dadigamuwa.

1B. M.D. Somasiri,
No. 43, Sumanasekarapura,
Walipillawa,
Dadigamuwa.

2. Keragalage Luwis Singho,
   Nakadamulla, Ranala.

3. Keragalage Misihami,
   Nakadamulla, Ranala.

4. Keragalage Asinona (Deceased),
   Nakadamulla, Ranala.

4A. W. Mahawatta,
   Nakadamulla, Ranala.

5. Keragalage Alis Nona (Deceased),
   Nakadamulla, Ranala.

5A. Edirisinghe Arachchige Chintha
   Nilmini Edirisinghe,
   No. 157, Nakadamulla, Ranala.

6. Keragalage Julis Singho (Deceased),
   Nakadamulla, Ranala.

6A. Sujeewa Janak Prasanna Keragala,
   Nakadamulla, Ranala.

7. Lokuhiraluge Podihami,
   Nakadamulla, Ranala.

8. Meeriyagallage Jane Nona (Deceased),
   Nakadamulla, Ranala.

8A. Horana Gamage William Singho
   (Deceased),
   Nakadamulla, Ranala.

8B. Horana Gamage Caroline Nona,
   Nakadamulla Ranala.

9. T.K. Magi Nona (Deceased),
   Nakadamulla, Ranala.

9A,10. D.W. Meeriyagalla
No. 287/B, Galahitiyawa,
Ganemulla.

11. Rupawathie Meeriyagalla (Deceased),
No. 767/5, Millagahawatta Road,
Thalangama North, Malabe.

11A. Pushpa Gamage,
No. 767/5, Millagahawatta Road,
Thalangama North, Malabe.

12. Horana Gamage Piyadasa,
Nakadamulla, Ranala.

13. M. Saranelis Perera (Deceased),
Kottawa, Pannipitiya.

13A,14. H. Eugine Perera,
Kottawa, Pannipitiya.

15. Kalupahanage Shanthilatha (Deceased),
Nawalamulla, Ranala.

15A. Arambawattage Karolis alias Gunadasa Rodrigo,
No. 37/2, Walawwatta, Ranala.

16. Habarakada Saranelis Perera (Deceased),
745, Katukurunda,
Kottawa, Pannipitiya.

16A. Habarakada Eugine Perera,
No. 981, Katukurunda, Kottawa,
Pannipitiya.

Defendant-Respondent-Respondents

AND NOW BETWEEN

Henadirage Chandrasiri,
No. 202, Nakadamulla, Dedigamuwa,
Ranala.

Petitioner-Petitioner-Appellant

Vs.

Keragalage Aron Perera (Deceased),
Nakadamulla, Ranala.

Plaintiff-Respondent-Respondent-Respondent

Pathmalatha Keragala,
Nakadamulla, Ranala.

Substituted Plaintiff-Respondent-Respondent-Respondent

1. Meeriyagallage Soidahami (Deceased),
   Nakadamulla, Ranala.

1A. Keragalage Caroline Perera
(Deceased),
No. 43, Sumanasekarapura,
Walipillawa, Dadigamuwa.

1B. M.D. Somasiri,
No. 43, Sumanasekarapura,
Walipillawa,
Dadigamuwa.

2. Keragalage Luwis Singho,
   Nakadamulla, Ranala.

3. Keragalage Misihami,
   Nakadamulla, Ranala.

4. Keragalage Asinona (Deceased),
   Nakadamulla, Ranala.

4A. W. Mahawatta,
   Nakadamulla, Ranala.

5. Keragalage Alis Nona (Deceased),
   Nakadamulla, Ranala.

5A. Edirisinghe Arachchige Chintha
   Nilmini Edirisinghe,
   No. 157, Nakadamulla, Ranala.

6. Keragalage Julis Singho (Deceased),
   Nakadamulla, Ranala.

6A. Sujeewa Janak Prasanna Keragala,
   Nakadamulla, Ranala.

7. Lokuhiraluge Podihami,
   Nakadamulla, Ranala.

8. Meeriyagallage Jane Nona (Deceased),
   Nakadamulla, Ranala.

8A. Horana Gamage William Singho
   (Deceased),
   Nakadamulla, Ranala.

8B. Horana Gamage Caroline Nona,
   Nakadamulla Ranala.

9. T.K. Magi Nona (Deceased),
   Nakadamulla, Ranala.

9A,10. D.W. Meeriyagalla
No. 287/B, Galahitiyawa,
Ganemulla.

11. Rupawathie Meeriyagalla (Deceased),
No. 767/5, Millagahawatta Road,
Thalangama North, Malabe.

11A. Pushpa Gamage,
No. 767/5, Millagahawatta Road,
Thalangama North, Malabe.

12. Horana Gamage Piyadasa,
Nakadamulla, Ranala.

13. M. Saranelis Perera (Deceased),
Kottawa, Pannipitiya.

13A,14. H. Eugine Perera,
Kottawa, Pannipitiya.

15. Kalupahanage Shanthilatha (Deceased),
Nawalamulla, Ranala.

15A. Arambawattage Karolis alias Gunadasa Rodrigo,
No. 37/2, Walawwatta, Ranala.

16. Habarakada Saranelis Perera (Deceased),
745, Katukurunda,
Kottawa, Pannipitiya.

16A. Habarakada Eugine Perera,
No. 981, Katukurunda, Kottawa,
Pannipitiya.

Defendant-Respondent-Respondent-Respondents

Before: **Sisira J. De Abrew, J.**
K.K. Wickramasinghe, J.
Janak De Silva, J.

Counsel: Jacob Joseph with Kaushali Rubasinghe and Kushani Harischandra for the Petitioner-Petitioner-Appellant
Seevali Amitirigala, PC with Pathum Wijepala for the Substituted Plaintiff-Respondent-Respondent-Respondent

Written Submissions on :
01.08.2016, 23.06.2017and 24.03.2021 by the Petitioner-Petitioner-Appellant
05.09.2016 and 10.03.2021 by the Substituted Plaintiff-Respondent-Respondent-Respondent

Argued on: 04.03.2021

Decided on: 02.06.2021

Janak De Silva J.

The Plaintiff-Respondent-Respondent-Respondent instituted this action in the District Court of Homagama to partition the land called Mahawatte containing in extent 3 Bushels paddy sowing more fully described in the schedule to the plaint dated 7th April 1981.

A Preliminary Plan No. 1445 dated 26th January 1982 (P3A) was prepared by Sena Iddamalgoda, Licensed Surveyor where the extent of the corpus was specified as R.3 P. 31.

A second Preliminary Plan No. 400 dated 24th December 1982 (P4A) was prepared by Mervin Samaranayake, Licensed Surveyor where the extent of the corpus was specified as A.2 R.1 P. 5.7. The increase in extent was as a result of the 7th Defendant-Respondent-Respondent-Respondent insisting that a larger portion of land should be surveyed. The extra portion of land in extent R.3 P.5.7 is marked as Lot 3 in P4A. The Survey Report (P4B) states that Miriyagallage Don Obious Singho, Henadheerage Gnanawathie, Henadheerage Emis Singho and Henadhirage Johanis Singho made claims to Lot 3 before the surveyor.

On or before 29th July 1987 the original case record was destroyed by fire and a new case record was reconstructed on 12th July 1988.

At the commencement of the trial, parties reached a settlement which was duly approved by the learned District Judge by judgment dated 24th April 2003. Aggrieved by the said judgment, 15th Defendant-Respondent-Respondent-Respondent appealed to the Court of Appeal which set aside the judgment and directed the learned District Judge to enter judgment strictly according to the terms of settlement entered between parties. Accordingly judgment (P13) and interlocutory decree (P14) was entered on 19th October 2010.

On 15th November 2013 the Petitioner-Petitioner-Appellant (hereinafter referred to as "Appellant") filed an application in the District Court of Homagama seeking to set aside the interlocutory decree and to be permitted to enter into the case and file a statement of claim. The Appellant contended that although his father Henadheerage Emis Singho and sister Henadheerage Gnanawathie made claims to Lot 3 in Preliminary Plan No. 400 (P4A), they were not aware whether this land was included as part of the corpus and that the Appellant only became aware that it was so included when the surveyor came to the land to block out on 12th November 2013. The learned District Judge dismissed the application.

Thereafter the Appellant invoked the revisionary jurisdiction of the High Court (Civil Appeal) Western Province holden at Avissawella seeking to set aside the judgment and interlocutory decree and to be permitted to enter into the case and make a claim. This application was dismissed and hence this appeal.

Leave to Appeal has been granted on the following questions of law:

(i) Was the said judgment of the High Court (Civil Appeal) Western Province holden at Avissawella contrary to law and against the submission made?

(ii) Whether the High Court (Civil Appeal) Western Province holden at Avissawella erred in law when it decided that the Petitioner has failed to establish that the Court defaulted to serve him notice due to failing to tender the journal entries from 1981 to 1988, which has been destroyed due to fire, and to ascertain whether the Court had failed to issue notice on the Petitioner in terms of Section 20 of Partition Law, in the absence of any journal entry which is beyond the control of the Petitioner which does not permit the Court to conclude that the Petitioner had failed to establish the fact that he was not served the notices by Courts?

(iii) Whether the High Court (Civil Appeal) Western Province holden at Avissawella erred in law when it decided that the Petitioner has failed to establish that the Court has defaulted to issue notice since Kalupahanage Shanthilatha had been made the 15th Defendant of the case as a result of the claim she made before the Commissioner who made the Preliminary Survey dated 1st October 1982 marked "P3A"?

(iv) Whether the High Court (Civil Appeal) Western Province holden at Avissawella failed to consider the statutory provisions given in the Partition Law No. 21 of 1977 to add a party to a pending case as set out in Sections 18(1), 21(a), 21(b) and 69(1)(b) of the Partition Act?

The learned counsel for the Appellant after citing several authorities submitted that although section 48 of the Partition Law invests interlocutory and final decrees entered under the Partition Law with finality, the revisionary powers of the appellate courts are left unaffected when there is a fundamental vice in the proceeding resulting in a miscarriage of justice. In particular reliance was placed on the decision in *Somawathie v. Madawela and Others* [(1983) 2 SLR 15].

In seeking to establish a miscarriage of justice, the learned counsel for the Appellant relies heavily on the provisions in section 20(1) of the Partition Law which reads:

> *"20(1) The Court shall order notice of a partition action to be sent by registered post -*
>
> *(a) to every claimant (not being a party to the action) who is mentioned in the report of the surveyor under subsection (1) of Section 18; and*
>
> *(b) to every person disclosed under paragraph (c) of subsection (1) of Section 19 by a defendant in the action."*

It is contended that the Appellant did not receive any notice in terms of these provisions and as a result his rights have been affected.

Notice in terms of these provisions should be sent only to claimants mentioned in the report of the surveyor or to a person disclosed by a defendant under paragraph (c) of subsection (1) of section 19. However, neither of the two surveyor reports (P3B) (P4B) mentions the Appellant as a claimant to the land surveyed. Furthermore, none of the defendants have disclosed the Appellant under paragraph (c) of subsection (1) of Section 19. Accordingly, I hold that the Appellant is not entitled to be noticed in terms of section 20(1) of the Partition Law.

The fundamental proposition sought to be established by the Appellant is that he did not receive notice in terms of section 20 of the Partition Law. For the reasons given above, he is not entitled to such notice.

In any event, there is nothing in the evidence before Court to indicate that the District Court failed to give effect to section 20 of the Partition Law. The burden of establishing any such failure is upon the Appellant as it is he who asserts. This he has failed to do. I will now examine this aspect in greater detail.

It is true that his father Henadheerage Emis Singho and sister Henadheerage Gnanawathie made claims before the surveyor to the corpus. However, the claim made by the Appellant to the corpus is not based on paternal inheritance. He claims upon deeds bearing Nos. 24440 (P19) and 1916 (P20).

The two vendors of deed no. 24440 (P19) are Miriyagallage Don Obious Singho and Miriyagallage Karunadasa and it has been executed on 26th September 1984 which is two years after Miriyagallage Don Obious Singho made a claim before the surveyor. There is nothing on record to indicate that Obious Singho had made any application alleging lack of notice. Miriyagallage Karunadasa never made a claim before the surveyor to the land surveyed.

The vendor of deed no. 1916 (P20) is Miriyagallage Don Saveriyel and it was executed on 25th October 1992. However, Don Saveriyel did not make any claim before the surveyor.

Although the father of the Appellant, Henadheerage Emis Singho also made a claim before the surveyor to the corpus, there is no evidence of any claim made by him of any lack of notice until his death on 22nd March 1993 (P36).

More importantly the Survey Report (P4B) states that Henadheerage Gnanawathie, sister of the Appellant, also made a claim to Lot 3 before the surveyor. However, she has not made any application to the District Court claiming that she was not noticed in terms of section 20 of the Partition Law.

Since the record was destroyed by fire, the next best evidence of the alleged failure on the part of the District Court to comply with section 20 of the Partition Law would have been the evidence of Gnanawathie that she was not duly noticed as required by law. Nevertheless, the Appellant has failed to provide any evidence from Gnanwathie with his application to the District Court although he claimed before the High Court (Civil Appeal) Western Province holden at Avissawella that Gnanawathie also resides on the land depicted in Preliminary Plan no. 400 (P4A).

One of the questions of law for determination includes a reference to section 69(1)(b) of the Partition Law. However, that has no application since the Appellant sought to be added as a party after the judgment was delivered.

Accordingly, I answer the questions of law (i), (ii) and (iv) in the negative. Question of law (iii) does not arise for determination in view of the answers given to the other questions of law.

For the aforesaid reasons, I affirm the judgment of the High Court (Civil Appeal) Western Province holden at Avissawella dated 18th December 2014 and the judgment and interlocutory decree dated 19th October 2010 of the learned District Judge of Homagama and dismiss the appeal. Registrar is directed to take steps accordingly.

The Substituted Plaintiff-Respondent-Respondent-Respondent is entitled to his costs in this Court as well as in the High Court (Civil Appeal) Western Province holden at Avissawella.

Judge of the Supreme Court

Sisira J. De Abrew, J.

I agree.

Judge of the Supreme Court

K.K. Wickramasinghe, J.

I agree.

Judge of the Supreme Court

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

Herath Mudiyanselage Sarath Chandra Herath,
Postal Division of Mahawewa,
Mahawewa

Plaintiff

S.C. Appeal No. 132/2010

SC/HCCA/LA 30/2010 **Vs.**

H.C.C.A. Kurunegala Case No. 102/2020(F)

D.C. Kuliyapitiya Case No.11298/P

1. Rathnayake Mudiyanselage Kusumawathie,
   C/O, A.M. Jayathilaka,
   Postal Division of Kottaramulla,
   Paluwelgala.

2. Rathnayake Mudiyanselage Somawathie,
   Near the Aswedduma Temple,
   Postal Division of Kuliyapitiya.

3. Herath Mudiyanselage Gamini Herath,
   Postal Division of Welipennagahamulla,
   Gallahemulla.

4. Rathnayake Mudiyanselage Jayasinghe Ratnayake, Yakwila,
   Kithalahitiyawa.

5. Rathnayake Mudiyanselage Abeyarathana,
   Postal Division of Yakwila,
   Kithalahitiyawa.

6. Jahapu Appuhamilage Malanie Hemalatha,
   Postal Division of Yakwila,
   Kithalahitiyawa.

7. Rathnayake Mudiyanselage Priyanthika Mali Ratnayake,
   Postal Division of Yakwila,
   Kithalahitiyawa.

8. Rathnayake Mudiyanselage Inoka Shamalee Ratnayake,
   Postal Division of Yakwila,
   Kithalahitiyawa.

9. Rathnayake Mudiyanselage Harischandra,
   Postal Division of Yakwila,
   Kithalahitiyawa.

10. Rathnayake Mudiyanselage Lakshman Kithsiri Ratnayake,
    Postal Division of Yakwila,
    Kithalahitiyawa.

Defendants

AND BETWEEN

Herath Mudiyanselage Sarath Chandra Herath,
Postal Division of Mahawewa,
Mahawewa.

Plaintiff-Appellant

Vs.

1. Rathnayake Mudiyanselage Kusumawathie,
   C/O, A.M. Jyathilaka,
   Postal Division of Kottaramulla,
   Paluwelgala.

2. Rathnayake Mudiyanselage Somawathie, Near the Aswedduma Temple,
   Postal Division of Kuliyapitiya.

3. Herath Mudiyanselage Gamini Herath,
   Postal Division of Welipennagahamulla,
   Gallahemulla.

4. Rathnayake Mudiyanselage Jayasinghe Ratnayake, Yakwila,
   Kithalahitiyawa.

5. Rathnayake Mudiyanselage Abeyarathana, Postal Division of Yakwila,
   Kithalahitiyawa.

6. Jahapu Appuhamilage Malanie Hemalatha, Postal Division of Yakwila,
   Kithalahitiyawa.

7. Rathnayake Mudiyanselage Priyanthika Mali Ratnayake,
   Postal Division of Yakwila,
   Kithalahitiyawa.

8. Rathnayake Mudiyanselage Inoka Shamalee Ratnayake,
   Postal Division of Yakwila,
   Kithalahitiyawa.

9. Rathnayake Mudiyanselage Harischandra, Postal Division of Yakwila,
   Kithalahitiyawa.

10. Rathnayake Mudiyanselage Lakshman Kithsiri Ratnayake,
Postal Division of Yakwila,
Kithalahitiyawa.

Defendant-Respondents

AND NOW BETWEEN

4. Rathnayake Mudiyanselage Jayasinghe Ratnayake,

4A. Rathnayake Mudiyanselage Sumeda Ratnayake, Yakwila,
Kithalahitiyawa.

Defendant-Respondent-Appellant

Vs.

Herath Mudiyanselage Sarath Chandra Herath,
Postal Division of Mahawewa,
Mahawewa.

Plaintiff-Appellant-Respondent

1. Rathnayake Mudiyanselage Kusumawathie,
C/O, A.M. Jyathilaka,
Postal Division of Kottaramulla,
Paluwelgala.

2. Rathnayake Mudiyanselage Somawathie, Near the Aswedduma Temple,
Postal Division of Kuliyapitiya.

3. Herath Mudiyanselage Gamini Herath,
   Postal Division of Welipennagahamulla,
   Gallahemulla.
5. Rathnayake Mudiyanselage
   Abeyarathana, Postal Division of
   Yakwila,
   Kithalahitiyawa.

6. Jahapu Appuhamilage Malanie
   Hemalatha, Postal Division of Yakwila,
   Kithalahitiyawa.

7. Rathnayake Mudiyanselage Priyanthika
   Mali Ratnayake,
   Postal Division of Yakwila,
   Kithalahitiyawa.

8. Rathnayake Mudiyanselage Inoka
   Shamalee Ratnayake,
   Postal Division of Yakwila,
   Kithalahitiyawa.

9. Rathnayake Mudiyanselage
   Harischandra, Postal Division of Yakwila,
   Kithalahitiyawa.

10. Rathnayake Mudiyanselage Lakshman
    Kithsiri Ratnayake,
    Postal Division of Yakwila,
    Kithalahitiyawa.

<u>Defendant-Respondent-Respondents</u>

Before: **Murdu Fernando, P.C., J.**

Yasantha Kodagoda, P.C., J.

Janak De Silva, J.

Counsel:

W. Dayaratne, P.C. with R. Jayawardena for the Defendant-Respondent-Appellant

Dr. Sunil Cooray with Sudarshani Cooray for the Plaintiff-Appellant-Respondent

Written Submissions on:

22.02.2011 and 17.03.2021 by the Defendant-Respondent-Appellant

22.03.2011 by the Plaintiff-Appellant-Respondent

Argued on: 17.02.2021

Decided on: 04.10.2021

Janak De Silva, J.

The Plaintiff-Appellant-Respondent (Respondent) instituted this action in the District Court of Kuliyapitiya for the partition of the land called Nelligahamula Watta alias Parahena alias Parawatta containing in extent A.2 R.2 P.8. There is no dispute between the parties as to the identity of the corpus. It is admitted that the corpus is more fully depicted in preliminary plan No. 3524 dated 21.03.1997 (X) prepared by licensed surveyor R.B. Navaratne.

Parties are also in agreement that Punchi Banda Ratnayake was allotted this land by partition decree in case No. 1553/P of District Court of Kurunegala dated 02.03.1972. The dispute revolves on the pedigree pleaded by the Respondent and the Defendant-Respondent-Appellant (Appellant).

According to the Respondent, Punchi Banda Ratnayake transferred an undivided one acre of the corpus to the Respondent by deed No. 3223 (P2) dated 15.03.1995 attested by R.K.R.F.J. Caldera, Notary Public. It is further contended that Punchi Banda Ratnayake died issueless on 24.09.1995 and therefore his brothers, sisters and their heirs, including the Appellant, succeeded to the balance portion of the corpus on intestate succession.

The Appellant on the contrary contends that Punchi Banda Ratnayake executed two deeds of transfer in favour of the Appellant, namely deed No. 5401 dated 21.09.1977 (4V3) for a divided one acre of the corpus and deed No. 908 dated 11.11.1980 (4V4) for a further undivided 1 ½ acre of the corpus. Alternatively, the Appellant contends that he has acquired prescriptive title to the corpus and sought a dismissal of the partition action.

The learned District Judge held that the paper title claimed by the Appellant lost priority to the paper title claimed by the Respondent since the two deeds relied on by the Appellant, namely deed No. 5401 dated 21.09.1977 (4V3) and deed No. 908 dated 11.11.1980 (4V4), were not registered in the correct folio in the land registry whereas deed No. 3223 (P2) relied on by the Respondent was registered in a folio which was connected to the folio in which the final decree in case No. 1553/P of District Court of Kurunegala was registered.

However, the learned District Judge concluded that the Appellant had prescribed to the corpus and dismissed the partition action.

The Respondent appealed to the High Court of Civil Appeal holden in Kurunegala.

The High Court of Civil Appeal held that Punchi Banda Ratnayake possessed the corpus until his demise and that he had taken income derived from the coconut cultivation on the corpus. It was held further that the Appellant had failed to prove any ouster. The High Court of Civil Appeal set aside the judgment of the District Court and directed that the corpus be partitioned on the pedigree pleaded by the Respondent. Aggrieved by this judgment, the Appellant has filed this appeal.

Leave to appeal was granted on the following questions of law:

(a) Did their Lordships of the Civil Appellate High Court seriously misdirect themselves when they held that the subject matter of this case is co-owned land?

(b) Did their Lordships' Court of the Civil Appellate High Court fail to consider the finding of the Learned District Judge that the 4th Defendant/Respondent/Petitioner had exclusive possession for the corpus since 1980 although the 5th Defendant/Respondent/Respondent had undivided rights for only 10 perches (A0-R0-P10)?

I observe that Punchi Banda Ratnayake became the sole owner of the land sought to be partitioned by virtue of partition decree in case No. 1553/P of District Court of Kurunegala dated 02.03.1972. The land became co-owned again when he executed deed 5051 (4V1) dated 14.10.1976 for an undivided 1 ½ acre in favour of Asilin Nona. A further undivided 1 acre was transferred by him again to Asilin None by deed No. 5105 (4V4) dated 19.12.1976.

The total extent of land transferred to Asilin Nona as aforesaid was re-transferred by her to Punchi Banda Ratnayake by deed Nos. 6274 (4V6) dated 10.11.1980 and deed No. 5400 (4V5) dated 21.09.1977.

Punchi Banda Ratnayake transferred 2 ½ acres in total to the Appellant by deed No. 5401 (4V3) dated 21.09.1977, which is for an undivided one acre, followed by deed No. 908 (4V4) dated 11.11.1980, which is for an undivided 1 ½ acre.

Hence by 11.11.1980, the Appellant had paper title for an undivided 2 ½ acres and Punchi Banda Ratnayake held an undivided 8 perches of the corpus.

In evaluating the claim of prescriptive rights by the Appellant, one must bear in mind two significant legal principles governing prescriptive rights among co-owners.

In *Corea v. Appuhamy et al.* (15 N.L.R. 65) the Privy Council held that, in law, the possession of one co-owner is also the possession of his co-owners and that it was not possible to put an end to that possession by any secret intention in his mind and that nothing short of ouster or something equivalent to ouster could put an end to that possession.

Moreover as the Appellant and Punchi Banda Ratnayake are brothers, the required proof of change in the character of possession to adverse is greater than in a case where the parties are total outsiders [*De Silva v. Commissioner General of Inland Revenue* (80 N.L.R. 292)].

It was incumbent on the Appellant to prove a starting point for his prescriptive rights. His evidence is that he began possessing the corpus from 1980. This coincides with the execution of deed No. 908 (4V4) dated 11.11.1980 after which he became the owner of an undivided 2 ½ acres of the corpus. However, the possession of the Appellant did not in my view take the character of adverse possession from such inception due to the absence of evidence of change of character as the Appellant entered possession as a co-owner. [*Chelliah v. Wijenathan* (54 N.L.R. 337 at 342)].

Nonetheless, it is in evidence that between 1982/1984 the Appellant constructed a building on the corpus consisting of three rooms, which are being used as shops. This is shown in the preliminary plan No. 3524 (X) dated 21.03.1997 prepared by licensed surveyor R.B. Navaratne and was claimed only by the Appellant during the preliminary survey. Kareem Ismail testified that he constructed this building at the request of the Appellant who paid for its construction. At the preliminary survey, none of the other parties including the Respondent, claimed that these buildings were being held in common [Appeal Brief, page 105]. In my view these facts are cogent evidence in establishing the beginning of adverse possession in favour of the Appellant.

This position is further buttressed with the evidence that the Appellant leased these shops to third parties and exclusively appropriated the rentals to the exclusion of any other. The Appellant, by deed No. 7191 (4V7) dated 15.08.1984, leased one of the shops to Devendra for a period of five years from 15.08.1984. Chandralatha, a sister of Devendra, testified that she and her brother leased this shop from the Appellant in 1984 and that she is in occupation of it even as at 2002 when she testified. During her cross-examination on behalf of the Respondent, she testified that the rental was paid to the Appellant and that no rental was ever paid to Punchi Banda Ratnayake and that one Jayasekera who was occupying another shop also paid rent to the Appellant. The learned counsel appearing on behalf of the Respondent failed to challenge this evidence. Moreover, the Respondent testified that the present occupiers of the shops on the corpus are in occupation under the Appellant [Appeal Brief, page 92].

The Appellant also led the evidence of one Nandasoma who testified that he took on lease the corpus from the Appellant in 1981 for eight years to cultivate pineapple and that the cultivation covered an extent of 1 ½ acres of the corpus. Although no documentary evidence of the lease was produced, Nandasoma claimed that the receipt was lost, the 5th Defendant-Respondent-Respondent corroborated the fact that there was a pineapple cultivation on the corpus.

In order to counter the case of the Appellant, the Respondent testified that Punchi Banda Ratnayake possessed the corpus until his death in 1995 and used to live in a small house on the corpus [Appeal Brief, page 95]. However, it was mere *ipse dixit* and in this context it is important to bear in mind the principle that mere statements of possession are insufficient to establish prescriptive rights. It is necessary that the witnesses should speak to specific facts and the question of possession has to be decided thereupon by Court [*Sirajudeen and two others v. Abbas* (1994) 2 Sri.L.R. 365]. In any event, this evidence was contradicted by the 2nd Defendant-Respondent-Respondent who testified that Punchi Banda Ratnayake lived in a small room on a land *adjoining* the corpus belonging to one of his brothers [Appeal Brief, page 173].

More importantly, the fact that Punchi Banda Ratnayake continued to possess the corpus is not credible given that he lost his undivided 8 perches share in the corpus when he executed deed No. 1866 (5V4) dated 04.11.1985 by which it was transferred to one Herath Mudiyanselage Jayatilake who later transferred his share by deed No. 2314 (5V5) dated 01.09.1988 to the 10th Defendant-Respondent-Respondent. No evidence was led that either of them possessed the corpus thereafter. In fact, the preliminary plan No. 3524 dated 21.03.1997 (X) shows that the corpus has been possessed as one unit and that there are no boundaries indicating it as having being possessed as two distinct lots.

Hence, there is cogent evidence to establish that the Appellant had prescribed to the corpus by the time this action was filed in November 1995 as correctly held by the learned District Judge.

No doubt the Appellant did admit that the 5th Defendant-Respondent-Respondent had paper title to the balance undivided 8 perches. However, this admission was erroneous. Moreover the 5th Defendant-Respondent-Respondent testified that he did not enter into possession of the undivided 8 perches.

In any event, mere acknowledgement of the paper title of the 5th Defendant-Respondent-Respondent by the Appellant cannot, in my view, stand in the way of setting up a claim of prescriptive title as it is by very nature a mode of defeating paper title. In *Wijesundera & Others v. Constantine Dasa and Another* [(1987) 2 Sri.L.R. 66], G.P.S. De Silva J. (as he was then) held that the knowledge on the part of the defendant that title to the property was in another was not a bar to his claim to prescriptive title, but tended rather to strengthen their claim, having regard to all the facts and circumstances of that case. In my view, it applies with equal force to the facts and circumstances of this case as well.

More significantly, the 5th Defendant-Respondent-Respondent did not prefer any appeal against the judgment of the learned District Judge who held that the Appellant had established his prescriptive rights to the full extent of the corpus.

For the foregoing reasons, the High Court of Civil Appeal erred in concluding that the Appellant had failed to establish his prescriptive title. Accordingly, I answer the two questions of law in the affirmative.

I set aside the judgment of the High Court of Civil Appeal holden in Kurunegala dated 17.12.2009 and affirm the judgment of the learned District Judge of Kuliyapitiya dated 11.11.2002 and direct that decree be entered accordingly. Registrar is directed to take steps accordingly.

The Appellant is entitled to his costs in both the High Court of Civil Appeal holden in Kurunegala and this Court.

Appeal allowed.

Judge of the Supreme Court

Murdu Fernando, P.C., J.

I agree.

Judge of the Supreme Court

Yasantha Kodagoda, P.C., J.

I agree.

Judge of the Supreme Court

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

SC/Appeal 132/2016

SC/SPL/LA 178/2015
HC/ALT 06/2012
LT Case No. 18/KT/349/2010

Suriyarachchige Raju of No. 4, Suriyagama, Haburugala

Applicant

Vs.

Barberyn Reef Hotel Ltd., Beruwala

Respondent

And

Barberyn Reef Hotel Ltd., Beruwala

Respondent-Appellant

Vs.

Suriyarachchige Raju of No. 4, Suriyagama, Haburugala

Applicant-Respondent

And Now

Suriyarachchige Raju of No. 4, Suriyagama, Haburugala

Applicant-Respondent-Petitioner

Vs.

Barberyn Reef Hotel Ltd., Beruwala

Respondent-Appellant-Respondent

Before:	Buwaneka Aluwihare, PC. J. V. K. Malalgoda, PC. J. E. A. G. R. Amarasekara J.
Counsel:	Athula Perera with Poorni Rupasinghe for Applicant-Respondent-Appellant. Murshid Maharoof with S. Ahmed and Dasuni Ruhunage for Respondent-Appellant-Respondent.
Argued on:	29. 11. 2019
Decided on:	06. 08. 2021

Judgement

Aluwihare PC. J.,

This is an appeal against an order of the High Court setting aside an award made by the Labour Tribunal of Kalutara.

Background to the Case

The Applicant-Respondent-Petitioner [hereinafter the Applicant] had been employed with the Respondent-Appellant-Respondent Hotel [hereinafter the Respondent], as a Chef from 1992 to 2010. On 21st April 2010, whilst on duty, the Applicant had been found sleeping. The reason attributed by the Applicant for the conduct alleged, was the aggravation of his diabetic condition. When he reported to work on the following day [22nd April], he had been served with a letter, suspending him from service with effect from the said date. Thereafter, the Applicant's services had been terminated with effect from 10th June 2010. On 16th August 2010, the Applicant made an application to the Labour Tribunal in terms

of Section 31b of the Industrial Disputes Act, pleading that the termination of his services was unjust and unreasonable.

The Labour Tribunal Decision

In its answer to the Labour Tribunal, the Respondent did not dispute the Applicant's period of employment at the Hotel or the salary he drew at the time his services were terminated. The Respondent also admitted that the Applicant's services were terminated due to disciplinary reasons.

The Respondent's position was that the Applicant frequently reported to work late and that he had been warned on several occasions in writing (letters dated 30th October 2006 alleging that the Applicant had reported to work late on 10 days in September, letter dated 20th November 2006 alleging the Applicant had reported to work late on 14 days in October, and letter dated 15th February 2007 where the Applicant had reported to work late on 7 days in the months of November and December). In spite of the warnings so given, the Applicant had continued to report to work late, in the months of February and March 2007 as well and as a disciplinary measure, the Applicant had been sent on no-pay leave from around mid- May 2007 to mid-June 2007 [letter dated 7th May 2007]. The letters marked as 'R2' to 'R6' were submitted to substantiate the above position. The Respondent asserted further, that on 21st April 2010, the Applicant, whilst on duty, had been found sleeping in the rest room (provided for the workers' benefit).

Under these circumstances, the Applicant had been suspended from service with effect from 22nd April 2010. Thereafter, by letter dated 10th May 2010 ('R8') charges had been framed against the Applicant and he had been requested to show cause within 7 days, as to why disciplinary action should not be taken against him. The Applicant, however, had failed to show cause during the 7-day period granted. After a lapse of about a month, the Respondent had taken steps to inform the Applicant that his services were no longer required, by the letter dated 10th June 2010 ('R9').

At the inquiry before the Labour Tribunal, two witnesses had given evidence on behalf of the Respondent. The Respondent also relied on the documents marked 'R1' to 'R10'. On behalf of the Applicant, the Applicant himself and another witness gave evidence and the documents marked 'A1' to 'A10' were submitted. Delivering its order, the Labour Tribunal ordered the reinstatement of the Applicant without a discontinuation of his services, however, the reinstatement was ordered without back wages. Although the Labour Tribunal reached the conclusion that the employer [Respondent] had placed acceptable evidence to establish the 1st charge leveled against the Applicant, the basis on which the Labour Tribunal made the direction for reinstatement appears to be, that the Respondent had not afforded an opportunity to the Applicant to offer his explanation as to the allegations. The learned President had gone on to hold that the Employer had acted in violation of the rules of natural justice.

The Decision of the High Court

The Respondent appealed to the High Court of the Province, where the order of the Labour Tribunal was set aside. The Learned High Court judge was of the opinion that, as the Applicant failed to show cause as to why he should not be dealt with and steps should not be taken against him, the Learned President of the Labour Tribunal could not have ordered the reinstatement of the Applicant. Accordingly, the High Court set aside the order of the Labour Tribunal and held that the Respondent was justified in terminating the services of the Applicant.

Questions of Law

On appeal by the Applicant, this Court granted Leave to Appeal on the following questions;

a) *In the circumstances pleaded, is the judgment of the High Court which had dismissed the application of the applicant just and equitable in terms of law?*

b) *Could the High Court set aside the order of the Labour Tribunal considering only the fact that, the supplicant (sic) had not answered the charges levelled against him on 10. 05. 2010?*
c) *In the circumstances pleaded, is the judgement of the High Court according to the law and according to the evidence adduced in the case?*

The Allegations against the Applicant

The charges preferred against the Applicant, as per the charge sheet ['R8'] were;

1. Neglecting mandatory services and leaving the kitchen without permission on 21st April 2010.
2. Neglecting mandatory services for a period exceeding 3 hours on 21st April 2010 by going to the hostel without permission during work hours.
3. Acting in breach of discipline or attempting to act in breach of discipline by the actions in 1 and 2 above.

As reflected in the above charge sheet, the Applicant's services were terminated specifically for **being absent from his workstation on 21st April 2010**.

The Evidence

The Administration Manager of the Hotel, Indika Upulnath De Silva, witness for the Respondent, maintains that the charge sheet was sent by registered post to the Applicant. A postal receipt for registered post bearing the date 10th May 2010 was submitted marked 'R8A' along with the charge sheet 'R8'. Although the Applicant initially took up the position that he did not receive the charge sheet (page 193 of 'x'), under cross examination, he has stated (at pages 214 and 215) that he received 'R8' but not 'R9' [Letter of termination]. Later however, (at page 227) he has stated that he received the letter informing that his services were terminated ('R9'), but not 'R8'. Thus, his testimony appears to be infirm.

The Applicant admitted that he failed to show cause as required by 'R8' but did not submit any reasons for such failure except the initial denial of the receipt of 'R8'. In the written submissions, the Applicant maintained that he led sufficient

evidence before the Labour Tribunal to indicate that he was not guilty of the charges levelled against him. The Applicant submitted blood reports marked 'A7' to 'A9' and 'A11' obtained in 2005, 2008, 2009 and 2010 respectively indicating Fasting Plasma Glucose levels as high as 197.80 and 216.8, in order to establish that he was suffering from diabetes for a period of about 7-8 years. The Applicant submitted a medical report marked 'A3' issued by Dr. Namal Jayatilaka of the Government Hospital of Bentota on the same date as the incident i. e. 21st April 2010 as an explanation for being absent from work for 3 hours.

The Applicant had been treated by Dr. Namal Jayatilaka and according to the medical report 'A3', his condition is stated as "*uncontrolled Diabetes Mellitus with Fasting Blood Sugar 365mg/dl.*" The evidence of the Applicant and Dr. Jayathilaka, however, indicate that the test referred to in 'A3' was in fact not a 'fasting' blood sugar test. From the summation of the evidence relating to this issue, it is evident that the medical report 'A3' does not accurately indicate the Applicant's blood sugar level. Therefore, 'A3' cannot be relied upon to reach the conclusion that the Applicant had in fact experienced a soaring blood sugar level on the day in question.

Furthermore, it was contended that the failure to show cause was not a bar to hold a domestic inquiry against the Applicant. The Respondent, however, had not proceeded to hold one. It was contended on behalf of the Applicant that these facts were not appreciated by the High Court and had the totality of the evidence adduced by the Applicant been considered in the correct perspective, the High Court would not have held that the termination of the Applicant's services was just and equitable.

The Operations/Security Manager of the Hotel, Wilson Wickramaratne giving evidence on behalf of the Respondent maintained that on 22nd April, an inquiry was conducted by him, and a statement from the Applicant (marked 'R10') was recorded. However, the evidence led at the Labour Tribunal indicates that the alleged inquiry into the matter by the Operations Manager, Wickramaratne had not been a comprehensive one. No other employee in the kitchen had been questioned regarding the absence of the Applicant from his workstation.

Furthermore, no statements other than the statement of the Applicant had been recorded (at page 118 of 'X').

The Respondent points out that, in the said statement ('R10') the Applicant had neither mentioned that he was suffering from uncontrollable diabetes nor that he had been recommended 3 days of rest by the doctor, whom he had consulted the previous day. In the Applicant's statement, there was no mention of consulting a doctor on the previous day either. Furthermore, the medical certificate purported to have been issued by the doctor when he was consulted on the previous day, had not been produced by the Applicant, at the time of making the statement. While the Applicant maintains that it was handed over to the Security Officer of the Hotel, the Respondent denies receiving such a medical certificate. According to the Applicant, the original of the medical certificate ['A3'] had been handed over to the Security Officer at about 3 pm on 22nd April 2010 as the Applicant had not been allowed to enter the Hotel premises. The Respondent maintains that if a document was given to the security officer, it would have been handed over to an officer at the Hotel's Reception desk. The position taken up by the Respondent was that the Applicant has belatedly obtained a backdated medical certificate in an attempt to state that he was ill on the day in question.

In the written submissions tendered, the Respondent pointed out that, by 'R10', the Applicant had admitted that he did not inform the Sectional Head nor his immediate superior in writing or verbally that he was not well. In addition, the Respondent had also pointed out that when there was a resident Doctor in the Hotel, the Applicant had not made use of the facility; that he admitted guilt; and gave an undertaking that he would not repeat such conduct in the future.

The Issues

The Applicant claims that no domestic inquiry was conducted before the decision to terminate his services was reached. Holding a domestic inquiry, however, is not mandatory in terms of the Sri Lankan law. In **St. Andrew's Hotel Ltd. v Ceylon Mercantile Union**, Case No. 138/85 decided on 01. 09. 1993 and in **Director CWE v. C. Ranatunge** CA 272/89 [CA minutes 18.10.93], it was held that there is no

duty to hold a domestic inquiry unless there was a special provision to do so in terms of the contract of employment or the collective agreement. It is accepted that a domestic inquiry will, however, be useful in establishing the bona fides of the employer.

On behalf of the Respondent, it was argued that the principles of natural justice apply only to administrative tribunals and not to the employer-employee relationship. This submission has no merit as it is generally accepted that judicial decision-making in any case, regardless of its nature, should be governed by the principles of natural justice, in order to guarantee a just decision-making process, by ensuring the right to a fair trial and avoid prejudice.

In the Indian case **D. K. Yadav v. JMA Industries Ltd.** 1993 SCR (3) 930, 1993 SCC (3) 259, K. Ramaswamy J. holding that the termination of an employee without following principles of natural justice is violative of Article 21 of Constitution of India (i.e. "*No person shall be deprived of his life or personal liberty except according to procedure established by law*") stated; "*The cardinal point that has to be borne in mind, in every case, is whether the person concerned should have a reasonable opportunity of presenting his case and the authority should act fairly, justly, reasonably and impartially. It is not so much to act judicially but is to act fairly, namely the procedure adopted must be just, fair and reasonable in the particular circumstances of the case. In other words, application of the principles of natural justice that no man should be condemned unheard intends to prevent the authority to act arbitrarily effecting the rights of the concerned person.*" Therefore, the norm that the person facing the allegation should be given a reasonable opportunity of presenting his case in line with the principles of natural justice is not excluded from labour matters and operates to ensure that the decision making authority acts fairly and justly.

The Colombo Apothecaries Co. Ltd v. Ceylon Press Workers Union (1972) 75 NLR 182 case dealt with the question of absence without prior permission over a period of time. The employee in question was absent without leave on numerous occasions from the printing press where he was employed. On several occasions he was informed that he had vacated his post but was reinstated after he gave his

explanations. Finally, the services of the employee were terminated, particularly on the ground of absence without prior permission over a period of time despite warnings by the employer. The question was whether the employee was entitled to absent himself without notice regardless of repeated warnings. Weeramantry J. held that the employee's services were liable to be terminated observing that "*While an employee is no doubt entitled to his quota of leave, he must not, as far as is avoidable, draw on this leave without prior notice to the management; nor must he repeatedly draw on such leave in such a manner as would throw out of gear the work of the establishment he serves.*" (at page 186). In coming to this conclusion, the court took into account the nature of the work carried out by the errant employee as a compositor whose work had to be completed in order for the process of printing to go on as previously planned and on schedule, commenting that absence without notice meant that the employer could not in advance entrust the respondent-employee's work to another employee in his place. It was emphasized that the consideration should not be whether the total number of days on which the employee was absent was within or in excess of his leave entitlement, but rather the impact on the smooth working of the establishment.

In the said case the services of the employee were terminated "*on the ground of misconduct and particularly of absence without prior permission over a period of time although warned by the employer*". In the present case, however, the charge sheet had been drawn up only with respect to the Applicant's conduct of sleeping while on duty on the 21st of April.

In the **Colombo Apothecaries** case (*supra*), Justice Weeramantry (at page 186), went on to state that, "*The fact that an earlier default had been pardoned or excused does not, in my view, wipe it off the slate so completely as to render that default totally irrelevant. That default assumes relevance and importance in the context of a complaint by the employer of successive and repeated defaults of the same nature.* ***When one is considering how reasonable or unreasonable has been the conduct of each party, it would be wrong to view the final act in the series in isolation as though it existed all by itself.*** *Here as elsewhere in the field of labour law, a proper assessment of a dispute can only be made against the background of the conduct and relationship between the parties.*" [emphasis added].

This view ought to be applied in the case at hand as well. While the fact that the Applicant's affliction prevented him from reporting to work on some days could be looked upon with sympathy, the failure to inform his employer cannot be considered lightly. The Applicant had been excused and issued warning letters on 3 occasions. When he failed to mend his ways, he had been sent on compulsory leave, with the incident on 21st April finally leading to his termination. It would not be fair by the employer to consider the final incident which led to the termination, in isolation.

From the evidence led before the Labour Tribunal it was revealed that the work of the Applicant was necessary for putting together, on time, the meals served for the guests staying at the hotel. This was a job where the work simply had to be completed by a given deadline if the residents of the Hotel were to be satisfactorily served their meals in keeping with the standards of the Respondent Hotel as a Ayurvedic resort, catering predominantly to foreign tourists. The Applicant has maintained that on the day he was found sleeping, he had finished the work for the day. This submission is not acceptable as it is a matter for the employer, and not the employee, to decide whether the work for the day was completed or not. Once an employee reports to work the common norm is that the employee would remain in his or her workstation until the end of the duty hours. Furthermore, regarding the days on which the Applicant was absent without prior notice, it has to be stated that it would have led to disruption in the working of the kitchen as another person would have to be assigned the usual tasks of the Applicant at short notice. This would have no doubt affected the ability to provide the meals on time, or in the least made the process of serving the meals on time challenging. The unreasonable conduct of one party in the employer-employee relationship, should not burden the other party.

This court observes that the Respondent was engaged in the hospitality trade where success largely depends on the customer satisfaction or the satisfaction of the guest to be precise. Thus, in the highly competitive present-day business world the sustenance of a business of this nature hinges on the customer reviews. Hence the employees are not only expected but are under a duty to rise up to industry demands and to act reasonably and with a sense of responsibility. As Justice

Weeramantry observed in the case of **Colombo Apothecaries** (*supra*) the absence of the Applicant from the place of work cannot be considered in isolation. As referred to earlier, Justice Weeramantry emphasized that it is the impact on the smooth working of the establishment that should be given paramountcy, rather than whether the employee was within or in excess of his leave entitlement.

We are mindful that in labour matters judicial forums are vested with a just and equitable jurisdiction. T. S. Fernando J. commenting on the parameters of the phrase 'just and equitable' in **Richard Pieris and Co. Ltd. v. Wijesiriwardena** (1961) 62 NLR 233 at 235 stated "*justice and equity can themselves be measured not according to the urgings of a kind heart but only within the framework of the law*". In **Associated Cables Ltd. v. Kalutarage** (1999) 2 SLR 314 it was held that although the Labour Tribunal was required to make a just and equitable order it must not only be just and equitable but the procedure adopted to that end must be legal and every judicial body exercising judicial powers must so arrive at an order only on legal evidence.

In **Municipal Council of Colombo v. Munasinghe** (1969) 71 NLR 223 at 225 it was observed that "*The mandate which the Arbitrator in an industrial dispute holds under the law requires him to make an award which is just and equitable, and not necessarily an award which favours an employee."* A similar view was expressed by A. R. B. Amerasinghe J. in **Elmo Rex Lord & Theresa Margaret Lord Partners v. Eksath Kamkaru Samithiya** SC Appeal No. 37/99, decided on 07. 03. 2001; "*The law relating to employment is not a one-way street. Justice, fairness and equity must be meted out even-handedly to employees and employers alike."* In **Millers Ltd. v. Ceylon Mercantile Industries and General Workers Union** (1993) 1 SLR 179 at 183, G.R.T.D. Bandaranayake J. expressed the opinion that an award is just and equitable only if it takes into consideration the interests of all the parties.

Therefore, it is clear that equity is not sympathy and that a court is barred from reaching a just and equitable decision based solely on sympathetic considerations. A just and equitable decision in an industrial matter is one which takes into consideration the situations of both the employer and the employee and assumes a holistic approach to the issue at hand based on the existing legal framework.

Applying this definition of the law, we think it fit to answer **question (a)** affirmatively in that; the judgment of the High Court which dismissed the application of the applicant, is just and equitable in terms of law.

The Learned High Court Judge set aside the award of the Labour Tribunal, on the basis that the learned President of the Labour Tribunal had granted relief on the premise that the Respondent had not given an opportunity to the Applicant to explain the allegations against him. The material placed at the inquiry, however, is indicative of the contrary in that it was the Applicant who did not respond to the allegations within the stipulated time period. At page 4 of the learned Labour Tribunal President's award, he had clearly stated that he arrived at the conclusion that the termination of the services of the Applicant was not just and equitable as the Respondent was in breach of the rules of natural justice, by not affording the Applicant an opportunity to show cause to the charge sheet. It appears that the learned President of the Labour tribunal had misdirected himself in arriving at this conclusion. In the examination in chief, the Applicant had said that he was served with a letter of suspension on 22nd October 2010 ['A10' or 'R7'] and the same contained a single allegation, requiring him to show cause. The Applicant, however, denied that he was served with the charge sheet 'R8'. In fact, R8 had been dispatched under registered cover, and the receipt of registration has also been marked as 'R8A'. Under cross examination, however, the Applicant had admitted that he received 'R8' (the charge sheet) but he did not respond [proceedings of 06.07.2011]. Considering the above, it is evident that the learned President of the Labour Tribunal had erred in arriving at his conclusions. The High Court, having observed that the learned President had misdirected himself, had quite correctly set aside the order. In the circumstances I answer the question of law referred to in **paragraph (b)** above also in the affirmative.

The final question this court is called upon to answer is, whether the judgement of the High Court was according to the law and according to the evidence adduced in the case (**question (c)**). As stated above, the learned President of the Labour Tribunal having come to the conclusion that the Respondent has established the first charge preferred against the Applicant has misdirected himself in holding that the respondent had violated rules of natural justice by not giving an opportunity

to the Applicant to answer the allegations leveled against him. The evidence, however, reflects the contrary and in the circumstances this court cannot fault the judgement of the High Court. Accordingly, **question (c)** too is answered in the affirmative.

Accordingly, the appeal is dismissed, however, the Applicant would be entitled to his statutory dues for the period of service with the Respondent.

In the circumstances of this case, I do not order costs.

Appeal dismissed.

Judge of the Supreme Court

V. K. Malalgoda, PC. J.
I agree.

Judge of the Supreme Court

E. A. G. R. Amarasekara, J.
I agree

Judge of the Supreme Court

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

1. Ambawatta Hewage Sisira Kumara,
2. Habaraduwa Pandigamage Mallika,
3. Ambawatta Hewage Chamila Kumari,
   All of
   'Athkam Niwasa',
   Juwanpullegewatta,
   Petiyagoda,
   Kelaniya.
   Plaintiffs

SC APPEAL NO: SC/APPEAL/138/2016
SC LA NO: SC/HCCA/LA/176/2015
HCCA GALLE NO: SP/HCCA/GA/47/2009 (F)
DC GALLE CASE NO: 15250/L

Vs.

1. Ambawatta Hewage Dayliya Kanthi,
2. Buluwa Hewage Ratnasiri,
   Both of
   No. 5, Melagoda,
   Wanchawala,
   Galle.
   Defendants

AND BETWEEN

1. Ambawatta Hewage Sisira Kumara,
2. Habaraduwa Pandigamage Mallika,
3. Ambawatta Hewage Chamila Kumari,

All of
'Athkam Niwasa',
Juwanpullegewatta,
Petiyagoda,
Kelaniya.
Plaintiff-Appellants

Vs.

1. Ambawatta Hewage Dayliya Kanthi,
2. Buluwa Hewage Ratnasiri,

Both of
No. 5, Melagoda,
Wanchawala,
Galle.
Defendant-Respondents

AND NOW BETWEEN

1. Ambawatta Hewage Sisira Kumara,

2. Habaraduwa Pandigamage Mallika,
3. Ambawatta Hewage Chamila Kumari,
All of
'Athkam Niwasa',
Juwanpullegewatta,
Petiyagoda,
Kelaniya.
Plaintiff-Appellant-Appellants

Vs.

1. Ambawatta Hewage Dayliya Kanthi,
2. Buluwa Hewage Ratnasiri,
Both of
No. 5, Melagoda,
Wanchawala,
Galle.
Defendant-Respondent-Respondents

Before: P. Padman Surasena, J.
K.K. Wickramasinghe, J.
Mahinda Samayawardhena, J.

Counsel: Dr. Sunil Coorey with Sudarshani Coorey for the Plaintiff-Appellant-Appellants.

Defendant-Respondent-Respondents absent and unrepresented.

Argued on: 27.04.2021

Written submissions:

by the Plaintiff-Appellant-Appellants on 16.12.2016

Decided on: 10.06.2021

Mahinda Samayawardhena, J.

The three Plaintiffs filed this action in the District Court of Galle seeking a declaration of title to the land described in the schedule to the plaint, ejectment of the two Defendants therefrom, and damages. The Defendants filed a joint answer seeking dismissal of the Plaintiffs' action, a declaration that they are the owners of the land, and damages.

At the trial, admissions were recorded, and issues were raised and the case was re-fixed for further trial. The Defendants were not ready on the date of further trial and the trial was postponed. On the next date, the Defendants were absent and their Attorney-at-Law informed Court that she had no instructions. The Court fixed the case for *ex parte* trial against the Defendants.

At the *ex parte* trial, the evidence of the 1st Plaintiff was led by a President's Counsel and documents P1-P7 were marked. The learned District Judge did not ask a single question from the witness nor was any clarification sought from Counsel for the Plaintiffs. The *ex parte* Judgment was postponed. By the *ex parte* Judgment delivered on 24.04.2009, the District

Judge dismissed the Plaintiffs' action on the basis that the Plaintiff failed to identify the corpus.

On appeal, the High Court of Civil Appeal affirmed the Judgment of the District Court. Hence the Plaintiffs before the final Court.

This Court granted leave to appeal on the question whether the High Court erred in law when it held that the corpus had not been identified in view of the unique facts of this case.

In my view, this question of law shall be answered in the affirmative and the appeal shall be allowed. Let me explain.

The parties to this action are members of the same family. They are not strangers to one another. The land in suit, which was their mother's property, is described in the schedule to the plaint.

The Defendants *inter alia* in paragraphs 2 and 15 of the answer admitted the corpus and, in the prayer to the answer, sought a declaration of title to the corpus in their favour. Furthermore, at the trial, by way of a formal admission recorded as admission No. 2, the corpus was admitted. In terms of section 58 of the Evidence Ordinance, admitted facts need not be proved unless "*the court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions*." But in this case, the Court did not require the corpus to be proved or properly identified despite its admission by the Defendants.

Obviously, no issue was raised at the trial on the identification of the corpus. Both the Plaintiffs and the Defendants raised issues on the premise that the corpus was

admitted. For instance, issue No. 26 raised by the Defendants is: "*Have the Defendants acquired prescriptive title to this land and the house?*" Be it noted that the Defendants speak of "this land". Then what is this fuss about non-identification of the corpus?

What the learned District Judge states in essence is that although the land is described by a Lot number in the schedule to the plaint, the Plan number is not mentioned and therefore the land has not been properly identified. This is an omission on the part of the Plaintiffs' Attorney-at-Law. What is typed in the schedule to the plaint as the subject matter of the dispute is the land described in the schedules to the deeds, which are all pleaded and produced in evidence. The Plan number is mentioned in the schedules to all these deeds.

The Plaintiffs filed this action seeking a declaration of title and ejectment of the Defendants from the entire land described in the schedule to the plaint, not from a portion of it. The Defendants' counter claim is also for the entire land. There is no ambiguity whatsoever as to the identification of the corpus by the Defendants against whom this action has been filed.

The system of justice we practice is adversarial as opposed to inquisitorial, and therefore, the Judge shall decide the case as it is presented before him by the two contesting parties and not in the way the Judge prefers it to have been presented before him.

In the Supreme Court case of *Saravanamuthu v. Packiyam [2012] 1 Sri LR 298*, the Plaintiff instituted the action in the District Court against the Defendants for a declaration of title

to the land described in the schedule to the plaint, ejectment of the Defendants therefrom, and damages. The Defendants in their answer admitted their residence and the situation of the land as averred in the plaint but denied the Plaintiff's claim. In the answer, they stated that the land is the same as that described in the schedule to the plaint, but described the land in the answer according to their deed. After trial, the District Court entered Judgment for the Plaintiff. On appeal, the High Court of Civil Appeal ordered a re-trial on the basis that Counsel for both parties had failed to draw the attention of Court to the discrepancy between the schedules to the plaint and the answer.

On appeal to this Court, Sripavan J. (later C.J.), whilst stating at page 301 "*It must be remembered that the jurisdiction of the Court is limited to the dispute presented for adjudication by the contesting parties*", held at page 302 that "*In view of the specific admission made by the Respondents in paragraph 4 of the answer there was no dispute amongst the parties as to the identification of the corpus even though the corpus is described differently in the answer. It is observed that no issue was raised before the District Court as to the identity of the corpus. The High Court sought to deal with the point that had not been an issue before the learned District Judge.*" The appeal was allowed and the Judgment of the District Court was restored.

Although the trial in the instant action was taken up *ex parte* against the Defendants, without purging the default, the Defendants were allowed to participate at the argument before the High Court, as in an appeal filed against a Judgment entered *inter partes*.

It is unfortunate that the High Court of Civil Appeal affirmed the Judgment of the District Court and dismissed the appeal with costs.

The learned High Court Judge attempts to justify the conclusion of the District Judge in a perplexing manner. He states:

> *The Plaintiffs have produced title deeds for the land described in the plaint. It is also correct that both parties have admitted the land described in the schedule to the plaint as the subject matter of this action. The subject matter means the land for which the dispute arose between the Plaintiffs and the Defendants. The Defendants admitted that the dispute arose for the land described in the plaint. However, there is no proof that the defined lot 1 of lot D mentioned in the title deeds of the Plaintiffs is the portion of land where the dispute arose between the Plaintiffs and the Defendants. Hence it is essential to depict the land for which the Plaintiffs seek a declaration of title.*

The learned High Court Judge states there is no proof that the defined Lot 1 of Lot D mentioned in the title deeds of the Plaintiffs is the portion of land in respect of which the dispute arose between the Plaintiffs and the Defendants. In the schedule to the plaint, the land is described as the defined Lot 1 of Lot D. The High Court Judge acknowledges that the Defendants admit that the dispute arose in respect of the land described in the plaint. I fail to understand this line of thinking of the learned High Court Judge.

Litigation is not wordplay, nor is it a game to be won by the cleverer or more astute. It is a far more serious contest authorised by law, in a court of justice, for the purpose of enforcing a right.

Unless the matter goes to the root of the case, cases need not be dismissed on flimsy technical grounds.

In *Silva v. Selohamy (1923) 25 NLR 113*, decided nearly a century ago, Schneider J. remarked at 114: "*It is not the policy of the Civil Procedure Code to throw out applications for relief for defect in pleadings. On the contrary, its policy would appear to be otherwise.*"

The High Court relied upon *Latheef v. Mansoor [2010] 2 Sri LR 333* to dismiss the appeal which reaffirmed the established principal that – be it *rei vindicatio* or partition – if the corpus cannot be identified, the action cannot be maintained. There is no question about the legal principal expounded in *Latheef's* case but the issue lies in the applicability of this principal to this case where the facts are totally different.

In *Latheef's* case, there was a real dispute in the identification of the corpus. There was no admission recorded as to the corpus and the 1st to 5th issues raised at the trial revealed that there was a dispute regarding the identity of the corpus. The Court then issued not one but two commissions to different surveyors to identify the corpus. After the return of the commissions, the 6th issue was raised putting the identification of the corpus in issue. The identity of the corpus was so complex that this Court dedicated 12 pages in the Judgment (pages 378-390) to deal with this question. In the instant action there is no such issue.

A principle laid down in a case shall be understood in the context of the peculiar facts and circumstances of that particular case. Such principles have no universal application unless the facts and circumstances in both cases are on all fours.

In the House of Lords decision of *Quinn v. Leathem [1901] AC 495*, the question arose on the applicability of the former decision of the same House in *Allen v. Flood [1898] AC 1*, which, if boldly applied, the Plaintiff had no case. "*If upon these facts so found the Plaintiff could have no remedy against those who had thus injured him*," Lord Halsbury remarked, "*it could hardly be said that our jurisprudence was that of a civilized community, nor indeed do I understand that any one has doubted that, before the decision in Allen v. Flood in this House, such fact would have established a cause of action against the Defendants*."

Lord Halsbury emphasised at page 506:

> *[E]very judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all.*

I set aside the Judgment of the High Court of Civil Appeal and the Judgment of the District Court and direct the learned District Judge to enter *ex parte* Judgment as prayed for in the prayer to the plaint on the uncontroverted evidence led at the trial.

The Plaintiffs are entitled to costs in all three Courts.

Judge of the Supreme Court

P. Padman Surasena, J.
I agree.

Judge of the Supreme Court

K.K. Wickramasinghe, J.
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 Section 754(1) of the Civil Procedure Code read with the provisions of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended by the Act No. 54 of 2006.

1. M. A. Sugathadasa,
   (deceased)

1A. Chandra Jayaweera,

2. Jayaweera Arachchige Chandra Podimenike
   All of Barandawatta,
   Henduwawa.
   Keppetiwalana

Plaintiffs

S.C. Appeal No.144/2016

SC/HCCA/LA Application No. .574/2014

NWP/HCCA/KUR/34/2009(F)

D.C. Kuliyapitiya, Case No. 13645/L

Vs.

Abesinghe Mudiyanselage Ranjith Gamini Abeysinghe
Athuruwala
Dambadeniya

Defendant

And

1A. Chandra Jayaweera,

2. Jayaweera Arachchige Chandra Podimenike

All of Barandawatta,
Henduwawa.
Keppetiwalana

Plaintiff-Appellants

Vs.

Abesinghe Mudiyanselage Ranjith Gamini Abeysinghe
Athuruwala
Dambadeniya

Defendant-Respondent

AND NOW BETWEEN

1. Abesinghe Mudiyanselage Ranjith Gamini Abeysinghe
(Now deceased)
Athuruwala
Dambadeniya
Defendant-Respondent-Petitioner.

1A. Edirisinghe Mudiyanselage Sumana Mallika

1B. Abeysinghe Mudiyanselage Wimantha Indeewara Abeysinghe

1C. Kasun Thisara Abeysinghe

1D. Isuri Palika Abeysinghe

Substituted-Defendant-Respondent-Appellants

Vs.

1A. Chandra Jayaweera,

2. Jayaweera Arachchige Chandra Podimenike

All of Barandawatta,
Henduwawa.
Keppetiwalana
Plaintiff-Appellant-Respondents

BEFORE : L.T.B. DEHIDENIYA, J.
S. THURAIRAJA, PC, J.
ACHALA WENGAPPULI, J.

COUNSEL : Amarasiri Panditharatne with Nimantha Satharasinghe for the Defendant-Respondent-Appellant
Manohara de Silva, PC with Hirosha Munasinghe for the Plaintiff-Appellant-Respondents.

ARGUED ON : 27th January, 2021

DECIDED ON : 05th November,2021

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ACHALA WENGAPPULI, J.

The 1st Plaintiff-Appellant-Respondent (later substituted by the 1A Plaintiff-Appellant-Respondent) and the 2nd Plaintiff-Appellant-Respondent, instituted a *Rei Vindicatio* action before the District Court of *Kuliyapitiya* in May 2003, against the Defendant-Respondent-Appellant (later substituted by 1A-D Defendant-Respondent-Appellants; hereinafter referred to as the "Defendant"), seeking a declaration of title to the land and to the building covering an extent of

747 square feet, (described as a *Kada Kamaraya*) standing thereon, morefully described in the schedules A and B of the plaint, and also the eviction of the Defendant therefrom. The Defendant, in his answer, seeking the dismissal of the plaint, had also laid down a claim of acquisition of prescriptive title to the said building and to the land on which it stood.

Therefore, dispute that had been presented by the parties for determination of the trial Court could be narrowed down to the question as to who has the right to own the said '*Kada Kamaraya*' and the parcel of land on which it stands, situated within a land in extent of one acre and 29 perches, described in schedule "ඇ" of the plaint.

The Plaintiffs have claimed that they have the paper title to the land described in schedule "ඇ" and produced the relevant deeds before the trial Court. On 17.05.1978, the 1st Plaintiff's father had leased out the said land in its entirety, including the building standing on it to one *Karunatilleke* for a period of 15 years. It is alleged by the Plaintiffs in their plaint that the Defendant had entered the said building illegally within the one-year period commencing from 17.05.1978, during which they have lost possession of their land temporarily. The lessee did not vacate from the land and the building at the expiry of the 15-year lease period, and had to be evicted by the fiscal, upon a writ of execution issued by Court in case No. 10741/L, an action instituted by the Plaintiffs seeking declaration of title and eviction of the said lessee. The fiscal, in execution of the writ, had placed the Plaintiffs back into possession of their land and only to the section of the building occupied by the overholding lessee, leaving out the remaining part of it, apparently on the claim that the Defendant's grandfather *Balin Appuhamy* had constructed the said *Kada Kamaraya*.

The Plaintiffs have thereafter instituted action on 21.08.2001, in case No. 13005/L and thereby sought to evict the Defendant from the said *Kada Kamaraya*, but had withdrawn it on 01.08.2002, reserving their right to re-institute proceedings. The Plaintiffs have thereafter instituted the instant action on 20.02.2003, seeking declaration of title to the land inclusive of the *Kada Kamaraya* and eviction of the Defendant.

The Defendant, in support of his claim of acquisition of prescriptive title to the *Kada Kamaraya* he possessed, asserted uninterrupted and long adverse possession. He also had taken up the position that the present dispute is *Res Judicata* among the parties, relying upon the dismissal of the earlier case No. 13005/L filed against him.

At the commencement of the trial before the District Court, the Defendant had suggested two issues (Nos. 12 and 13) particularly to the effect that whether he had conferred with title to the disputed "parcel of land" *(idam kebella)* upon the deed No. 12182 of 08.09.2003 (marked as "P14") and, whether he, along with *Balin Appuhamy,* had possessed the said *kada kamaraya* and the parcel of land covered under it for over 10 years, prior to the institution of the instant action. At a subsequent stage of the proceedings, the Defendant had suggested yet another issue (No. 17), whether the pleadings and the judgment of case No. 13005/L, are *Res Judicata* among the parties.

The trial Court, having considered the material presented before it, decided issue No. 17 in favour of the Defendant and dismissed the Plaintiff's action.

Being aggrieved by the said dismissal, the Plaintiffs have preferred an appeal to the High Court of Civil Appeal in appeal No.

NWP/HCCA/Kur/34/2009(F). The High Court of Civil Appeal, by its judgment on 28.04.2014 answered the said issue No. 17 as "not proved". The appellate Court, having concluded that the Defendant failed to establish that he had acquired prescriptive title to the *Kada Kamaraya* and to the land on which it stands, proceeded to answer issue Nos. 12 and 13 also as "not proved" and allowed the appeal of the Plaintiffs.

With the pronouncement of the judgment of the High Court of Civil Appeal, the Defendant thereafter sought Leave to Appeal from this Court on several questions of law that had been formulated and inserted in paragraph 8 of his petition.

This Court, after hearing Counsel on 12.07.2016, granted leave only on the question of law, "did the Provincial High Court of Civil Appeal err in failing to consider the prescriptive title of the Defendant and his grandfather *Balin Appuhamy*? "

At that stage, learned President's Counsel for the Respondent, raised the following consequential issues of law.

1. Is the Petitioner entitled to challenge the issue of prescription as he has failed to appeal against the Judgement of the District Court with regard to the issues raised by the Defendant in respect of prescription?

2. The Defendant is also not entitled to raise on the question of prescription in these proceedings as he has failed to challenge the issue pertaining to prescription in terms of section 772 of the Civil Procedure Code?

3. In any event, the Defendant is not entitled to claim prescription as much as his claim in the District Court was only with regard to a room of a building and not with regard to a land?

In support of the appeal, learned Counsel for the Defendant contended before this Court that the High Court of Civil Appeal misled itself and thereupon had fallen into error when it answered issue No. 13, raised on the acquisition of prescriptive title, as "not proved" by attributing its reason, to his failure to present the deed P14, on which he had relied on in establishing the said issue. Learned Counsel also pointed out that the Defendant, in his answer, had taken up the position that *Balin Appuhamy* was in occupation of the disputed *Kada Kamaraya* for well over ten years prior to the institution of the instant action, and, in addition, presented a substantial body of evidence before the trial Court, which clearly indicate the position that since coming into possession of the said *Kada Kamaraya*, it was unaccompanied by any payment of rent or produce, or performance of service or duty or any other act by him from which an acknowledgement of a right existing in the Plaintiff could be inferred with.

In support of this contention, learned Counsel relied on the statement made by the Plaintiffs in their plaint that the Defendant came into "illegal" occupation of the disputed building prior to May 1978 and was in possession of the said *Kada Kamaraya* since that point of time onwards denying the title of the Plaintiffs over it. He added that the character of the Defendant, when coming into occupation of the said

building was not of a licensee, who had entered the premises with leave and license of the Plaintiffs and thereby acknowledging the rights of the Plaintiffs over that premises, but as a trespasser, who did not recognize any property rights of them over the said premises.

Learned Counsel for the Defendant sought to strengthen his argument further by adverting to the failure of the Plaintiffs to take steps to evict the Defendant along with the overholding lessee on 09.06.2001, in spite of the fact that he too was in the occupation of the disputed building at the time of the execution of the writ. Since then, and until the institution of the instant action in 2003, the Defendant was in possession of the said building and thus uninterruptedly maintained his title, adverse to or independent of that of the Plaintiffs, for well over two decades and therefore clearly acquired prescriptive right over the disputed building. It was also contended by the Defendant, that the trial Court, having considered the evidence and in dismissing the Plaintiffs' action, had arrived at a conclusive finding of fact that the Defendant had possessed and continued to be in possession of the disputed premises over a long period.

Learned President's Counsel for the Plaintiffs, in resisting the appeal of the Defendant, submitted that the trial Court, having arrived at a finding that the Defendant was in possession for over long period of time either "legally or illegally"; nonetheless, had proceeded to answer the issue Nos. 12 and 13, suggested by the Defendant over his claim of acquisition of prescriptive title, as "does not arise for consideration" since the matter is *Res Judicata* among parties. Learned President's Counsel highlighted the fact that the Defendant did not prefer an appeal against the said specific findings on those pivotal issues nor has he made any application under section 722 of the Civil

Procedure Code contesting them, although the law had specifically provided for such a course of action. His contention, therefore, is that the Defendant cannot reagitate the issue of prescription before this Court.

I shall now proceed to consider these submissions against the backdrop of the evidence that had been placed before the trial Court and the reasoning contained in the judgments of the Courts below.

It is evident from the judgement of the District Court, in dismissing the Plaintiff's action, it was of the view that an identical cause of action had already been decided by that Court, in case No. 10741/L (referring to the first case instituted by the Plaintiffs against the Defendant for his eviction) and its appeal was pending determination before the Court of Appeal. Therefore, the trial Court decided that the matter is *Res Judicata* among the parties. The reasoning of the trial Court, adopted in arriving at that conclusion, also indicate that it considered the failure of the Plaintiff to evict the Defendant along with the overholding lessee from the building at the time of executing the writ, despite the fact that the Court order was for the entirety of the land, as a factor indicative of the renunciation of their rights over that part of the building by the Plaintiffs.

In exercising its appellate jurisdiction, the High Court of Civil Appeal has held that the trial Court was in error, when it answered the issue No. 17 that the matter is *Res Judicata* among parties. The High Court had thereupon proceeded to allow the Plaintiffs' appeal by holding that the "*defendant has not also proved what is stated in issue No. 13, the alleged prescriptive title of Balin Appuhamy*" and the deed of gift P14, in relation to issue No. 12.

The only question of law, upon which this Court had granted leave to the Defendant to proceed with his appeal against the judgment of the High Court of Civil Appeal, read "*Did the Provincial High Court of Civil Appeal err in failing to consider the prescriptive title of the Defendant and his grandfather Balin Appuhamy*?". In view of the limited scope of the question of law on which leave was granted, learned Counsel had understandably confined his challenge to the impugned judgment of the High Court of Civil Appeal, only on the basis that it had failed to consider the evidence available on the acquisition of prescriptive title by *Balin Appuhamy.*

The quotation from the judgment of the trial Court, inserted in the preceding paragraph of this judgment, clearly indicate that the High Court of Civil Appeal, before arriving at the said impugned conclusion, did in fact consider the issue of acquisition of prescriptive title after evaluation of the evidence presented before the trial Court. The appellate Court also had added that "… *the Defendant has not been able to show any right or title that would allow him to remain in that property …*".

One of the consequential questions of law, as formulated by the learned President's Counsel, too is connected to the issue of acquisition of prescriptive title as it has been formulated to read "*in any event, the Defendant is not entitled to claim prescription as much as his claim in the District Court was only with regard to a room of a building and not with regard to a land?".*

In view of the scope of the area covered under the above questions of law, it is necessary for this Court to consider same within that defined area, in the light of the applicable principles of law and in reference to the evidence that had been presented before the trial Court.

The dispute among the Plaintiffs and the Defendant, as already noted, is the right to own the *Kada Kamaraya*, and the portion of land covered under that building. The 1st Plaintiff claims paper title to the said land, over which the said building was erected on, based upon the deed of transfer No. 18705 of 14.09.1975, executed in his favour by his father *Mallawa Arachchige Kiri Banda,* the original owner. The said land is depicted in Plan No. 65A/L.R.C. Ku 15/Ku. 14.

The 1st Plaintiff had leased out the said land with its building to one *Wickramasinghe Arachchilage Piyadasa Karunatilleke* on 17.05.1978, for a period of 15 years by the execution of an Indenture of Lease No. 20122. The lessee was accordingly permitted to occupy the building standing on it and to enjoy the fruits of the land. During this period, the lessee *Karunatilleke* operated a metal crusher and a sawmill on that land and had his office located in that building. At the expiration of the lease period of 15 years, the 1st Plaintiff informed his lessee to handover vacant possession. Since the lessee did not vacate, the 1st Plaintiff instituted action in case No. 10741/L before the District Court of *Kuliyapitiya*, in seeking declaration of his title to the said land and the eviction of the said overholding lessee. The trial Court held in favour of the 1st Plaintiff and a writ of execution was eventually issued. Pending determination of the appeal preferred by the said lessee challenging his eviction, the trial Court issued a writ of execution. Neither the present Defendant nor his grandfather *Balin Appuhamy* were parties to that litigation.

The fiscal of the Court, in order to execute the writ issued in favour of the 1st Plaintiff, visited the land on 18.10.2000. During his visit, it was noted down by the fiscal that the building standing on it had two "කඩ කාමර" adjacent to each other and one *Balin Appuhamy* is in

possession of one, while the other was possessed by the lessee *Karunatilleke,* the defendant in case No. 10741/L. Upon enquiry, the fiscal was informed by the Defendant that the building was erected by *Balin Appuhamy,* who had occupied it since for over "50" years. The Defendant before the trial Court in the instant action is *Balin Appuhamy's* grandson, who continued to be in possession of that part of the building after *Balin Appuhamy's* demise. The 1st Plaintiff, when enquired by the fiscal claimed that his father too had shared the construction cost of that building. The Plaintiff's claim of sharing the construction cost of the *Kada Kamaraya* was not disputed by the Defendant at any point of time.

The fiscal, in executing the writ of Court, had thereafter placed the 1st Plaintiff in possession of the land on 09.06.2001, and only on the part of the building occupied by *Karunatilleke* leaving out the *Kada Kamaraya* in the Defendant's possession, after instructing him to make a claim before the trial Court within two weeks. The witness who produced the certified copy of the fiscal report in case No. 10741/L, marked as "X" before the trial Court, said that the Court record indicate that the Defendant had tendered an affidavit presenting a claim. But the Defendant failed to produce a copy of his affidavit tendered to Court on the direction of the fiscal, nor did he elicited the nature of the claim he had presented in the said affidavit, in that case or the decision made by that Court on it, before the trial Court.

There is oral evidence led on behalf of the Defendant through a retired Grama Niladhari, who had served the area from 1972 to 1978, and could recall that *Balin Appuhamy* had ran a grocery in that building during his tenure of office.

Clearly it is with the above evidence, the Defendant had sought to counter the paper title of the 1st Plaintiff to the disputed building under section 3 of the Prescription Ordinance. The instant action, being a *Rei Vindiactio* action, both the trial Court as well as the High Court of Civil Appeal have accepted that the Plaintiffs have proved their paper title to the land. Therefore, it is for the Defendant to establish that the action of the Plaintiffs is prescribed as he had acquired prescriptive title, a title adverse to and independent of the paper title of the Plaintiffs. In doing so, not only must he establish that the point of time he had commenced such possession, but also he must furnish proof of undisturbed and uninterrupted possession of that property for over ten years. The applicable principle of law had been succinctly stated by Gratiaen J in the judgment of ***Chelliah v. Wijenathan (1951)*** 54 NLR 337. His Lordship states (at p, 342), "*where a party invokes the provisions of Section 3 of the Prescription Ordinance in order to defeat the ownership of an adverse claimant to immovable property, the burden of proof rests fairly and squarely on him to establish a starting point for his or her acquisition of prescriptive rights*." G.P.S. de Silva CJ in ***Sirajudeen v Abbas*** (1994) 2 Sri L.R. 365, had re-emphasised that statement of law.

The Defendant, although sought to 'tack' the period his grandfather had possessed the building to the period of his own, and thereby strived to establish that they have held that property adverse to or independent to the paper title of the Plaintiff for over the required ten-year period, but was conspicuously silent in his evidence on exactly when did *Balin Appuhamy* commence his adverse possession against the Plaintiffs.

At the hearing before this Court, learned Counsel for the Defendant referred to paragraph 20 of the plaint, where it was stated that the Defendant had entered the premises "illegally" during the period the Plaintiffs lost possession from 17.05.1978, and sought to pin the commencement of his claim of prescription to that date. This contention does not take the Defendant's claim any further, as it is not an acceptable substitute for the total absence of any evidence as to the starting point of his claim of prescription, presented before the trial Court.

Why the reference in a plaint, in this instance, could not be taken as the starting point of the prescriptive period, in the absence of any specific evidence to that effect presented before the trial Court, could be explained further. This is primarily due to several reasons.

The averment in the plaint, even if it is taken as an item of 'evidence' on the point as the learned Counsel submits, is clearly an obscure statement as to its meaning. It could well be a due to an instance of poor draftsmanship as the said averment reads " **වර්ෂ 1978.05.17 දින සිට (අ) (ආ) උපලේඛනයන්හි ඉඩම් කොටස් වල භුක්තිය සහ හිමිකම් අවුරුදු එකක් පමණ මෙම පැමිනිලිකරුට නොලැබී තිබීම මත මෙම නඩුවේ විත්තිකරු බදු ඉඩමේ 1වැනි උපලේඛණයේ ඉඩමෙහි පිහිටි ගොඩනැගිල්ලේ නීති විරෝධීව ඇතුල් වී ඇත.**". It speaks of the fact that the 1st Plaintiff had lost the possession of the building for a period of one year from 17.05.1978. This is the day on which the 1st Plaintiff had entered into a lease agreement with *Karunatilleke* for a period of fifteen years. The lease was in respect of the land in its entirety including the only building standing on it. It is highly improbable that the said lessee would have entered into such an agreement with the father of the 1st Plaintiff, if the Defendant was already in occupation of the building standing on that land. There is clear evidence that the lessee had his

office to the sawmill in that building. The statement that the Plaintiff had lost possession for over one year does not logically fit in anywhere as the lessee is entitled to possess the land along with the building, during the lease period. In fact, it is said in evidence that the lessee was in possession of the leased-out building and the land for over 20 years, until the fiscal had placed the 1st Plaintiff back in possession, in June 2001. This statement, therefore, does not indicate exactly when *Balin Appuhamy* came into possession. It merely states he had come to possess when the Plaintiffs have lost possession of their land temporarily.

If this is the correct position as asserted by the Defendant, then the only building standing on the land, must have been the one put up by *Balin Appuhamy* who possessed it since that point of time as evident from the contents of the fiscal report, marked as 'X'. That proposition creates another ambiguity as to the building the father of the 1st Plaintiff had leased out on 17.05.1978 to his lessee. If the only building was already in possession of *Balin Appuhamy,* then the lessee would have been placed in possession of 'another' building by the 1st Plaintiff's father on his land. But the plan of the land, to which the 1st Plaintiff had claimed paper title, led in evidence indicates there is only one building standing on it.

The contention of the learned Counsel for the Defendant that *Balin Appuhamy* was in possession of the *Kada Kamaraya* prior to 1978 not as a licensee, who had entered the premises with leave and license of the Plaintiffs and thereby acknowledging the rights of the Plaintiffs over that premises, but as a trespasser who did not recognize any property rights of them over the said premises, does not fit in with the evidence presented before the trial Court. If *Balin Appuhamy* was already in possession of the only building standing on that land as a

trespasser prior to 1978, then why did he allow the lessee, who acknowledged the title of Plaintiffs, to have his office in the same building?

All these factors favour an inference that *Balin Appuhamy's* construction of the *Kada Kamaraya,* and occupying it since its construction, is clearly a subsequent event to the leasing out the land described in schedule A of the plaint on 17.05.1978. However, despite the fact it was the Defendant's burden to establish the starting point of his adverse possession, absolutely no evidence was produced by him as to when did *Balin Appuhamy* come to occupy same. It is also relevant to note that the incoherent statement from the plaint was not put to the 2nd Plaintiff who gave evidence before the trial Court, by the Defendant, during her cross examination.

Once the issues are raised and accepted by Court, the parties must present evidence in relation to such issues, in assisting the trial Court to reach a determination in respect of each of them. The District Court will have its jurisdiction circumscribed only to determine the dispute, as presented before it by the parties through the issues and on the material presented before it, per ***Pathmawathie v Jayasekare*** (1997) 1 Sri L.R. 248. This Court, in ***Hanaffi v Nallamma*** (1998) 1 Sri L.R. 73 stated at p. 77, "*since the case is not tried on the pleadings, once issues are raised and accepted by the court the pleadings recede to the background. The Court of Appeal was in error in harking back to the pleadings …*".

The Plaintiffs too had adopted to a similar strategy before the trial Court to fill out a significant gap in their case in challenging the claim of acquisition of prescriptive title, by introducing the position that *Balin Appuhamy* came into possess that part of the building due to actions of

the lessee, who had allowed him to occupy the building during the lease period, only through their written submissions tendered before that Court. Even if there was evidence to that effect, it will not fill the gap left by the Defendant in his failure to establish a starting point as there too was no mention of a starting point to the adverse possession.

The only evidence presented before the trial Court, touching on the circumstances under which *Balin Appuhamy* came to possess the part of the building, is from the said fiscal's report, in which the Court officer had noted down the explanation of the 1st Plaintiff as well as of the Defendant for not executing the writ on that part of the building. The Defendant relied on a particular segment of the fiscal report by marking it as V3a. The contents of this segment will be considered in greater detail at a later stage of this judgment. For the purpose of consideration of the area presently under review, it is relevant to note that both *Balin Appuhamy* and the 1st Plaintiff's father were dead when the 1st Plaintiff instituted the instant action. Owing to that reason there is no direct evidence presented through the witnesses who had personal knowledge of the circumstances under which the Defendant came into possess the *Kada Kamaraya* standing on the 1st Plaintiff's land. The contents of the fiscal report, being a contemporaneous official record as to the respective positions taken up by the parties, although based on hearsay material, were admitted as evidence in the trial before the Court and not disputed by either party as to its contents or to its reliability.

In that segment of the report V3a, it is indicated that the Defendant had claimed before the fiscal that his grandfather *Balin Appuhamy,* having constructed the building, was in its possession for over "50" years. Once more, the Defendant had not referred to any

starting point or explained exactly when and how *Balin Appuhamy* came into possess that part of the building, in answering the fiscal's query.

Clearly there are ample evidence before the trial Court, that the Defendant and his predecessor were in continuous possession of the part of the building they allegedly occupied since late-seventies. The *Grama Niladhari Somapala*, stated to Court that *Balin Appuhamy* had operated a grocery store in the disputed premises and have distributed food provisions under the Government sponsored food stamps scheme. Having called the said witness, the Defendant did not elicit the time of commencement of that business, the capacity in which *Balin Appuhamy* operated that grocery store or whether there any official records as to its ownership.

Considering the available evidence, I am of the view that the Defendant, in his attempt to discharge the evidentiary burden as to the starting point of his adverse possession, has undoubtedly failed in that task, and cannot circumvent his failure by placing reliance on an averment in the plaint as the contents of the pleadings could not be taken as 'evidence' presented before Court. The failure of the Defendant to present evidence before the trial Court as to the starting point at which he had commenced his adverse possession is therefore fatal to his case, leaving his claim restricted to an instance of mere possession of the *Kada Kamaraya* for over a period of ten years, with no specific point of commencement of any adverse possession.

In addition to the proof of the starting point of the period of prescription, it was also incumbent upon the Defendant to establish that his possession for over ten years by a title adverse to or independent to that of the Plaintiff, as the section 3 of the Prescription Ordinance

imposes such a requirement, in proof of a claim of acquisition of prescriptive title.

It had been emphasized by the appellate Courts that, in a claim of acquisition of a prescriptive title under section 3 of the Prescription Ordinance, mode of proving such acquisition is by way of presenting cogent evidence with specific reference as to the nature of possession. The applicable law had clearly been laid down by this Court in ***Sirajudeen v Abbas***(supra) where G.P.S. de Silva C.J., citing *Walter Pereira's* Laws of Ceylon, 2nd Edition, page 396, concurred with the learned author in stating that "*as regards the mode of proof of prescriptive possession, mere general statements of witnesses that the plaintiff possessed the land in dispute for a number of years exceeding the prescriptive period are not evidence of the uninterrupted and adverse possession necessary to support a title by prescription*" and, citing the judgment of ***Peynis v. Pedro*** 3 SCC 125, added that "*it is necessary that the witnesses should speak to specific facts, and the question of possession has to be decided thereupon by Court*".

The only reliable evidence pointing to the nature of the possession of over that part of the building could be found contained in the said fiscal report, marked 'V3a' by the Defendant himself and his oral testimony on that incident. It indicates that when the fiscal had enquired from the Plaintiff as well as the Defendant as to the basis of the latter's possession of *Kada Kamaraya*, they have stated their respective positions to the Court official. The positions taken up by the two contesting parties at that point of time are the only available evidence in relation to the circumstances under which *Balin Appuhamy* came to possess the *Kada Kamaraya* and nature of the relationship he has had with the father

of the 1st Plaintiff, the original owner of the land, long before the instant action was instituted.

The issuance of the writ of execution by the Court, was on the basis that the building standing on the land is in the possession of the overholding lessee *Karunatilleke,* in its entirety. The fiscal, during his first visit to the land had noted that the present Defendant too was in occupation of the building, but his possession is limited only to a part of the building. Anticipating a legal issue in execution of the writ in its existing form, the Court officer had thereafter sought further directions from trial Court, reporting back his observations, based on what the parties have claimed before him. It is in this context; that he had enquired from the Plaintiff and the present Defendant as to the reasons for the latter's possession of a part of the building.

The Defendant claimed that his grandfather *Balin Appuhamy* had constructed the building and occupied it for over 50 years, while the 1st Plaintiff asserted that his father too had financially contributed to the construction cost of the building. The Defendant, in his evidence before the trial Court referred to the enquiry made by the fiscal in the presence of *Sugathadasa,* the 1st Plaintiff. He stated that the 1st Plaintiff came along with the fiscal in executing the writ. When questioned by the fiscal, the 1st Plaintiff admitted that the building is possessed for over "50" years by *Balin Appuhamy.* He also added that his father had shared the construction cost of the *Kada Kamaraya* with *Balin Appuhamy.* The evidence of the Defendant varied with the contemporaneous record of the fiscal only as to the number of years of possession. It is undisputed that the other part of the building was in the possession of the overholding lessee.

It is important to note from that evidence that there was some form of agreement or an understanding existed between the Plaintiff's father and the Defendant's grandfather over the cost of construction of the building. Both parties admittedly have contributed towards the construction cost of the building that had been put up on the 1st Plaintiff's land. Whether the construction was in relation only to an addition made to an already existing building or to a partition of an already constructed building is not clarified by the Defendant. But the fact that the Plaintiff's father's contribution towards construction cost of the *Kada Kamaraya* is clearly admitted by the Defendant.

This factual position is indicative of the Defendant conceding to the right of the 1st Plaintiff over his land and to the building constructed over it. The Defendant never claimed acquisition of prescriptive title over the land, when the Court official made enquiries in executing the writ. It is therefore clear that when *Balin Appuhamy* had accepted an unspecified part of the construction cost of *Kada Kamaraya* from the 1st Plaintiff's father, the former had conceded to the latter's rights over the land and the *Kada Kamaraya*. The Defendant, however, in his evidence said that his grandfather constructed the building on his own land, and thereby contradicted his own statement to the fiscal.

Therefore, it is clear that *Balin Appuhamy,* when moving into the building he claims to have constructed over the 1st Plaintiff's land, had conceded to the rights of the Plaintiffs and occupied it under the 1st Plaintiff's father and thus assumed a subordinate character in possessing the said *Kada Kamaraya*. If that in fact the case is then the Defendant must, in the alternative, establish at which point that he had emerged from that subordinate character, which could be referable to an

act of ouster for he must possess the property by a title adverse to or independent of that of the Plaintiffs.

In ***Seeman v David*** (2000) 3 Sri L.R. 23, at p.26, it had been stated that:

> "*it is well settled law that a person who entered property in a subordinate character cannot claim prescriptive rights till he changes his character by an overt act. He is not entitled to do so by forming a secret intention unaccompanied by an act of ouster. The proof of adverse possession is a condition precedent to the claim for prescriptive rights*".

It is the Defendant's evidence that his grandfather was in possession of that part of the building since its construction and only in November 1983, *Balin* had rented it out to one *Lionel Ekanayake* for a period of five years said to be on a notarially executed document, before the execution of the said deed of gift in his favour in the year 1987. However, in this instance too the Defendant did not produce any document in support of that claim, nor this position was ever put to the 2nd Plaintiff who gave evidence before the trial Court. The 2nd Plaintiff, in her evidence stated that she was unaware of the reason for exclusion of the Defendant from the execution of the writ. She also learnt that *Balin Appuhamy,* who was in possession of the building, had fraudulently executed a deed at a subsequent stage, a position the Defendant himself conceded to during his evidence.

It is significant to note that the Defendant never claimed that he did not pay any rent to the Plaintiffs during his evidence. This is an important aspect of the Defendant's case in establishing adverse possession. It was for him to establish that he never paid any rent from the day he came into possession, if he was to be considered as a trespasser as his Counsel contends. Strangely, the Defendant was totally silent on that important aspect during the trial, having had the opportunity to say so.

The Defendant also admitted that neither him nor *Balin Appuhamy* paid any assessment rates to the local authority in respect of the building at any point of time. On the other hand, the Plaintiffs had tendered proof of payment of assessment rates but did not clearly establish that they were paid in respect of the premises in dispute. The witness from the local authority however, denied the fact that the disputed premises was given the assessment number 146 as the Defendant suggested. Countering the claim of the Defendant, the Plaintiffs have led evidence in support of a complaint made by them to the Government Agent in September 1993, regarding illegal felling of trees by the lessee.

The Defendant, in support of his claim of prescription, relied heavily on the finding of the trial Court that he was in possession of the disputed building for a 'long period' of time. However, the trial Court, as pointed out by the learned President's Counsel, opted to answer the issue Nos. 12 and 13 raised on the point as "does not arise" since the matter is *Res Judicata* among the parties. At most, the findings of the trial Court only support the Defendant's case to the extent that he was in possession of the building for well over the requisite time period of ten years.

However, the mere fact of long possession does not qualify any person to claim prescriptive title under section 3 of the Prescription Ordinance. Having come into possession of an immovable property under a subordinate capacity, a person could subsequently acquire prescriptive title to an immovable property by changing the character of his possession by an overt act of ouster. It had already been laid down in ***Sirajudeen v Abbas*** (supra) that "*…what needs to be stressed is that the fact of occupation alone would not suffice to satisfy the provisions of section 3 of the Prescription Ordinance. One of the essential elements of the plea of prescriptive title as provided for in section 3 of the Prescription Ordinance is proof of possession by a title adverse to or independent of that of the claimant or plaintiff*". Sharvananda J, as he was then, stated in ***de Silva v Commissioner General of Inland Revenue (1973)*** 80 N.L.R. 292 stated at p.295 that;

> *"The principle of law is well established that a person who bases his title in adverse possession must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of his title to the property claimed. In order to constitute adverse possession, the possession must be in denial of the title of the true owner. The acts of the person in possession should be irreconcilable with the rights of the true owner; the person in possession must claim to be so as of right as against the true owner."*

In ***Solomon Dias v William Singho & Others*** (2015) 1 Sri L.R. 277, Gooneratne J stated at 286 that "… *mere possession for a period of time cannot give rise to a plea of ouster*". The resultant position is there was no

acceptable evidence presented by the Defendant establishing an overt act of ouster.

In view of the contention advanced by the learned President's Counsel for the Plaintiffs that, if at all what *Balin Appuhamy* had conveyed to the Defendant is his 'right' over the possession of the building only and therefore he is not entitled to acquire prescriptive title to it as his claim in the trial Court was only regard to a room of a building and not with regard to a land it stood on, it is necessary to consider the question of law that had been formulated on that premise, at this stage of the judgment.

Learned Counsel for the Defendant sought to counter that contention by stating that in terms of section 3 of the Prescription Ordinance not only lands but immovable properties are also made subject to acquisition of rights by prescription.

It could well be that the learned President's Counsel relied on the dicta of Drieberg J in ***Samaranayake v. Mendoris (1928)*** 30 N L R 203, in presenting his contention on this point. In that judgment, Drieberg J, quoted the following passage from The Digest, XLVI., 1, 12 (Monroe's Translation) where the underlying law had been stated clearly. It stated "*where a man builds on another man's ground with his own materials, the building becomes the property of the person who owns the soil itself, and, if the' former knew that the ground was another's, he is regarded as having lost the ownership of the materials of his own free will; consequently, even if the building should be demolished, he has no good right of action to recover the materials*".

Sansoni J, as he was then, in ***Kangaratnam v Suppiah (1957)*** 61 NLR 282, following the dicta of Drieberg J in ***Samaranayake v. Mendoris*** (ibid), stated that "*it is clear beyond doubt that our law does not recognize the ownership of a building apart from the land on which it stands*". In this context, it is relevant to mention here that the changes in the contemporary socio-economic considerations have made inroads to the said common law principle, referred to in ***Samaranayake v. Mendoris,*** with the subsequent enactment of Condominium Property Act No. 12 of 1970, which was subsequently replaced by Apartment Ownership Law No. 22 of 1973 as amended.

It is correctly pointed out by the learned Counsel for the Defendant that section 3 of the Prescription Ordinance refers to "*lands or immovable property*" and the *Kada Kamaraya* containing of *747* square feet is clearly be taken as an item of immovable property. In his answer the Defendant had taken up the position in paragraph 3 that on the deed No. 12182 he has become the 'owner' of both the building as well as the land on which it stood. In paragraph 4, he states that he and his predecessor *Balin Appuhamy* had possessed the *Kada Kamaraya* for over 10 years prior to the institution of action, a position he maintained before the trial Court as well.

Learned Counsel for the Defendant, having referred to the inclusion of "immovable property" in section 3 of the Prescription Ordinance, did not elaborate any further in his submissions as to the failure to produce the said deed of gift before the trial Court, in support of his claim of acquisition of prescriptive title to the land.

Both parties have contributed towards the cost of the building, although the individual share of each party is not known. *Balin Appuhamy* had accepted the 1st Plaintiff's father's contribution both in monetary terms as well as by providing a plot of land to build on. The Defendant did not make a claim to the land in the presence of the fiscal. The evidence available before the trial Court clearly points to the reasonable inference that the Plaintiff's father, having allowed *Balin Appuhamy* to build over his land and by sharing the cost of construction, had thereby become a co-owner of the building.

The above factual position was revisited once more, in order to consider them in the light of another important principle of law. The factual position referred to above, seemed of an instance where the principle of *jus superficiarium* applies. In ***Ahamadu Natchia v Muhamadu Natchia (1905)*** 8 NLR 330, Layards CJ stated the applicable principle in *jus superficiarium* as follows:

> *"The ownership of a house apart from the site on which it stands is well known to our law. It is called the right of superficies. The jus superficiarium is the right which a person has to a building standing on another's ground. It cannot be termed full ownership, for no one can be legally full owner of a building who has not the ownership of the soil. It is the right to build on the soil and to hold and use the building so erected, until such time as the owner of the soil tenders the value of the building, if the amount to be paid has not been previously agreed upon. The right is acquired and lost like immovable property and is even presumed to be granted when the owner of the ground*

> *permits another to build thereupon. The right can be alienated, and consequently there can be no doubt of its passing to the heirs of the original owner of the right (Grot. 2, 46, 9, 10, and 11).*

In determining the appeal upon a retiral, ***Muhamadu Natchia v Ahamadu Natchia (1906)*** 9 NLR 331, Lascelles ACJ thought it fit to emphasise that an agreement between the landowner and the person who acquires the right is the foundation of the right under *jus superficiarium*. His Lordship strongly recommended adopting a cautious approach in situations where this principle of law applies since "… *claims to a right of 'superficies' should not be allowed unless the agreement between the parties is clearly demonstrated. To sanction laxity of proof in this respect would be to expose proprietors of house property to serious danger from claimants alleging that some former owner has permitted them or their ancestors to build on his land*." It has been held by *Gratian* J in ***Samarasekera v Munasinghe (1954)*** 55 NLR 558, that the servitude of *jus superficiarum* could "… *also be acquired by prescription where a person who, in appropriate circumstances, has erected a building on another's land and has without interference by the soil-owner exclusively enjoyed the use and enjoyment of it as a superficiary for the requisite period of ten years*". His Lordship had further clarified such acquisitions on prescription are confined to the servitude, and not to soil-rights.

Their Lordships of the Privy Council, in the judgment of ***Suppiah v Kanagaratnam (1960)*** 61 NLR 553, were in "*complete agreement*" with the principles of law that had been enunciated in the judgments of ***Samaranayaka v Mendoris*** (supra) and ***Kangaratnam v Suppiah*** (supra), and quoted the section reproduced below from Grotius, contained in Book II of his Jurisprudence of Holland at Ch. 46, sections

8-10 (as translated by Professor Lee at page 279 of Volume 1 of his translation of Grotius).

> "*8. The right of superficies is the right which a man has to a building standing upon another man's ground.*
>
> *9. This right is not full ownership, because in law no one can be full owner of the building if he is not at the same time owner of the ground: but it is the right of building upon the site, and of retaining and using the building until the ground-owner pays the value of the building or an agreed sum.*
>
> *10. This right is acquired and lost like immovable property: and is understood to be effectively granted when the owner of the soil allows anyone to build upon it.*"

Their Lordships, in referring to the pleadings before them, observed that "*It is difficult to suppose that anyone reading these pleadings and the issues framed thereon would infer that the plaintiff at the trial was going to endeavour to establish a right to a jus superficiarium as against the defendant in his capacity as lessee under a lease for 20 years. This right in Roman Dutch law, which seems but rarely to have arisen for consideration in the Courts of Ceylon and as to the nature of which it is necessary to refer to the ancient jurists, is nowhere mentioned in the pleadings or issues.*"

In the instant appeal too, the Defendant did not present a claim of prescriptive title to the disputed building by placing reliance on the principle of *jus superficiarium* before the trial Court but was content with presenting purely a claim of acquisition of prescriptive title upon possession of the building and the land under it

These principles of law, although relevant to the consideration of the consequential question of law formulated by the 1st and 2nd Plaintiffs, have no application to the question of law formulated by the Defendant. The High Court of Civil Appeal had considered the challenges mounted by the Defendant to the paper title of the Plaintiffs by claiming acquisition of prescriptive title by suggesting issue Nos. 12 and 13 and decided that the Defendant had failed to establish either of these two issues by presenting evidence. In answering the issue No. 12 against the Defendant, the High Court stated that he had failed to prove the very deed on which he claimed title to the land where the disputed building stands. Issue No. 13 too had been answered by the High Court of Civil Appeal on the basis that the Defendant did not prove the alleged acquisition of prescriptive title, either by *Balin Appuhamy* or by tacking on to the period of possession under *Balin Appuhamy* to that of his own.

The Defendant's complaint was the High Court of Civil Appeal had failed to consider his case that had been presented before the trial Court on the lines that had been argued before this Court by the learned Counsel. The High Court of Civil Appeal decided issue No. 12 in the negative primarily due to non-production of the deed of gift No. 12182 before the trial Court. The Defendant had admittedly relied on the said deed in support of his claim to the land by raising issue No. 12 over it at the commencement of the trial, and therefore it was incumbent upon him to establish the very basis on which he claim title to the land covered under the *Kada Kamaraya,* by proving due execution of the said deed, under section 68 of the Evidence Ordinance. During the trial before the District Court, the Defendant was called by the Plaintiff as a

witness during his case. During his examination in chief, said deed was marked as P14. The Defendant then conceded to the position put to him by the Plaintiff that it is a fraudulent deed, an allegation already made by the 2nd Plaintiff, in her evidence. The appeal brief contained a copy of the said Deed of Gift (at p. 246). Having placed reliance on it by making specific reference to it during his evidence by marking it as P14, the Defendant nonetheless withheld its production to Court and did not lead evidence of its due execution. The copy of the deed bears marking given to it 'P14', but the absence of the initials of the trial Judge on it seems to suggest that it had not been produced before Court and thereby abandoning his claim based on the said deed.

It has already been referred to earlier on in this judgment that the High Court of Civil Appeal did consider the issue Nos. 12 and 13 of the Defendant and answered them as "not proved". I have carefully re-evaluated the evidence placed before the trial Court in its totality and of the firm view that the appellate Court had correctly answered the said two issues. Despite the fact that there was evidence that the Defendant was in possession of the disputed part of the building since late seventies until the institution of the instant action in February 2003, he had starved his case of any evidence, either in relation to the starting point of adverse possession or in relation to the point at which the permissive possession was changed to that of an adverse possession, by proof of an overt act of ouster. Thus, it is amply clear that the High Court of Civil Appeal had more than one reason to answer the issue Nos. 12 and 13 in the negative as they remain unproved.

It is appropriate to consider the remaining two questions of law, as formulated by the 1st and 2nd Plaintiffs as consequential issues of law, I part with this judgment.

With the dismissal of the Plaintiffs' action on the basis of *Res Judicata* by the trial Court, he had preferred an appeal to the High Court of Civil Appeal challenging the said dismissal. One of the grounds on which the Plaintiffs relied on in support of their appeal was that the trial Court had erroneously determined that the Defendant was in possession of the building for a long time either legally or illegally. The Plaintiffs have mounted a challenge on that conclusion reached by the trial Court on the footing that the trial Court had failed to consider the basis on which the Defendant was in possession. The Defendant's position is that he was in long possession of the building and therefore had prescribed to its ownership. Clearly, in view of these considerations, the acquisition of prescriptive title had been very much an issue before the High Court of Civil Appeal. The appellate Court had accordingly pronounced its determination on those issues concerning prescription after due consideration.

The Defendant sought leave to appeal against the judgment of the High Court of Civil Appeal and after hearing Counsel, this Court granted leave to consider the question whether the Provincial High Court of Civil Appeal err in failing to consider the prescriptive title of the Defendant and his grandfather *Balin Appuhamy*?

Thus, the claim of acquisition of prescriptive title by the Defendant through his grandfather *Balin Appuhamy* had become the core issue of this appeal. Its consideration is necessitated by the

question of law that had been formulated on the issue of prescription to which this Court had granted leave. In granting leave, this Court acted under section 5C (1) of the High Court of the Provinces (Amendment) Act No. 54 of 2006, since it was of the "*opinion the matter involves a substantial question of law or is a matter fit for review by such Court*". Article 127(1) of the Constitution conferred this Court with jurisdiction "*for the correction of all errors in fact or in law which shall be committed by*", Court of Appeal and any Court of First Instance, and in this particular instance, by the High Court of Civil Appeal holden in North Western Province at Kurunegala and the District Court of *Kuliyapitiya.*

In the circumstances, the question whether the Defendant is entitled to challenge the issue of prescription since he has failed to appeal against the Judgment of the trial Court with regard to the issues raised by him in respect of prescription has already been decided by this Court when it granted leave having considered same as a "*substantial question of law*".

The mere failure to prefer an appeal by the Defendant, against the determination of the trial Court on the issues that had been raised on his plea of prescription, where the Court had not answered in either way due to the reason that they did not arise for consideration, does not therefore preclude the Defendant from reagitating them before this Court, in view of the fact that this Court had already granted leave on the issue of law dealing with the question of prescription. But the Defendant could only agitate the issue only to the extent to which leave was granted by this Court.

It was contended on behalf of the Plaintiffs that the failure of the Defendant to challenge the issue pertaining to prescription in terms of section 772 of the Civil Procedure Code disentitles him from raising the same before this Court. The section 772 allows a respondent, not only to support a decree but also to take any objection to such decree, which he could have taken by way of appeal, although he had not appealed against any part of it. To avail this opportunity, such a respondent was obligated by the provisions of that section to give seven days' notice in writing of such objection.

This contention need not be considered in detail, in view of the finding contained in the two immediately preceding paragraphs. Suffice it to state that mere failure to act under section 772 of the Civil Procedure Code, does not operate as an absolute bar or an automatic disqualification against such a respondent, as the appellate Courts have consciously retained a wide discretion to hear such a respondent, in fulfilling its responsibility "*to do complete justice between the parties*", despite him not seeking relief under the said section. This point had already been clarified by this Court in ***Ratwatte v Gunasekera*** (1987) 2 Sri L.R. 260, where Sharvananda CJ, in view of the contention that the plaintiffs in that particular instance had failed to comply with the provisions of section 772(1) of the Civil Procedure Code, said "*… the provision does not bar the Court, in the exercise of its powers to do complete justice between the parties, permitting him to object to the decree, even though he had, failed to give such notice. The Court of Appeal has inherent jurisdiction to grant or refuse such permission in the interest of justice.*"

Thus, the answers to the question of law raised by the Defendant and the consequential questions of law raised by the Plaintiffs are as follows :-

Question of law of the Defendant - No

Question of Law No. 1 of the Plaintiffs - Yes, only to the extent to which leave was granted,

Question of Law No. 2 of the Plaintiffs – Yes, only to the extent to which leave was granted,

Question of Law No 3 of the Plaintiffs – No.

The appeal is dismissed with costs as the only question of law raised by the Defendant is answered in the negative.

JUDGE OF THE SUPREME COURT

L.T.B. DEHIDENIYA, J.

I agree.

JUDGE OF THE SUPREME COURT

S. THURAIRAJA, P.C., J.

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an Application for Leave to Appeal from the Judgment of the Civil Appellate High Court of Sabaragamuwa holden in Ratnapura dated 9.11.2011.

SC APPEAL NO. 145/2013

SC/HCCA/LA No.527/2011

SP/HCCA/RAT/ No. 201/2009(FA)

DC Ratnapura Case No.2744/L

1. T.M. Dingiri Mahathmaya (Deceased)
1 (a). Piyaseeli Podimenike Tennakoon.

2. B.W. Jayawardena,
Both of Sannasgama, Lellopitiya.

Plaintiffs

VS

1. H. Don Brampi Singho (deceased)
1(a). H. Dona Kamalawathie,
Sannasgama, Lellopitiya.

Defendant

AND BETWEEN

1. T.M. Dingiri Mahathmaya (Deceased)
1 (a). Piyaseeli Podimenike Tennakoon.

2. B.W. Jayawardena,
Both of Sannasgama, Lellopitiya.

Plaintiffs-Appellants

VS

2. H. Don Brampi Singho (deceased)
1(a). H. Dona Kamalawathie,
Sannasgama, Lellopitiya.
1 (a) Substituted Defendant- Respondent

AND NOW BETWEEN

1. H. Don Brampi Singho (deceased)
1(a). H. Dona Kamalawathie,
Sannasgama, Lellopitiya.
1 (a) Substituted Defendant- Respondent-Appellant

VS

1. T.M. Dingiri Mahathmaya (Deceased)
1 (a). Piyaseeli Podimenike Tennakoon.

2. B.W. Jayawardena,
Both of Sannasgama, Lellopitiya.
Plaintiffs-Appellants- Respondents

BEFORE : **SISIRA J. DE ABREW, J.**
MURDU N.B. FERNANDO, PC, J. AND
S. THURAIRAJA, PC, J.

COUNSEL : Navin Marapana, PC with Saumya Hettiarachchi for the 1 (a) Substituted Defendant- Respondent- Appellant.
Ikram Mohamed, PC with Anuradha Dharmawardena and Vinura Jayawardena for the Plaintiffs-Appellants- Respondents.

ARGUED ON : 20th January 2021.

WRITTEN SUBMISSIONS : 1 (a) Substituted Defendant- Respondent- Appellant on 12th December 2013.

Plaintiffs-Appellants- Respondents on 20th May 2014.

DECIDED ON : 15th March 2021.

S. THURAIRAJA, PC, J.

Introduction

Hettige Don Brampi Singho the Defendant-Respondent-Appellant (hereinafter referred to as the Appellant) preferred an appeal to this Court against the judgment of the Civil Appellate High Court of Rathnapura which issued a Judgment in favour of Tennakoon Mudiyanselage Dingiri Mahathmaya the Plaintiff-Appellant-Respondent (hereinafter referred to as the Respondent) and this court granted leave to appeal on the question of law set out in paragraph 14 (a) of the Petition dated 5th December 2011.

The relevant question of law is reproduced for ease of reference

"*14(a) Have the Learned High Court Judges erred in holding that the respondents have identified the subject land?*"

Learned President's Counsel who appeared for the Appellant reiterated that his appeal is solely on non-identification of the corpus. Both learned Counsel made comprehensive submissions and this Judgment has taken into consideration the Petition, Affidavit, Written Submissions and all annexed materials.

It will be prudent to set out the facts of this case and in the process, it will be mandatory to refer to the history (which is available in the brief) of this litigation.

Brief Facts

The deceased Respondent, Tennakone Mudiyansalage Dingiri Mahathmaya of Sannasgama filed a plaint at the Court of Request of Ratnapura under the case number C.R No. Class RET/20 No. 20256 to eject the deceased Appellant, Hettige Don Brampi Singho and Dhanapala Arachchilage Carolis Appu. The case was settled and the terms of settlement were duly filed on the 21st December 1927. The terms of settlement were as follows:

1. *Plaintiff be declared entitled to the land called "Medawatta" and the partly tiled and thatched house standing there all.*
2. *The defendants to remain in the said house paying an annual rent of Rs. 3 to the plaintiff for a period of 50 years.*
3. *Parties to bear their own costs.*

Following this on the 10th February 1928 the Commissioner of Request entered the Decree.

Further, a lease agreement was entered on the 30th November 1927 between Tennakone Mudiyansalage Dingiri Mahathmaya (Deceased Respondent) and Hettige Don Brampi Singho (Deceased Appellant) for a lease amount of Rs. 150/= covering a period of 50 years. A Deed of Lease No. 12525 (hereinafter referred to as "*Deed of Lease No. 12525*") dated 30th November 1927 attested by D.P.S. Rajapakse was signed by all parties and duly registered to effect this understanding.

Since Hettige Don Brampi Singho (Deceased Appellant) did not vacate the said land and premises upon the expiration of the Deed of Lease No. 12525 in or around

30th November 1977, the deceased Respondent filed this present action to evict him from the said property at the District Court of Ratnapura on the 8th March 1978.

Tennakone Mudiyansalage Dingiri Mahathmaya who was the original 1st Plaintiff-Appellant-Respondent died during the pendency of the action and was substituted by Piyaseeli Podimenike Tennakoon who is the Substituted Plaintiff-Appellant-Respondent. Further Hettige Don Brampi Singho who was the original Defendant-Respondent-Appellant died during the pendency of the action and was substituted by H. Dona Kamalawathie who is the Substituted Defendant-Respondent-Appellant. It is also noteworthy that the Plaint was amended on the 12th May 1994. The Appellant filed their answer on the 13th February 1980. The Learned District Court Judge dismissed the plaint on the basis that the land is not properly identified.

The Respondents appealed against the said Order to the Civil Appellate High Court. The Learned Judges decided that the District Judge has misunderstood the nature of the case and therefore had misdirected himself in dismissing the case for non-identification of the property. The Civil Appellate Judges entered a judgment in favour of the Respondent.

The Appellant has invoked the jurisdiction of this court by way of a Petition dated 5th December 2011 and this Court has granted leave to appeal on the above-mentioned question of law. Since both Counsels made submissions on both judgments, I have carefully perused the same.

Identity of the Corpus

In **Mary Beatrice et al. v Seneviratne (1997) 1 SLR 197** Senanayake J took the opportunity to quote the following passage from Maasdorp, Institutes of Cape Law 4th Edition Volume 3 page 248;

> *"A lessee as already stated is not entitled to dispute his landlord's title and consequently he cannot refuse to give up possession of the property at the*

termination of his lease on the ground that he is himself the rightful owner of the said property. His duty in such a case is first to restore the property to the lessor and then litigate with him as to the ownership."

The above passage was accepted by the Supreme Court in the case of **Bandara v Piyasena 77 NLR 102**.

Taking into consideration the above passage and the judgments in **Bandara v Piyasena (supra)** and **Mary Beatrice (supra)** it could be seen that this is an action in relation to the fulfilment or non-fulfilment of contractual obligations arsing between a lessor and lessee. Therefore, this is an action filed against a tenant holding over. Hence a distinction can be made between a *rei vindicatio action* and an action *against a tenant holding over*. [Vide **Pathirana v Jayasundera 58 NLR 169 @ 173**]

As per the sole question of law raised, it is pertinent to peruse the judgments of the District Court and the Civil Appellate High Court. I find the observations made by the Judges of the Civil Appellate Court acceptable as the learned District Judge had misidentified this case as a case of *actio rei vindicatio*. It could also be seen that the learned District Judge had relied on the case of **Peeris et al v Savunhamy 54 NLR 207** in arriving at his decision. Due to the importance placed by the District Court judge on the case of **Peeris v Savunhamy**, it is essential that I take into consideration the dictum of that judgement and its applicability to the present case.

The case of **Peeris v Savunhamy** dealt with two issues in its appeal. Firstly, it dealt with the burden of proof upon the plaintiff to prove that he has a dominium and secondly, the court dealt with the issue of whether the court could reverse the findings of a trial judge if it was demonstrated that he had misjudged the facts. In that case the plaintiff sought to vindicate title to an undivided share of a land. However, the plaintiff had no title deeds for her share and based her entire claim on prescriptive possession. The court held that in an action for declaration of title to land, where the defendant is in possession of the land in dispute, the burden is on the plaintiff to prove that he has

dominium and further the courts went on to state that a finding of fact may be reversed on appeal if the trial Judge has demonstrably misjudged the position.

In my view this case is not relevant to the facts in issue, as in the present case the establishment of the dominium is not the issue but the identity of the corpus. It is appropriate to take into consideration the observation made by Lord Halsbury in the case **Queen v Leathern (H.L.) 1901 at 495** with regard to the application of case laws;

> *"…that every judgment must be read as applicable to the particular facts proved or assumed to be proved since the generality of the expressions which may be found they are not intended to the expositions of the whole law but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always, logical at all."*

Following the decision in **Peeris v Savunhamy** many cases elaborated the position with regard to the establishment of the identity of the corpus. In the case of **Seyed Mohamed et al. v Perera 58 NLR 246**, Sinnetamby J in not following the decision in the case of **Peeris v Savunhamy** was of the view that to identify the premises in dispute in an action for declaration of title to immovable property, the Court may take into consideration statements of boundaries in title deeds of adjoining lands belonging to persons who are strangers to the action and who have not been called to give evidence. The evidence of such title deeds may become inadmissible only if objection to their production is taken in the court of first instance; they cannot be objected to for the first time in appeal.

The Supreme Court in **Ratnayake et al. v Kumarihamy et al. (2005) 1 SLR 303**, in deciding whether the trial court had correctly identified the extent of the corpus

was of the opinion that both oral and documentary evidence could be considered to identify a corpus on a balance of probability.

This shows that the established law or procedure in identifying the extent of a corpus in a dispute takes into consideration statement of boundaries in title deeds of not only the land in dispute but the adjoining lands even though they are strangers to the action and both oral and documentary evidence is considered on a balance of probabilities. As found in any *rei vindicatio* action, the burden of proof in an action against a tenant holding over is on the plaintiff and they need to prove such an onus on a balance of probability. [Vide **Loku Menike et al. v Gunasekare (1997) 2 SLR 281**]

Now I consider the judgment of the High Court, where the learned judges had identified the issues, briefly set out their reasons and had come to their conclusions stating that the said corpus is adequately identified.

In order to identify the corpus "Medawatte" we need to trace the point at which both parties agree to the extent and identity of the corpus. This could be seen with regard to the settlement agreement entered into at the Court of Requests of Ratnapura on the 21st December 1927. Accordingly, the Commissioner of Request entered the Decree on the 10th February 1928.

It is pertinent to reproduce the relevant portion of the decree where the corpus is identified and explained.

Decree

"This action coming on for final disposal before W. Samsons esqur Commissioner of Requests, Ratnapura on the 10th Day of February 1928, in the presence of Messrs Attygala, Muttettuwegama, on the part of the Plaintiff, and of Messrs Wijetilaka and Peeris, on the part of the Defendants, it is ordered and decreed, that the Plaintiff be and the same is hereby declared entitled to ***the land called Medawatta***

situate at Sannasgama bounded on the North by Digarolleidama, East by Palegampolagewatta, South by High Road and West by Landewatta, containing in extent, 3 Seru Kurakkan sowing and the part by titled and thatched house thereon."

(Emphasis added)

It is also important to take into consideration the description of the corpus provided in the Deed of Lease No. 12525 for clarity as all parties have signed that agreement thereby agreeing on the identity of the corpus.

"ඉහත කී බදු දීමනාකාර යාට අයිතිව තිබූ සබරගමු පළාතේ රත්නපුර දිස්ත්‍රික්කුවේ නවදුන් කෝරළේ උඩපත්තුවේ **සන්නස්ගම තිබෙන මැදවත්තට මායිම් උතුරට දිග රොලෙල් ඉඩමද නැගෙනහිරට කරෝලිස් අප්පුගේ වත්තද දකුණට මහපාරද බස්නා ඉරට ලන්දෙ වත්තද මෙහි තුළ කුරක්කන් සේරු තුනක පමණ වපසරිය ඇති ඉඩම** තුළ මෙහි බදු ගැණුම්කාරයා විසින් ගොඩ නඟා පදින්විව සිටින දැනට උළු සහ වල් සෙවිලි ගෙය පිළිබඳ බිම් බද්දද..."

(Emphasis added)

English translation of the description mentioned above:

The said Lessor owned an allotment of Land with the land lease called **Medawaththa** together with the tile and weed roofed house built by the lessee standing thereon situated at the village of Sannasgama in the Uda Pattu of Nawadun Korale in the District of Rathnapura Sabaragamuwa Province and is bounded on the **NORTH by Digarolel Land on the EAST by Land claimed by Karolis Appu on the SOUTH by Main Road and on the WEST by Landewaththa containing in extent of three (3) Seru of Kurakkan...**

(Emphasis added)

This brings us to the present action filed in 1978 by the Respondent to evict the Appellant upon the expiration of the Deed of Lease No. 12525 on the 30th November 1977. The schedule in the original plaint filed in 1978 described the property as follow:

"සබරගමු පළාතේ රත්නපුර දිසාවේ නවදුන් කෝරළේ උඩපත්තුවේ සන්නස්ගම **තිබෙන මැදවත්තට මායිම්: උතුරට දිගරොල්ලේ ඉඩමද, නැගෙනහිරට කරෝලිස් අප්පුගේ වත්තද, දකුණට මහපාරද, හා බස්නාහිරට ලන්දෙ වත්තද යන මෙකී මායිම් තුළ කුරක්කන් සේරු තුනක් පමණ වපසරිය ඇති ඉඩම** හා එහි තුල පිහිටි ගොඩනැගිල්ලන් සමඟ."

(Emphasis added)

English Translation of the above schedule in the original plaint filed in 1978:

"Allotment of Land called **Medawaththa** together with the building and everything standing thereon situated at the village of Sannasgama in the Uda Pattu of Nawadun Korale in the District of Rathnapura Sabaragamuwa Province and is bounded on the **NORTH by Digarolle Land on the EAST by Land claimed by Karolis Appu on the SOUTH by Main Road and on the WEST by Landewaththa containing in extent of three (3) Seru of Kurakkan…"**

(Emphasis added)

According to the amended plaint dated 12th May 1994 the schedule described the property as follows.

"සබරගමු පළාතේ රත්නපුර දිසාවේ නවදුන් කෝරළේ උඩ පත්තුවේ සන්නස්ගම තිබෙන මැදවත්ත නැමති ඉඩමට මායිම්: උතුරට දිගරොල්ලේ ඉඩමද, නැගෙනහිරට කරෝලිස් අප්පුගේ වත්තද,

දකුණට මහ පාරද, හා බස්නාහිරට ලන්දෙ වත්තද යන මෙකී මායිම් තුළ කුරක්කන් සේරු තුන (3) ක් පමණ වපසරිය ඇති ඉඩම හා එහි තුල පිහිටි ගොඩනැගිල්ලත් සමඟ වේ.

දැනට මෙම දේපල අවසර අත් මිනින්දෝරු එම්. එස්. දියගම මහතා විසින් මැනසාදන ලද අxක 1004 සහ 12/07/1983 දිනැති සැලැස්මේ දක්වා ඇති උතුරට - දිගරොල්ල සහ පහල ලියැද්ද ද, නැගෙනහිරට- ආටිගලගේ වත්ත ද, දකුණට- කරෝලිස් අප්පුගේ වත්ත ද, පාලුගම්පල ගම ද, බස්නාහිරට- රත්නපුර සිට පැල්මඩුල්ල දක්වා ඇති මහා මාර්ගයද, ලන්දෙ වත්තද යන මෙකී මායිම් තුළ අක්කර එකයි රූඩ් දෙකයි පර්චස් දහ තුන (අක්.1 රූ.2 පර්.13) (හෙක්ටයාර් 0.6399) ක් විශාල ඉඩම සහ එය තුල පිහිටි ගොඩනැගිල්ල ද වේ."

English Translation of the above schedule in the amended plaint filed in 1994:

Allotment of Land called Medawaththa together with the buildings and everything standing thereon situated at the village of Sannasgama in the Uda Pattu of Nawadun Korale in the District of Rathnapura Sabaragamuwa Province and is bounded on the **NORTH** by Digarolle Land on the **EAST** by Land claimed by Karolis Appu on the **SOUTH** by Main Road and on the **WEST** by Landewaththa containing in extent of three (3) Seru of Kurakkan.

Presently, said land is depicted in Plan No. 1004 dated 12/07/1983 made by M.S. Diyagama Licensed Surveyor together with the buildings standing thereon and is bounded on the **NORTH** by Digarolla and Pahala Liyedda on the **EAST** by Land claimed by Attygalle on the **SOUTH** by Land claimed by Karolis Appu and Palugampala Village and on the **WEST** by Rathnapura- Pelmadulla Main Road and Landewaththa containing in extent of **One Acre Two Roods Thirteen Perches (A1-R2-P13) (0.6399 Hectares)**.

The appellant filed his answer dated 13th February 1980 and described the property as follows:

> "සබරගමු පළාතේ රත්නපුර දිසාවේ නවදුන් කෝරළේ උඩ පත්තුවේ සන්නස්ගම පිහිටි උතුරට පහල ලියැද්ද, සහ පිටකුඛුර ද, නැගෙනහිරට හෙන්ද්‍රික් අප්පුගේ ඉඩම සහ පාලුගම්පල දෙනිය ද, දකුණට මහ පාර සහ බස්නාහිරට ලන්දෙ වත්තද, මායිම් වූ කුරක්කන් සේරු 10 ක් පමණ වපසරිය වූ මැදවත්ත, ආටිගලවත්ත, සහ නවගමුවගේ පහලවත්ත නොහොත් දිගරොල්ල සහ ඒකාබද්ධ ඉඩම වේ."

English Translation of the above schedule in the Answer filed in 1980:

> Allotment of Land called Medawaththa, Attygallewaththa and Nawagamuwage Pahalawaththa alias Digarolla and an amalgamated land together with the buildings and everything standing thereon situated at Sannasgama Village in the Uda Pattu of Nawadun Korale in the District of Rathnapura Sabaragamuwa Province and is bounded on the **NORTH** by Pahala Liyedda and Pitakubura on the **EAST** by Land claimed by Hendrik Appu and Paalugampala Deniya on the **SOUTH** by Main Road and on the **WEST** by Landewaththa containing in extent of Ten (10) Seru of Kurakkan…
>
> In the original answer the appellant took the position that the property is a combined property and Weerasingha Haramanis Da Silva Goonathilaka was entitled to 5/16 shares. Further the said Haramanis da Silva Goonathilaka had sold this property and subsequently he is entitled for undivided 5/192 shares.

It could be seen that from 1927 up until 1978 there has been no different description of the corpus in issue. The description of the corpus is said to have been changed after this case was filed.

It comes to my attention that there is a court proceeding at the District Court of Ratnapura marked by the Appellant uner **V4**. The Appellant had instituted a land & damage case against Dhanapala Arachchillage Joslin Nona and Walliwala Gamage Gunasena. The case number was 8091 and the date of the plaint was 7th November 1968. In paragraph 2 of the plaint, it states as follows:

> "The person called Tennakone Mudiyansalage Dingiri Mahathmaya the original owner of the land called and known as "Madawatta" situated at Sannasgama within the jurisdiction of this court and more fully described in the schedule hereto."

The schedule referred there is identical to the first case filed in 1927, and the plaint in the present case. It is observed that one Mr. B.L. Abeyratne proctor had appeared for the said Brampi Singho the Deceased Appellant who was a plaintiff in a different case No. 8091 dated 7th November 1968 at the District Court of Ratnapura. In the present case the answer and the amended answer states that one Mr. B.L. Abeyratne had appeared for them (appellant). It is also observed that in the Civil Appellate High Court in Ratnapura one Mr. B.L. Abeyratne appeared. This shows that the Appellant themselves acknowledge the fact that the Respondents are the owners of the corpus in dispute and they are in agreement with the identity of the corpus – Medawatte.

The above evidence the fact that the owner is the Respondent and the property in dispute was the property stated in the schedule. Considering all, I find that the findings of the learned High Court Judge is reasonable and supported by evidence as envisaged in the judgment of **Ratnayake v Kumarihamy**. (supra) Therefore, I hold that the corpus is properly identified.

Bona Fide Conduct

In the amended answer filed in the District Court dated 29th July 1994, in paragraph 12 the appellant takes up a position that he was forced to sign the said deed of lease No. 12525 (Which was executed on the 30th November 1927). This is the first time that the appellant takes up a position that he was forced to sign the said deed.

The circumstances of entering a lease agreement are sufficiently explained at the beginning and it could be seen that from 1927 there has been no complaint made to any relevant authorities of being forced to sign a deed.

Further the Appellant filed a case against Dhanapala Arachchilage Joslin Nona and another at the District Court of Ratnapura under case number 8091, in the plaint at paragraph 3 states as follows;

> *"3. The plaintiff built a tiled house on the land and the said Dingirimahatmaya by and upon deed of lease No. 12525 dated 30th November 1927 gave a lease of the said land to the said plaintiff for a period of fifty years form 30th November 1927. "*
>
> (sic)

This shows that such a position was raised by the Appellant to mislead the courts and to get a favourable decision. Such a position taken by the Appellant and later not pursued is disrespectable to the judicial system and it is supported by two Maxims of Equity.

Firstly, we can consider this issue under the maxim of "*he who comes in to equity must come with clean hands.*"

It is an established fact that if a person who approaches the court must come with clean hands and put forward all the material facts otherwise, he shall be guilty of misleading the court and his application or petition may be dismissed at the threshold.

If an applicant makes false statement and/or suppresses material facts or attempts to mislead the court, the court may dismiss action on that ground alone.

In **Har Narain v Badri Das [1964] 2 S.C.R. 203**, Gajendragadkar J. speaking for the Court observed:

> *"It is of utmost importance that in making material statements and setting forth grounds in applications for special leave, care must be taken not to make any statements which are inaccurate, untrue or misleading."*

In that case the Court revoked the leave granted because the appellant had made certain inaccurate and misleading statements in his petition for leave to appeal to the Indian Supreme Court.

He who comes into equity must come with clean hands. A court of equity will refuse relief to a plaintiff whose conduct in regard to the subject matter of the litigation has been improper. [Vide **Arunima Baruah v Union of India [2007] 6 SCC 120**]

As discussed earlier it is observed that the appellants had not acted in good faith. Further they tried to mislead the court through their amended answers stating that the said lease was signed by force. This court will not tolerate any person who is misleading the judicial system and it should be seriously noted and dealt with. As such this court is empowered to dismiss this application *in limine* and order cost as way of penalty.

Secondly, we can consider this issue under the maxim of *suppressio veri et suggestio falsi* (suppression of truth and suggestion of falsehood).

This is a fairly new maxim of equity. It has developed to form as a rule of law. *Suppressio veri* and/or *suggestio falsi* means that when with respect to a material fact of the case, either suppression of truth or suggestion of a false statement is proven, then the injured party can seek relief. Both of these are considered to be equally wrong. In this situation it is important to consider the case of **Regina v Lucas (1981) 2 All ER**

1008 which advances the proposition that a lie, if established, would corroborate the story of the opponents. Following this decision Atukorale, J in **Karunanayake v Karunasiri Perera (1986) 2 Sri L.R 27** (with Sharvananda, C.J and Colin-Thome, J agreeing) expressed the view that principle envisaged in the ***Lucas*** case applies equally to civil cases as it would to criminal cases.

In this situation it could be seen that the Appellants have suggested a false position thereby falling within the maxim of *suggestio falsi*. The courts in similar jurisdictions such as India, in the case of **K.K. Anathan Pillai v State of Kerala (1968) AIR Ker 234**, during an *ex parte* proceeding, the party that had appeared, did not disclose the complete material facts in order to get a stay order in their favour. Later, when the Court discovered this, it was held that such a stay order issued on untrue facts would be deemed invalid. In another Indian case **Nand Lal v State of Jammu & Kashmir (1960) AIR JK 19**, it was held that when the relevant facts of the case are not correctly and precisely mentioned in the petition, then by application of this maxim, the writ petition will be dismissed, without going into the merits of the case.

As stated earlier it is the view of this court not to tolerate any person who is misleading the judicial system and it should be seriously noted and dealt with. Through the application of such a maxim a false suggestion such as in this case could lead to dismissal of this petition of the Appellant.

In applying both these maxims of equity in the present scenario it could be seen that the Appellant by making a false statement has invited the courts to dismiss this application and order costs. I am of the view that a cost should be imposed upon the Appellant for disrespecting the judicial system and damages must be awarded to the Respondent.

Summary

Considering all the above matters, I dismiss this appeal with costs. Respondents are also entitled to recover the costs in both the District Court and the High Courts. In view of the conclusions reached, I answer the above questions of law in the negative.

Appeal 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 application for Leave to Appeal against judgement dated 17/12/14 delivered by the High Court of the Western Province exercising Civil Appellate jurisdiction at Gampaha in WP/HCCA / GAM/173/2009 (F) DC Gampaha case No. 37834/P.

SC Appeal 154/2016
SC /HCCA/LA No. 47/2015
WP/HCCA/Gampaha No. 173/2009 (F)
DC Gampaha Case No. 37834/P

Lulwala Hewayalage Tilanganee Weerasuriya,
182/A/1 Suraweera Mawatha, Walpola, Ragama.

1b and 2a Substituted Defendants-Respondents-Petitioner

Vs.

Kirigalbadage Gamini Chandrasena
No. 186, Boystown Road,
Walpola, Batuwatte.

Plaintiff-Appellant-Respondent

Before : Jayantha Jayasuriya, PC, CJ

S. Thurairaja, PC, J.

Yasantha Kodagoda, PC, J

Counsel	:	Dr. Sunil F.A. Cooray with Nilanga Perere for the 1b and 2a Substituted Defendant-Respondent-Appellants.
		S.N. Vijithsingh for the Plaintiff-Appellant-Respondent.
Written submissions		
filed on	:	13.09.2016 and 12.01.2021 by the 1b and 2a Substituted Defendant-Respondent-Appellant.
		20.10.2016 by the Plaintiff-Appellant-Respondent.
Argued on	:	27.08.2020
Decided on	:	17.06.2021

Jayantha Jayasuriya, PC, CJ

The Plaintiff-Appellant-Respondent-Respondent (hereinafter referred to as the "plaintiff-respondent") instituted a partition action in the District Court of Gampaha. The corpus as described in the schedule of the plaint is 24.61 perches in extent. The said land is depicted as lot 4 in plan no. P/3263 dated 13 May 1980 (the final partition plan in the aforesaid District Court of Gampaha Case P/17889), which is a divided portion of a land called Higgaha watte. Two defendants are cited in the plaint and the plaintiff-respondent claimed that he along with the two defendants are the lawful co-owners of the corpus. The entitlement of each one of them is set out in paragraph 6 of the plaint. He claims that he is entitled to 480/1392 shares and the 1st and 2nd defendants are entitled to 288/1392 and 624/1392 shares of the said land, respectively.

However, the two defendants disputed the claim of the plaintiff-respondent. They claimed that the plaintiff-respondent has no entitlement to any shares of the said property and the two defendants are the only lawful co-owners.

There is no dispute on the identity of the corpus. All parties agreed that the corpus in question was a part of the corpus in a prior partition action (P/17889). According to the final decree of the said partition action dated 04 May 1981, three persons namely Leelawathie, Rosana alias Seeta Fernando and Kusumawathie derived 480/1392, 288/1392 and 624/1392 shares of the said land respectively. Rosana alias Seeta Fernando is the 1st Defendant in the partition action initiated by the plaintiff-respondent. Said Kusumawathie had transferred all here rights and shares to one Siridasa in 1983 (subsequent to the initial partition action) and said Siridasa transferred all rights and shares derived from Kusumawathie to the 2nd Defendant.

The main contention in this case is as to who derives the shares allocated to aforesaid Leelawathie, from the final decree in the initial partition case No P/17889.

The final decree of the partition case under consideration was issued on the 04th of May 1981. The plaintiff-respondent claims that he derived the co-ownership to this property through the Deed No 451 dated 02.11.1981. Aforesaid Leelawathie [one of the three co-owners on whom the shares were devolved by the final decree in the aforementioned initial partition action (P/17889)] conveyed 10 perches (480/1392 shares) that she derived from the partition case to the plaintiff-respondent through the aforesaid Deed No 451 dated 02.11.1981. This deed was produced marked "P3" at the trial. It is on this basis that the plaintiff-respondent sets out the devolution of the title. Respective shares of the three persons, whom he named as co-owners of the said property has been calculated on this basis.

However, the two defendants disputed the devolution of the title set out by the plaintiff-respondent. They claimed that Leelawathie did not have a right to convey the shares devolved from the final decree in partition action P/17889, to the plaintiff-respondent in 1981. It is their contention that said Leelawathie, had conveyed the 'lot or lots' that would be allocated to her at the final determination of the partition action 17889/P, to one of the other two co-owners namely Kusumawathie by the deed no 3936 attested in 1976, while the said partition action was in

progress. (The aforesaid deed 3936 was marked 1V2 by the defendants through the cross-examination of the plaintiff-respondent subject to proof but did not lead further evidence to prove the execution of the said deed).

Thereafter said Kusumawathie on 3rd November 1983 transferred all shares she derived from the Final Decree in Case No. 17889/P of District Court of Gampaha and all shares said Leelawathie derived from the said Final Decree (which were already transferred to her on 28 October 1976 by aforesaid deed No. 3936 by said Leelawathie) to one R.D. Siriyadasa by deed No 5346 attested by Valentine Dias N.P. (The aforesaid deed 5346 was produced marked 2V1). Thereafter, said R.D.Siriyadasa transferred all his rights derived from said Leelawathie to L.H.Winston Suraweera (the 2nd Defendant in the partition action relevant to this matter) on 20th January 1984 by the deed No 5454 attested by M.P.Padmini Pathirathna N.P. (The aforesaid deed 5454 was produced marked 2V2). Therefore, defendents claim that the 2nd Defendant had derived all rights and shares of said Kusumawathie (including shares of Leelawathie, which were transferred to Kusumawathie by deed 3936 that was produced marked 1V2, subject to proof) and the plaintiff-respondent could not derive any rights through the transfer effected by Leelawathie by deed 451 dated 02 November 1981.

The trial in the District Court proceeded on thirteen points of contest. One of the points of contest raised by the plaintiff-respondent was:

No. 2 Whether rights to the land should be devolved on the parties in accordance with the plaint?

Three of the points of contest raised by the two defendants include:

No. 5 – Whether Leelawathie had transferred her rights to Kusumawathie by the Deed No 3936 dated 28.10.1976

No. 6 – Whether the Plaintiff has any title or possessory Rights to the property in question

No. 7 – Whether all rights of the land should be devolved in the two defendants as in accordance with the scheme of devolution set out by the two defendants.

The plaintiff-respondent raised two additional points of contest namely:

No. 12 – Whether the deed No 3936 dated 28.10.1976 pleaded in the statement of claim of the two Defendants' is a fraudulent deed (චිත්තිකරුවන්ගේ හිමිකම් ප්‍රකාශයේ සඳහන් අංක 3936 සහ 1976.10.28 දින දරණ වැලන්ටයින් ඩයස් නොතාරිස් තැන සහතික කළ ඔප්පුව වංචනික ලෙස සකස් කරන ලද ඔප්පුවක් ද?)

No. 13 – Whether the deed No 451 dated 02.11.1981 had gained priority by being properly registered under the provisions of the Registration of Documents Ordinance.

In this matter, three different stages of the proceedings namely raising points of contest, the order allowing the deed 3936 marked 1V2 be produced subject to proof and the delivery of the judgement, did take place before three different judges. It was not the same learned judge before whom the points of contest were raised, who delivered the judgement. The Learned District Judge who delivered the judgment dated 03.09.2009 held in favour of the two defendants. He answered points of contest Nos. 5 and 7 affirmatively and answered point of contest No. 6, "has no right". Furthermore, he held that points of contest Nos. 12 and 13, 'do not arise'. The learned trial judge accepted the scheme of partition of the two defendants and entered a judgment in favour of the two defendants.

Being aggrieved by the said judgment of the learned district judge, the plaintiff-respondent appealed to the Civil Appellate High Court. The learned Judges of the Civil Appellate High Court set aside the judgment of the District Court and held in favour of the plaintiff-respondent. The learned judges of the Civil Appellate High Court ordered that the corpus be partitioned in accordance with the devolution of title and shares set out by the plaintiff-respondent.

The main ground on which the Learned High Court Judges set aside the Judgment of the District Court is that the Learned Judge's decision to consider deed No 3936 dated 28.10.1976 as evidence, is contrary to section 114(1) of the Civil Procedure Code and hence, was a misdirection of law. They further held that point of contest No. 12 namely - *Whether the deed No 3936 dated 28.10.1976 pleaded in the statement of claim of the two Defendants' is a fraudulent deed* (විත්තිකරුවන්ගේ හිමිකම් ප්‍රකාශයේ සඳහන් අංක 3936 සහ 1976.10.28 දින දරණ වැලන්ටයින් ඩයස් නොතාරිස් තැන සහතික කළ ඔප්පුව වංචනික ලෙස සකස් කරන ලද ඔප්පුවක් ද?) - should have been answered affirmatively.

The two Defendants-Respondents-Petitioners-Appellants (hereinafter referred to as the "defendant-appellants") being aggrieved with the decision of the Civil Appellate High Court are challenging the above decision of the Civil Appellate High Court, before this Court. This Court had granted special leave to appeal on the following three questions of law raised by the defendant-appellants:

1). Did their Lordships at the Civil Appellate High Court err in law in deciding that deed no 3936 (1V2) is a fraudulent document for the mere reason that the same has been marked subject to proof?

2). Did their Lordships at the Civil Appellate High Court err in law by wrongly applying the principles laid down in the case of Hilda Jayasinghe v Jayawickrema 1982(1) SLR 349?

3). Did their Lordships at the Civil Appellate High Court err in law by failing to appreciate the fact that the deed no 1V2 (No 3946) is properly registered as per the law and therefore it should have the benefit of priority?

This Court had further accepted the following two questions of law raised by the plaintiff-respondent:

4). Whether the due execution of the Deed No 3936 dated 28.10.1976 marked as '1V2' is proved in terms of Section 68 of the Partition Law in the circumstances of this case?

5). If that issue is answered in the Plaintiff-Appellant-Respondent's favour, whether the questions referred to in the Petition will not arise?

Learned Counsel for the defendant-appellants and the plaintiff-respondent in the course of their oral submissions as well as in the written submissions contended that the two main issues that need to be determined by this Court are:

1. Whether the Deed No. 3936 dated 28.10.1976 had been proved?

and if this question is answered in the affirmative,

2. Whether the said deed should get priority over the deed No 451 dated 02.11.1981, the deed through which the plaintiff-respondent gained co-ownership to the land in question?

It is settled law, that a party to a partition action is not prevented from alienating or mortgaging the right to which such party might become entitled after a partition had been decreed in respect of the land, while the partition action is in progress. However, such transaction becomes effective to vest rights in the transferee only after the interest is, in law allotted to the party, namely, only at the stage when the final decree in the partition action is entered. [**Sirisoma et al v Saranelis Appuhamy** 51 NLR 337, at 343-345, **Subaseris v Prolis** 16 NLR 393 at 395, **Louis Appuhami v Punchi Baba** 10 NLR 196 at 198, **Abdul Ally v Kelaart and Another** (1904) 1 Bal 40 at 43-44].

The plaintiff-respondent does not contest existence of such right to a party in a partition action. However, the issue to be determined by this Court is whether in the given situation, there was admissible evidence available for the trial judge to consider and hold that Leelawathie, conveyed the 'lot or lots' that would be allocated to her at the final determination of the partition action 17889/P, to one of the other two co-owners namely Kusumawathie by the deed no 3936 attested in 1976, while the said partition action was in progress. In other words, whether it was lawful for the trial judge to have considered the deed produced marked "1V2" in the context of the points of contest raised and the objections raised in this matter?

The plaintiff-respondent contends, that the learned district judge erred when he decided in favour of the defendant-appellants by relying on the deed no. 3936 dated 28.10.1976 marked "1V2", for the reason that the appellants failed to prove the said deed in the course of the trial. To the contrary, defendant-appellants contend that no formal proof of deed marked "1V2" is required due to section 68 of the Partition Law No 21 of 1977 as amended.

Section 68 of the Partition Law provides:

"It shall not be necessary in any proceedings under this law to adduce formal proof of the execution of any deed which, on the face of it, purports to have been duly executed, unless the genuineness of that deed is impeached by a party claiming adversely to the party producing that deed, or unless the court requires such proof".

The defendant-appellants tendered the deed in question marked 1V2, in the course of the cross examination of the evidence of the plaintiff-respondent. At that stage the plaintiff-respondent did not accept the said deed and moved that the deed be tendered "subject to proof". However, defendant-appellants at that stage disputed such requirement. Nonetheless, the learned trial judge having considered this matter ordered, "the said deed be marked subject to proof". However, no evidence had been presented during the trial to prove the execution of the deed marked "1V2". When the trial resumed before a new judge on 30 March 2009, the plaintiff-respondent had moved that the deed marked 1V2 be struck off as it had not been proved. Defendant-appellants at that stage had re-iterated that no further proof of the said deed was required. It is in this background that the learned trial judge in his judgement dated 03 September 2009 held that there is no requirement to prove the deed "1V2". The learned trial judge arrived at the said conclusion on the premise that the plaintiff-respondent had not challenged and impeached the genuineness of the deed "1V2" in his plaint and therefore did not have a right to raise point of contest No. 12 namely "Whether the deed No 3936 dated 28.10.1976 pleaded in the statement of claim of the two Defendants' is a fraudulent deed". Furthermore, the learned trial judge held that the need to answer point of contest No. 12 did not arise, as the plaintiff-respondent did not impeach the said deed in the pleadings of the plaint. The learned trial judge was of the view that provisions in section 68 of the Partition Law can be invoked in favour of the defendant-appellants in this matter.

The plaintiff-respondent in this matter raised point of contest No. 12 namely – "Whether the deed No 3936 dated 28.10.1976 pleaded in the statement of claim of the two Defendants' is a fraudulent deed", as a further issue, after the defendant-appellants raised the point of contest No.

5 namely "whether Leelawathie referred to in paragraph 3 of the plaint transferred all her rights to Suduwahewage Kusumawathie by the deed no 3936 attested by Valentine Dias Notary on 28 October 1976". Therefore, the plaintiff respondent by raising the point of contest No. 12 had impeached the genuineness of the deed "1V2" at the first given opportunity in these proceedings. The learned trial judge erred when he held that the plaintiff did not have a right to raise the point of contest No. 12 on the premise that he has no such right as he failed to challenge the genuineness of the said deed in the plaint. It is settled law that the issues or points of contest in a civil case need not be confined to the pleadings. (**Attorney-General v Smith** 8 NLR 229 at 241, **Silva v Obeyesekera** 24 NLR 97 at 107, **The Bank of Ceylon, Jaffna v Chelliahpillai** 64 NLR 25 at 27, **De Alwis v De Alwis** 76 NLR 444 at 448). Furthermore, the plaintiff-respondent in his evidence refused to accept the deed 1V2. He further contended that the defendant-appellants failed to produce this deed at the police inquiry held consequent to a compliant he made. According to his evidence, police had called all the parties to attend the inquiry with respective deeds. The defendant-appellants did not produce any deed at that stage whereas the plaintiff-respondent produced the deed of transfer P3. This portion of evidence of the plaintiff-respondent had neither been challenged nor contradicted by the defendant-appellants. When all of these facts are taken together, I am of the view that the plaintiff-respondent had in fact impeached the genuineness of the deed "1V2" and therefore the trial judge should not have dispensed with the formal proof of the deed "1V2" relying on section 68 of the Partition Law. Hence, it remained the duty of the trial judge to have considered whether the deed marked "1V2" has been proved in accordance with the law.

Section 114(1) of the Civil Procedure Code mandates that;

"No document shall be placed on the record unless it has been proved or admitted in accordance with the law of evidence for the time being in force".

Furthermore, section 68 of the Evidence Ordinance provides that;

"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 court and capable of giving evidence".

At the trial, defendant-appellants did not present any evidence to establish the execution of the deed marked "1V2". On behalf of the defendant-appellants, it was submitted before this court that the dispensation of the proof of execution of the deed "1V2" being lawful on the basis that the "execution of a document impeached as having been obtained by fraud need not be proved unless particulars of the alleged fraud relate to its due execution, such as that the execution of the document was done in blank". This proposition is based on the observation of Lawrie ACJ in **Baronchy Appu v Podihamy** (1902) 2 Brownie's Reports 221 at 222….

Lawrie ACJ in the said case observed;

> *"It has, I think been decided that when a deed is impeached as having been obtained by fraud it is not necessary to prove its execution by calling the attesting witnesses".*

He further observed that;

> *"I am inclined to think that the evidence of at least one of the attesting witnesses was necessary to prove that it was a document which was signed, and not a blank sheet of paper".*

The Court of Appeal in **Piyadasa v Binduva alias Gunasekera,** [1992] 1 SLR 108 at 109 having cited the aforementioned observation of Lawrie ACJ observed;

"this decision supports the view that a document formally and duly executed need not be proved even if the signature of the executant was obtained by fraud or deception, but where the document was fraudulently or illegally executed, the due execution must be proved, because the alleged execution is in fact no execution at all".

These two judgements tend to support the proposition that in situations where a party who signed a deed takes up the position that he signed the deed due to a fraud or deception practiced on him, no formal proof of the 'execution' is warranted. Such contention is on the premise that such position amounts to an admission on the 'execution of the deed'. Such a proposition is in line with section 70 of the Evidence Ordinance, which reads as:

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

However, such a proposition does not support the contention that no formal proof of the execution of a deed is warranted as provided under section 114(1) of the Civil Procedure Code read with section 68 of the Evidence Ordinance, when *'the genuineness of such deed'* is impeached as provided under section 68 of the Partition Law. Instances on which the genuineness of a deed can be impeached is far wider than the specific instance of a specific position that a person signed the deed due to a fraud or a deception practiced on him. To the contrary, section 68 of the Partition Law provides that no formal proof is required in situations when 'a deed on the face of it purports to have been duly executed' **unless** the 'genuineness of the deed is impeached by a party claiming adversely to the party producing that deed' (emphasis added).

Therefore, in a partition action when the genuineness of a deed is impeached, the party who seeks to make his claim based on such deed should provide evidence of its execution as required

under section 114(1) of the Civil Procedure Code read with section 68 of the Evidence Ordinance, unless law dispenses with, such proof. The evidentiary requirement arising under section 68 of the Evidence Ordinance is aptly discussed by the Supreme Court in its decision in **Samarakoon v Gunasekera** [2011] 1 SLR 149.

In **Samarakoon v Gunasekera** (supra at 154) the Supreme Court held;

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

Further explaining the factual position that arose in that case and explaining the legal proposition in the proper context the Supreme Court further observed;

> *"In the present case, the defendants had not challenged the due execution of deeds P3, P5 and P6. When they objected to those documents at the time the same were marked in evidence what they did was to challenge the plaintiff to prove those documents in the proper way in which a document required by law to be attested has to be proved if it is to be used as evidence. The plaintiff thus had notice that he had to prove P3, P5 and P6 in the manner provided in section 68 of the Evidence Ordinance. He had failed to lead the evidence necessary to prove those documents in accordance with the provisions of section 68. At the close of the plaintiff's case when the documents marked were read in evidence the defendants have stated that documents not proved should be excluded. This was a reference to documents marked subject to proof and proved in accordance with the law. In view of the failure of the plaintiff to prove documents P3, P5 and P6 on which the title claimed by him depended, the learned trial Judge had rightly excluded those documents and had held that the plaintiff had failed to prove his title."*

Similarly, in my view in the instant case also, trial judge's decision to consider deed marked "1V2" as evidence and decide the devolution of title based on the purported transfer of rights by Leelawathie to Kusumawathie, without formal proof of deed marked "1V2", is contrary to section 114(1) of the Civil Procedure Code read with section 68 of the Evidence Ordinance. Thereby the learned trial judge had erred in law when he held in favour of the defendant-appellants based on the deed "1V2" which was not proved in accordance with the law. The Supreme Court in **Perera & Others v Elisahamy** (1961) 65 CLW 59, considering the applicability of section 69 of the Partition Act (the provision similar to section 68 of the Partition Law) observed:

> *"Section 69 of the Partition Act is of no avail in the instant case as that section does not apply to cases in which the genuineness is impeached or the Court requires its proof"*. (at page 60)

Citing with approval the judgment of the Privy Council in [(1928) A.I.R (Privy Council) 127] the court further observed:

> *"A court cannot act on facts which are not proved"*. (at page 60)

The plaintiff-respondent's claim to the land in question and the devolution of title is based on the final decree in District Court of Gampaha Case P/17889 and Deed No 451 dated 02.11.1981 which was produced marked "P3". Defendant-appellants did not impeach the genuineness of the deed marked "P3". Furthermore, one of the attesting witnesses to this deed did testify at the trial. Therefore, the plaintiff had proved his rights to the land and the learned trial judge had erred when he failed to consider plaintiff's rights as proved by evidence in court.

In view of the reasons enumerated hereinbefore, I am of the view that the trial judge's decision to answer point of contest No. 2 as – "Entitled as per the judgment" and the decision to answer points of contest Nos. 5 and 7 namely "Whether Leelawathie who is referred to in paragraph 3 of the plaint had transferred all her rights to Suduwa Hewage Kusumawathie by the deed No 3936 attested by Notary Valentine Dias on 28 November 1976?" and "whether all rights to the relevant land should be vested with the 1a and 2a defendants in line with their statement of claim?" in the affirmative, is an error of law.

I hold that the point of contest No. 2 should be answered in the affirmative and points of contest Nos. 5 and 7 should be answered in the negative.

I see no reason to deviate from the decision of the learned judges of the Civil Appellate High Court where they have held that the learned trial judge erred when he concluded that no rights could be devolved on the plaintiff-respondent based on deed "P3". Furthermore I hold that the rights of the parties should be decided as determined by the Civil Appellate High Court. Therefore I affirm the judgment of the Civil Appellate High Court of Gampaha dated 17 December 2014.

However, the learned judges of the Civil Appellate High Court had proceeded further and answered point of contest No 12 - Whether the deed No 3936 dated 28.10.1976 pleaded in the statement of claim of the two Defendants' is a fraudulent deed (**විත්තිකරුවන්ගේ හිමිකම් ප්‍රකාශයේ සඳහන් අංක 3936 සහ 1976.10.28 දින දරණ වැලන්ටයින් ඩයස් නොතාරිස් තැන සහතික කළ ඔප්පුව වංචනික ලෙස සකස් කරන ලද ඔප්පුවක් ද?**) - in the affirmative after holding that the learned trial judge erred when he answered point of contest No. 12 – "Does not arise". The learned judges of the Civil Appellate High Court arrived at this finding in the process of resolving the issue that they identified as the most important issue in this matter. According to them, "whether the deed bearing no. 3936 (which was produced marked 1V2) could be considered to be a genuine deed due to the reason that the said deed remained a deed which was

not proved as the plaintiff demanded that the said deed be produced subject to proof". The learned judges of the Civil Appellate High Court had formulated this question on the assumption that the failure to prove the relevant deed leads to the conclusion or an inference that the said deed is a fraudulent deed. In my view such construction is a misdirection of fact and law.

The sole impact of the challenge to the genuineness of the said deed by the plaintiff respondent in this matter is on the mode of proving the said deed in court. As discussed earlier in this judgment, when a party to a partition action impeaches the genuineness of a deed claiming adversely to the party which produces such deed, such second mentioned party cannot invoke the benefit under section 68 of the Partition Law but should proceed to prove the execution of such deed as provided under section 114(1) of the Civil Procedure Code read with section 68 of the Evidence Ordinance. However, the failure to prove the execution of a deed as required under aforesaid circumstances *per se* in the absence of any other evidence to establish the fraudulent nature of the deed, could not lead to an adverse conclusion on the genuineness of the deed. Such a failure would lead to a situation that the contents of such deed cannot be considered as evidence by court, only.

Therefore, the learned Civil Appellate High Court Judges decision to answer point of contest no. 12 namely "Whether the deed No 3936 dated 28.10.1976 pleaded in the statement of claim of the two Defendants' is a fraudulent deed (**විත්තිකරුවන්ගේ හිමිකම් ප්‍රකාශයේ සඳහන් අංක 3936 සහ 1976.10.28 දින දරණ වැලන්ටයින් ඩයස් නොතාරීස් තැන සහතික කළ ඔප්පුව වංචනික ලෙස සකස් කරන ලද ඔප්පුවක් ද?**), in the affirmative is an error of fact and law.

Hence, the judgement of the Civil Appellate High Court in this matter dated 17 December 2017 is varied. Accordingly I hold that the answer of the learned trial judge to point of contest no. 12 namely – "does not arise" should remain unaltered, due to the reasons enumerated hereinbefore.

In view of the foregoing reasons, I proceed to answer legal issue No 4 raised before this Court (Whether the due execution of the Deed No 3936 dated 28.10.1976 marked as '1V2' is proved in terms of Section 68 of the Partition Law in the circumstances of this case?) in the negative and legal issue No 5 (If that issue is answered in the Plaintiff-Appellant-Respondent's favour, whether the questions referred to in the Petition will not arise?) in the affirmative. In view of these findings the need to answer other legal issues does not arise.

I hold that the rights of the parties should be decided as determined by the Civil Appellate High Court of Gampaha in the judgment dated 17 December 2014 and therefore affirm the judgment of the Civil Appellate High Court of Gampaha dated 17 December 2014 subject to the variation on its decision relating to the point of contest No. 12, as decided hereinbefore. The appeal of the two defendant-appellants is dismissed with costs.

Chief Justice

S. Thurairaja, 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 nature of an Appeal to the Supreme Court in terms of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Officer-in-Charge
Special Crimes Division,
Colombo.

Complainant

SC Appeal No. 155/14
High Court Colombo
Appeal HCMCA No. 106/08
Magistrates Court Maligakanda
Case No. 22070/05

vs.

Mananage Susil Dharmapala
No. 132C, Pitumpe Road,
Padukka.

Accused

AND BETWEEN

Mananage Susil Dharmapala
No. 132C, Pitumpe Road,
Padukka.

Accused – Appellant

vs.

Officer-in-Charge
Special Crimes Division,
Colombo.

Complainant – Respondent

AND NOW BETWEEN

Mananage Susil Dharmapala
No. 132C, Pitumpe Road,
Padukka.

Accused – Appellant – Appellant

vs.

Officer-in-Charge
Special Crimes Division,
Colombo.

Complainant – Respondent - Respondent

Before: **Hon. Priyantha Jayawardena, PC**
Hon. E.A.G.R. Amarasekara
Hon. Yasantha Kodagoda, PC

Counsel: Kapila Suriyaarachchi with Anuradha Bandara and Dilini Wijesekara for the Appellant.
Yuresha De Silva, Senior State Counsel for the Respondent.

Argued on: 25th June 2020

Written Submissions: On behalf of the Appellant, tendered on 16th October 2014 and further written submissions tendered on 4th August 2020.
On behalf of the Respondent, tendered on 7th August 2020.

Decided on: 28th June, 2021

Judgment

Yasantha Kodagoda, PC, J.

Background

On 16th June 2005 the Complainant – Respondent – Respondent (hereinafter referred to as the "Respondent") "Officer-in-Charge, Colombo Crimes Division, Sri Lanka Police" [erroneously referred to in the caption of the Petition by which Special Leave to Appeal was sought, as the "Officer-in-Charge, Special Crimes Division"] instituted criminal proceedings against the above-named Accused – Appellant – Appellant (hereinafter referred to as the "Appellant") in the Magistrate's Court of Maligakanda (Case No. 22070/05). In the charge sheet attached to the complaint filed by the Respondent in terms of section 136(1)(b) of the Code of Criminal Procedure Act, it was alleged that the Appellant had committed the following offences:

1. That on or about 8th April 2005, at the Public Library in Colombo 7 situated within the jurisdiction of the Magistrates Court, exhibited for sale, gave on rent, or possessed for trading purposes, unlawfully prepared copies of a record named *'Galana Gangaki Jeewithe'* containing songs titled *'Yowun Wasanthae'* and *'Onna Ekoomath'* which are owned and lyrics composed by Sunil Ariyaratne, and thereby committed an offence punishable in terms of section 178(2) of the Intellectual Property Act, No. 36 of 2003.

2. That on or about the same date, place and in the course of the same transaction of the afore-stated offence, exhibited for sale, gave on rent, or possessed for trading purposes unlawfully prepared copies of a record named *'Galana Gangaki Jeewithe'* containing 15 songs including the song titled *'Onna Ekoomath Eka',* of which the music was composed by, sung, and is owned by Mirihana Aarachchige Nanda Malini, and thereby committed an offence punishable in terms of section 178(2) of the Intellectual Property Act, No. 36 of 2003.

3. That on or about the same date, place and in the course of the same transaction of the afore-stated offence, exhibited for sale, gave on rent, or possessed for trading purposes unlawfully prepared copies of a record named *'Galana Gangaki Jeewithe',* which contained songs titled *'Sannaliyane'* and *'Galana Gangaki Jeewithe'* owned by Mahagamage Raveendra Mahagamasekera and originally produced by his father, and thereby committed an offence punishable in terms of section 178(2) of the Intellectual Property Act, No. 36 of 2003.

On 22nd September 2005, after the charges were read out to the Appellant, he pleaded *'not guilty',* and accordingly the case was taken up for trial. Witnesses Sub Inspector Roshan Hewawitharana, Sub Inspector Prasad Weeraratne, Professor Sunil Ariyaratne, Visharadha Mirihana Arachchige Nanda Malini, and Mahagamage Raveendra Mahagamasekera testified for the prosecution. No evidence was presented for and on behalf of the Appellant. At the end of the trial, the learned Magistrate delivered Judgment finding the Appellant '*guilty*' as charged, and accordingly convicted him. He was sentenced to a substantive term of 6 months imprisonment suspended for a period of ten years, and to a fine of Rs. 5,00,000/= with a default sentence of oneyear imprisonment.

The Appellant appealed against the afore-stated conviction and sentence to the High Court of the Western Province holden in Colombo. Following the hearing of the Appeal, delivering Judgment dated 20th May 2014, the learned High Court Judge affirmed the conviction and sentence imposed by the learned Magistrate, and accordingly dismissed the Appeal.

The Appellant sought from this Court, Special Leave to Appeal against the Judgment of the High Court of the Western Province. On 4th September 2014, the Supreme Court granted Special Leave to Appeal in respect of the Judgment of the High Court of the Western Province, on the following two questions of law:

1. *Has the High Court erred in law by failing to apply the law with respect to the productions marked "P2", while the evidence of the prosecution has created a reasonable doubt as to the integrity of the said productions?*

2. *Has the High Court failed to consider the fact that the prosecution has not proved its case beyond reasonable doubt?*

The case for the prosecution presented before the learned Magistrate can be summarized in the following manner:

According to the evidence of Professor Sunil Ariyaratne, Visharadha Mirihana Aarachchige Nanda Malini, and Mahagamage Raveendra Mahagamasekera, upon receiving information that a particular person was illegally selling at the compound of the Colombo Public Library, music compact disks (music CDs) containing songs in respect of which they held proprietary rights, on 8th April 2005, they have gone to the Colombo Crimes Division of the Sri Lanka Police and lodged complaints relating to this matter. The complainants alleged that several video compact disks (VCDs) containing such unlawfully copied songs were also being sold at the same location.

On the same day, a team of police officers led by Sub Inspector (SI) Roshan Hewawitharana conducted a raid at the premises of the Colombo Public Library using Sub Inspector Prasad Weeraratne as a decoy. When the police party reached the premises of the Colombo Public Library the time was around 3.10 pm, and there had been an exhibition at the premises with multiple stalls. The Appellant was at one stall. On a table near the Appellant were some compact disks for sale. The compact disks (CDs) for sale included CDs titled *'Galana Gangaki Jeewithe'* and *'Sannaliyane'*. Decoy Weeraratne had inquired from the Appellant about the price at which the two CDs were being sold, and the Appellant had responded that each

one was being sold at Rs. 150/=. Thus, the decoy had given the Appellant a 500/= Rupee note, which SI Hewawitharana had previously given him at the police station to be used during the raid, and purchased from the Appellant two CDs which contained the afore-stated titles. The Appellant had returned change of Rs. 200/=. As soon as the transaction was completed, the decoy had given the previously agreed beckoning signal and the rest of the police officers including SI Roshan Hewawitharana had come to where SI Weeraratne and the Appellant were. The Appellant had been arrested by SI Hewawitharana. He had recovered the 500/= Rupee note which was tendered by the decoy to the Appellant from the right-hand trouser pocket of the Appellant. At the time of the arrest, further eight CDs titled *'Galana Gangaki Jeewithe'* had been taken into the custody by the police from the possession of the Appellant. Thereafter, the Appellant had been taken in police custody to the police station along with the CDs. At the police station, officers have got down an audio CD playback device to play the CDs and also a television set, and played the CDs. They had done so in the presence of the three complainants, having got them down to the police station following the raid. They have listened to the songs in the CDs. There is also evidence that at the police station, the police had shown to the complainants a film contained in another CD recovered from the Appellant's possession. It is necessary to note that the three charges contained in the charge sheet relate to one out of the two CDs purchased from the Appellant by the decoy SI Weeraratne, namely the CD titled *'Galana Gangaki Jeewithe'*.

Following the examination of the CDs by the police officers and the complainants at the police station by listening to and viewing them, they had been duly sealed and placed in safe custody, after registering the productions under reference 'PR 46/05'. It is in evidence that for the purpose of sealing the productions the investigators have used both the left thumb impression of the Appellant and the police seal. Several items relating to the raid, namely (i) the 500/= Rupee note bearing No. H/79 420550 which was used to purchase the two compact disks, (ii) the two compact disks that were so purchased, and (iii) the eight compact disks that were taken into custody from the possession of the Appellant, were produced at the trial and marked "P1" (currency note), "P2A" and "P2A1" (two CDs purchased by the decoy from the Appellant) and "P3" (the eight CDs taken by the police from the possession of the Appellant).

According to Professor Sunil Ariyaratne, the compact disk titled *'Galana Gangaki Jeewithe'* was played at the police station in the room of a police officer. He observed that the disk contained three songs of which he had composed the lyrics, namely *'Onna Ekomath'*, *'Bambarindu Bambarindu'* and *'Yowun Wasanthe'*. These three songs were listed as items 8, 9 and 15 in the disk. Professor Ariyaratne's position was that while he possessed co-ownership of the intellectual property rights of these songs, the Appellant had not been conferred with copying or publication rights of these songs. Documentary proof in this regard was produced at the trial. According to him, at the police station they had viewed the film *'Sarungalaya'* from a CD collected by the police during the raid. That too had contained his songs. However, it is necessary to note that the charge sheet does not contain a charge based on the '*Sarungalaya'* film, nor is there a reference to the song '*Bambarindu Bambarindu'*, which is said to be a song of that film.

During the trial in the Magistrate's Court, "P2A" and "P2A1" had been re-played. "P2A" was a compact disk entitled '*Galana Gangaki Jeewithe'*. "P2A1" was entitled *'Sannaliyane'*. *"P2A"* contained *inter-alia* the songs *'Galana Gangaki Jeewithe'*, *'Onna Ekomath'*, *'Bambarindu Bambarindu'* and '*Youwun Wasanthe'*. Professor Ariyaratne has produced marked "P5" and "P6" documents to establish his intellectual property ownership of the film *'Diyamanthi'* in which the song '*Yowun Wasanthe'* is found, and the film '*Saradiyelge Putha'* in which the song *'Onna Ekomath'* is found. His position was that as reflected in the said documents, he possessed the right to authorize copying of the songs into CDs, a right which he had not transferred to anyone.

According to Visharadha Mirihana Arachchige Nanda Malini, "P2A" which had the title *"Galana Gangaki Jeewithe"*, also had the words *"Edaa Geetha Edaa Handinma"* (having the meaning '*songs of that era, from the voices of that era*'). She testified that this particular CD contained 15 songs, all of which were originally sung by her. She said that the CD contained the song *'Onna Ekomath'*. This was a song in the film *'Saradiyelge Putha'*. After singing the song for the production of the film she had obtained ownership of the song from the producer of that film. According to her, her ownership of the song is reflected in "P6". She also testified that "P3" had eight CDs, all of which contained songs sung by her for different films and copied and included into those CD without her permission.

According to Mahagamage Raveendra Mahagamasekera, his father Mahagama Sekera had been a lyricist. He died in 1976. His father had not conveyed intellectual property rights with regard to the songs authored by him, to anyone. Thus, upon his death, the intellectual property rights of his late father had been inherited by his mother, himself and his brother. After lodging the complaint, he had been asked to come to the police station to attempt to identify the CDs that had been taken into custody during a raid that had been conducted by the police. He had listened to some compact disks at the police station. He had identified in the compact disk titled *'Galanagangaki Jeewithe'*, five songs written by his late father and in the disk titled *'Sannaliyane'* another two songs. He testified that, songs of his father are contained in the disks titled *'Galanagangaki Jeewithe'* and *"Sannaliyane'*. The songs of which the lyrics had been composed by his late father found in the compact disks had been *'Me Sinhala Apage Ratai', 'Meepup Ladimi', 'Ratna Deepa', 'Pilae Pedura', 'Sannaliyane', 'Obe Deesa', 'Wakkada Langa', 'Aetha Kandukara' and 'Malahiru Basina'.*

Following the closure of the case for the prosecution, the learned Magistrate had explained the rights of the Accused and called upon the Accused - Appellant to, if he so wishes, present evidence on his behalf. In response, the Accused - Appellant exercising his right to remain silent, did not testify or offer any evidence on his behalf.

The learned Magistrate having considered the applicable law and the evidence presented before court, concluded that the prosecution had discharged its burden of proving the case against the Accused - Appellant beyond reasonable doubt, and found him *guilty* of having committed all three offences contained in the charge sheet. Accordingly, the Accused - Appellant was convicted and sentenced by the learned Magistrate, in the manner stated above.

Submissions made by learned counsel

During the hearing of this Appeal and in his written submissions, learned counsel for the Appellant urged on behalf of the Appellant the following matters relating to the questions of law in respect of which special leave to appeal was granted.

As regards the first question of law relating to the prosecution not having established the integrity of the production marked "P2", it was submitted that there exists a contradiction between the testimonies given by SI Prasad Weeraratne and Sunil Ariyaratne, in that, while according to Prasad Weeraratne he purchased two CDs titled *'Sannaliyane'* and *'Galanagangaki Jeewithe'* and he watched them and realized that they contain songs, according to Sunil Ariyaratne, he watched the film '*Sarungalaya*' at the Police Station. Further, according to Sunil Ariyaratne, what was produced as evidence during the trial was not what he watched at the police station. Counsel pointed out that when the compact disk was played in court, what was heard was a song titled 'B*ambarindu Bambarindu'*. It was submitted that Sunil Ariyaratne had not identified the production marked "P2" at the police station. Therefore, learned Counsel for the Appellant submitted that what was produced at the trial marked "P2" was not what was taken into custody by the police, but an introduction. Learned counsel cited ***Perera v. Attorney General,*** 1998(1) Sri L.R. 378 in support of his submission that in view of the foregoing, there exists a serious doubt regarding the genuineness of the productions. He further submitted that while according to police witnesses, "P2" was sealed soon after Sunil Ariyaratne, Nanda Malini and Raveendra Mahagamasekera examined them and they did so in the presence of the Appellant, according to Nanda Malini, she listened to the CDs on another day too, approximately two weeks after having listened to them on the first occasion. Learned counsel for the Appellant submitted that this too raised a doubt regarding the integrity of the production in issue.

As regards the second question of law relating to the prosecution not having proven its case beyond reasonable doubt, learned counsel relied with special emphasis on the issue pertaining to the doubt arising with regard to the integrity of the production marked "P2". Learned counsel for the Appellant submitted that the prosecution had not established that Sunil Ariyaratne, Nanda Malini and Raveendra Mahagamasekera had ownership of the works contained in the two CDs. He also submitted that from an overall perspective, the prosecution had not discharged its burden of proving the prosecution's case beyond reasonable doubt.

In response to the submissions of the learned counsel for the Appellant, learned Senior State Counsel who appeared for the Respondent submitted that the prosecution has established

that what was produced as productions by the prosecution and in particular "P2", were in fact what was recovered from the custody of the Appellant and therefore the integrity of the productions was intact. She also submitted that in a case where the productions are readily identifiable, evidence relating to the 'chain of custody' of such productions need not be established by the prosecution. Learned Senior State Counsel in her further written submissions has pointed out to the following features of the two CDs marked and produced as "P2A" and "P2A1", namely, (i) the titles of the two CDs (i.e. "*Galana Gangaki Jeewithe*" and "*Sannaliyane*"), (ii) the unique production reference (i.e. PR46/5) given by the police to those CDs, (iii) the date and the markings placed on the two CDs by the police when they were purchased by the decoy, and (iv) the two CDs having been shown to the three complainants at the police station soon after the detection, were aspects that supported the prosecution's position that what was purchased from the Appellant were in fact produced at the trial. Learned Senior State Counsel submitted that the three complainants had identified certain contents of the two CDs as containing their works, and therefore the CDs contained intellectual property in respect of which they have proprietary rights. She submitted that these evidential features were proof that what were produced at the trial were in fact what was recovered from the custody of the Appellant. In support of her submission, she cited *McCormick on Law of Evidence* (3rd Edition, West Publishing Co.). It was also pointed out by the learned Senior State Counsel that during the cross-examination of the two police officers it was not even suggested to them that what was shown to Sunil Ariyaratne, Nanda Malini and to Raveendra Mahagamasekera were not the CDs that were purchased by the police decoy from the Appellant. Thus, learned Senior State Counsel pointed out that no allegation of *foul play* can now be made against the police. She submitted that the prosecution had fulfilled its duty of establishing the integrity of the productions *'without a scintilla of doubt'*.

As regards the second issue raised by learned counsel for the Appellant, learned Senior State Counsel has in her written submissions, adverted to the following: In view of the constituent ingredients of the offence contained in section 178(2) of the Intellectual Property Act, the prosecution does not have the legal burden of proving that the intellectual property in issue (which the Appellant sold to the decoy) were owned by Sunil Ariyaratne, Nanda Malini and Raveendra Mahagamasekera. What is necessary is to establish that the Appellant did not

have copyrights of the works contained in the two CDs. Learned Senior State Counsel submitted that the ingredients of the offence have been successfully proven by the prosecution. She also pointed out that the Appellant had failed to establish that he had any rights in respect of the works in issue.

It is necessary to point out that the written submissions tendered on behalf of the Appellant contained certain other submissions which were not urged at the hearing of this Appeal. At the conclusion of the hearing, it was agreed by counsel that post-argument written submissions will be confined to only the matters that were in fact urged on behalf of the parties during the hearing of this Appeal. Court indicated to learned counsel that the judgment will also relate only to matters that were urged during the hearing. Therefore, I will confine this judgment to my opinion and conclusions relating only to the matters that were in fact urged by learned counsel (as reflected above) during the hearing and to the corresponding submissions contained in the written submissions. However, while doing so, I will consider from multiple perspectives, whether the prosecution has proven the charges against the Appellant beyond reasonable doubt.

Consideration by Court and conclusions

In view of the inextricable link between the first and second questions of law, I propose to deal with both questions together.

Real (physical) evidence

Learned counsel for the Appellant laid heavy emphasis on the production which he referred to as "P2", which should actually be a reference to compact disks (CD) marked and produced at the trial as "P2A" and "P2A1". His primary submission was that *"the prosecution had failed to establish the integrity of "P2", namely, that the prosecution had failed to prove that "P2" was the CD recovered from the Appellant's custody, and that "P2" contained unauthorized copies of songs of which the three complainants had copyrights"*.

Productions marked and produced as "P2A", "P2A1" and "P3" are items of **real evidence**. It is to be noted that unfortunately though, such items of physical evidence are produced in

certain trials, without much attention being given to requirements of the law pertaining to their admissibility and evidential significance. The present case is a good example.

According to the law of Evidence, as of right it would not be possible for a party to a criminal or civil case to present a physical object as an item of evidence, on its own standing. This is because it would not come within any one of the four categories of 'evidence' also referred to as 'judicial evidence', recognized by the law of Evidence, namely '**oral evidence**', '**documentary evidence**', '**contemporaneous audio-visual recordings**' and '**computer evidence**'. The latter two categories of evidence, namely '**contemporaneous audio-visual recordings**' and '**computer evidence**' gained recognition in the eyes of the law by the Evidence (Special Provisions) Act, No. 14 of 1995. What is contemplated by 'contemporaneous audio-visual recordings' are recordings of the occurrence of the facts in issue or relevant facts embedded in certain media, and they can take the form of audio recordings, video recordings, audio-visual or video recordings, and still photographs. Section 60 of the Evidence Ordinance which provides that **oral evidence** must in all cases whatsoever, be direct, provides further, in its second proviso that, *"if oral evidence refers to the existence or condition of any* ***material thing*** *other than a document, the court may, if it thinks fit, require the production of such material thing for its inspection"*. (Emphasis added.) Such *material things* when produced at a trial are referred to as ***real evidence***. Thus, it would be seen that the law of Evidence has not completely precluded the presentation of physical material as evidence. Therefore, the sequence to be followed in the presentation of a physical object as *real evidence* would be, first, to present oral evidence regarding the existence or condition of such a physical object, and thereafter, secondly, invite the Court to consider permitting the production of such physical object for inspection. What is important to note is that in terms of section 60 of the Evidence Ordinance, once such a material thing is presented to the Court, the function of the Court is to **inspect** it. That is for the Judge or Jury as the case may be, to directly perceive such an object using his or their own senses. If necessary, the Court may record its observations regarding such material object that was produced. However, as in the case of oral and documentary evidence, a physical object is not ordinarily produced at the trial for the purpose of proving or disproving the existence or non-existence of a *fact in issue* or a *relevant fact*. The practice in Sri Lanka is to refer to such items as 'productions'. In most other jurisdictions they are referred to as 'exhibits'.

E.R.S.R. Coomaraswamy (Volume I, at page 68) in his monumental work on the Law of Evidence, has stated that though 'real evidence' does not come within the ambit of 'Evidence' under section 3 of the Evidence Ordinance, *real evidence* is an item of 'judicial evidence' and the judge is called upon to see the thing himself and the knowledge derivable therefrom is generally obtained without the use of any medium. However, in view of the second proviso to section 60 of the Evidence Ordinance which provides for the admission of real / physical evidence, it is necessary to bear in mind that, such evidence in the nature of physical objects are not *sui generis* (does not stand alone by itself), and is necessarily associated with an item of oral evidence which provides a description of the existence or condition of such physical item. In other words, the Court may in terms of section 60 permit the production of a material object for inspection, only if oral evidence refers to the existence or the condition of any material thing. In the alternative, acting in terms of section 165 of the Evidence Ordinance, the Court may on its own motion *order the production of any document or* ***thing*** in order to *discover or to obtain proper proof of relevant facts.*

Therefore, such evidence (physical / real evidence) in my view will serve the purposes of (i) providing clarity to oral evidence and enable the judge or the jury as the case may be to correctly comprehend the relevant item of oral evidence, (ii) providing corroboration of oral testimony and documentary evidence, (iii) being used as an aide to the assessment of credibility and testimonial trustworthiness of testimony provided by one or more witnesses, and (iv) being a basis for the Court to determine the cogency or sufficiency of evidence presented in the form of oral and documentary evidence. Thus, an item of real evidence cannot by itself generally be used to 'prove' the *facts in issue*, which in criminal cases amounts to the constituent ingredients of the offence. In certain situations, a physical object may be produced at a trial for the first time, for the purpose of its identification. That may aid the proof of a *fact in issue* or a *relevant fact*.

The impact or the legal consequences arising out of the absence of a particular physical item of evidence being presented by the prosecution at a trial will depend on a host of considerations, including the attendant facts and circumstances of the case. In such situations, the principal factor to be taken into consideration is, what purpose, if any, would the prosecution have achieved, had they produced the relevant item of real evidence. As

E.R.S.R. Coomaraswamy has put it, *"non-production of a physical object, which might conveniently be produced for inspection by the Court, does not render oral evidence respecting the same inadmissible"* (Volume II, Book I, page 19). The legal consequences arising out of a doubt being created with regard to the integrity of a physical object that was produced, would be founded upon a consideration of the purpose sought to have been achieved by the party which produced the object. The legal consequences that may arise by a party not producing a material object which was within their control to produce, would be the rendering of nugatory the purpose such party could have achieved by having produced it. It may also affect the cogency of the evidence. There may be situations where the circumstances of the case may justify the judge from drawing an adverse presumption in terms of section 114(f) of the Evidence Ordinance.

I will now apply these principles of law with regard to the submission made by learned counsel for the Appellant relating to the productions produced at the trial, and in particular to production marked "P2A" (*"Galana Gangaki Jeewithe"*), which he erroneously submitted had been marked as "P2". In this regard, it is necessary to recall that all three charges relate to songs said to have been contained only in one CD, and that being the CD titled *"Galana Gangaki Jeewithe"*.

Particularly in view of the emphasis shown by the learned counsel for the Appellant with regard to these productions, I examined the productions relating to the Magistrate's Court case. The examination of the productions revealed the following:

Production marked "P2A"

This production is a compact disk (CD) with a cover. The cover contains the title *"Galana Gangaki Jeewithe"*. In addition to the title of the CD, the front cover contains the following in Sinhala and English. *"Eda Geetha Eda Handinma"*, *"Solid Gold Old Songs"* and *"Old is Gold"*. Its rear contains the following words: "Nanda Malini Geyu Chithrapata Geetha", and "Sahaya Gayana – Narada Dissasekera, W.D. Amaradeva, Sisira Senaratne, Victor Ratnayake". It also contains references to the existence of 15 songs inside the CD and a list of such songs. Within brackets there is a reference to

the film in which the relevant song is to be found. Among the list of the songs are *"Galana Gangaki Jeewithe"* (*"Ranmuthuduwa"*) as item No. 1, *"Onna Ekomath"* (*"Saradiyelge Putha"*) as item No. 8 and *"Yowun Wasanthe"* (*"Diyamanthi"*) as item No. 15. It should be noted that, it is these songs, that are referred to in the three charges contained in the charge sheet.

Production marked "P2A1"

Though another CD entitled *"Sannaliyane"* and marked "P2A1" was available among the productions, I do not propose to set out details of that CD, as none of the charges relate to a CD by that name. Suffice for me to state that "P2A1" contained a list of songs, which included the songs which Raveendra Mahagamasekera claimed had been authored by his father late Mahagama Sekera.

Constituent ingredients of the offence

Section 178(2) of the IP Act provides as follows:

"Any person knowing or having reason to believe that copies have been made in infringement of the rights protected under Part II of the Act, sells, displays for sale, or has in his possession for sale or rental or for any other purpose of trade any such copies, shall be guilty of an offence, and shall be liable on conviction by a Magistrate for …"

Therefore, the ***actus reus*** of this offence is that the offender should have (i) sold, (ii) displayed for sale, or (iii) had in his possession for sale or for rental or for any other purpose of trade, a '***copy***' that has been made in infringement of the rights protected under Part II of the Act. The offence does not require the prosecution to prove that the copying was carried out by the offender, as 'copying' is not a constituent ingredient of the offence. The ***mens rea*** of the offence is that the offender should have either (i) known or (ii) had reason to believe that the *'copy'* in issue had been made by whomsoever in infringement of the rights protected under Part II of the Act.

Copyrights

In the context of the IP Act, the term '***copy'*** is a reference to a *'copy'* of a *'**work**'* that is recognized by that Act. In terms of section 5 of the IP Act, a *'work'* means ***'any literary,***

artistic or scientific work referred to in section 6'. In terms of section 6, both '*musical works, with or without accompanying words'* and *'audio-visual works'* fall within the ambit of '***protected literary, artistic or scientific work'***, provided they are '***original intellectual creations in the literary, artistic and scientific domain'***. Therefore, original songs are *'works'* that are protected in terms of the Act. In terms of section 6(2) of the Act, such *'works'* shall be legally protected by the sole fact of their creation, and irrespective of their mode or form of expression, as well as of their content, quality or purpose. Section 9 of the Act provides that '*subject to the provisions of sections 11 to 13,* ***the owner of copyright of a work shall have the exclusive right to carry out or authorize inter alia the acts of*** *(a)* ***reproduction of the work****, and (b)* ***the public distribution of the original and each copy of the work by sale, rental, export or otherwise, of such work'.*** These two rights along with the other rights contained in section 9 of the IP Act are referred to as '**economic rights**'. Sections 11 to 13 confers exceptions with regard to copyright protection, namely copying for the purposes of fair use and copying following the lapse of seventy years following the death of the author. In terms of section 10 of the IP Act, authors of '*works*' are also conferred with '**moral rights**', which includes the right to have his name indicated prominently on the copies of the work. It is important to note that authors are entitled to such 'moral rights', independently of the 'economic rights', and even when the author is no longer the owner of the 'economic rights' of a work. In terms of section 5 of the Act, an *'author'* is the physical person who had created the *'work'*. He would normally have both the *economic* and *moral rights* of the relevant *'work'*.

As per section 6(1)(e) of the IP Act, for the purposes of the application of the provisions of the Act, a song would be a protected *'work'*, as it is a *'musical work with accompanying words in the artistic domain'*. Similarly, as per section 6(1)(f), a film (motion picture) would also be a protected *'work'*, as it is *'an audio-visual work in the artistic domain'*. The term *'audio-visual work'* has been interpreted in the IP Act to mean *'a work that consists of a series of related images which impart the impression of motion, with or without accompanying sounds, susceptible of being made visible, and where accompanied by sounds susceptible of being made audible'.* Section 5 of the IP Act provides that the *'author'* means the physical person who has created the relevant *'work'*. In the context of a song, for the purpose of the application of the IP Act, the *'author'* of a song would be the lyricist, music composer, and should there have been a producer, such producer of the song. This is in view of the fact that they perform constituent and

indispensable functions relating to the creation of a song. The *'author'* of a film would be its proprietor, who is designated as the 'producer' of the film. In terms of section 5 of the IP Act, the 'producer' of an 'audio-visual work' means the physical person or legal entity that undertakes the initiative and responsibility for the making of the relevant audio-visual work or sound recording. Thus, in terms of the law, the producer of the film would originally have the film's economic and moral rights.

The lyricist, music composer and the producer of a song jointly have economic rights to *inter alia* authorize the reproduction of the song. That is a reference to the 'copying' of the song from one media to another. If a song is made for the purpose of an 'audio-visual work' (such as a film) and integrated into such film, unless otherwise provided, the producer of the film will be vested with the economic and moral rights of the film, which would include such rights in respect of components of the film including the song included in the film. Therefore, when a song is embedded in a film, unless specifically protected through agreement, the lyricist, music composer and the producer of the song would lose economic rights in respect of the song. Thus, right to authorize copying of the song into a media (such as a compact disk) will be vested with the producer of the film. Reproducing the song without obtaining the authorization of such a person who has economic rights of the *work*, would amount to an infringement of the economic rights of the owner of the film, namely the producer. The position would be different if the song is produced again and provided a new fixation. However, it is important to note that when a song becomes a component of a film, though the lyricist, music composer and the producer of such song lose their economic rights, they retain moral rights with regard to the original song. It is also necessary for the purposes of this Appeal to be mindful that a producer of a film or any other subsequent copyright owner of such film, may in terms of section 16 of the Act grant a license, an assignment or transfer to any other person in writing, and the right to carry out any of the acts arising out of economic rights in whole or any part of such economic rights. Unless specifically precluded in the licensing, assignment or transfer agreement, there is no prohibition in law for a licensee, assignee or transferee to re-transfer the rights he has received to another third party.

Section 17 of the Act prescribes the rights of performers, such as singers of songs. In terms of section 17(1) of the Act, subject to the provisions of section 21 of the IP Act (provision which sets out certain limitations), a performer (such as the singer of a song) shall have exclusive right to carry out or to authorize *inter alia* the reproduction of a *fixation* of his performance or a substantial part thereof. According to law, for a *work* to be protectable, it must be *fixed* to a tangible medium of expression. A *work* is considered to be *fixed* when it is stored on some medium in which it can be perceived, reproduced, or otherwise communicated. Thus, when a song is recorded onto a compact disk (CD) the *work* is deemed to be *fixed* to the compact disk on which the song has been recorded. That is referred to as a *fixation*. Therefore, the authorization of the singer of a song is required for the preparation of copies of the fixation in which such song has been recorded. Thus, the preparation of copies of such a compact disk without obtaining the authorization of the original performer (singer), would amount to an infringement of the rights of such performer. However, when a song has been sung for inclusion in a film and such song has been included into such film, unless otherwise specifically provided in the agreement between the singer and the producer of the film, the singer loses his rights under section 17(1). That is in view of section 17(2) of the Act which provides that once a performer has authorized the incorporation of his performance into an audio-visual fixation (such as a film), the provisions of section 17(1) shall have no further application. If the performer once again performs with the permission of the producer of the film, that performance will be recognized as a different performance, and section 17(1) will become applicable once again. However, if such subsequent performance is a component of a different fixation, the rights of the singer will be limited to the agreement between the singer and the producer of such subsequent fixation. In this case, the position of the complainants is that unauthorized copying had taken place from the original films.

Fixations such as compact disks containing **unauthorized reproductions / copies of *works*** such as songs, songs extracted from films and films themselves, are generally referred to as *'pirated copies'*.

The essence of the above narrative of the law relating copyrights which is a component of Intellectual Property Law, as is relevant to the facts of this case, is that the preparation of

unauthorized copies, the sale, and the possession for sale *pirated copies* of songs including songs copied out of films and copying of songs into other fixations, whether in their audio-visual form or audio only form, is prohibited by the Intellectual Property Act. The violation of that prohibition amounts to an offence, as the preparation of such copies infringes upon the rights recognized by Part II of the IP Act. Additionally, in terms of section 178(2) of the Act, selling, displaying for sale, and having in possession for sale, rental or for any other purpose of trade any such copies prepared in violation of copyrights, is also prohibited by law, and the violation of such prohibition constitutes an offence.

Charges

The first charge preferred against the Appellant relates to the songs *'Yowun Wasanthe'* and *'Onna Ekomath'*, which the prosecution claimed were in a compact disk entitled *'Galana Gangaki Jeewithe'*. The second charge also relates to the song *'Onna Ekomath'* in the same disk. The third charge relates to the songs *'Sannaliyane'* and *'Galana Gangaki Jeewithe'* in the disk named *'Galana Gangaki Jeewithe'*. According to the first charge, the position of the prosecution was that Sunil Ariyaratne had *'ownership'* of the songs *'Yowun Wasanthe'* and *'Onna Ekomath'*. According to the second charge, the prosecution alleged that Mirihana Arachchige Nanda Malini also had *'ownership'* of the song *'Onna Ekomath'*. According to the third charge, the prosecution alleged that Raveendra Mahagamasekera had ownership of the songs *'Sannaliyane'* and *'Galanagangaki Jeewithe'* said to have been in the same CD titled *'Galana Gangaki Jeewithe'*. Thus, it would be seen that, all three charges are related to a compact disk titled ***'Galana Gangaki Jeewithe'*** in which the songs ***'Yowun Wasanthe'***, ***'Onna Ekomath'***, ***'Sannaliyane'*** and ***'Galana Gangaki Jeewithe'*** were said to have been found.

***Actus reus* of the offence**

I will now examine and arrive at a conclusion on whether the prosecution has proven the *actus reus* or the physical element of the offence contained in section 178(2) of the Act. For that purpose, it is necessary to re-visit the evidence led at the trial.

According to the evidence of Professor Sunil Ariyaratne, he had been the lyricist of the songs *'Yowun Wasanthe'* and *'Onna Ekomath'*. The song *'Yowun Wasanthe'* had been a component

of the film *'Diyamanthi'*. Professor Ariyaratne had obtained copyrights for the audio-visual display through multi-media of the film *'Diyamanthi'* from the producer of the film, Wasantha Obeysekera. Thus, he exclaimed that he had copyrights of the songs in the film *'Diyamanthi'* and documentary proof thereof was tendered to court by producing the document marked "P5". Therefore, his position was that he had copyrights of the song '*Yowun Wasanthe*'. The song '*Onna Ekomath*' had been a component of the film '*Saradiyalge Putha*'. Professor Sunil Ariyaratne and Visharadha Nanda Malini had jointly obtained copyrights for audio-visual display of the film '*Saradiyelge Putha*' from the producer of the film Neil Rupasinghe, and a document in proof of that was produced marked "P6". Therefore, his position was that he and Nanda Malini had joint copyrights for the song '*Onna Ekomath*'. He had not transferred copyrights of these two songs to any other person. Nor had he given such rights to any other person authorizing the copying of these two songs onto compact disks or to sell disks containing such copies.

On 8th April 2005, when Professor Ariyaratne was informed by officers of the Colombo Crimes Division that sequel to his complaint, a raid had been conducted, and thus to call-over at the police station, he complied. At the police station, he listened to and viewed several compact disks that had been recovered by the police during the raid. It is indeed a fact that according to Professor Ariyaratne, at the police station he had viewed a film titled '*Sarungale* as well. Among the items he listened to, was a compact disk titled *'Galana Gangaki Jeewithe'* which contained the abovementioned songs in respect of which he possessed copyrights. He has observed that the songs were of the nature of the original songs. He noted that the 'publisher' listed on the label of the compact disk, namely Sajindra Video, of No. 32, Super Market, Padukka, had not been conferred with copyrights relating to these songs. Additionally, the compact disk did not contain a reference that the lyricist of these songs was Professor Sunil Ariyaratne. It is this compact disk which was produced marked "P2A" during the trial.

According to Visharadha Nanda Malini, the song *'Onna Ekomath'* had been originally sung by her for the film '*Saradiyelge Putha*'. She had done so, having directed the music of that song too. She had also obtained copyrights of that song through a document marked "P6". Her position was also that she had neither transferred rights in respect of that song to any

other person or given permission for copying the song onto compact disks or for selling such disks containing her songs. She also testified that the compact disk titled *'Galana Gangaki Jeewithe'* (marked and produced at the trial as "P2A") contains fifteen songs, and all of them were sung by her. The song *'Onna Ekomath'* was the eighth song in that compact disk. She vouched for the fact that, the recording she listened to at the police station, contained her own voice. On being shown "P6" which was previously produced by Professor Sunil Ariyaratne, Visharadha Nanda Malini admitted that it was through "P6" that she too claimed copyrights to the song *'Onna Ekomath'*. Having examined the eight compact disks marked "P3", the witness testified that they too contained pirated copies of her film songs.

According to Mahagamage Raveendra Mahagamasekera, his late father Mahagama Sekara had composed the lyrics of the songs *'Ratna Deepa' 'Pile Pedura'*, *'Sannaliyane'*, *'Obe Deesa'*, *'Wakkada Langa'*, *'Eatha Kandukara'*, *'Mala Hiru Basina'*, *'Me Sinhala Apege Ratai'* and *'Meepup Ladimi'*. He had identified these songs in the two CDs that were played at the police station after the raid. There had been two of his father's songs in the CD titled *'Galana Gangaki Jeewithe'* five of his father's songs in the CD titled *'Sannaliyane'*. Neither his father nor his mother, brother or himself, being the only heirs who jointly succeeded to his father's rights, had transferred those rights to anyone else or authorized the preparation of copies onto compact disks. However, he has not stated that the CD titled *'Galana Gangaki Jeewithe'* (marked and produced by the prosecution as "P2A") contained songs *'Sannaliyane'* and *'Galana Gangaki Jeewithe'* composed by his father. Thus, it is necessary to conclude that, through the evidence of Raveendra Mahagama Sekera, the prosecution has failed to establish the actus-reus of the third charge.

This witness has testified to the manner in which he got to know of the Appellant. In 2004, he had received information that a particular person was selling pirated copies of compact disks containing songs of which the lyrics had been written by his late father. Thus, he had visited the premises of the Colombo Public Library and met the Appellant who was selling the compact disks. The witness had purchased such a compact disk and asked for a receipt. The Appellant had declined to issue a receipt. The Appellant had explained that he (the Appellant) had purchased some *gramophone records*, and thus he was entitled to produce

and sell compact disks containing the relevant songs. The witness had responded that his father had not authorized any person to reproduce his songs. He had thus said that what the Appellant was doing was 'illegal', and that if he (the Appellant) were to continue to engage in such conduct he would be compelled to take legal action. After some time, as he had received information that the Appellant was continuing with the particular 'illegal' activity, the witness had informed the situation to Professor Sunil Ariyaratne and to Visharadha Nanda Malini, and had with them proceeded to the police and lodged a complaint.

From the foregoing evidence, I hold that the prosecution has successfully and beyond reasonable doubt proved that Professor Sunil Ariyaratne had economic rights in respect of the songs '*Yowun Wasanthe*' and '*Onna Ekomath*', which were components of the films '*Diyamanthi*' and '*Saradiyelge Putha*', which inter-alia conferred the right on him to authorize the copying of those songs to audio-visual media such as compact disks. Thus, copying of such songs without his permission would amount to a violation of the copyrights of Professor Sunil Ariyaratne. Further, Professor Sunil Ariyaratne also possessed moral rights with regard to those songs. I also hold that Visharadha Nanda Malini had economic rights with regard to authorizing the copying to audio-visual media such as to compact disks, of the song '*Onna Ekomath*' which was a component of the afore-stated film '*Diyamanthi*'.

The economic rights of Professor Sunil Ariyaratne and Visharadha Nanda Malini had not been given by license, or assignment or transferred by them to either the Appellant or to any other person.

I hold that the prosecution has failed to establish that Raveendra Mahagamasekera had moral rights of the song '*Galana Gangaki Jeewithe*', which the prosecution claimed in the third count in the charge sheet was in a CD titled '*Galana Gangaki Jeewithe*'. Further, though the prosecution has through the evidence of Raveendra Mahagamasekera established that the late Mahagama Sekera was the lyricist of the song '*Sannaliyane*' and hence Raveendra Mahagamasekera, his mother and brother had rights in respect of such song, as that song was not in the CD titled '*Galana Gangaki Jeewithe*', the third charge fails. Further, though outside the scope of the third charge, it is necessary for me to point out that, the evidence of

Raveendra Mahagamasekera reveals that the economic rights he jointly possessed with his mother and brother relating to songs authorized by his late father had been infringed by the unauthorized copying and possessing for sale CDs containing songs authored by the late Mahagama Sekera. These songs are to be found in CDs marked "P2A" and "P2A1". However, as the third charge has been framed in a faulty manner, the said evidence cannot be relied upon by the prosecution to prove the third charge.

The prosecution has established without any doubt that the Appellant 'sold' inter-alia a compact disk to Sub Inspector Prasad Weeraratne, which was prior to its sale in the possession of the Appellant. The said compact disks 'purchased' by Sub Inspector Prasad Weeraratne had been titled *'Galana Gangaki Jeewithe'*. That compact disk ("P2A") along with the compact disk marked "P2A1" and the other eight compact disks had been brought to the police station along with the Appellant. Soon afterwards, the compact disk titled *'Galana Gangaki Jeewithe'* had been played to be heard by Professor Sunil Ariyaratne, Visharadha Nanda Malini and Raveendra Mahagamasekera. Professor Sunil Ariyaratne and Visharada Nanda Malini identified several songs including the three songs referred to in the first and second charges in respect of which they had the copyrights referred to above. The prosecution has established beyond doubt the integrity of the compact disk *'Galana Gangaki Jeewithe'* from the stage it was 'purchased' from the Appellant to the stage at which it was played to be heard by the three complainants. Therefore, the integrity of the compact disk in issue is not in doubt, up to the stage when it was identified that the disk contained songs copied in violation of the copyrights of the owners of such copyrights, namely the afore-stated two complainants. Thus, I conclude that, the prosecution had proved beyond reasonable doubt the ***actus reus*** of the offence, namely that **the Appellant had in his possession for sale a compact disk titled *'Galana Gangaki Jeewithe'* which contained copies of songs *'Yowun Wasanthe'* and *'Onna Ekomath'* of which the copyrights were vested with Professor Sunil Ariyaratne and Visharadha Nanda Malini. Such copies had been made in infringement of the rights protected under Part II of the Act.**

Integrity of the productions

In view of the submissions strenuously made by learned counsel for the Appellant that the integrity of the production marked "P2" had not been established by the prosecution, in that

the prosecution had not established beyond doubt that the compact disks in issue (marked "P2A" and "P2A1") were in fact the compact disks recovered from the possession of the Appellant and were also the disks that were played at the police station and listened to by the three complainants, I need to point out the following: As pointed out by me previously, the production relating to the three charges are the productions that were marked "P2A". The abovementioned analysis of the evidence, reveals clearly that from the perspective of the need to maintain the integrity of the production, what was necessary for the prosecution to establish is that the compact disk that was listened to by the complainants at the police station was in fact one out of the several disks recovered from the possession of the Appellant. I hold that the said duty has been performed by the prosecution beyond reasonable doubt.

The situation would have been quite different had the prosecution attempted to get the songs identified for the first time by the complainants during the trial in the well of the Court. Then, it would have been incumbent on the prosecution to establish the integrity of the productions from the time they were taken into custody to the point they were produced in Court during the trial.

Even if the submission strenuously put forward by the learned counsel for the Appellant is accepted as being correct, it is necessary to point out that the prosecution has established that the compact disk marked "P2A"and produced at the trial was in fact that which was recovered from the possession of the Appellant and identified by the complainants at the police station. That conclusion has been reached by me due to the reasons that (a) there is cogent and reliable evidence that the compact disk titled *'Galana Gangaki Jeewithe'* having been 'purchased' from the Appellant was soon afterwards played at the police station to be heard by the three complainants, (b) the defence has not presented any evidence either through prosecution witnesses themselves or through defence witnesses indicative of the said compact disk having been 'introduced' or 'switched' either by the police or by a complainant, (c) as pointed out by the learned Senior State Counsel the compact disk titled *'Galana Gangaki Jeewithe'* had certain unique identification features, (d) soon after listening to the compact disks, the compact disks were sealed using the left thumb impression of the Appellant and the seal of the Officer-in-Charge of the police station (these being un-

impugned items of evidence), (e) the productions had been entered in the Production Register of the police station and thereby assigned a 'PR' number (un-impugned), and (f) as observed by the learned Magistrate, the afore-stated seals were intact at the time the productions were opened for the first time at the trial (another item of un-impugned evidence). Thus, there can be no doubt regarding the integrity of the productions, even from the standard and degree expounded by the learned counsel for the Appellant.

***Mens Rea* of the offence**

It is now necessary to examine whether the Appellant possessed the requisite ***mens rea*** which is also referred to as the *'fault element of the offence'*. In view of the manner in which the offence contained in section 178(2) has been structured, it would be necessary for the prosecution to prove that at the time the Appellant possessed for sale the compact disk titled *'Galana Gangaki Jeewithe',* he **either (i) 'knew', or (ii) 'had reason to believe', that the *copies* of the four songs *'Yowun Wasanthe'*, and *'Onna Ekomath'* contained in the said compact disk, had been made in infringement of the rights protected under Part II of the Act**.

Thus, the issue is whether the Appellant *knew or had reason to believe* that the compact disk in issue ("P2A") contained pirated copies of the afore-stated songs. The term 'k*new'* as the literal meaning of the English word 'knowledge' denotes and signifies the existence of specific knowledge by the accused regarding a particular fact. The term *'reason to believe'* has been interpreted in section 24 of the Penal Code. It provides that, *"a person is said to have 'reason to believe' a thing, **if he has sufficient cause to believe that thing**, but not otherwise"*. (Emphasis added.) Thus, the term *'had reason to believe'* denotes the existence of certain related knowledge on the part of the accused, based upon which, from an objective standard it can be reasonably inferred that the accused **ought to have known the existence of the relevant fact**. In other words, what the Court needs to consider is whether in the circumstances of the case, the accused either ***'knew'*** or ***'had sufficient cause to believe'*** the existence of the particular fact.

'*Criminal Law in Sri Lanka'* by Wing-Cheong Chan, Michael Her, Neil Morgan, Jeeva Niriella and Stanley Yeo (LexisNexis, India, 1st Edition, 2020), states as follows: "*Knowledge involves an awareness that something exists or is likely to exist in the future. … Knowledge is a subjective*

state of mind which is different from an objective assessment of whether one should know certain facts. It cannot be imputed to a person merely from the consequences resulting from the act. … Since the Penal Code sometimes uses the terms 'knowing' and 'having reason to believe' in the same section, it can be inferred that the fault element of 'knowing' something must be given a subjective meaning. … It may be possible to infer that an accused had knowledge from proof that they had suspicion of the true facts, but deliberately refrained from making further inquiries which would have confirmed the suspicion."

As Dr. Sir Hair Singh Gour in *'The Penal Law of India'* (Diamond Jubilee - 10th Edition, Volume 1, page 242) has pointed out, *"what is a sufficient cause in a given case so as to justify the presumption, is a matter upon which no general statement can be made, for it must depend upon the facts and circumstances of each case"*. This is a reference to the presumption of the existence of 'knowledge'.

The formulation *'had reason to believe'* also in my view prevents an accused from taking up a position which can be aptly referred to as *wilful ignorance* or *voluntary blindness to the obvious*. Further, this element of *mens rea* has been included in most offences where *knowledge* is the foundational *mens rea*, as it would otherwise be impractical in most situations for a prosecution to prove through evidence that the accused actually had the required *knowledge* of the existence of the relevant fact. When in the 'mens rea', the term *'had reason to believe'* is the alternate component to 'knowledge', the burden on the prosecution is to establish that certain related circumstances were known to the accused, and hence from an objective footing he **ought to have known of the existence of the relevant fact**. Thus, from the perspective of sufficiency of evidence to prove the *mens rea,* it would be pertinent to note that to prove the requirement of *'had reason to believe'* would require a lesser threshold of evidence than the threshold required to prove *'knowledge'*.

Unlike with regard to the *actus reus* of an offence, the *mens rea* of an offence is a *state of mind* of the perpetrator, and hence it would not be possible to prove such ingredient through direct evidence. The existence of the *mens rea* of an offence has to be inferred by Court, based on a consideration of circumstantial evidence led by the prosecution, coupled with principles of evidence, such as inferences arising out of evidence, presumptions, and

matters in respect of which the Court is entitled to take judicial notice. With regard to *mens rea* in offences that contain the element *'knowing or having reason to believe'*, to find the accused *guilty,* upon a consideration of the available evidence which is likely to be in the nature of circumstantial evidence, the Court must be in a position to arrive at an irresistible and inescapable sole interference that the accused either **had the requisite knowledge**, or **should have had reason to believe in the existence of the relevant facts pertaining to such knowledge**. Thereafter, such knowledge can be imputed as the state of mind of the accused. An inference less or different to that will accrue to the benefit of the accused and he shall be entitled to be acquitted. Even after the Court arrives at such inference based on the prosecution evidence, it may be possible for the accused to negate that inference upon a presentation of direct evidence that may emanate from the Accused himself, that he did not have the requisite state of mind and was acting in *good-faith.*

If one were to consider the evidence led at the trial including the attendant circumstances, it can be reasonably inferred that either the Appellant had himself made unauthorized copies of the songs or had procured the compact disks from a person such as the person / institution referred to in the label of disks (Sajindra Video, of No. 32, SuperMarket, Padukka) who had made the unauthorized copies. If in fact the Appellant had in *good faith* received the disks containing unauthorized copies of the songs in issue from either Sajindra Video or from some other third party, that would be a matter especially within his own knowledge. Section 106 of the Evidence Ordinance provides that, *when any fact is especially within the knowledge of any person, the burden of proving such fact lies upon him.* The Appellant has not presented any evidence in this regard or with regard to any other matter. In this regard it is also necessary to take into consideration the evidence of Raveendra Mahagama Sekera, about the incident which had taken place in 2004, where he met the Appellant and purchased a compact disk containing unauthorized copies of his father's songs. On that occasion, the Appellant had taken up the position that he had purchased an old record containing those songs (referred to by the Appellant as a *'gramophone record'*) and hence he had the right to sell copies of the songs. Nevertheless, Raveendra Mahagama Sekera had challenged the Appellant that what he was doing was 'illegal'. Thus, in 2004, the Appellant's position was that he had obtained copies of the songs, and that he had the right to do so. Another important item of circumstantial evidence is that the prosecution has proved that

the other compact disk purchased by Sub Inspector Prasad Weeraratne from the Appellant titled *'Sannaliyane'* ("P2A1"), and the other eight compact disks ("P3") secured from the Appellant's possession, all contained pirated material such as unauthorised copies of songs of Visharadha Nanda Malini and songs authored by the late Mahagama Sekera. Finally, both the external appearance of the compact disk titled '*Galana Gangaki Jeewithe'* ("P2A") *"Sannaliyane"* ("P2A1") and their contents did not contain any reference to the lyricists of the songs contained in the compact disk, namely Professor Sunil Ariyaratne and the late Mahagama Sekera. The external appearance of the disk titled *'Galana Gangaki Jeewithe'* however contained a reference to the singer of the songs contained in it, namely Visharadha Nanda Malini, in the phrase '*Nanda Malini Gayuu Chithrapata Geetha'* (meaning 'film songs sung by Nanda Malini'). Thus, there was an *ex-facie* infringement of the moral rights of lyricists Professor Sunil Ariyaratne and Mahagama Sekera in the two CDs marked "P2A" and "P2A1".

In view of all the afore-stated circumstances, I conclude that an irresistible and inescapable inference arises that the Appellant knew or certainly had reason to believe that the compact disk titled *'Galana Gangaki Jeewithe'* contained copies of the songs '*Yowun Wasanthe'* and '*Onna Ekomath* which had been made in infringement of the rights protected under Part II of the Intellectual Property Act. Thus, I am satisfied that the prosecution has discharged its burden of proving beyond reasonable doubt that the Appellant entertained the requisite *mens rea* of the offence contained in section 178(2) of the Intellectual Property Act, with which he was charged.

Proof beyond reasonable doubt

As pointed out by the learned counsel for the Appellant, indeed, in a criminal trial, the prosecution must prove its case beyond a reasonable doubt. Learned Senior State Counsel also did not express disagreement with this standard of proof expected from the prosecution in any criminal case, which is a salient feature in adversarial criminal cases in common law jurisdictions. The degree of proof 'beyond reasonable doubt' apart from its historical roots in the common law tradition and the adversarial system of criminal justice, specifically arises out of a fundamental right enshrined in Article 13(5) of the Constitution. That being, the *'presumption of innocence until and accused is proven guilty'* and the right to a *'fair trial'*.

These two fundamental rights are cornerstones of our criminal justice system in which fairness is a governing principle. It is a principle enshrined in in Sri Lanka's legal system. However, the presumption of innocence is rebuttable, and will prevail only until the presumption is vacated by Court, due to the cogency of evidence that the prosecution has presented. The importance and the weight of the presumption of innocence is such, that in order to vacate that presumption, the case for the prosecution must be proven beyond reasonable doubt. A *'reasonable doubt'* means a doubt in respect of which a valid reason can be attributed. For a *'doubt'* to be recognized as amounting to a *'reasonable doubt'*, the ground for the development of the doubt must be objective and reason based. There should be a logical basis for the entertaining of the doubt. That is the distinction between a *'mere doubt'* and a *'reasonable doubt'*.

John Woordroffe & Amir Ali in *'Law of Evidence'* (18th Edition, Volume 1, page 325) has described *'proof beyond reasonable doubt'* in the following manner:

"For a doubt to stand in the way of conviction of guilt, it must be a real doubt and a reasonable doubt – a doubt which after full and fair consideration of the evidence, the judge really, on reasonable grounds, entertains. … If the data leaves the mind of the trier in equilibrium, the decision must be against the party having the burden of persuasion. … If the mind of the adjudicating tribunal is evenly balanced as to whether the accused is guilty or not, it is its duty of the tribunal to acquit. If the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is as manifestly unreliable that no reasonable tribunal can safely convict based on it, the prosecution must fail. The court cannot be satisfied beyond reasonable doubt, if there are still some reasonable hypotheses compatible with the innocence of the accused. There is no emancipation of the mind, unless all reasonable doubts have been eliminated from it. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The benefit of doubt, to which the accused is entitled to, is reasonable doubt; the doubt which rational thinking men will reasonably, honestly and conscientiously entertain, and not the doubt of a timid mind."

Lord Denning in *Miller v. Minister of Pensions* [(1947) 2 AER 372] referring to the degree of proof the prosecution must satisfy, has held that *"… it need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond a shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to*

deflect the course of justice. If the evidence is so strong against a man, as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that would suffice."

In *The King v. Vidanalage Abraham Appu* [40 NLR 505] Acting Chief Justice Soertsz has held that " *… so far as the case for the prosecution in a criminal trial is concerned, it will not suffice for it to make out a case of grave suspicion against an accused person, it must establish its case, and so long as there is reasonable doubt left, there is no proof. The phrase 'to prove beyond reasonable doubt' is explanatory of the meaning of the word 'prove'."*

In terms of section 3 of the Evidence Ordinance, 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. Therefore, on an application of the principle contained in section 3 of the Evidence Ordinances buttressed by the earlier mentioned judicial precedents, I am of the opinion that, a criminal case can be considered to have been proved by the prosecution beyond reasonable doubt, if in the objective mind of the Judge or the jury, as the case may be, the prosecution has presented sufficient cogent evidence which causes the Judge or the jury to believe that the accused had committed the offence he has been charged with, or the judge or the jury considers that the accused having committed the offence to be so probable that the judge or the jury ought, under the circumstances of the case, act upon the supposition that the accused committed the offence. A case is *'proven beyond reasonable doubt'*, when a state of mind develops in the judge or the jury as the case may be, as to belief in the truthfulness of the assertion made by the prosecution, and the absence of a logically sound reason to doubt that assertion.

If either due to the sheer nature of the prosecution's evidence, or as a result of the defence impugning the prosecution's evidence, or through the presentation of defence evidence, or through a combination of such means, the defence raises what the judge / jury believes to be a *'reasonable doubt'* regarding the case for the prosecution, the benefit of such doubt must necessarily accrue to be benefit of the accused, and the accused would therefore be entitled

to be *acquitted.* The prosecution is required to prove all the ingredients of the offence the accused has been charged with (which would include the *actus reus* and the *mens rea* of the offence*), 'beyond reasonable doubt*'. It must be borne in mind that proving the prosecution's case beyond reasonable doubt requires a very high degree of cogency and sufficiency of evidence. It is a very high standard to meet. Mere conjecture, theories, suspicion or even proving a case to a degree that the judge or the jury would form the view that the accused may have committed the offence, is wholly insufficient. Furthermore, proving a case on a balance of probabilities is also wholly insufficient. However, proving a case beyond reasonable doubt is distinct from and lesser in degree than proving a case to a degree of mathematical accuracy. The law does not require the prosecution to prove its case with scientific precision and to a degree of mathematical accuracy. Proving a case beyond reasonable does not mean that there should be proof beyond a shadow of doubt or fanciful or imaginary doubts. Prosecutions have to primarily rely on human testimony. With all the inherent weaknesses of human testimony, it would not be reasonably possible and would in fact be unattainable to achieve such an extremely high degree of proof. Therefore, what is necessary is to prove the prosecution's case beyond reasonable doubt, which in fact means that, on an objective consideration of the evidence presented by the prosecution and should the defence have opted to present evidence, on a consideration of such defence evidence as well, would a reasonable person considering the evidence objectively, entertain either absence or lack of belief that the accused in fact committed the offence.

As E.R.S.R. Coomaraswamy has put it, "*the presumption of innocence merely means that the prosecution must prove the case against the accused beyond reasonable doubt. The two rules mean the same concept … The presumption of innocence is so strong that in order to rebut it, the crime must be brought home to the accused beyond reasonable doubt*". [The Law of Evidence, volume II, Book I, page 297-8]

It is indeed a well enshrined and recognized cardinal principle that an accused has the right to remain silent during the trial. In this case, the Accused - Appellant has exercised that right. There is no compulsion that may be imposed on an accused to present defence evidence or to prove his innocence. However, particularly in the backdrop of a prosecution having proved a minimum of a *strong prima facie case* against the accused, hiding behind the

presumption of innocence and exercising the right to remain silent, if the accused chooses to remain silent and not offer any evidence, if the circumstances justify, such silence and absence of evidence in favour of the accused may attract certain consequences in law in the nature of an adverse inference, and thereby entitle the judge or jury to arrive at certain adverse findings against such accused.

According to the *curses curiae* of this Court, on the application of, as well as quite independent of, the much debated dictum of Lord Ellenborough in *Rex v. Lord Cochrane and others (1814) Gurney's Reports 479,* when the prosecution has established a *strong prima facie case*, the continued silence on the part of the accused and his failure to explain incriminatory items of evidence, which, if the accused is in fact innocent, be well within his power to explain, would elevate the *strong prima facie case* to the level of a *presumptive case,* thereby in appropriate cases justifying a finding of *guilt* against the accused. In such circumstances, it would be lawful and fair for the Court to conclude that the prosecution has proven its case beyond reasonable doubt. {See *Queen v. Sumanasena,* [66. NLR 350], *Seetin v. The Queen* [68 NLR 316], *R. v. Seeder de Silva* [41 NLR 337], *Ilangatilaka v. The Republic* [(1984) 2 Sri L.R. 38], *Basnayake v. OIC, Special Crimes Detection Unit, Anuradhapura* [(1988) 2 Sri L.R. 50], *The Attorney General v. Potta Naufer and Others* [(2007) 2 Sri L.R. 144], and *Somaratne Rajapakse and Others vs. Honourable Attorney General* [(2010) 2 Sri L.R. 113].}

In the backdrop of all the earlier referred to cogent items of direct and circumstantial evidence presented by the prosecution, notwithstanding the prosecution having presented a very strong case against the Appellant, the Appellant did not offer any explanation on his behalf either by giving evidence or calling witnesses or through both such ways. There was no attempt by the Appellant to explain any item of evidence presented by the prosecution against him. The Appellant did not refute the allegation against him by way of evidence. He did not even attempt to explain the incriminatory items of evidence against him, which were well within his control to explain, if he was *not guilty* of having committed the offences contained in the charge sheet. Thus, taking as a whole the entire body of evidence presented by the prosecution and the accused's failure to provide an innocent explanation in respect of any of those items of evidence, I am of the view that the prosecution has proven its case

against the Appellant beyond reasonable doubt, and hence the conviction of the Accused - Appellant is lawful.

Suggestions put to prosecution witnesses

Counsel for the Accused - Appellant has during cross-examination **suggested** to Professor Sunil Ariyaratne, that due to a personal animosity he had with the Appellant, he had submitted to a Police Officer named Lugoda of the Colombo Crimes Division a CD which he himself had prepared, bribed him, and got a *"false case"* filed against the Appellant. It has also been suggested to him that his evidence that they watched the '*Sarungalaya*' film at the police station is false, and that they did not watch any film at the police station, and that he did not identify any production at the police station. Further, it has been suggested that what was shown to the witness by the police was not what was recovered from the possession of the Appellant. These suggestions have been vehemently denied by the witness.

Similarly, a **suggestion** has been made to witness Raveendra Mahagamasekera. It has been suggested to this witness that he is not the son of Mahagama Sekera. From the perspective of this witness's personal character, this is a very serious allegation to have been made. Undoubtedly, Raveendra Mahagamasekera would have been insulted, embarrassed and annoyed by the said suggestion, which he had vehemently denied. In view of Raveendra Mahagamasekera's own testimony that he is the son of Mahagama Sekera and the testimony given by Professor Sunil Ariyaratne and Visharadha Nanda Malini relating to Raveendra Mahagamasekera, it is overwhelmingly evident that Raveendra Mahagamasekera is in fact the son of the late well known and much respected lyricist Mahagama Sekera, and not an imposter. It is also evident that the defence counsel had no material at all, to establish the truth of such malicious and offensive suggestion, as, if he had, he would have impeached the testimony given by Raveendra Mahagamasekera using such material. After Raveendra Mahagamasekera denied the suggestion, the defence presented no evidence to contradict the witness and thereby assert the truthfulness of his suggestion.

It is necessary to observe that **suggestions** are in fact a component of a comprehensive cross-examination. Suggestions are factual assertions or propositions put to a witness during cross-examination by the counsel conducting such cross-examination, for the purposes of (i) impeaching the credibility and testimonial trustworthiness of a witness, (ii) attempting to elicit an item of evidence favourable to the party on whose behalf the cross-examination is being conducted, such as an admission, (iii) indicating to Court the position of the party on whose behalf the cross-examination is being conducted, regarding the testimony given by the particular witness, and (iv) indicating to Court the position of the party on whose behalf the cross-examination is being conducted, the overall case of the opposing party.

From an ethical perspective, **suggestions** must necessarily be founded upon instructions received by the counsel conducting the cross-examination from his client. Professional ethics of Attorneys require that for the purpose of deciding on the nature of the cross-examination to be conducted, for counsel not to rely on mere verbal instructions received from the client, but to examine and assess the veracity of the instructions he receives, prior to acting on instructions received and making suggestions. In fact, this requirement is not limited to making suggestions, but to all professional conduct of counsel. Counsel should not put suggestions to a witness, unless he in *good faith* believes the contents of such *suggestion* to be true. It would be unethical to put *suggestions* to a witness during cross-examination, which the counsel himself knows or has reason to believe is false. Thus, in the administration of justice, there is no room for baseless and ill-founded suggestions being made. It is the responsibility of Court to prevent the making of baseless suggestions, and if that is not possible, frown upon the making of such suggestions and where appropriate initiate disciplinary action against the Attorney-at-Law who acted in violation of this professional ethic.

In the circumstances, I am compelled to conclude that the question put under cross-examination containing the afore-stated suggestions, come within the ambit of section 151 and 152 of the Evidence Ordinance which empowers the Court to forbid the asking of indecent and scandalous questions, and questions aimed at annoying or insulting a witness. When such a question in the form of a suggestion is put to a witness, it would be desirable for the trial judge to inquire from counsel whether the Attorney has reasonable grounds for

the framing of and making such a suggestion, and an evidential basis to establish the truth of the contents of such suggestion. On a strict application of the law, in this case, the defence counsel who appeared on behalf of the accused should have been reported to the Supreme Court in terms of section 150 of the Evidence Ordinance. Courts of law should not be permitted to be used as platforms to make wild and sweeping allegations against witnesses, which cannot be substantiated, and thereby baselessly, unnecessarily and inappropriately injure the character and reputation of witnesses, harm the witness's state of mind, and to bring disrepute to the system of administration of justice.

Dr. A.R.B. Amerasinghe in *"Professional Ethics and Responsibilities of Lawyers"* (Chapter XII) has stated as follows: *"An attorney must not in the course of making submissions or cross-examining a witness say or lead a witness to say anything that might mislead the court. In particular,* ***counsel must not make any statement to court or put any proposition to a witness that is not supported by reasonable instructions, or that lacks factual foundation by reference to the information available to court****. Counsel has a particular responsibility to the court when cross-examining a witness* ***not to put to the witness allegations in the form of questions which counsel knows that the witness does not have the necessary information or knowledge to answer, or where there is no justifiable foundation for the question****."* (Emphasis added.)

No **suggestion** if denied by the witness, would by itself be considered as evidence, or would be capable of creating a reasonable doubt regarding the testimony of the particular witness, unless, the truth of the contents of such suggestion is established by way of evidence, or through a combination of evidence and presumptions, matters in respect of which the Court may take judicial notice, and inferences which the Court is lawfully entitled to arrive at. In this case, the defence has neither presented evidence of its own behalf, nor elicited evidence from prosecution witnesses in proof of any of the suggestions made.

Therefore, I conclude that the above-mentioned suggestions made to Professor Sunil Ariyaratne and to Raveendra Mahagamsekera, and to the other witnesses who testified for the prosecution, have not given rise to a reasonable doubt either regarding their respective credibility or the case for the prosecution. The baseless and frivolous suggestions made to

the afore-stated prosecution witnesses by the Attorney-at-Law for the Accused has to be responded to by this Court by the condemnation his conduct necessarily deserve.

Conclusions

Therefore, I answer the two questions of law in respect of which special leave to appeal was granted in the following manner:

1. *The learned Magistrate and the learned Judge of the High Court have correctly applied the law with respect to productions marked "P2A", as the evidence for the prosecution* ***has not created a reasonable doubt*** *as to the integrity of the said productions.*

2. *As regards the first and the second counts on the charge sheet, the prosecution has in fact proven its case beyond reasonable doubt. In the circumstances, the learned Magistrate and the learned High Court Judge have correctly considered the evidence and concluded the fact that the prosecution has proved the first and the second charges in the charge sheet beyond reasonable doubt. However, the learned Magistrate and the learned High Court Judge have erred in holding that the prosecution had proved the third count in the charge sheet beyond reasonable doubt.*

Accordingly, I affirm the conviction imposed by the learned Magistrate with regard to the first and second counts on the indictment.

Sentence

An examination of the journal entries reveals that, following the finding of the accused *guilty* of having committed all three offences in the charge sheet and convicting him, the learned Magistrate has imposed what may be referred to as a 'composite punishment' in relation to the three charges contained in the charge sheet. The scheme of the Code of Criminal Procedure Act and in particular section 16 of the Act envisages that when an accused is convicted of having committed more than one offence, the High Court Judge or the Magistrate as the case may be, should impose separate sentences in relation to each of the offences in respect of which he has been found *guilty*. That has not been done in this matter. Thus, the sentence imposed by the learned Magistrate is unlawful to that extent.

The law relating to intellectual property such as copyrights have been developed for multiple reasons including the need to protect intellectual property such as original creations, and confer on the authors of protected works certain rights which would inter-alia confer on them lasting reputation for their creations as well as financial and commercial entitlements. Infringement of copyrights negates those objectives and inhibits the growth of creations. Violation of copyrights is an avenue of illicit business activity, which must be condemned. The conduct of the Accused – Appellant would have certainly caused financial loss to the complainants. The Accused – Appellant has for financial gain engaged in selling pirated copies of music CDs. His conduct has been premediated, well organized, fraudulent, and carried out with the objectives of unlawful financial gain for himself, and causing financial loss to the complainants. It has also resulted in depriving the complainants of legitimate financial gain. I also see no mitigatory circumstances in favour of the Accused receiving a lenient sentence. In my view, in a matter of this nature involving infringement of intellectual property rights, the sentence to be imposed should be founded upon the need to punish the accused for the offence committed, impose deterrence on society, and effect compensatory relief to the complainants. These are sentencing policies, which should govern the sentence to be imposed. Taking the afore-stated factors into consideration, the sentence imposed by the learned Magistrate, in my view is lenient. However, the prosecution has not appealed and moved the High Court of the Provinces for enhancement of the sentence. Nevertheless, it is necessary for this Court to ensure the lawfulness of the sentence imposed.

In the circumstances, I impose a term of 6 months imprisonment suspended for a period of ten years and a fine of Rs. 5,00,000/= with a default sentence of imprisonment of one year, per each of the two charges the Accused – Appellant stands convicted of having committed. The sentences are to run concurrently.

In view of the foregoing, the conviction of the Accused – Appellant with regard to the first and second counts on the charge sheet are affirmed. The Accused – Appellant is acquitted with regard to the third count on the charge sheet. Subject thereto, this Appeal is dismissed.

As there is merit in the Appeal in so far as the third count in the charge sheet is concerned, no order is made as regards costs.

Judge of the Supreme Court

Priyantha Jayawardena, PC

I agree.

Judge of the Supreme Court

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 appeal in terms of section 9 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990.

SC Appeal 159 / 2018

SC/Spl/LA No. 137/2017

High Court Balapitiya case No. 542 / 2016

Magistrate's Court Balapitiya case No. 97138

Agampodi Wijepala de Soyza,

Katuwila,

Ahungalla.

ACCUSED - APPELLANT – APPELLANT

-Vs-

1. Officer-in-Charge,

   Police Station,

   Ahungalla.

   COMPLAINANT - RESPONDENT - RESPONDENT

2. Hon. Attorney General,

   Attorney General's Department,

   Colombo 12.

   RESPONDENT - RESPONDENT

Before: **L. T. B. Dehideniya J**

P. Padman Surasena J

Yasantha Kodagoda PC J

Counsel: Chathura Galhena for the Accused - Appellant - Appellant.

Yuresha De Silva SSC for Attorney General.

Argued on : 30 - 04 - 2021

Decided on : 07 - 07 - 2021

P Padman Surasena J

The Accused - Appellant - Appellant (hereinafter sometimes referred to as the Appellant) along with his wife stood charged in the Magistrate's Court of Balapitiya. The charge has alleged that the accused on 02-07-2007 had assaulted one Alagiyahandi Nandawathie de Silva with hand and thereby committed an offence punishable under section 314 read with section 32 of the Penal Code. Both the Appellant and his wife had pleaded not guilty to the said charge.

The wife of the Appellant who was named as the 2nd Accused in the charge sheet, had passed away in the course of the trial in the Magistrate's Court. Thereafter, the trial had proceeded only against the Appellant.

At the trial, the virtual complainant Alagiyahandi Nandawathie de Silva, her sister Sriyawathie de Silva and Police Sergeant 21709 Koswatta Gedara Nishshanka (an officer from Ahungalla Police Station) had given evidence. After the prosecution closed its case, the Appellant had given a dock statement.

Learned Magistrate at the conclusion of the trial, pronounced the judgment dated 28-04-2015, convicting the Appellant for the above charge.

Being aggrieved, by the said judgment of the learned Magistrate, the Appellant had appealed to the High Court of Southern Province holden at Balapitiya. The High Court, by its judgment dated 09-05-2017 had affirmed the conviction and enhanced the compensation payable to the virtual complainant. The Appellant, in this appeal, seeks to canvass the above judgments before this Court.

Upon the Petitioner supporting the special leave to appeal application relevant to this appeal, this Court by its order dated 10th October 2018, had granted special leave to appeal on the following questions of law.

i. Did the Provincial High Court has misdirected itself in analyzing the evidence led by the prosecution and the medico-legal report marked **P 1**?

ii. Did the Provincial High Court misdirected itself in failing to analyze the contradictions in the evidence of the virtual complainant and the contents of the medico-legal report marked **P 1**?

iii. Did the Provincial High Court err in entering the Judgment without dealing with the infirmities of the judgment of the learned Magistrate?

In order to answer the above questions of law, it would be necessary to turn, albeit briefly, to the evidence adduced before Court in this case.

The virtual Complainant Alagiyahandi Nanadawathie de Silva has commenced narrating the incident relevant to the charge revealing the fact that the Appellant is the person to whom she had leased out her land. As the period of the said lease had ended, she along with her sister Alagiyahandi Sriyawathie de Silva had gone to the said land on the date of the incident with the intention of re-taking the possession of the house in the said land. According to her, the extent of this land is about six acres. As they entered the property, the Appellant who had refused to hand over the keys of the house, had started assaulting the virtual complainant's head. This had taken place in the porch as she entered the house. The virtual complainant has also further stated that the wife of the Appellant also assaulted all over her body with a Cinnamon stick. Sriyawathie who was with her at that time had then run away. The virtual complainant states that the Appellant and his wife had thereafter dragged her out and pushed her to the road. She had fallen at that time. Having flagged down a three-wheeler thereafter, she had then gone to Ahungalla Police Station. She had not known that her hand was fractured until she went to the hospital. She has categorically stated that it was her right hand, which was fractured because of this incident. Further, she also has stated that she obtained an X ray image of her right hand and that it was her right hand, which was treated and bandaged in the hospital. She had made a complaint to the police before she got herself admitted to Balapitiya hospital.

It is to be noted that this witness had shown the wrist area of her right hand as the location of the injury when answering the questions during the cross-examination.

The Medico legal report (MLR) of the Virtual Complainant has been produced marked **P 1** in the course of the trial. The short history given by the patient in the said MLR is recorded as *"assaulted by a known person and fallen on ground after the assault".* The said MLR has

confirmed that there have been two injuries on the body of the Virtual complainant. They have been described in the MLR as follows.

1) *Contusion measuring 2 x 2 cm on left wrist joint*

2) *Scaphoid bone fracture of left wrist.*

The first two questions of law in respect of which this Court has granted leave to appeal are centered around the question as to whether the Provincial High Court has misdirected/erred in analyzing evidence adduced by the prosecution vis a vis the contents of the MLR marked **P 1**. It was in that backdrop that the learned counsel for the Appellant submitted before this Court that the discrepancies highlighted by the defence in the course of the trial go to the root of the prosecution's case. He further submitted that the said discrepancies have affected the credibility of the main prosecution witness in this case, namely the virtual complainant.

It is a fact that the virtual complainant has categorically stated that it was her right hand, which was fractured because of this incident. It is also a fact that the MLR shows injuries only on her left wrist. It is on that basis that the learned counsel for the Appellant argues that the evidence of the virtual complainant is not corroborated by medical evidence.

As the two of the above positions are clearly irreconcilable to each other, there exists a clear discrepancy (with regard to the question whether the injury was on the left or right hand) between the positions taken up by the virtual complainant on one hand and the medical evidence adduced by the prosecution on the other. While the prosecution has not called the particular Medical Officer who had examined and prepared the said MLR to give evidence before the Magistrate, even if it had happened, the Medical Officer concerned could not have taken a different position, as he is required to base his evidence on the contents of the report he had made. Therefore, the categorical assertion by the virtual complainant that it was her right hand, which was fractured because of this incident and the fact that she obtained treatment to her right hand, becomes clearly contradictory to the contents of MLR.

As the aforementioned first two questions of law relate to the question as to whether the Provincial High Court has misdirected/erred in analyzing evidence adduced by the prosecution vis a vis the contents of the MLR marked **P 1**, this Court must next find out how the learned High Court Judge had considered this issue.

The view expressed by the learned High Court Judge is that the above discrepancy had not misled the learned Magistrate, as the said discrepancy is not related to the causing of injury referred to in the charge. The said view is on the basis that the only charge framed against the Accused is for causing hurt to the virtual complainant by assaulting with hands. Hence,

the learned High Court Judge has taken the view that the above discrepancy is not relevant to the case at hand. (i.e. the injury on the hand is not directly relevant to the charge). It is on the same basis that the learned High Court Judge has concluded that the learned Magistrate had not misdirected herself on the said discrepancy.

The inference most favourable to the defence in the given situation would be to the effect that the virtual complainant has told in Court, something that is not true. However, as all falsehood is not deliberate (as held in the case of Boghinbai Hirjibai V State of Gujarat[1]), there is an onerous task for the Court then to ascertain whether such falsehood is due to a deliberate attempt to mislead Court with a view of obtaining an order or any other benefit in favour of the witness who uttered such falsehood. This is in addition to the other duties of Court such as ascertaining whether such discrepancies go to the root of the case and shake the overall credibility of such witness.

There could be broadly two reasons as to why the virtual complainant in the instant situation had taken up such a position. Those reasons could be as follows.

I. She has deliberately told Court something, which she knew to be false.

II. Due to an inadvertence, she has mixed up the facts and did not remember whether it was her right or left arm, which was injured.

I would now consider whether the virtual complainant in the instant situation has deliberately told Court something, which she knew to be false.

At the outset, it is relevant to note that this witness was around 64-68 years of age[2] at the time of giving evidence before the learned Magistrate. This incident had occurred on the 2nd July 2007 and the virtual complainant had given evidence on 14-02-2012. This means that the said witness had given evidence before the Magistrate's Court about 4½ years after she sustained the injuries.

Her evidence is that she felt a pain in the hand after she fell down. It is also her position that she realized that her hand was also injured only in the hospital. Thus, this seems to be not an injury serious to the extent that the witness should have felt a severe pain at the time of injury. If the injury is so serious to the extent of creating a lasting severe pain, then one may be justified in thinking that it would be improbable for such a person not to remember the exact hand on which such injury was inflicted. However, in the light of the evidence adduced

[1] AIR 1983 SC 753.
[2] Her age has been recorded at the commencement of her evidence as 64 and that as 68 at the commencement of the cross examination.

in the instant case, it is difficult to identify the injury caused to the wrist of the virtual complainant as one, which had brought about a severe pain, which one would expect to last in her mind for a considerable length of time due to its severity. Further, this injury is not one caused directly due to the assault but due to the fall. That may have been another factor as to why the witness could not remember whether it was the left or right hand that hit the ground causing that injury.

I cannot see how she could have got any additional advantage by falsely stating that it is her right hand that was injured due to the relevant fall and not the left hand. This shows that there has not been any necessity for this witness to falsely assert that it was her right hand that was injured in the course of this incident. Thus, the most that a Court of law can infer in this instance is that the witness has mixed up her left and right hands. One needs to be mindful that this is not a case where the assertion of the witness can never be supported by the medical evidence due to absence of any injury whatsoever. To the contrary, had the witness managed to avoid the mix up of her left and right hands, this would then be a classic case where medical evidence perfectly supports the evidence of the virtual complainant who has stated that she felt a pain in the hand after she fell down. Therefore, the above discrepancy alone would not be sufficient to vitiate the conviction of the Appellant.

E R S R Coomaraswamy in his work '*The Law of Evidence*'[3] has described as to how a Court should evaluate contradictions and omissions in the following way.[4] "*…. Another test that is applied in the evaluation of evidence is the test of inconsistency, contradictions per se and discrepancies in the evidence of the witness. A witness is often contradicted by his statements to the police under section 110 of the Code,[5] or by his depositions in the magistrate's court. Some may be positive contradictions, while others may be omissions, which may be of material facts or immaterial facts. In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The entire statement should be taken into consideration to ascertain whether they are due to a deliberate attempt to suppress or depart from the truth. Witnesses should not be disbelieved on the basis of trifling discrepancies and omissions.[6]"*

Thus, it would be necessary for the Court to examine the instant discrepancy along with the other infirmities relied upon by the learned counsel for the Appellant.

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[3] Vol II, Book 2.
[4] Ibid. at page 1054 (under the sub headings 'The test of inconsistency, contradictions and discrepancies').
[5] *Act No. 15 of 1979. (Cap 26).*
[6] *Dashiraj vs. The State A.I.R. (1964) Tri. 54.*

Learned counsel who appeared for the Accused before the Magistrate's Court had drawn the attention of the court to an omission in the statement of this witness to Police to show that this witness had not stated in her statement to Police that she suffered any pain in her hand. It is to be noted that this witness in the course of answering the questions posed to her in cross-examination, has categorically stated that her hand was not injured in the course of the assault.

The virtual complainant is consistent and firm when she had stated that it was her right hand, which was injured. She had even proceeded to show that to Court. The omission pointed out by the defence in the trial is to the effect that she had not stated in the statement to police that her hand had been injured. This fact is corroborated by the virtual complainant herself as she had stated in her evidence that it was only in the hospital that she realized that her hand had also been injured. As has been mentioned above, this witness had made a complaint to the police before she got herself admitted to hospital. Thus, the fact that her hand had been injured when she fell was not within her knowledge by the time she made her statement to Police. Therefore, the purported omission the learned Counsel for the Appellant is relying upon, does not in any way affect the consistency of the evidence of this witness.

The learned defence counsel had also drawn the attention of Court to the fact that this witness had not stated anything with regard to the assault by the wife of the Appellant in her statement to police. I observe that this is a piece of evidence only against the wife of the Appellant, the prosecution against whom was abated due to her demise. On the other hand, this Court needs to consider whether indeed an omission of this nature has been established by the defence in this case.

According to section 155 of the Evidence Ordinance one of the ways in which credit of a witness can be impeached by the adverse party is by proving that such witness has made a former statement, which is inconsistent with that witnesses's evidence in Court. One tool used by the defence counsel in trial Courts to achieve this purpose is to highlight the fact that such witness has failed to state some material fact to the statement made by such witness to Police. Such failures are commonly referred to as omissions attributed to that witness. Once such omissions are proved, then the trial Court must consider whether such omission affects the credibility of that witness. Thus, condition precedent to such consideration by Court is the firm establishment of such omission. This is because the necessity to consider such an omission does not simply arise if indeed there is no such omission in existence.

It would be relevant at this stage to refer to the Court of Appeal judgment in the case of Keerthi Bandara V Attorney General.[7] In that case, His Lordship Justice Sisira De Abrew stated as follows.

"*…… We lay it down that it is for the Judge to peruse the Information Book in the exercise of his overall control of the said book and to use it to aid the Court at the inquiry or trial. When defence counsel spot lights a vital omission, the trial Judge ought to personally peruse the statement recorded in the Information Book, interpret the contents of the statement in his mind and determine whether there is a vital omission or not and thereafter inform the members of the jury whether there is a vital omission or not and his direction on the law in this respect is binding on the members of the jury. Thus when the defence contends that there is a vital omission which militates against the adoption of the credibility of the witness, it is the trial Judge who should peruse the Information Book and decide on that issue. When the matter is again raised before the Court of Appeal, the Court of Appeal Judges are equally entitled to read the contents of the statements recorded in the Information Book and determine whether there is a vital omission or not and both Courts ought to exclude altogether the illegal and inadmissible opinions expressed orally by police officers (who are not experts but lay witnesses) in the witness box on this point. …* "

Moreover, the Evidence Ordinance in section 145 specifically provides for the manner in which a witness can be cross-examined and confronted with the statements made by such witness previously and the procedure to be adopted when proving such statements. It is worthwhile to reproduce here the said section.

Section 145.

(1) A witness may be cross-examined as to previous statements made by him in writing or reduced into writing and relevant to matters in question without such writing being shown to him, or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

(2) If a witness, upon cross examination as to a previous oral statement made by him relevant to matters in question in the suit or proceeding in which he is cross examined and inconsistent with his present testimony, does not distinctly admit that he made such statement, proof may be given that he did in fact make it; but before such proof can be given the circumstances of

[7] 2000 (2) SLR 245 at 258.

the supposed statement sufficient to designate the particular occasion must be mentioned to the witness, and he must be asked whether or not he made such a statement.

The scheme of the above section clearly demands that the following mandatory steps must be adhered to, when marking and proving an inconsistency.

Firstly, a cross-examining counsel who intends to show that the evidence of the witness under cross examination is contradictory with a previous statement made by him, must ask questions relevant to such matters in question without such previous statements being shown to him.

Secondly, if such witness comes out with something that is prima facie inconsistent with any part of such statement, it is then only the section allows such counsel to bring such parts of such statement which are to be used for the purpose of contradicting him, to the attention of such witness.

Thirdly, if such witness has stated something inconsistent with his previous statement and does not distinctly admit making such previous statement, then the cross-examining counsel is under a duty as per sub section 2 of the above section to ask whether or not such witness has made such a previous statement.

Fourthly, it is thereafter only the cross-examining counsel can proceed to prove that such witness has in fact made such previous statement.

The second question of law as set out towards the beginning of this judgment also raises the question whether the Provincial High Court misdirected itself in failing to analyze the contradictions in the evidence of the virtual complainant. Therefore, I would now deal with the effect of the two contradictions marked **V 1** and **V 2** by the defence in the trial.

By the contradiction marked **V 1**, the learned counsel who appeared for the Accused at the Magistrate's Court had attempted to show that the virtual complainant has stated in the evidence in chief that she had received a blow to the lower part of her right arm when the accused assaulted her. Thus, I will reproduce below, the relevant portion from the Magistrate's Court proceedings which reflect the said questions and answers leading to the said purported marking of the contradiction **V 1**, **V 2** as well as the other purported discrepancies.

> 01,02 වුදිතයින් සිටි.
> නිතිඥ සසංක ජයසේකර මහතා පෙනී සිටි.
> පැමිනිල්ල වෙනුවෙන් අහුන්ගල්ල පෙලිසියේ උ.පො.ප.ජයසුරිය පෙනී සිටි.
> පැ.සා.1 මුලික සාක්ෂි අවසන් කර ඇත. හරස් ප්‍රශ්ණ සදහා කැඳවයි.

<u>අලගියාහන්දි නන්දාවති ද සිල්වා : වයස : අවු.68 යි.,පදිංචිය - අංක.12,බොරුගෙඩලන්ද, කොස්ගම. සිංහ.,ප්‍රතිඥා මත.</u>

<u>හරස් ප්‍රශ්ණ</u> - නිතිඥ සසංක ජයසේකර මහතා :

ප්‍ර. දැන් තමන් කලින් දවසේ සාක්ෂි දිලා කියා සිටියා, තමන්ගේ අතටත් වැදුනා, ගහපු පාර ?

අතට වැදුනා කියා කිව්වා ?

උ. නැහැ. අරගෙන ගිහිල්ලා අනිත් පාරට තල්ලු කලා කිව්වා.

ප්‍ර. මගේ දකුණු අතේ යට බාහුවටත් වැදුනා. එහෙම කියලා සාක්ෂි දිලා කියා තියෙනවා නම් හරිද? වැරදිද ?

උ. රෝහලේදි තමයි, අත කැඩිච්ච බව දන්නේ.

ප්‍ර. එමෙන්ම මගේ දකුණු අතේ යට බාහුවට වැදුනා කිව්ව නම්, ඒක හරිද? වැරදිද ?

උ. මට මතක හැටියට මම කිව්වේ නැහැ.

ප්‍ර. එහෙම නම් තමන් කිව්වේ නැහැ ?

උ. මට මතක හැටියට කිව්වේ නැහැ.

(සාක්ෂිකාරියගේ **2012.02.14** වන දින මුලික සාක්ෂියේ ,03 වන පිටුවේ අවසාන පේළියේ සහ ඊට උඩ පේළියේ ඇති , "මගේ දකුණු අතේ යට බාහුවට වැදුනා" කියන කොටස - **වි.1** - ලෙස සළකුනු කිරීමට අවසර ඉල්ල සිටි.)

ප්‍ර. තමන්ට පහර දිපු අවස්ථාවේ තමන්ගේ අත තුවාල වුනාද ?

උ. මට කෝටුවෙන් පහර දුන්නා.

ප්‍ර. එහෙම පහර දිලා අත තුවාල වුනාද ?

උ. එහෙම පහර දුන්නා තුවාල වුන් නැහැ.

ප්‍ර. මම අහන්නේ අත තුවාල වුනාද ?.

උ. ගහද්දි අත තුවාල වුනේ නැහැ.

ප්‍ර. තමන් පසුගිය දවසේ ගරු අධිකරණයේ සාක්ෂි දිලා, "මම රෝහලට යන තෙක් දන්නේ නැහැ, දකුණු අත තුවාල වෙලා කියා" කිව්වාද ?

උ. මම ඇදගෙන ගිහිල්ලා වත්තෙන් එළියට තල්ලු කලාට පස්සේ මම වැටුනා.

ප්‍ර. තමන් මේ ගරු අධිකරණයට පහුගිය දවසේ සාක්ෂි දිලා, මගේ දකුණු අත තුවාල වුනා කිව්ව නම්, හරිද ? වැරදිද ?

උ. දකුණු අත තමයි තුවාල වුනේ ඇදගෙන ගිහිල්ලා දැම්මට පස්සේ.

ප්‍ර තුවාල වෙලාද තිබුනද ?

උ. තුවාලයක් නැහැ. කැක්කුම තිබුනා.

ප්‍ර. එහෙම නම් දකුණු අතේ තුවාලවුනා කිව්ව නම්, ඒක බොරුද ?

උ. මට නැගිට ගන්න බැරි වුනා. කැක්කුමයි. රෝහලේදි දොස්තර මහත්තය කිව්වා, ඔයාගේ අත කැඩිලා කියා.

ප්‍ර. එහෙම නම් එදා කිව්වේ බොරුවක් ?

උ. උත්තරය් නැත.

(එදින සාක්ෂි සටහන් වල **04** වන පිටුවේ "දකුණු අත තුවාල වුනා" කියන කොටස **<u>වි.2</u>** ලෙස ලකුනු කරන බව කියා සිටි.)

ප්‍ර. තමන් කියන්නේ, පාරට ඇදලා දැම්මා කියා ?

උ. ඔව්.

ප්‍ර. තමන් කියන විදිහට ඒ වෙලාවේ තුවාල වුනා ?

උ. ඔව්.

ප්‍ර. තමන්ගේ තුවාල වුනේ කොහොමද ?

උ. මගේ දකුණු අත කැක්කුම තිබුනා.

ප්‍ර. කවිද තමන් පොලිසියට එක්ක ගෙන ගියේ ?

උ. එතන ත්‍රිවිල් රථයක් තිබුනා, ඒකෙන්.

ප්‍ර. තමන් පොලිසියට කිව්වද මම පාරට ඇදලා දාලා මගේ අත කැක්කුම තියෙනවා කියා කිව්වද ?

උ. කිව්වා.

ප්‍ර. අතට පහර දුන්නා කියා කිව්වද ?

උ. අනම් මනන් ඇහුන නිසා ,අත කැක්කුම තියෙනවා කියා කිව්වා.

ප්‍ර. 2008.07.02 වන දින පොලිසියට කරපු ප්‍රකාශයේ ,අත කැක්කුම තියෙනවා කියා වවනයක්වත් කියා නැත කියා යෝජනා කරන්නේ ?

උ. අත කැක්කුමයි කියා තමයි රෝහලට ඇතුලත් කලේ.

ප්‍ර. "මගේ අත කැක්කුම තියෙනවා" කියා තමන් පොලිසියට දීපු කට උත්තරයේ වවනයක්වත් කියා නැත කියා යෝජනා කරන්නේ ?

උ. මම කිව්වා, මගේ ඔඵවෙහි කැක්කුම තියෙනවා. මට පෙෂර් එක තියෙනා. කියා කිව්වා.

උ. "මගේ අත කැක්කුමයි " කියන කොටස ඌණතාවයක් ලෙස සළකුණු කරන බව කියා සිටි.

(පැ.1 දරණ අධිකරණ වෛද්‍ය වාර්තාව වුදිතගේ නිතිඥ මහතා (නඩු ගොනුවේ ඇති) පරීක්ෂා කර බලයි.)

ප්‍ර. කවදද තමන් ඔය විජේපාලලාගේ ගෙදරට ගියේ ?

උ. 2007 , 10 වෙනි මාසයේ 02 වැනිදා වත්තට ගියේ.

ප්‍ර. මොකටද ගියේ ?

උ. මම වත්ත බදු දීලා තිබුනේ, අවුරුදු 06 කට. ඊට පස්සේ වත්තේ බද්ද ඉවර වුනේ. 2007. ඊට පස්සේ මම මාසයක් පහු කරලා දවසක ගියා වත්තට. එදා තමයි මට පහර දුන්නේ.

ප්‍ර. කවිද තමන්ට ඉස්සර වෙලාම ගැහුවේ ?

උ. මෙම වත්ත බදු දීප බදුකරු විජේපාල.

ප්‍ර. කොහේදිද ගැහුවේ ?

උ. මගේ වත්තේ වාඩිය තියෙනවා. වාඩියේස්තෝප්පුවේ ඉඳගෙන.

ප්‍ර. මොකකින්ද ?

උ. අතින්.

ප්‍ර. කොහේටද ගැහුවේ ?

උ. මගේ වත්තේ වාඩිය තියෙනවා, වාඩියේ වාඩියේස්තෝප්පුවේ ඉඳගෙන.

ප්‍ර. මොකකින්ද ?

උ. අතින්.

ප්‍ර. කොහේටද ගැසුවේ ?

උ. ඔඵවට ගැහුවා. මෙයාගේ බිරිඳ කෝටුවෙන් ගැහුවා.

ප්‍ර. කොහේටද ගැහුවේ මූණටත් වැදුනද ?

උ. මුණටත් වැදුනා.

ප්‍ර. කිපාරක් ගැහුවාද ?

උ. පාර 05 ක් 06 ක් ගැහුවා.

ප්‍ර. මුණට සහ ඔළුවට ගැහුවම තුවාල වුනාද ?

උ. ඔළුව කැක්කුම ගත්තා.

ප්‍ර. මුණ ඉදිමුනා නේද ?

උ. ටිකක් ඉදිමුනා.

ප්‍ර. ඔළුවට සහ මුණට ගැහුවා ?

උ. ඔළුවට ගැහුවා. මුණටත් වැදුනා.

ප්‍ර. තමන් අමුලික බොරු කියන්නේ, මුණටයි ඔළුවටයි ගැහුවා කියා ?

උ. මට ගැහුවා. .

ප්‍ර. විජේපාලගේ බිරිඳ ගැහුවේ කොහොමද ?

උ. කුරුඳු කෝට්ටක් අරගෙන ඇවිල්ලා එතනදි මට ගැහුවා, විජේපාලගේ බිරිඳ.

ප්‍ර. මොකකින්ද ගැහුවේ ?

උ. කුරුඳු කෝට්ටෙන්.

ප්‍ර. තමන් පොලිසියට කිව්වද විජේපාලගේ බිරිඳ කුරුඳු කෝට්ටකින් හෝ පොල්ලකින් පහර දුන්නා කියා ?

උ. මතක නැහැ.

ප්‍ර. තමන් දැන් මේ නඩුවේ වාසි ගන්න බොරු සාක්ෂි දෙනවා කියා යෝජනා කරන්නේ?

උ. මට වාසි ගන්න උවමනා නැහැ. මම වාසි ගන්න බොරු කියන්නේ නැහැ.

ප්‍ර. දැන් තමන් සිවිල් අධිකරණයේ නඩුවක් පවරා තියෙනවා නේද ?

උ. පවරා තියෙනවා.

ප්‍ර. තමන් පවරාලා තියෙන්නේ මොකටද ?

උ. මේ අය එලියට දාන්න. ඒ නඩුව මේ 26 වෙනිදා තියෙනවා.

ප්‍ර. දැන් තමන් අද කිව්වා පොලිසියට කිව්වද නැද්ද කියා තමන්ට මතක නැත කියා?

උ. ඔව්.

ප්‍ර. තමන් ගිය වතාවේ මේ අධිකරණයේ සාක්ෂි දෙන විට කිව්වා නේද කුරුඳු කෝටුවකින් පහර දුන්නා කියා?

උ. කිව්වා.

ප්‍ර. තමන් පොලිසියට කිව්වද ඒක ?

උ. මතක නැහැ.

ප්‍ර. මතක නැහැ.

ප්‍ර තමන් අද අධිකරණයට කිව්වා මතකයි, පොලිසියට කිව්වද කියා මතක නැහැ කියා?

උ. ඔව්.

ප්‍ර. තමන් යෝජනා කරන්නේ තමන් විජේපාලගේ බිරිඳ ගැහුවා කියා එක වචනයක්වත් කියා නැත කියා පොලිසියට ?

උ. මම කිව්වද මතක නැහැ. මට පෙෂ්ර වැඩිවෙලා සිටියේ මතක නැහැ.

When one peruses the evidence in chief of the virtual complainant as a whole, it can clearly be observed that her evidence in court was that her right arm had rested hard on the ground when she fell after being pushed by the Accused. It is therefore a matter for regret that the learned counsel who appeared for the Accused in the Magistrate's Court had

replaced his own version in place of that of the witness when he questioned the witness in the following manner; දැන් තමන් කලින් දවසේ සාක්ෂි දිලා කියා සිටියා, තමන්ගේ අතටත් වැදුනා, ගහපු පාර ?

Thus, it is clear that the above purported portion of the evidence, which the learned counsel had used to contradict the witness, is not indeed a part of her evidence before Court. Therefore, the learned counsel who appeared for the accused in the Magistrate's Court deliberately, without any excuse, had attempted to mislead the witness by asking questions as if she had stated so in the evidence in chief. In any case, while the witness had not admitted making such statement in Court, the prosecution also had not proved that she had made such statement. Thus, I am of the view that the contradiction **V 1**, is something that does not in reality exists in the evidence of the virtual complainant.

As regards the other contradiction **V 2**, it can be clearly observed that the virtual complainant in both her evidence in chief and cross-examination has been consistent that it was only in the hospital that she got to know that her right hand had been injured. Further, the unfair manner in which the said counsel had questioned the witness clearly shows that the contradiction **V 2**, is a contradiction illegally created by counsel and not an inconsistency in the evidence of the witness.

Learned counsel who appeared for the Accused before the Magistrate's Court had also attempted to highlight certain other items of evidence of the virtual complainant as omissions in her statement to Police. I have carefully perused the evidence of the virtual complainant on record and I am unable to trace any satisfactory proof of the said other so called discrepancies as well. The learned counsel for the reasons best known to him has been satisfied to leave it at that without even making any attempt to adduce proof before Court that the virtual complainant had indeed made such statements. They are either non-existent or are not proved to the satisfaction of Court. A closer look at the questions and answers set out above would manifestly show that it is so. Thus, it is not possible for a Court of law to consider them as omissions in the statement made to Police by the virtual complainant.

Therefore, as reflected from the above record of proceedings, I am of the view that the two purported contradictions marked **V 1** and **V 2** by the defence in the trial before the Magistrate's Court are non-existent contradictions and hence should not be considered as discrepancies in the evidence of the virtual complainant.

The learned defense counsel had also suggested to this witness that there were no signs of assault on her head.

As the sister of the virtual complainant (prosecution witness No. 2) also stated in her evidence that the 1st Accused assaulted both the virtual complainant and herself with hands. She also

stated that the wife of the Accused had assaulted with a stick. She further states that she ran away from the scene when they came to assault her further. She states that there were bruises on the body of the virtual complainant.

In the case of Bandaranaike V Jagathsena and others [8] 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.[9]

In the Indian case of State of Uttar Pradesh V M K Anthony,[10] it was 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 scrutinise 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 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. If the Court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate Court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial Court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. 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. Cross examination is an unequal dual between a rustic and refined lawyer. … "

In the light of the above conclusions it is my view that the learned High Court Judge was right when he concluded that the so called discrepancies has not affected the credibility of the virtual complainant or that the said purported discrepancies have not created any reasonable doubt in the prosecution's case. Therefore, I answer all of the aforementioned questions of law in the negative.

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[8] 1984 (2) SLR 397.
[9] Ibid. at page 415.
[10] A I R (1985) SC 48 (paragraph 10).

For the above reasons, the Accused Appellant is not entitled to succeed in this appeal. In these circumstances, I affirm both the judgment of the High Court dated 09-05-2017 and the judgment of the learned Magistrate dated 28-04-2015 and direct that this appeal be dismissed.

Appeal is dismissed.

JUDGE OF THE SUPREME COURT

L. T. B. Dehideniya 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

1. Geekiyanage Sardha Maheshini Amarasinghe,
2. Dona Kusuma Sardhalatha Amarasinghe,
   Both of
   "Sisira", Sisirawatte,
   Narammala.
   Plaintiffs

SC APPEAL NO: SC/APPEAL/161/2019
SC LA NO: SC/HCCA/LA/536/2017
HCCA KURUNEGALA NO: NWP/HCCA/KUR/03/2016/LA
DC KULIYAPITIYA NO: 66/L

Vs.

1. Geekiyanage Nirosha Prasadini Kahandawarachchi (nee Amarasinghe),
2. Chanaka Ravindra Kahandawarachchi,
   Both of
   No. 2, Esther Place,
   Park Road,
   Colombo 05.

3. Geekiyanage Thanuja Sanjeewani Amarasinghe,
   No.14, Vijitha Road,
   Nedimala,
   Dehiwala.
4. Commercial Bank,
   Bristol Street,
   Colombo 01.

   Defendants

AND BETWEEN

1. Geekiyanage Nirosha Prasadini Kahandawarachchi (nee Amarasinghe),
2. Chanaka Ravindra Kahandawarachchi,
   Both of No. 2,
   Esther Place, Park Road,
   Colombo 05.

   1st and 2nd Defendant-Appellants

Vs.

1. Geekiyanage Sardha Maheshini Amarasinghe,
2. Dona Kusuma Sardhalatha Amarasinghe,
   Both of “Sisira”, Sisirawatte,
   Narammala.

   Plaintiff-Respondents

3. Geekiyanage Thanuja Sanjeewani Amarasinghe,
   No.14, Vijitha Road, Nedimala,
   Dehiwala.
4. Commercial Bank,
   Bristol Street,
   Colombo 01.

   3rd and 4th Defendant-Respondents

AND NOW BETWEEN

1. Geekiyanage Sardha Maheshini Amarasinghe,
2. Dona Kusuma Sardhalatha Amarasinghe,
   Both of "Sisira", Sisirawatte,
   Narammala.

   Plaintiff-Respondent-Appellants

1. Geekiyanage Nirosha Prasadini Kahandawarachchi (nee Amarasinghe),
2. Chanaka Ravindra Kahandawarachchi,
   Both of No. 2,
   Esther Place, Park Road,
   Colombo 05.

   1st and 2nd Defendant-Appellant-Respondents

3. Geekiyanage Thanuja Sanjeewani
   Amarasinghe,
   No.14,
   Vijitha Road,
   Nedimala,
   Dehiwala.
4. Commercial Bank,
   Bristol Street,
   Colombo 01.
   3rd and 4th Defendant-
   Respondent-Respondents

Before: P. Padman Surasena, J.
Yasantha Kodagoda, P.C., J.
Mahinda Samayawardhena, J.

Counsel: Dr. Sunil Cooray with Diana Rodrigo for the Plaintiff-Respondent-Appellants.
Dushantha Kularathne with Roshan Pathirana for the 1st and 2nd Defendant-Appellant-Respondents.

Argued on : 03.08.2021

Written submissions:

by the Plaintiff-Respondent-Appellants on 22.11.2019.

by the 1st and 2nd Defendant-Appellant-Respondents on 08.10.2020.

Decided on: 15.10.2021

Mahinda Samayawardhena, J.

The two plaintiffs filed this action against the four defendants seeking a declaration that the 1st and 2nd defendants are holding the property in suit conveyed by deed No. 256 in trust for the plaintiffs, and the 2nd defendant's transfer of his rights in favour of the 1st and 3rd defendants by deed No. 11848 is confined to such limited rights. They sought an order retransferring the property in their names and damages. No relief was sought against the 4th defendant bank to whom the property had been mortgaged and the 4th defendant was later discharged from the proceedings.

The 1st and 2nd defendants filed the answer seeking dismissal of the action. The 3rd defendant filed a somewhat perplexing answer in that the answer commences by denying the averments in the plaint and concludes by seeking a decree that the 1st and 2nd defendants are holding the property in trust for the plaintiffs. Notably, the 3rd defendant does not state in the answer that she is prepared to transfer whatever rights passed on to her by deed No. 11848 in the name of the plaintiffs. At the trial, the plaintiffs raised issues seeking all the reliefs prayed for in the prayer to the plaint, including the reliefs sought against the 3rd defendant.

Halfway through the trial, the 1st and 2nd defendants made an application to the District Court to make the 3rd defendant a plaintiff in the action on the basis that the 3rd defendant supports the case of the plaintiffs. This application was refused by the District Court mainly on the ground that it was a belated application. On appeal, the High Court of Civil Appeal set aside this order and directed the District Court to add the 3rd

defendant as the 3rd plaintiff. It is against this Judgment of the High Court of Civil Appeal that the plaintiffs have preferred this appeal.

This Court granted leave to appeal against the Judgment of the High Court of Civil Appeal on the questions whether the impugned Judgment is contrary to *inter alia* sections 14 and 18 of the Civil Procedure Code, and whether the High Court failed to consider the reason the 3rd defendant was not made a plaintiff and the fact that the 3rd defendant has no cause of action against the 1st and 2nd defendants.

The High Court of Civil Appeal allowed the application of the 1st and 2nd defendants under section 18(1) of the Civil Procedure Code, which reads as follows:

> *The court may on or before the hearing, upon the application of either party, and on such terms as the court thinks just, order that the name of any party, whether as plaintiff or as defendant improperly joined, be struck out; and the court may at any time, either upon or without such application, and on such terms as the court thinks just, order that any plaintiff be made a defendant, or that any defendant be made a plaintiff, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in that action, be added.*

The High Court of Civil Appeal highlights that in terms of section 18(1), "*the court may <u>at any time</u>, either upon or without such*

application, and on such terms as the court thinks just, order that any plaintiff be made a defendant, or that any defendant be made a plaintiff".

After the amendments to the Civil Procedure Code by Act No. 9 of 1991 and Act No. 8 of 2017, section 18 of the Civil Procedure Code cannot be read in isolation but in conjunction with section 93(2). *(Colombo Shipping Co Ltd v. Chirayu Clothing Pvt Ltd [1995] 2 Sri LR 97)*

Section 93(2) of the Civil Procedure Code reads as follows:

> *On or after the day first fixed for the Pre-Trial of the action and before final judgment, no application for the amendment of any pleadings shall be allowed unless the Court is satisfied, for reasons to be recorded by the Court, that grave and irremediable injustice will be caused if such amendment is not permitted, and on no other ground, and that the party so applying has not been guilty of laches.*

The basic rule embodied in section 93(2) is that no amendment of pleadings shall be allowed on or after the day first fixed for the pre-trial of the action. As this section stands today, the Court no longer has the discretion to allow the amendment of pleadings after the day first fixed for the pre-trial of the action. The Court can now allow the amendment of pleadings after the day first fixed for the pre-trial of the action if and only if the Court is satisfied that (a) grave and irremediable injustice would be caused if such amendment is not permitted and (b) the party seeking such amendment is not guilty of laches. Both these requirements must be satisfied, not one. *(Kuruppuarachchi v. Andreas [1996] 2 Sri LR 11)*

The plaintiffs filed the action on 06.11.2009 and the 3rd defendant filed the answer on 26.04.2010. The 1st and 2nd defendants knew the 3rd defendant's standpoint by 26.04.2010. The case was first fixed for trial on 16.12.2010.

This was after the amendment to section 93(2) by Act No. 9 of 1991 but before the amendment by Act No. 8 of 2017. At the time of Act No. 9 of 1991, there was no pre-trial, only trial. The only change made to section 93(2) by Act No. 8 of 2017 was the substitution of the words "day first fixed for the trial" with the words "day first fixed for the Pre-Trial".

The application to add the 3rd defendant as the 3rd plaintiff under section 18 of the Civil Procedure Code was made by the 1st and 2nd defendants on 06.11.2015 in the middle of the trial after voluminous evidence had been recorded on several dates of hearing. There is no explanation for the delay in making the application. The 2nd defendant is clearly guilty of laches. Nor has the Court been convinced that grave and irremediable injustice would be caused if such amendment is not permitted.

Allowing the application of the 1st and 2nd defendants under section 18 of the Civil Procedure Code necessarily entails the amendment of pleadings. It is not just a matter of amending the caption. The amendment of pleadings was not legally permissible at the stage the application was made and therefore the application to add the 3rd defendant as the 3rd plaintiff ought to have been refused.

The High Court of Civil Appeal took the view that no cause of action is disclosed in the plaint against the 3rd defendant and there is no explanation in the plaint as to why the 3rd defendant

was made a defendant. The plaintiffs have clearly explained in the plaint the basis upon which the 3rd defendant was brought in (i.e. the execution of deed No. 11848 by the 2nd defendant in favour of the 3rd defendant) and the relief sought against her. This does not appear to be a collusive action as suggested by the High Court of Civil Appeal.

Can the 3rd defendant be made the 3rd plaintiff on the facts and circumstances of this case? Section 11 of the Civil Procedure Code enacts "*All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative, in respect of the same cause of action.*" According to section 5 of the Civil Procedure Code, a cause of action is the wrong for the prevention or redress of which an action may be brought. The 1st and 2nd defendants have committed no wrong to the 3rd defendant. Hence no cause of action has accrued to the 3rd defendant against the 1st and 2nd defendants. The 3rd defendant, in my view, cannot be made a plaintiff.

The questions of law in respect of which leave was granted are answered in the affirmative.

I set aside the Judgment of the High Court of Civil Appeal and restore the order of the District Court dated 11.03.2016. The plaintiffs are entitled to costs in all three Courts recoverable from the 1st and 2nd defendants.

Judge of the Supreme Court

P. Padman Surasena, J.

I agree.

Judge of the Supreme Court

Yasantha Kodagoda, P.C., J.

I agree.

Judge of the Supreme Court

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

SC Appeal 162/15

Application No: SC HC (CA) LA 464/2014

NWP/HCCA/KUR/134/2010(F)

DC Kurunegala Case No: 9540/M

In the matter of an Application for leave to Appeal from the judgement dated 4th August 2014 of the High Court (Civil Appeal) of North Western Province made under and in terms of the Section 5(c) of High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 0f 2006

Sadayan Kanapathi Sandrakala

Kadithalamulla, Polgahawela

Plaintiff

Vs.

Mohammed Saththas Issathul Sareena,

No.10, Kurunegala Road,

Bandawa, Polgahawela

Defendant

AND

Sadayan Kanapathi Sandrakala

Kadithalamulla, Polgahawela

Plaintiff-Appellent

Vs.

Mohammed Saththas Issathul Sareena,

No.10, Kurunegala Road,

Bandawa, Polgahawela

Defendent-Respondent

AND NOW

Mohammed Saththas Issathul Sareena,

No.10, Kurunegala Road,

Bandawa, Polgahawela

Defendent-Respondent- Petitioner

Vs.

Sadayan Kanapathi Sandrakala

Kadithalamulla, Polgahawela

Plaintiff-Appellant-Respondent

Before: B.P Aluwihare, PC, J.

L.T.B Dehideniya, J.

Murdu N.B Fernando, PC, J.

Counsels: Keshan Thalagahagoda with Ms. Rashmi Dias for the Defendant-Respondent-Appellant

Kamal Nissanka for Plaintiff- Appellant – Respondent instructed by Lakshman Herath

Argued on: 04.09.2020

Decided on: 01.12.2021

L.T.B. Dehideniya, J.

Plaintiff-Appellant- Respondent (hereinafter sometime referred to as the Respondent) instituted an action by plaint dated 30.05.2006 seeking damages from the Defendant – Respondent –Petitioner (hereinafter sometime referred to as the Appellant). In her plaint, the Respondent had alleged that the Appellant had made a false complaint to the Polgahawela Police Station accusing the Respondent of Theft. Upon the said complaint, the Respondent had been arrested, produced in Court, remanded for 10 days and thereafter released on bail. The Magistrate Court of Polgahawela

had discharged the Respondent on or about 06.12.2005, on the basis that the witnesses had not presented themselves in Court. Consequent to the filing of the action in the District Court, the proceedings against the Respondent before the Magistrate Court (Case bearing No.13028) had been reopened. The matter had been taken up for trial and the Respondent was acquitted and discharged on or around 16.03.2010. The Respondent's cause of action of the District Court action arose when the Respondent was discharged by the Magistrate's Court on the account of the fact that the witnesses had not presented in Court, before the case was reopened.

The Respondent contested that the Appellant's act of false allegation of theft, constituted an aggression upon her person, her dignity or her reputation, and that the act was intentional. The Respondent has further stated that, in consequence of the complaint made by the Appellant, the Respondent had been arrested, assaulted by Police and thus suffered physical and mental trauma, the Respondent had to relocate with her family due to extreme social stigma and resulted in losing her small business and the education of the Respondent's child had got affected. The Respondent had denied the charges of theft and further contends that the Appellant had no reasonable or probable cause to make the said complaint and the Appellant has committed an *injuria* with the intention of impairing Respondent's dignity, reputation and personality. Accordingly, the Respondent claimed a sum of Rs.400, 000/- as damages

The District Court of Polgahawela delivered the judgement dated 01.09.2010 in favour of the Appellant holding that no sufficient evidence was led that would establish that the Appellant acted maliciously or that she made a false complaint. District Court further held that the Respondent's claim was not explicit enough to consider whether the Respondent's action was based on *actio injuriarum* or malicious prosecution. Being aggrieved by the said judgement the Respondent tendered an appeal there from to the High Court of Civil Appeal of the North Western Province. Upon hearing the parties, the High Court of Civil Appeal delivered the judgement dated 04.08.2014 in favour of the Respondent, set aside the Judgement of District Court of Polgahawela holding that the Respondent's action comes under the *actio injuriarum* and not malicious prosecution. The Learned High Court Judges further affirmed that the Appellant has failed to establish a reasonable and probable cause in making the allegations of theft. It is from the aforesaid judgement that this appeal is preferred.

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

1) Did the High Court err in law by failing to appreciate that the rights of parties are determined as of the date of the institution of the action and that consequently the Judgement of the Magistrate's Court could not have formed the foundation of the judgement in favour of the Plaintiff?

2) Did the High Court err in law by failing to consider that the action before the District Court could not be maintained while proceedings were still pending before the Magistrate's Court and that no cause of action would accrue until a finality had been reached in respect of such proceedings in terms of the law?

3) Did the High Court misdirect itself in law applying the judgement of ***Alwis v. Ahangama?***

The Appellant's case is based on the ground that the judgement of the High Court of Civil Appeal of the North Western Province, is wrong, contrary to law and against weight of the evidence led before the Court. When carefully considering the evidence tendered before the Magistrate Court in the initial action, it appears that the Appellant had made the said complaint only upon a 'suspicion' against the Respondent (Appellant's Statement to the Police Station of Polgahawela marked as **පැ.1** in the original action). Examining all the evidence presented, it appears that the series of events in which the Appellant lined up the theft that allegedly took place at her place of business was based on the conclusions drawn from the suspicion of the Respondent. Among the factual evidence submitted in the said police complaint and the evidence presented at the proceedings, multiple contradictory evidence has been detected. Although it is recorded in **පැ.1** the police complaint, that the Appellant went home having closed the shop at about 5.00 p.m., it seems to be an inaccurate fact since the evidence of the Appellant in Case bearing No.13028 in Magistrate's Court as well as in the District Court of Kurunegala (Case bearing No.9540/M) was that her daughter closed the shop in that evening (at p.61 of the proceedings). However, when the learned counsel had shown the Appellant what was recorded in the Police Records, the Appellant was unable to provide a justifiable reasoning for the contradictions of the evidence.

Further, the Appellant has clearly stated in her Police Complaint that there was no eyewitness evidence of the theft suspected to have been committed by the Respondent**;** except the evidence that the missing clothing items were there for sale with few cloth merchants, namely; Rajapakse

Siril Anandathilake and Nisantha Bandara, at the fair of Polgahawela. However, the police statements obtained from the said merchants were not submitted and they had not been produced before the Court as witnesses. When carefully considering the Police Records, it appears that the said merchants had failed to recognize the clothing items as the exact same missing clothing items belongs to the Appellant. Further, when the learned counsel cross-examined, the Appellant had failed to even recognize the identities of the two merchants.

As per the aforesaid context;

i. The Appellant has failed to substantiate the allegation of theft against the Respondent by clear evidence.
ii. Contradictions identified in the Appellant's evidence throughout the court proceedings has damaged the credibility of the Appellant's allegations against the Respondent.

Accordingly, with the perusal of the factual evidence pertaining to the present application, it is clear that there was no reasonable or probable cause for the Appellant to suspect the Respondent of theft.

The learned District Judge in the judgement dated 01.09.2010 held that the Respondent's claim was not explicit enough to consider whether the Respondent's action was based on *actio injuriarum* or malicious prosecution. The District Court further held that, the action must be dismissed since the Respondent had failed to establish direct evidence on malice or *injuria* with regard to the complaint of theft of the Appellant against the Respondent. The law has introduced a set of essential factors in establishing an action of *actio injuriarum* and malicious prosecution. ***R.G Mckerron*** (The Law of Delict, Reprinted Edition, 2009 at p.53) describes *actio injuriarum* as an act committed with *dolus* (wrongful intent) or as it is usually termed in this connection, *animus injuriandi* which consisting an impairment of the Plaintiff's personality.

> *"The interests of personality protected by the actio injuriarum are those interests 'which every man has, as a matter of natural right, in possession of an unimpaired person, dignity and reputation'. The plaintiff therefore, show that the act complained of constituted an impairment of his person, dignity and his reputation.*
>
> *Examples such acts are;*

- *Assaults of all kind*
- *The unjustifiable infliction of any restraint upon the liberty of another*
- *The use of defamatory or insulting words concerning another*
- *The malicious and unwarranted institution of criminal proceedings against another" [emphasis added]*

The legal principle of "ABUSE OF LEGAL PROCEDURE" under *actio injuriarum* action has been discussed and accepted in case law jurisprudence. In ***Alwis v. Ahangama*** [2000] 3 Sri L.R 225 Justice Fernando referring to ***R.G Mckerron*** (The Law of Delict, Reprinted Edition, 2009 at p.259)**,** held that in both injuria and malicious prosecution has a general requirement to be fulfilled, which is to *"set the law in motion"*.

> *"Every person has a right to set the law in motion, but a person who institutes legal proceedings against another maliciously and without reasonable and probable cause abuses that right and commits an actionable wrong…*
> *The chief classes of proceedings to which the rule applies are:1)Malicious criminal prosecutions 2)Malicious imprisonment or arrest 3)Malicious execution of property 4)Malicious insolvency 5)Malicious civil actions"*

In light of the well-established legal principles discussed above, it is clear to this court that in the present application, the Appellant has 'set the law in motion' by making the police complaint against the Respondent. Furthermore, it is undeniable that, being arrested upon the said complaint, the Respondent was produced in Court and remanded for 10 days, itself constructs an *injuria* since the said complaint of the Appellant has led to an impairment of personality, dignity and reputation of the Respondent.

It is a question with great importance before this Court that, whether the Appellant has acted maliciously when making the alleged complaint of theft against the Respondent. The necessary ingredients forming a charge of malicious criminal arrest are discussed in ***Chitty Vs. Peries*** (41 N.L.R 145 at page 147), Howard CJ stated that the Plaintiff must show *(i) that his arrest on a criminal charge was instigated, authorized or effected by the Defendant (ii) that the Defendant acted maliciously and (iii) that the Defendant acted without reasonable and probable cause*.

The Respondent has stated that the Appellant lodged the Police complaint purely on malicious intent. Upon the process of adducing evidence before the Court, the Respondent has stated that the Appellant had a quarrel with the Respondent over a personal dispute, and consequently made the said Police complaint , wilfully or intentionally to cause harm, without legal justification against the Respondent. When carefully observing the evidence led before this court, it appears that the Appellant has failed to rebut the Respondent's evidence on the aforesaid personal dispute (at p.2-3 of the proceedings) and had no other reasonable or probable cause for the allegations of theft against the Respondent, except the said personal dispute. Further, it is clear to this court that it was the Appellant's Police complaint that led to the arrest of the Respondent. Therefore it is evident that, the necessary ingredients forming malice have been satisfied by the Respondent. Therefore, it is conspicuous that, the respondent's claim in this case is not based on malicious prosecution as understood in the English Law, but founded on principles of *actio injuriam* known to the Roman Dutch law.

It is a pivotal issue, whether the respondent could maintain this action if the criminal proceedings against the respondent in the Magistrate's Court had not reached a finality at the time the present civil proceedings was instituted against the Petitioner. The Appellant submits that, one of the essential requirements to be fulfilled to maintain such a case is termination of criminal proceedings in the Magistrate's Court in favour of the Respondent, at the time when civil proceedings for damages was instituted. The key to this issue depends on the degree of the definition of the "cause of action". In this regard the definition of the cause of action given in ***Ranghami v. Kirihamy*** (1904) 7 NLR 357 would be a useful guidance in resolving the issues. Layard C.J at p.359 stated as follows;

> *"Brett, J., had previously in* ***Jackson v. Spittal*** *(5 C. P. 552) laid down that a cause of action was the act on the part of the defendant which gives the plaintiff his cause of complaint. Taking that as the true definition of 'cause of action'.."*

This definition has been accepted and adopted in the case of ***Somasiri v. Ceylon Petroleum Corporation*** [1992] 1 Sri. LR 39 at p.43. As far as the present application is concerned what caused the Respondent to institute a civil action? It is the malicious initiation of a criminal proceeding against the Respondent without any reasonable and probable cause. It is the very act

of maliciously making a Police complaint without a probable cause, that led the Police to arrest the Respondent, which has made the Respondent institute the civil action upon the *injuria*. Further, when carefully observing the factual evidence, it is obvious that the Respondent instituted the civil action for damages after she was discharged by the Magistrate's Court, on or about 6th December 2005 by reason of the witnesses had not presented themselves in Court. Therefore, even the proceedings against the Respondent before the Magistrate Court (Case bearing No.13028) had been reopened after the filing of the action in the District Court, The Respondent's cause of action for the civil action arose when the Respondent was discharged by the Magistrate's Court on the account of the fact that the witnesses had not presented in Court, before the case was reopened. Moreover, according to the proceedings, leading evidence of the District Court commenced only on 24.03.2010, after the Respondent was acquitted and discharged on or around 16.03.2010 by the Magistrate's Court (Case bearing No. 13028). And the said judgement was marked and produced at the trial of the District Court.

Looking at the decided cases, where similar legal issues were discussed, it also appears that there is no legal impediment to the Respondent to maintain a civil action against the Appellant, when the Respondent has tendered convincing evidence of 'cause of action' against the Appellant.

> In ***Kalu Banda vs. Rajakaruna*** [2002] 3 Sri L.R 44 at p.44,
>
> *The plaintiff-respondent instituted action seeking damages alleging that the defendant petitioner without any reasonable and probable cause maliciously prosecuted him by instituting criminal proceedings in the Magistrate's Court. The criminal action in which the plaintiff-respondent was being prosecuted had not been terminated. The defendant-petitioner contended that, no cause of action had accrued to the plaintiff-respondent to sue him in a civil action for malicious prosecution as the criminal action had not been terminated at the time the present civil action for malicious prosecution was instituted against him. The District Court held that the action is maintainable.*
>
> *Held:*
>
> *(1) As far as the present civil action is concerned, it is the institution of criminal proceedings maliciously without any reasonable and probable cause that had caused the plaintiff to institute Court proceedings.*

(2) The plaintiff-respondent's claim is not based on malicious prosecution as understood in the English Law but founded on principles of actio injuriam known to the Roman Dutch Law.

The reasoning adopted In ***Alwis vs. Ahangama*** [2000] 3 Sri. L.R by Fernando J., at p. 238, provides legal guidance in determining whether a civil action is maintainable in an application where similar legal issues arise as discussed in the present application.

"I therefore hold that the Plaintiff's action was maintainable. Being an action in respect of an injuria allegedly committed by the Defendant, by (a) maliciously, and (b) without reasonable and probable cause (c) making a defamatory complaint (of theft) against the Plaintiff (d) which resulted in legal proceedings against the Plaintiff (namely his arrest and production in the Magistrate's Court)"

Therefore, taking into account the relevant case law and legal principles, I am of the view that the Respondent's civil action seeking damages for injuries occurred as a result of the false Police complaint is maintainable against the Appellant.

The harm or loss which gives rise to the *actio unjuriarum* is a violation of a personality interest, usually classified as *corpus*, or bodily integrity, *dignitas*, or dignity; and *fama*, or reputation.as per the averments of the plaint dated 30.05.2006, the Respondent had sought damages for the patrimonial loss and the injuries done to her personality, dignity and reputation. However, when carefully observing the evidence led before the Court, it appears that the Respondent has not tendered evidence on patrimonial loss she suffered due to the false complaint made by the Appellant against the Respondent. Therefore, when assessing damages in respect of non-patrimonial loss, which does not have an economic or pecuniary value, the court exercises its own judgement in the matter and strives to determine awards which will be fair to the Respondent as well the Appellant.

The allegation of theft made by the Appellant without a reasonable and probable cause had led the Police to arrest the Respondent, detained at a remand prison for ten days. The Respondent had to endure many hardships including humiliation of being labelled as thief, her child being insulted at school as a child of a thief which had effected the child's education and his mental health, and she and her family had to change the locality and relocate to Colombo in order to avoid `the extreme social stigma. Furthermore, the Respondent had to give up her small business when relocating to

Colombo, causing her severe financial hardship. In respect to all the evidence tendered by both parties, it is clear to this court that the Respondent has been able to successfully establish her evidence on the *injuria* caused by the Appellant's Police complaint of theft against the Respondent. However it is important to point out that, the Appellant has failed to rebut the aforesaid evidence in the Court.

I answer the questions of law as follows,

1) No
2) No
3) No

By considering above circumstances, I am in the view that, this Court will not interfere with the judgement of the High Court of Civil Appeal of the North western Province.

Appeal dismissed with costs.

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 for a mandate in the nature of Writs of *Certiorari* and *Mandamus* under and in terms of Article 140 of the Constitution

SC Appeal 163/2015

SC SPL LA 261/2014
CA Writ Application No.181/2014

1. Amal I. Senevirathne
   No. 45, Sarvodaya Road, Gaminipura.

2. W. L. Gayana Sewwandi Mali
   Susiri Niwasa, Navimana South, Matara.

3. Shashini Tharanga Kariyawasam
   No. 30, Gangarama Road, Megalle, Galle.

4. B. V. Rasika Dilanthi Bolukandura
   No.72, Sri Rahula Mawatha, Maho.

5. Janaka Jayalath Munasinghe
   No.202/2, Ranasinghe goda, Katuwana.

6. W. A. U. Warunamala Wijesooriya
   No.229/2, Megoda Kalugamuwa, Peradeniya.

7. R. M. Sajith Niroshan
   V. Temple Road, Kahatawila, Pothuwatavana.

8. Sheik Abdul Cader Adil Ahamed
   No. 111/92, Abdul Hameed Street, Colombo 12.

9. G. A. Chamila Nilanthi Kumari
   No. 481, Siri Niwasa Mawatha, Mulleriyawa.

10. N. G. Ruvini Champika Weerasekara
    No. 110, Supermarket, Kandy Road, Kiribathgoda.

11. K. M. Inoka Nilmini Kulathunga
    No.310/C, Kandy Road, Kadawatha.

12. Chaminda Samarawickrama Lokuhetty
    No. 75/21, 1st Lane,
    Sirinanda Jothikarama Road, Lalalgoda, Pannipitiya.

13. K. A. Achala Dinashi
    No. 132/2A, Moragahalanda Road,
    Erawwala, Pannipitiya.

14. Isuru Madhushanka Ranagala
    B49 G2, N.H.S. Colombo 10.

15. K. M. Asanka Wijewardana
    No. 240, Kadurugahamaditha,
    Ranjanagama, Kurunegala.

16. W. Joseph Tiroshan Sanjay de. Silva
    No. 95/3, New Galle Road, Moratuwa.

17. P. Rashmi Tharika Fernando
    No. 146, Pethiyagoda, Gampaha.

18. M. R. Dishanthi Maldeniya
    No. 155/B Ihalagama, Gampaha.
19. M. A. D. Ashani Koshila
    No. 978/7, Dawatagahawatta Road, Thalangama Road, Thalangama South, Baththaramulla.

20. Ashani Apeksha Aabeysekara,
    No. 3/8, Wekumagoda Road, Galle.

21. Sembu Kuttige Sanjeewa Sampath
    No. 143/A, Mahawatta, Batapola.

22. W. A. Nirosh Wasansa
    No. 103, Thissa Road, Ranna.

23. Abdul Ghany Muhhammed Naflan
    No. 719/5A, Galle Road, Kalutara South.

24. G. Kalpa Suresh Pathirana
    No. 13, Narangoda Road, Hedeniya, Werellagama.

25. Liyanage Leonard Amal Perera
    No. 274/3, Jayanthi Mawatha,
    Mulleriyawa New Town.

26. M. A. Mahesh Kumara Manthriathna
    No. 524, Punchi Mandawala, Mandawala.

27. Y. M. W. Sarath Samarakoon Bandara
    Sarasavi Uyana, Rassandeniya, Denuwara.

28. J. A. P. H. Sandaamil Jayawaedana
    "Samanala," Ihala Barube, Nikadalupotha.

29. H. M. A. Samadhi Wanninayake
    Walpaluwatta, Ehatuwana.

30. Madhuri Chantha Withanagama
    No. 136/1/1, Bathalawaththa Road,
    Thalahena, Malabe.

31. D. Nipuni Devindi Peiris
    No. 289/B, Center Road, Aligomulla, Panadura.

32. I. M. Maheshwari Mithrapali Rathwita
    Pethangalla, Gokarella.

Petitioners

Vs.

1. The Incorporated Council of Legal Education
   No. 244. Hulftsdrop Street, Colombo 12

2. Dr. Jayatissa De Costa,
   Principal, Sri Lanka Law College,
   No. 244. Hulftsdrop Street, Colombo 12

3. Hon. Rauf Hakeem
   Minister of Justice, Ministry of Justice, Colombo 12.

4. The Commissioner General of Examinations
   Department of Examination,
   Isurupaya, Battaramulla.

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

Respondents

Now Between

1. Maduri Chaintha WIthanagama
   No. 136/1/1, Bathalawaththe Road, Thalahena, Malabe.

2. W. L. Gayana Sewwandi Mali
   Susiri Niwasa, Navimana South, Matara.

3. Shashini Tharanga Kariyawasam
   No. 30, Gangarama Road, Megalle, Galle.

4. B. V. Rasika Dilanthi Bolukandura
   No.72, Sri Rahula Mawatha, Maho.

5. Janaka Jayalath Munasinghe
   No.202/2, Ranasinghe goda, Katuwana.

6. W. A. U. Warunamala Wijesooriya
   No.229/2, Megoda Kalugamuwa, Peradeniya.

7. R. M. Sajith Niroshan
   V. Temple Road, Kahatawila, Pothuwatavana.

8. Sheik Abdul Cader Adil Ahamed
   No. 111/92, Abdul Hameed Street, Colombo 12.

9. G. A. Chamila Nilanthi Kumari
   No. 481, Siri Niwasa Mawatha, Mulleriyawa.

10. N. G. Ruvini Champika Weerasekara
    No. 110, Supermarket, Kandy Road, Kiribathgoda.

11. K. M. Inoka Nilmini Kulathunga
    No.310/C, Kandy Road, Kadawatha.

12. K. A. Achala Dinashi
    No. 132/2A, Moragahalanda Road,
    Erawwala, Pannipitiya.

13. Isuru Madhushanka Ranagala
    B49 G2, N.H.S. Colombo 10.

14. K. M. Asanka Wijewardana
    No. 240, Kadurugahamadiththa,
    Ranjanagama, Kurunegala.

15. W. Joseph Tiroshan Sanjay de. Silva
    No. 95/3, New Galle Road, Moratuwa.

16. M. R. Dishanthi Maldeniya
    No. 155/B Ihalagama, Gampaha.

17. M. A. D. Ashani Koshila
    No. 978/7, Dawatagahawatta Road, Thalangama Road, Thalangama South, Baththaramulla.

18. Ashani Apeksha Aabeysekara,
    No. 3/8, Wekumagoda Road, Galle.

19. W. A. Nirosh Wasansa
    No. 103, Thissa Road, Ranna.

20. Y. M. W. Sarath Samarakoon Bandara
    Sarasavi Uyana, Rassandeniya, Denuwara.

21. D. Nipuni Devindi Peiris
    No. 289/B, Center Road, Aligomulla, Panadura.

Petitioners' Petitioners

Vs.

1. The Incorporated Council of Legal Education
   No. 244. Hulftsdrop Street, Colombo 12

2. Mrs. Indra Samarasinghe
   Principal, Sri Lanka Law College,
   No. 244. Hulftsdrop Street, Colombo 12

3. Hon. Thalatha Athukorala
   Minister of Justice, Ministry of Justice, Colombo 12.

4. Mr. Sanath Poojitha
   The Commissioner General of Examinations
   Department of Examination,
   Isurupaya, Battaramulla.

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

Respondents- Respondents

Before: Justice Vijith K. Malalgoda, PC
Justice Murdu N. B. Fernando PC
Justice S. Thurairaja PC

Counsel: Anura Gunaratne for the Petitioners'-Petitioners
M. Gopallawa, DSG, with Ms. Sureka Ahmed SC for the Respondents-Respondents

Argued on: 07.09.2020
Judgment on: 01.04.2021

Vijith K. Malalgoda PC J

Petitioners-Petitioners before this court (hereinafter referred to as Petitioners) initially went before the Court of Appeal, seeking the grant of mandates in the nature of Certiorari quashing the decision of the Council of Legal Education (hereinafter referred to as the 1st Respondent) to admit only 177 students to the Sri Lanka Law College for the academic year 2014 and *Mandamus* on the 1st

Respondent and/or the 2nd Respondent Principal, Sri Lanka Law College and/or the 3rd Respondent Minister of Justice to increase the intake up to 225 students to the Sri Lanka Law College for the academic year 2014.

The Court of Appeal by its order dated 17.11.2014, refused to issue notice on the Respondents and dismissed the Petitioners application.

Being aggrieved by the said order of the Court of Appeal, the Petitioners sought special leave from the Supreme Court. This Court on 28.09.2015 granted Special Leave, on the following questions of Law;

1. Was the Court of Appeal in error by holding that the Petitioners' legitimate expectation was based solely upon the number of students selected on previous years irrespective of merit based on their performance at the Entrance Examination?
2. Was the Court of Appeal in error in holding that "the paramount consideration be given to the performance of the candidate than the number of vacancies that exist" when the Petitioners have obtained 64 and 65 marks which is far above the 40% by Rule 23 (2) (VII)?
3. Was the Court of Appeal in error by not giving sufficient weight to the number of vacancies that exist or to be decided as a relevant factor when concluding that the Petitioners had no legitimate expectation?
4. In any event, was the Court of Appeal in error by holding that the Petitioner had no legitimate expectation?
5. Whether a Writ of *Mandamus* will lie when a discretion is available to the Public Authority?

As submitted by the Petitioners, they responded to an advertisement published on 05.05.2013 calling for applications for the Entrance Examination to admit students to the Sri Lanka Law

College, for the academic year 2014. Accordingly, all of them had sat for the said examination on 06.10.2013, which was conducted by the Commissioner General of Examination.

According to the Petitioners, the results of the said examination was not available until the 1st Respondent displayed a list of 177 candidates on 25th January 2014, who obtained more than 66 marks at the said examination, as the students who had been selected for the academic year 2014. However, the results of the said examination were published in the internet on 30th January 2014.

The Petitioners who had not scored more than 66 marks but scored 64 or 65 marks at the said examination, complained against the said decision of the 1st Respondent to declare the cut-off point for the academic year at 66 marks as an arbitrary decision taken based on factors unsupported with justifiable reasons.

In this regard the Petitioners have further claimed that there was an average intake of 225 students annually, to the Sri Lanka Law College, and therefore restricting the intake to 177 in the academic year 2014, was against their legitimate expectation.

Petitioners submitted that the intake for the year 2014 was the lowest intake to the Sri Lanka Law College since 1981 and in the said circumstances argued that the 1st Respondent's decision to deviate its policy by restricting the intake to 177 students without a valid reason, is unfair and unreasonable.

In support of their contention the Petitioners mainly relied on the statistics with regard to the intake of students to Sri Lanka Law College for the period 1981-2012, (P-6 and F) and performance Report published by the Ministry of Justice for the year 2012. (P-10 and L)

As revealed before this court, in terms of Section 7 (1) of the Council of Legal Education Ordinance No. 2 of 1900(as amended) (hereinafter referred to as the Ordinance), it shall be lawful for the 1st Respondent, Incorporated Council of Legal Education, with the concurrence of the Minister, to make such by-laws, rules and orders as to it shall seem necessary for defined purposes.

Rule 23 (2) (VII) of the Rules of the 1st Respondent, made under Section 7 of the Ordinance provided for the selection criteria to the Sri Lanka Law College as;

> "Candidates shall be selected for admission to the Sri Lanka Law College in the order of merit based on their performance at the Entrance Examination and the number of vacancies are determined by the council. Provided no candidate who has obtained less than 40 per-centum of the maximum marks shall be selected for admission."

When considering Rule 23 (2) (VII) referred to above it is clear that the 1st Respondent Council is vested with the discretion of determining the number of vacancies for each academic year, who seek admission to the Sri Lanka Law College. Under the above Rule the only limitation to the above discretion is the restriction on admitting students who obtain less than 40 per-centum of the maximum mark.

The Petitioners who heavily relied on the documents they produced marked 'F' and 'L', argued that as a practice the 1st Respondent selected 225 students to Sri Lanka Law College each year and the Ministry of Justice had also acknowledged the same by including the said number in their Annual Performance Report for the year 2012 as the annual intake.

Even if this court considers the statistics provided by the Petitioners with regard to the intake of students to the Sri Lanka Law College for the period 1981-2012 as accurate, in the absence of any challenge to the above from the Respondents, it appears that an exact number of 225 students were

never selected to the Sri Lanka Law College during these 30 years. As observed by this court it has varied from 208 students to 701 students, and the said number was decided by the 1st Respondent using its discretion.

During the arguments before us, the Respondents took up the position that the 1st Respondent is compelled to consider,

a) Number of students that could be facilitated during the relevant academic year
b) Marks obtained by candidate at the Entrance Examination

when using its discretion in deciding the cut-off mark and the number of students admitted to an academic year.

Since the competition at this examination is very high, the eligible candidates will have a significant increase even within one mark. In support of their argument, the Petitioners relied upon a decision by the 1st Respondent with regard to the student intake for the year 2008. Even though the Petitioners relied on the said decision to establish that there were instances where the 1st Respondent had taken more students providing additional facilities, the said decision of the 1st Respondent had further established;

a) Changing one mark of the cut-off point can increase the student intake by nearly 70 (in the said instance between 81-82) marks.
b) The maximum student intake cannot go beyond 225
c) If the above limit is exceeded, additional facilities such as lectures in two sessions by recruiting additional lecturers as well, will have to be arranged.

The Petitioners who had scored 64 and 65 marks at the Entrance Examination for the academic year 2014 complains against the decision of the 1st Respondent to limit of the cut-off mark at 66 and

thereby restricting the student intake to 177. However, they are silent whether the 32 Petitioners before this court are the only eligible group, if the cut-off mark is brought down by two marks, and if the intake goes beyond 225 by reducing the cut-off mark by two marks as claimed by the Petitioners, whether the 1st Respondent was in a position to provide additional facilities for the academic year 2014.

As observed by this court, those are the matters that should have been considered by the 1st Respondent when deciding the cut-off mark and the number of students admitted to the Sri Lanka Law College for the particular academic year and as further observed by this court, taking that decision is within the discretion vested with the 1st Respondent by Rule 23 (2) (VII).

In these circumstances, I will now consider whether the impugned decision to restrict the student intake to 177 by deciding the cut-off mark as 66 for the academic year 2014 was in violation of the legitimate expectation of the Petitioners and/or the said decision was an unreasonable decision by the 1st Respondent.

When considering the argument that the said decision was in violation of the legitimate expectations of the Petitioners, I am reminded of the following passage from the book titled, Administrative Law by *Wade and Forsyth* to the effect, that

> "It is not enough that an expectation should exist; it must in addition be legitimate. But how is it to be determined whether a particular expectation is worthy of protection? This is a difficult area since an expectation reasonably entertained by a person may not be found to be legitimate because of some countervailing consideration of policy of law.

> But some points are relatively clear. First of all, for an expectation to be legitimate it must be founded upon a promise or practice by the public authority that is said to be bound to fulfil the expectation."
>
> [Administrative Law H.W.R. WADE and C.F. FORSYTH 10th Edition page 449]

As observed by this court the Petitioners main contention before us was to establish that there was a practice by the 1st Respondent to admit 225 students to Sri Lanka Law College annually. In the above context they relied on three documents, the statistics, performance report for the year 2012 and a decision by the 1st Respondent in the year 2008.

However as already observed in this judgment, 225 students (exact number) were never selected in a particular year but it was varied from 208-701 during the 30 years period the Petitioners relied upon, but one thing is clear from the council decision in 2008, that the maximum number of students that can be entertained as a single batch is 225.

The fact that the performance report of the Ministry of Justice for the year 2012 gives the annual intake to the Sri Lanka Law College as 225 is also a matter that has to be looked into seriously by this court. Does this indicate the practice or does it gives a promise that every year 225 students will be taken to the Sri Lanka Law College. There is no dispute before this court that Sri Lanka Law College is an Institute established through an Act of Parliament as well as an institute comes under the Ministry of Justice. Even though the Secretary to the Ministry is represented in the 1st Respondent, the 1st Respondent is governed by the Ordinance under which it was established and the Rules made thereunder. In these circumstances, a decision taken by the 1st Respondent under a specific rule cannot be superseded by a mere statement and/or a document made in the pretext of a performance report.

Even if the contents in the said document is considered as correct, that only gives the performance for the year 2012 and doesn't go beyond, but it clearly contradicts with the statistics provided, since the student intake for the year 2011 and 2012 are 238 and 551 respectively.

In the case of ***Ram Pravesh Singh V. State of Bihar (2206) 8 SCC 381*** the doctrine of legitimate expectation was discussed as follows;

> "A legitimate expectation even when made out, does not always entitle the expectant to a relief. Public Interest, change in policy, conduct of expectant or another valid or *bona fide* reasons given by the decision maker, may be sufficient to negate the 'legitimate expectation.' The doctrine of legitimate expectation based on established practice (as contrast form legitimate expectation based on promise) can be invoked only by someone who has dealings or transactions or negotiations with an authority on which such established practice has a bearing or by someone who has a recognized legal relationship with the authority and who has not entered into any transaction or negotiation with the authority , cannot invoke the doctrine of legitimate expectation, merely on the ground that the authority has a general obligation to act fairly."

There is no dispute that the Petitioners before this court were applicants to sit as candidates for an examination conducted by the Department of Education to select students for Sri Lanka Law College for the academic year 2014.

The advertisement calling for applications form suitable candidates were called not by the Department of Examination but by the 1st Respondent. In this context it can be argued that the petitioners had entered in to a transaction with the 1st Respondent.

But can that transaction alone create a legitimate expectation among the applicants to the said examination when they fail to fulfil the requirements identified in the rules.

In this regard this court is mindful of two issues raised on behalf of the Respondents.

Firstly, the Respondents relied on a declaration made by each of the applicant in the application itself and argued that due to the declaration made, the Petitioners are not entitled to claim legitimate expectation with regard to the number of places decided by the 1st Respondent. Petitioners when submitting their applications, had declared that;

> "I am fully aware that if any information given by me herein is found to be incorrect, false or intended to mislead the Council of Legal Education, I am liable to be disqualified from sitting the Entrance Examination, and if such information is discovered after admission, I am liable to be expelled from the college, and **I am also aware that my registration as a student will depend on the results of the Entrance Examination as approved by the Council of Legal Education and the number of places available for that year."** (emphasis added)

Secondly the Respondents relied on the decision by the Court of Appeal in the case of ***Vasana V. Incorporated Council of Legal Education and Others (2004) 1 Sri LR 154*** where *Amaratunga (J)* observed;

> "When the basic ingredient necessary for the formation of a Legitimate Expectation is marks over and above the cut-off point is lacking, the Petitioner cannot rely on document which contains a provisional decision which has been subsequently found to be a decision based on erroneous factual data submitted to the Law College due to an inadvertent error committed by an examiner."

In the said case the Court of Appeal held;

I. The legitimate expectation of any candidate sitting for the Law College Entrance Examination is that if at the examination he scores the minimum mark necessary to gain admission to the Law College, he would be admitted; accordingly earning the necessary minimum mark is the foundation on which the legitimate expectation of a candidate rests.

II. If he fails to get the necessary minimum mark, the legitimate expectation cannot exist any longer

The Petitioners never challenged making a declaration as referred to above but took up the position that it was arbitrary and unreasonable to restrict the intake to 177 students by fixing the cut-off mark at 66 against the long-standing practice of taking 225 students to the Sri Lanka Law College.

However as already observed by me, there isn't a single batch for the 30 years as referred to by the Petitioner, which had 225 students but it was varied from 208 to 702.

In these circumstances, it is clear that the 1st Respondent is vested with a wide discretion to decide the size of the batch and the cut-off mark. The Petitioner making the declaration referred to above had admitted the wide discretion of the 1st Respondent to decide the number of students to be admitted to the academic year 2014 by deciding the cut-off mark, which is the "foundation to the legitimate expectation" as held in ***Vasana V. Council of Legal Education (supra).***

Whilst challenging the 1st Respondent's decision to decide the cut-off mark as 66 and restricting the intake for the year 2014 for 177 without going for 225 students as per the practice for the last 30 years, Petitioners further argued that they too have scored 65 and 64 marks at the Entrance Examination which is far above the minimum threshold identified by rules; i. e. 40 marks and

therefore the Petitioners are entitled to be selected to the Sri Lanka Law College on their merit, alone, but I see no basis for the above argument, since rule 23 (2) (VII) had given the 1st Respondent the discretion to decide the cut-off mark in order to decide the number of students admitted to the Sri Lanka Law College in a particular academic year. If the competition is high, the cut-off mark can rise up and on the other hand if the competition is low, the cut-off mark too will come down but, it cannot lower beyond 40 per centum of the total mark.

In these circumstances, any candidate who has not obtained the cut-off mark decided by the 1st Respondent whether it is 66 or 81, is disqualified to gain admission to the Sri Lanka Law College on his merits and therefore he or she is not entitled to claim his/her right to gain admission on merit. This court shall now consider whether the impugned decision of the 1st Respondent, when taken together with all relevant material that was placed before this court, is unreasonable. In considering so court shall bear in mind the following two passages from Administrative Law by Wade and Forsyth;

> "The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the Public authority ……..
>
> Decisions which are extravagant or capricious cannot be legitimate. But if the decision is within the confines of reasonableness, it is no part of the courts function to look further into its merits."
>
> [H.W.R. Wade C.F. Forsyth Administrative Law 11th Edition page 302]

and the test routinely applied for this purpose, set out in ***Associated Provincial Picture Houses Limited V. Wednesbury Corporation [1948] 1 KB 223.*** Accordingly, the criteria for review to be applied would be whether the person vested with the discretion:

a) Misdirected himself

b) Failed to take relevant considerations into account

c) Failed to exclude irrelevant considerations

Lord Green in ***Associated Provincial Picture House Limited V. Wednesbury Corporation*** *(supra)* defined unreasonableness as "something so absurd that no sensible person could ever dream that it lay within the powers of the authority."

However, the Petitioners before this court could only show that the intake of students for the academic year 2014 was 177 as against the student intake within the last 30 years which was between 208 to 702 and in the performance report of the Ministry of Justice for the year 2012, the student intake for the Sri Lanka Law College was indicated as 225 which I have considered separately in my Judgment.

Except for the above reference in the performance report there is no indication of 225 as the student intake to the Sri Lanka Law College, in any other document submitted before this Court. But Rule 23 (2) (VII) of the Rules made under Section 7 of the Ordinance says "number of vacancies are determined by the council"

In the said circumstances, it is clear that the impugn decision to select 177 students for the academic year 2014 by deciding the cut off mark as 66 was within the discretion given to the 1st Respondent by Rule 23 (VII) of the Rules made under Section 7 of the Ordinance.

Petitioners failed to establish that the said decision violates the legitimate expectation of them and/or it was an arbitrary/unreasonable decision of the 1st Respondent.

For the reasons given in my judgment I answer the 1st to the 4th questions of law raised before this court, in favour of the Respondents and dismiss this appeal. The merits of the case does not warrant answering the 5th question of Law that was raised by this court when granting leave in the instant case. Therefore, I refrain from answering the 5th question raised before this court.

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 S. Thurairaja PC

I agree,

Judge of the Supreme Court

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

1. Sirinivasam Prasanth,
2. Gayathiry Prasanth,
   Both of Ratnagara Place,
   Dehiwala.
   And presently of 289, Cossack Court, Mississauga, L5 B4 C2, Ontario, Canada.

   Acting through their Power of Attorney holder,
   Kanagasundram Sathiakantham
   of No.442, R.A. De Mel Mawatha,
   Kollupitiya, Colombo 3.
   Plaintiffs

SC APPEAL NO: SC/APPEAL/163/2019
SC LA NO: SC/HCCA/LA/327/2019
HCCA NO: WP/HCCA/COL/131/2015 (F)
DC COLOMBO NO: DLM/00041/2013

Vs.

1. Nadaraja Devarajan,
2. Sri Jayadevi Devarajan,
   Both of No. 541/4 – 1/2A,
   Galle Road, Wellawatta,
   Colombo 6.
   Defendants

AND BETWEEN

1. Nadaraja Devarajan,
2. Sri Jayadevi Devarajan,
   Both of No. 541/4 – 1/2A,
   Galle Road, Wellawatta,
   Colombo 6.
   Defendant-Appellants

Vs.

1. Sirinivasam Prasanth,
2. Gayathiry Prasanth,
   Both of Ratnagara Place,
   Dehiwala.
   And presently of 289, Cossack
   Court, Mississauga, L5 B4 C2,
   Ontario, Canada.

   Acting through their Power of
   Attorney holder,
   Kanagasundram Sathiakantham
   of No.442, R.A. De Mel Mawatha,
   Kollupitiya, Colombo 3.
   Plaintiff-Respondents

AND NOW BETWEEN

1. Sirinivasam Prasanth,
2. Gayathiry Prasanth,
   Both of Ratnagara Place,
   Dehiwala.
   And presently of 289,
   Cossack Court, Mississauga,

L5 B4 C2,
Ontario, Canada.

Acting through their Power of
Attorney holder,
Kanagasundram Sathiakantham
of No.442, R.A. De Mel Mawatha,
Kollupitiya, Colombo 3.
Plaintiff-Respondent-Appellants

Vs.

1. Nadaraja Devarajan,
2. Sri Jayadevi Devarajan,
Both of No. 541/4 – 1/2A,
Galle Road, Wellawatta,
Colombo 6.
Defendant-Appellant-
Respondents

Before: Buwaneka Aluwihare, P.C., J.
Achala Wengappuli, J.
Mahinda Samayawardhena, J.

Counsel: Palitha Kumarasinghe, P.C., with Viraj Bandaranayake for the Plaintiff-Respondent-Appellants.
Lakshman Wickramaratne for the Defendant-Appellant-Respondents.

Argued on : 17.02.2021

Decided on: 22.03.2021

Mahinda Samayawardhena, J.

The Plaintiffs filed this action in the District Court of Colombo seeking a declaration of title to the property described in the third schedule to the plaint, the ejectment of the Defendants therefrom and damages. The Defendants sought the dismissal of the Plaintiffs' action and claimed prescriptive title to the property. After trial, the District Court entered Judgment for the Plaintiffs except damages. On appeal, the High Court of Civil Appeal set aside the Judgment of the District Court and entered Judgment for the Defendants. Hence this appeal by the Plaintiffs.

Leave was granted by this Court on the question whether the High Court erred in holding that the Defendants acquired prescriptive title to the property within the meaning of section 3 of the Prescription Ordinance, No. 22 of 1871, as amended, on the strength of the evidence adduced at the trial.

The property in suit is a condominium unit. The parties to the case are close relations. The Power of Attorney holder who filed this case is the father of the 2nd Plaintiff; the 1st Plaintiff is the husband of the 2nd Plaintiff. The 2nd Defendant is the uterine sister of the 2nd Plaintiff's father; the 1st Defendant is the husband of the 2nd Defendant.

The aforesaid Power of Attorney holder of the Plaintiffs was the owner of the property by Deed P1 executed in 1994. He gifted the property to his daughter, the 2nd Plaintiff, by Deed P2. It is significant that Deeds P1 and P2 were not marked subject to proof at the trial. Nor was an issue raised by the Defendants at

the trial disputing the Deeds. The Defendants do not have a Deed to this property.

Nevertheless, the learned High Court Judge seems to be disputing Deed P1 on the basis that the consideration for P1 was not paid by the transferee, the 2nd Plaintiff's father, to the transferor (the owner of the condominium unit), but by the sister of both the 2nd Plaintiff's father and the 2nd Defendant, who at that time was living in the UK. This is clear by looking at the answer given by the learned High Court Judge in the impugned Judgment to issue No.1, which reads "*there can be encumbrances or fetters in the alleged paper title*" of the transferee of Deed P1 as the consideration was supplied by a third party.

A Deed does not become invalid or less valid merely because consideration was paid by a third party. There is no law that consideration must be paid by the transferee personally. In this case, the sister living in the UK, by P3 marked at the trial not subject to proof, whilst stating "*the above property was bought by my brother [the transferee of P1]*" and "*I provided him with financial assistance to buy this property*", expressly admits "*I am fully aware that I have no legal right to this property.*" Therefore the learned High Court Judge was erroneous to have held that Deed P1 is subject to "*encumbrances or fetters*".

Hence there is no difficulty in concluding that the Plaintiffs have the paper title to the property.

In a vindicatory action, the initial burden is on the Plaintiff to prove title to the property. If he fails to prove title, the Plaintiff's action shall fail no matter how weak the case of the Defendant

is. However, once the paper title to the property is accepted by the Defendant or proved by the Plaintiff, the burden shifts to the Defendant to prove on what right he is in possession of the property.

Let me add this for clarity. The right to possession and the right to recover possession are essential attributes of ownership of immovable property. The owner is entitled to these as of right. The law does not require that the owner must possess his property. That is his choice. He can either possess it or leave it as it is. In simple terms, merely because the owner does not possess the property, he does not lose ownership of the property.

In *Siyaneris v. Udenis de Silva (1951) 52 NLR 289* the Privy Council held: "*In an action for declaration of title to property, where the legal title is in the Plaintiff but the property is in the possession of the Defendant, the burden of proof is on the Defendant.*" In *Theivandran v. Ramanathan Chettiar [1986] 2 Sri LR 219 at 222*, Sharvananda C.J. stated: "*In a vindicatory action the claimant need merely prove two facts; namely, that he is the owner of the thing and that the thing to which he is entitled to possession by virtue of his ownership is in the possession of the Defendant. Basing his claim on his ownership, which entitles him to possession, he may sue for the ejectment of any person in possession of it without his consent. Hence when the legal title to the premises is admitted or proved to be in the Plaintiff, the burden of proof is on the Defendant to show that he is in lawful possession.*" This was quoted with approval by G.P.S. de Silva C.J. in *Beebi Johara v. Warusavithana [1998] 3 Sri LR 227 at 229* and reiterated in *Candappa nee Bastian v. Ponnambalam Pillai*

[1993] 1 Sri LR 184 at 187. *Vide* also *Wijetunge v. Thangarajah [1999] 1 Sri LR 53, Gunasekera v. Latiff (1999) 1 Sri LR 365 at 370, Jayasekera v. Bishop of Kandy [2002] 2 Sri LR 406* and *Loku Menika v. Gunasekera [1997] 2 Sri LR 281 at 282-283*.

Let us now consider whether the Defendants discharged their burden of proof. The Defendants did not make a claim in reconvention in the prayer to the answer that they have acquired prescriptive title to the property. But by issue No.13 raised at the trial, they did claim prescriptive title to the property. This is permissible in terms of section 146 of the Civil Procedure Code which allows issues to be raised on matters where "*the parties are at variance*" and "*the right decision of the case appears to the Court to depend*."

It is settled law that once issues are framed and accepted by Court, the case of each party is crystallised in the issues and the pleadings recede to the background. Thereafter the case is tried and the parties marshal their evidence not on the pleadings but on the issues. Practically, the Judgment is the answers to the issues with reasons.

Issue No.13 raised by the Defendants reads as follows: "*Did the 1st and 2nd Defendants acquire prescriptive title [to the property] from the day which they came into possession in the year 1995?*" The year 1995 is significant as I will explain below. It cannot be a mistake or typographical error as the same year is repeated in issue No.10 raised by Defendants: "*Did the Defendants obtain possession of the property from a third party in the year 1995?*" Although the Defendants state in the answer that they came into possession of the property in March 1994, they took up the clear position by way of the issues that they came and commenced

prescriptive possession from 1995 (having taken possession of the property from a third party). For whatever reason, this is how the Defendants put their prescriptive claim in issue at the trial. On the other hand, even if the Defendants pleaded in the answer that they commenced prescriptive possession from 1995, they could have (subject to objection by the Plaintiffs) raised an issue that they commenced prescriptive possession from March 1994.

The above two issues were answered by the learned District Judge in the negative and by the learned High Court Judge on appeal in the affirmative in that the learned High Court Judge states that the Defendants commenced prescriptive possession not from 1995 but from March 1994. The answer to issue No.13 by the learned High Court Judge is as follows: "*The 1st and 2nd Defendant Appellants have acquired prescriptive title from continuous, uninterrupted, adverse and independent possession from March 1994.*"

The Plaintiffs countered the prescriptive claim of the Defendants on the premise that the Defendants were permitted to occupy the house in order for the Defendants' children to continue their education in Colombo, as the Defendants were displaced during the civil war in the North. It may be recalled that the transferee of Deed P1 is the brother of the 2nd Defendant and the purchase price of the house was paid, according to the Defendants, by their sister in the UK. The learned High Court Judge in his Judgment says the claim that the 2nd Plaintiff's father granted leave and license to his sister, the 2nd Defendant, to stay in the house is unsustainable because Deed P1 was executed on 01.12.1994 whereas the Defendants had come into occupation

of the house in March 1994 having obtained the keys to the house from the vendors of Deed P1.

This approach of the learned High Court Judge is not permissible given the issues raised by the Defendants at the trial as quoted above. If I may repeat, the position taken up by the Defendants at the trial as crystallised in the issues is that they came and commenced prescriptive possession of the property from 1995 and not from March 1994. Upon acceptance of the issues, the position is that the 2nd Plaintiff's father became the owner of the property by Deed P1 dated 01.12.1994, before the Defendants came into possession of the house in 1995.

In the adversarial system of justice associated mainly with common law jurisdictions, the case is decided by the Judge on a competitive process between the Plaintiff and the Defendant without the Judge himself taking part in the dispute. Conversely, in the inquisitorial system of justice associated mainly with civil law jurisdictions, the pre-trial in particular and also the trial itself is, practically, an expedition presided over by the Judge in pursuit of the truth. Notwithstanding that the goal of both the adversarial and inquisitorial systems is the ascertainment of the truth, the former seeks to attain it by pitting the parties against one another, whereas the latter seeks to attain the same by the Judge's direct involvement in the process. Both systems have advantages and disadvantages.

Sri Lanka is known to have a common law system (although strictly speaking we have a mixed system with features of both legal systems). The system of justice we practice here is adversarial and not inquisitorial. Hence the Judge trying a case shall be careful not to overstep his limits in the guise of due

administration of justice. The Judge shall decide the case as it is presented before him by the two competing parties and not based on his own conception of justice and injustice, unless there is a compelling reason to deviate from the fundamental principle.

It was held in *Pathmawathie v. Jayasekara [1997] 1 Sri LR 248*: "*It must always be remembered by Judges that the system of civil law that prevails in our country is confrontational and therefore the jurisdiction of the Judge is circumscribed and limited to the dispute presented to him for adjudication by the contesting parties. Our civil law does not in any way permit the adjudicator or judge the freedom of the wild ass to go on a voyage of discovery and make findings as he pleases may be on what he thinks is right or wrong, moral or immoral or what should be the correct situation. The adjudicator or Judge is duty bound to determine the dispute presented to him and his jurisdiction is circumscribed by that dispute and no more*."

The Supreme Court in *Saravanamuthu v. Packiyam [2012] 1 Sri LR 298* observed: "*It must be remembered that the jurisdiction of the Court is limited to the dispute presented for adjudication by the contesting parties*."

Chief Justice G.P.S. de Silva in *Beebi v. Warusavithana [1998] 3 Sri LR 227 at 230-231* observed:

> *It must be noted that the proceedings before the District Court were adversarial in character. The Court of Appeal was in error when it placed a burden on the District Court "to make sure that inadequate information is not placed before it." As a general proposition, "it is no part of a*

> *Judge's duty in a civil action to fill in the deficiencies in a case of one of the disputants by calling evidence on his own." per Nihill, J. in Rewata Thero v. Horatala 14 CLW 155. Sections 150, 151 and 163 of the Civil Procedure Code indicate that the burden is on each party to lead such evidence as is necessary to establish his case or his defence, having regard to the issues upon which the case proceeds to trial.*

In *Bandaranaike v. Premadasa [1978-79] 2 Sri LR 369 at 384* Soza J. explained this in the following terms:

> *When we speak of the adversary or accusatorial system as distinguished from the continental inquisitorial system, we refer to a particular philosophy of adjudication whereby the function of the counsel is kept distinct from that of the Judge. It is the function of counsel to fight out his case while the Judge keeps aloof from the thrust and parry of the conflict. He acts merely as an impartial umpire to pass upon objections, hold counsel to the rules of the game and finally to select the victor. This common law contentious procedure has its defects and has been criticised by jurists like Roscoe Pound (see Landmarks of Law ed. Hensen-Beacon series pp. 186, 187) but it is the Anglo American system and prevails in India and Sri Lanka too. In fact the Foster Advisory Committee in its Report on the English Civil Procedure (1974) recommends the retention of the adversary system of procedure—see the Stevens publication of the report—chapter 5 paragraph 102 pp. 28, 29. This system is built on the English notion of fair play and justice where the Judge does not descend into the arena and so*

> *jeopardise his impartiality. Under this system it is counsel's duty to prove the facts essential to his case with the other party striving to disprove these facts or to establish an affirmative defence.*

Is it possible or believable that the Defendants obtained the keys to the house quite independently from the transferor of Deed P1 (the owner of the condominium unit) when the transferee of the Deed and the party who paid the consideration for the Deed were very much alive and available? In my judgment, it is not. There is no reason for the transferor to give the keys to the unit to an outsider unless the transferee or the person who paid the consideration for the Deed told the transferor to do so. No such thing happened.

This conclusion is amply justified by P3, the letter of the 2nd Defendants' sister in the UK, marked not subject to proof. It *inter alia* reads as follows:

> *This is to confirm that the above property was bought by my brother Mr. Kanagasundaram Sathiakantham (the father of the 2nd Plaintiff) in 1994. I provided him with financial assistance to buy this property. I also confirm that as our sister, Mrs. Srijeyathevi Devarajan [the 2nd Defendant] was having problem with accommodation during that time Mr. Sathiakantham agreed to let Mrs. Devarajan and her family stay in the property without rent so that her family can stay in Colombo until her children complete their secondary school education….Mrs. Devarajan's children have completed their education, currently in full time employment and are in better financial position. Mrs. Devarajan's family should therefore abide by*

the agreement leave the above property and find their own accommodation.

P3 amply corroborates the Plaintiffs' version of events that the Defendants came into possession of the house as licensees of the transferee of Deed P1.

The learned High Court Judge accepts P3 but unfortunately says: P3 was issued after the institution of the action; its maker did not give evidence nor was she was cross-examined; its contents were never verified; hence its evidentiary value is very low. I am unable to agree. The maker of P3 is not a stranger but the 2nd Defendant's sister who, according to the 1st Defendant, paid the purchase price to the vendor. Although the letter was issued after the institution of the action, it speaks of events anterior to the date of filing the action. This is what witnesses do in the course of their evidence in Court. The maker of P3 was not called as a witness because P3 was not marked subject to proof. Had it been marked subject to proof, the maker could have been called as a witness. It is naive to think that in a civil case the parties shall call the makers of all marked documents as witnesses in order to prove those documents whether or not they are marked subject to proof.

In a civil case, if the opposing party disputes a document, he must, at the time of marking the document, raise that objection and, if necessary, make an application to Court to mark it subject to proof. Otherwise, there is no necessity to call witnesses to prove all marked documents. The explanation to section 154 of the Civil Procedure Code reads: "*If the opposing party does not, on the document being tendered in evidence, object to it being received and if the document is not such as is*

forbidden by law to be received in evidence, the Court should admit it." This principle is applicable even to Deeds, irrespective of section 68 of the Evidence Ordinance. (*Siyadoris v. Danoris (1841) 42 NLR 311, Silva v. Kindersly (1914) 18 NLR 85, Seyed Mohomed v. Perera (1956) 58 NLR 246, Cinemas Ltd v. Sounderarajan [1998] 2 Sri LR 16 at 18, Hemapala v. Abeyratne [1978-79] 2 Sri LR 222, Wijeardena v. Ellawala [1991] 2 Sri LR 14 at 34-35, Kandasamy v. Sinnathamby [1985] 2 Sri LR 249 at 255*)

What I have stated above shall not be taken to mean that all documents the opposing party purportedly requires to be marked subject to proof must necessarily be proved by calling witnesses. There is a practice among some lawyers to get up and say "subject to proof" whenever a document is marked in evidence by the other party. This they do as a matter of course or as a matter of routine and not with any particular objective in mind, except perhaps to prolong the trial. It is regrettable that most of the time the party who produces the document obliges to this without a murmur. If we are serious about law's delays, we must put an end to this bad practice. When a counsel routinely says "subject to proof", the Judge must ask what he wants the other party to prove in the document. If this simple question is asked, I am certain the objection would be withdrawn or at least the issue to be addressed would be narrowed down. On the other hand, if the document is, take for instance, a Deed pleaded in the plaint but no issue has been raised disputing the Deed, the Defendant cannot make a routine application to mark it subject to proof when it is marked in evidence. Against this backdrop, I must emphasise that the Judge shall not mechanically refuse documents marked subject to proof but not technically proved by calling witnesses. The

Judge shall decide the question of proof at the end of the trial on the facts and circumstances of each individual case.

From the evidence adduced at the trial, it is clear that the Defendants in this case came into possession of the house with the leave and license of the transferee of Deed P1 (with the acknowledgment of the sister who provided financial assistance to purchase the property) and not as independent persons who obtained the keys to the house from the transferors of Deed P1.

The Defendants' position is that after they came into possession in 1995 they continued to possess the property until 2012, in which year the Plaintiffs disputed the possession of the Defendants. The learned High Court Judge says the Defendants "*possessed from March 1994 up to the institution of the action in 2013 as their own based on a title adverse and independent*" and therefore are entitled to claim prescriptive title to the property as provided in section 3 of the Prescription Ordinance.

Permissive possession, however long it may be, is not prescriptive possession. For permissive possession to become adverse possession in order to claim prescriptive possession, there shall be cogent evidence. The Defendants who entered into possession of the property in a subordinate character as licensees are not entitled to commence adverse possession against the owner by forming a secret intention in mind unaccompanied by an overt act of ouster. The Defendants must establish a clear starting point known to the owner in order for the former to claim prescriptive possession against the latter. The prescriptive period of ten years begins to run only from that point and not from the date the Defendants came into possession. (*Sirajudeen v. Abbas [1994] 2 Sri LR 365, Reginald*

Fernando v. Pabilinahamy [2005] 1 Sri LR 31 at 37, Chelliah Vs. Wijenathan (1951) 54 NLR 337 at 342, Mitrapala v. Tikonis Singho [2005] 1 Sri LR 206 at 211-212, Seeman v. David [2000] 3 Sri LR 23 at 26, Madunawala v. Ekneligoda (1898) 3 NLR 213, Navaratne v. Jayatunga (1943) 44 NLR 517, De Soysa v. Fonseka (1957) 58 NLR 501)

When the relationship between the two parties is very close, such as in the instant case, the overt act manifesting the commencement of adverse possession and strong affirmative evidence for the continuation of such adverse possession for over ten years are all the more important to successfully claim prescriptive title. (*De Silva v. Commissioner of Inland Revenue (1978) 80 NLR 292, Podihamy v. Elaris [1988] 2 Sri LR 129*)

In the instant case, the Defendants have manifestly failed to prove the commencement of adverse possession and the continuance of it for over ten years. The proof of mere possession of the property for over ten years does not satisfy the requirements under section 3 of the Prescription Ordinance. The possession shall be "*by a title adverse to or independent of that of the claimant or Plaintiff in the action.*"

I answer the question upon which leave to appeal was granted in favour of the Plaintiff-Appellants.

I set aside the Judgment of the High Court of Civil Appeal and restore the Judgment of the District Court and allow the appeal. The Plaintiffs are entitled to costs in all three Courts.

Judge of the Supreme Court

Buwaneka Aluwihare, P.C., J.

I agree.

Judge of the Supreme Court

Achala Wengappuli, J.

I agree.

Judge of the Supreme Court

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

1. D.M. Gunadasa,
   No. 22, Sumanatissa Mawatha,
   Padukka Road, Horana.
2. D.M. Wijepala,
   Bambaragaha Ulpatha,
   Kuruwitenne.

   Plaintiffs

SC APPEAL NO: SC/APPEAL/166/2018
SC LA NO: SC/SPL/LA/224/2018
CA NO: CA/37/95 (F)
DC BADULLA NO: 423/L

Vs.

D.M. Somawathie alias
Samawathie,
4th Mile Post,
Galkotuwawatta,
Ketawala,
Landewela.

Defendant

AND BETWEEN

1. D.M. Gunadasa,
   No. 22, Sumanatissa Mawatha,
   Padukka Road, Horana.
2. D.M. Wijepala, (Deceased)
   Bambaragaha Ulpatha,
   Kuruwitenne.

2A. Senadeera Siriyalatha,

2B. Raveendra Pushpakumara,
   Dissanayaka,

2C. Piyal Kumara Dissanayaka,

2D. Vajira Kumara Dissanayaka,
   All of,
   Bambaragaha Ulpatha,
   Kuruwitenne.
   Plaintiff-Appellants

Vs.

D.M. Somawathie alias
Samawathie, (Deceased)
4th Mile Post,
Galkotuwawatta,
Ketawala, Landewela.
Defendant-Respondent

D.M. Upali Kusumsiri Bandara,
4th Mile Post,
Galkotuwawatta,
Ketawala, Landewela.
Substituted Defendant-
Respondent

AND NOW BETWEEN

D.M. Gunadasa,
No. 22, Sumanatissa Mawatha,
Padukka Road, Horana.
1st Plaintiff-Appellant-Appellant

Vs.

2A. Senadeera Siriyalatha,
2B. Raveendra Pushpakumara,
Dissanayaka,
2C. Piyal Kumara Dissanayaka,
2D. Vajira Kumara Dissanayaka,
All of,
Bambaragaha Ulpatha,
Kuruwitenne.
Plaintiff-Appellant-Respondents

D.M. Upali Kusumsiri Bandara,
4th Mile Post,
Galkotuwawatta,
Ketawala, Landewela.
Substituted Defendant-
Respondent- Respondent

Before: S. Thurairaja, P.C., J.
A.L. Shiran Gooneratne, J.
Mahinda Samayawardhena, J.

Counsel: Dr. Jayatissa De Costa, P.C., with Chanuka Ekanayaka for the 1st Plaintiff-Appellant-Appellant.

Venuke Cooray for the Substituted Defendant-Respondent-Respondent.

Argued on: 27.10.2021

Written submissions:

by the 1st Plaintiff-Appellant-Appellant on 10.01.2019.

by the Substituted Defendant-Respondent-Respondent on 03.11.2021.

Decided on: 30.11.2021

Mahinda Samayawardhena, J.

The two plaintiffs filed this action in the District Court of Badulla seeking a declaration of title to the land described in the schedule to the plaint, ejectment of the defendant therefrom and damages. The defendant filed answer seeking the dismissal of the action.

The mother of the two plaintiffs and the defendant was the owner of this land. She gifted it to the two plaintiffs in 1968 by the deed of gift marked P1 at the trial. This deed was not marked subject to proof. It is on this deed the two plaintiffs claim title to the land.

As crystalised in the issues, the defendant contested the plaintiffs' action on three grounds: (a) the deed is invalid; (b) the defendant has alienated the land to her sons but they are not parties to the case; and (c) the land has not been properly identified. Grounds (b) and (c) were never pursued.

A deed of gift can be challenged on various grounds: due execution, fraud, prior registration, non-acceptance etc. Even though the defendant in her answer and by way of an issue made a general statement that the deed of gift P1 is invalid, she was careful not to disclose the basis on which she stated so. In my view, if it is the contention of the defendant that the deed was invalid because it was not accepted by the donee, the defendant must plead it specifically in her answer and raise it as a specific issue. Merely making a general statement that the deed is invalid and asking one or two questions about the acceptance of the deed in the cross examination of the plaintiff is not sufficient at all.

Be that as it may, after trial the District Court dismissed the plaintiffs' action with costs on the basis that the first donee who is the first plaintiff had not accepted the donation by placing his signature on the deed and the acceptance of the donation by the second donee who is the second plaintiff for himself and on behalf of the first donee who is his brother is not valid. The District Judge proceeded on the premise that when the donee is a major, the only mode of acceptance of the donation is the donee signing the deed himself. Although there was no issue regarding the acceptance of the donation by the second donee for himself, the District Judge gave no relief to the second plaintiff either.

On appeal, the Court of Appeal affirmed the judgment of the District Court and dismissed the appeal with costs. Hence this appeal by the plaintiffs to this court. This court granted leave to appeal on the following three questions of law:

> *Have the Court of Appeal and the District Court erred in law not considering:*

(a) that the deed of gift P1 is legally valid?

(b) that after the donation the first and second plaintiffs possessed and enjoyed the property from 1968-1982 and also they rented out and collected rent from the said property?

(c) that the second plaintiff could accept the gift on behalf of the first plaintiff who is his own brother?

The general principle is that a donation is a contract and acceptance of it by the donee is essential to clothe the deed of gift with validity. There is a natural presumption that every deed of gift is accepted. The law does not specify a particular form for acceptance of a deed of gift. The common practice is for the donee to sign the deed of gift signifying his acceptance. However this does not mean that the deed of gift is invalid unless the acceptance appears on the face of the deed. Such acceptance can be inferred from the circumstances. This includes the conduct of the doner and donee after the donation. The entering into possession of the property by the donee leads to the inevitable inference that the donation was accepted despite the lack of acceptance on the face of the deed. The question of acceptance of a donation is a question of fact which needs to be answered on the unique facts and circumstances of each individual case and not by simply looking at the deed of gift to ascertain whether the donee himself has signed the deed. This view is supported by ample authority including, ironically, all four decisions cited in the judgment of the Court of Appeal to dismiss the appeal on the ground that the first donee has not signed the deed personally. I will restrict my consideration to those four cases although there is a plethora of decisions to support the above view.

The first case cited by the Court of Appeal is *Wickremesinghe v. Wijetunga (1913) 16 NLR 413*, in which there was no acceptance of the gift on the face of the deed, but the District Judge held that the deed of gift was duly accepted and dismissed the plaintiff's action. On appeal, the Supreme Court held at 416:

> *In the present case the evidence shows that there were at least two distinct acts of acceptance by the first defendant of the donation in question. It appears that on the wedding day of the first defendant the plaintiff delivered over to her the deed of donation, and then she accepted the same. Although, as I have observed, the delivery of the deed was not essential to complete the transaction, it has significance here as a token of acceptance of the gift. Moreover, the first defendant sold a half of three of the lands gifted to her husband before the commencement of the present action. That also was clearly an act of acceptance of the donation. For these reasons I see no grounds for interfering with the judgment appealed from, and I would affirm it with costs.*

The next case cited was *Bindua v. Untty (1910) 13 NLR 259* where Wood Renton J. (later C.J.) held at 260-261:

> *It is quite clear that by the Roman-Dutch Law acceptance may be manifested in any way in which assent may be given or indicated. In the present case there is evidence showing that Sinda [the donor] not only permitted his eldest son Sumara, who was one of the donees, and who was of full age at the time, to accept the donation on his own behalf and on that of the minor children, but also that he surrendered the property in question to the donees after the execution of the deed of gift; that Sumara possessed the land*

thenceforward, and that his minor brothers and sisters took the produce themselves on becoming majors; and that they dealt with the land as owners while Sinda was still alive. I have examined all the cases that were cited to us in the argument, but I do not think it is necessary to deal with them in detail. The question of acceptance is a question of fact, and each case has to be determined according to its own circumstances. I would hold that here there is ample evidence of the acceptance of the donation to satisfy the requirements of the law in the conduct of Sinda himself at the time of the donation and subsequent to it, in the possession of the land by Sumara, a donee and a major, with Sinda's consent, and as Sinda's agent, if it is necessary to hold so much, for the purpose of the acceptance of the donation, and in the conduct of the minor donees themselves during Sinda's life. It is true that the critical point of time in such a case as this, where the donation was one taking effect at once on the execution of the deed, is the date of the execution of the deed itself. But for the purpose of determining whether there was such an acceptance, we are entitled to look not only at the circumstances accompanying, but also at those subsequent to, the date of the donation. Taking all the facts of the present case I hold that a sufficient acceptance of the deed of gift has been established.

The third case cited was the Privy Council decision of *Abeyawardene v. West (1957) 58 NLR 313*. The main question in this case centered round the issue whether the deed of gift in question created a fideicommissum in favour of a family and the question of the acceptance of the gift arose for consideration incidentally. The Privy Council held at 319 that the acceptance

of the deed of gift on behalf of two minors by their two major brothers and their brother-in-law is a valid acceptance notwithstanding they are neither natural nor legal guardians of the minors.

The last case cited was *Chelliah v. Sivasamboo (1971) 75 NLR 193* where Alles J. in a separate judgment reviewed almost all the seminal decisions in relation to the acceptance of a deed of gift with particular reference to minors. In this case, a donor had gifted immovable property to three persons, namely his two sons and his grandson, who was the son of his deceased daughter. The three donees were all minors at the time and the donor allowed his second wife to accept the donation on behalf of the donees. The acceptor was hence the step mother of two of the donees and the step grandmother of the third donee. According to the terms of the deed, the acceptor and the donees were entitled to be in possession of the property and enjoy its income and produce. When the donees attained majority, they ratified the acceptance on their behalf by dealing with the property and reciting the deed of gift as their source of title. The trial Judge held there was no valid acceptance of the deed of donation on the ground that the donor's second wife was neither the legal nor natural guardian of the minor donees and therefore could not have accepted the donation on their behalf. The Supreme Court held that the acceptance by the donor's second wife on behalf of the minor donees was valid.

After reviewing the previous decisions, it was held at 211:

> *Therefore the character of the acceptor is not conclusive on the question whether there was a valid acceptance or not. Acceptance depends on the facts of each particular case, and*

> *when the acceptor was not a natural guardian or a person appointed by a competent court, acceptance could be presumed if there were sufficient circumstances for a court to draw such an inference.*

The next question is whether there was a valid acceptance of the deed of gift P1 by the first donee. At the time of the execution of the deed, the first donee was not present but the donor, the second donee, the two attesting witnesses and the notary were all present. The second donee accepted the gift on behalf of himself and his brother, the first donee. In the deed it was recorded that "*I the said second named donee for myself and for and on behalf of the first named donee do hereby thankfully and gratefully accept the above grant and gift hereby made*."

The donor mother who lived ten long years after the execution of this deed did not say that the first donee had not accepted the donation and therefore the deed was invalid. According to the evidence of the two donees and one of the attesting witnesses to the deed who was the donees' brother, the mother surrendered possession of the land together with the house thereon to the two donees and lived with one of her children until her death. The two donees have *inter alia* rented out the house to a school master for about two years. These items of evidence were never challenged during the course of cross examination. When this evidence is considered together with the acceptance of the donation by the second donee on behalf of himself and the first donee, there is no doubt that the deed of gift was accepted by both donees.

The District Court and the Court of Appeal only considered the absence of the signature of the first donee on the deed of gift to

conclude that the donation was not accepted by the first donee and therefore the deed P1 is invalid. That conclusion is erroneous. There is a valid acceptance of the deed of gift by both donees.

I answer the questions of law upon which leave was granted in the affirmative and set aside the judgments of the District Court and the Court of Appeal and allow the appeal with costs. The District Judge will enter judgment for the plaintiffs as prayed for in the prayer to the plaint.

Judge of the Supreme Court

S. Thurairaja, P.C., J.
I agree.

Judge of the Supreme Court

A.L. Shiran Gooneratne, J.
I agree.

Judge of the Supreme Court

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

SC Appeal 172/16

SC (SPL) LA 113/2016

CA Case No. 541/2000(F)

DC Colombo Case No.14564/P

In the matter of an Application to substitute made under and in terms of Section 404 of the Civil Procedure Code read with Section 79 of the Partition Law No.21 of 1977

Kalukapuge Thomas Perera,

612, Desingghhe Mawatha,

Thalangama South,

Battaramulla

Plaintiff

Vs.

1. Kalukapuge Engalthina,

2. Kalukapuge Simiyan,

Both of No.612,

Desingghhe Mawatha,

Thalangama South,

Battaramulla

3.Lanka Lands Company Ltd

No.347, Union Place,

Colombo 02

Defendents

AND BETWEEN

Lanka Lands Company Ltd

No.347, Union Place,

Colombo 02

3rd Defendant Appellant

Vs.

Kalukapuge Thomas Perera,

612, Desinghe Mawatha,

Thalangama South,

Battaramulla

Plaintiff-Respondent (Deceased)

Kalukapuge Karthelis Perera

622/A, Desinghe Mawatha,

Thalangama South,

Battaramulla

Substituted Plaintiff -Respondent

1. Kalukapuge Engalthina,
2. Kalukapuge Simiyan,

   Both of No.612,

   Desinghe Mawatha,

   Thalangama South,

   Battaramulla

1st and 2nd Defendant-Respondents

AND BETWEEN

Communication and Business Equipment (Pvt) Ltd,
(Now known as Apogee International(Pvt) Ltd)
No.99/6 Rosmead Place,
Colombo 07

Petitioner

Vs.

Lanka Lands Company Ltd,
(Now not a legal person)
No.347, Union Place,
Colombo 02

3rd Defendant- Appellant - Respondent

Kalukapuge Thomas Perera,
No.612, Desinghe Mawatha,
Thalangama South

Plaintiff- Respondent-Respondent (Deceased)

Kalukapuge Karthelis Perera
No.622/A, Desinghe Mawatha,
Thalangama South

Substituted Plaintiff-Respondent -Respondent

1. Kalukapuge Engalthina,
2. Kalukapuge Simiyan,
   Both of No.612,
   Desinghe Mawatha,
   Thalangama South,

1st and 2nd Defendant-Respondent - Respondents

AND NOW BETWEEN

Communication and Business Equipment (Pvt) Ltd,
(Now known as Apogee International(Pvt) Ltd)
No.99/6 Rosmead Place,
Colombo 07

Petitioner-Petitioner

Vs.

Lands Company Ltd,
(Now not a legal person)
No.347, Union Place,
Colombo 02

3rd Defendant- Appellant-Respondent -Respondent-Respondent

Kalukapuge Thomas Perera
No.612, Desinghe Mawatha,
Thalangama South

Plaintiff- Respondent-Respondent

-Respondent (Deceased)

Kalukapuge Karthelis Perera

No.622/A, Desinghe Mawatha,

Thalangama South

Substituted Plaintiff-Respondent

-Respondent-Respondent

1. Kalukapuge Engalthina,
2. Kalukapuge Simiyan,

Both of No.612,

Desinghe Mawatha,

Thalangama South,

1st and 2nd Defendant-Respondent

- Respondent-Respondents

Before: L.T.B Dehideniya J.

S. Thurairaja PC, J.

Achala Wengappuli J.

Counsels: Nihal Jayamanna PC with Ms. Noorani Amarasinghe for Appellant- Appellant

Dr. Jayatissa de Costa PC with Mr. Chanuka Ekanayake for substituted Plaintiff-Respondent-Respondent - Respondent

Argued on: 12.11.2021

Decided on:17.12.2021

L.T.B. Dehideniya, J.

The original Plaintiff instituted the partition action bearing No. 14564/P in the District Court of Colombo against the Defendants to Partition the land more fully described in the 2nd schedule to the plaint in terms of the Partition Act No.21 of 1997. Subsequently, the 3rd Defendant- Appellant-Respondent-Respondent-Respondent, Lanka Lands (Pvt) Ltd intervened in the partition action and filled its statement of claim seeking the dismissal of the plaint. After the trial, the learned District Court Judge delivered the judgement dated 04.07.2000 allowing the partition of the land in the manner set out in the judgement. Being aggrieved by the said judgement, 3rd Defendant-Appellant-Respondent-Respondent-Respondent company, appealed to the Court of Appeal. Meanwhile, Assistant Company Registrar informed the substituted Plaintiff-Respondent-Respondent-Respondent (hereinafter sometime referred to as Respondent) by letter dated 29.07.2010 that the name of the 3rd Defendant- Appellant Company had been struck off from the company register on account of the fact that, the company had not been re-registered under the new Companies Act No. 07 of 2007.

When the above appeal was taken up for hearing on 15th July 2011, the Respondent raised a preliminary objection that, since the Lanka Lands (Pvt) Ltd has ceased to exist, the appeal cannot be maintained. With regard to the preliminary objections of the Appellant company, Petitioner-Appellant (hereinafter sometime referred to as the Appellant),Communication and Business Equipment (Pvt) Ltd (Now known as Apogee International (Pvt) Ltd) filed an Application in terms of Section 404 of the Civil Procedure Code to have itself substituted in the room of the 3rd Defendant- Appellant-Respondent-Respondent-Respondent, which was struck off from the company register and therefore ceased to exist, on the ground that 3rd Defendant- Appellant-Respondent-Respondent-Respondent transferred all its rights related to the subject matter to

Communication and Business Equipment (Pvt) Ltd by deed of transfer No. 907 dated 19.08.1994. Considering the submissions of both parties, Court of Appeal delivered the judgement dated 25.05.2016 in favour of the Respondent, refusing the application of the Appellant to be substituted in the room of the 3rd Defendant- Appellant-Respondent-Respondent-Respondent. The Learned Appeal Court judge further held that, since the substitution was sought eighteen years after the transfer deed was registered, the Appellant had been sleeping over its own rights. It is from the aforesaid judgement that this appeal is preferred.

This Court granted leave to appeal on the following question of law;

1) Is there a delay and/or lack of ***uberrima fides*** on the part of the Appellant in making the application for substitution under section 404 of the Civil Procedure Code?
2) Did the Court of Appeal fail to appreciate that the Petitioner was in law entitled to invoke the provisions of Section 404 of the Civil Procedure Code any time before the final decree?

The Appellant's application is based on the ground that the Appellant company has a legal right to sought the substitution in the room of the Lanka Lands (Pvt) Ltd, under the Section 404 of the Civil procedure Code, in order to prosecute the appeal. The Appeal Court had expressed the opinion of the court on the key issues raised in the application. Firstly, the Learned Appeal Court Judge examined whether the Appellant is entitled to seek substitution in the room of a company which was ceased to exist, under Section 404 of the Civil Procedure Code. The Appeal Court held that, since the transfer of interests by deed No.907 had taken place in 1994, whereas substitution was sought in 2012, the Appellant had delayed the substitution for eighteen years. The Appeal Court further emphasized that the Appellant has failed to assert his rights in a timely manner has resulted in the claim being barred by laches.

As per the submissions tendered by the Appellant, in the eyes of the law, it is essential for a Court in a partition action to determine the rights of parties. The rights of the parties must be determined as at the date of the filing of the action and/or the filing of the statements of claim. Appellant further contends that the Court cannot simply shut one party out without hearing, especially the Appellant in this application. With a view to the aforesaid context, it is incumbent upon this Court to determine whether the Appellant is entitled to invoke Section 404 of the Civil Procedure Code.

When considering the case law jurisprudence, similar legal issues, elements and legal provisions to the present application has been discussed and accepted in a range of Indian case law. The legal principles outlined in the said decisions and the opinion of the court can be adopted as directives for the present application.

> ***Bank Kreiss AG v. Mr. Ashok K. Chauhan*** [decision dated 23 October 2007 -High Court of Delhi in CS (OS) No. 675 of 1999] at para **4** per Badar Durrez Ahmed, J.,
>
> *"Three interesting questions arise for consideration in these applications. They are:*
>
> *(1) Whether a merging company, upon merger with another company and thereby ceasing to exist as an independent entity, could be construed as having "died" upon such merger in the context of Order 22 of the Code of Civil Procedure, 1908?..*
>
> *..The difficulty that arises in the present case is because the plaintiff was a corporate entity or in other words, a juristic person and not a natural person. There is no difficulty with the term "death" when applies to a natural person. But, what is meant by death in the context of a company needs to be examined.*

According to the learned Counsel for the defendants, the moment a company ceases to exist by virtue of dissolution consequent upon winding up or by virtue of having merged into another entity, it would mean that the company died. Several decisions were cited on both sides on this and other aspects of the matter. Before I examine those decisions, it would be necessary to note that Order 22 Rule 3 CPC has no reference to the word "person" or "persons". The reference is only to the plaintiff/ plaintiffs. However, a reading of Order 1 Rule 1 CPC would make it clear that a plaintiff has to be a person. Therefore, it is safe to assume that the expressions plaintiff or plaintiffs refers to person or persons who institute the suit. Section 3(42) of the General Clauses Act, 1897 provides that in the said Act, and in all central acts and regulations made after the commencement of the said Act, unless there is anything repugnant in the subject or context, inter alia, "person" shall include any company or association or body of individuals, whether incorporated or not. Thus, a company would also be regarded as a person unless such meaning is repugnant to the context of the statute."

at para 7

"..In the cases of assignment, creation or devolution of interest during the pendency of a suit referred to in Rule 10 of Order 22 CPC, the original party, that is, the assigner or the one who creates or from whom the interest devolves continues to exist (to be alive) even after such assignment, creation or devolution of interest. This is clear from the observation that if the person on whom the interest has been assigned or devolved upon, has the option of continuing the

suit with the leave of the Court or of letting the original plaintiff continue the same."

When adapting the existing law in Sri Lanka to the aforesaid legal interpretation, it becomes apparent that, in a case where assignment, creation and devolution of interests during pendency of a suit, cannot be brought to an end merely because the interests of a party in the subject matter of suit has devolved upon another during its pendency. Therefore, the Appellant has a fair right to invoke Section 404 of the Civil Procedure Code in order to seek substitution in the room of the Lanka Lands (Pvt) Ltd. When reading Section 404 of the Civil Procedure Code together with Section 760 (A) it appears that, Court of Appeal has the authority, provided by the Supreme Court Rules, to determine who is a 'proper person' to be substituted in place of, or in addition to the party who has died or undergone a change of status after lodging an appeal in any civil action, and the name of such a party shall thereupon be allowed to be substituted.

Section 404

"In other cases of assignment, creation, or devolution of any interest pending the action, the action may, with the leave of the court, given either with the consent of all parties or after service of notice in writing upon them, and hearing their objections, if any, be continued by or against the person to whom such interest has come, either in addition to or in substitution for the person from whom it has passed, as the case may require."

Section 760(A)

"Where at any time after the lodging of an appeal in any civil action, proceeding or matter, the record becomes defective by reason of the death or change of status of a

party to the appeal, the Court of Appeal may in the manner provided in the rules made by the Supreme Court for that purpose, determine who, in the opinion of the court, is the proper person to be substituted or entered on the record in place of, or in addition to, the party who has died or undergone a change of status, and the name of such person shall thereupon be deemed to be substituted or entered of record as aforesaid."

According to the submissions, Appellant contends that 'proper person', would be by reference to the Rules made under Article 136, no such Rules have been in fact made in regard to substitution in a pending case in appeal. The Appellant refers to ***Careem Vs. Sivasubramaniam and Another*** [2003] 2 Sri L.R 197 where Udalagama J. held that the proper person need not to be a heir, executor or administrator but would include a person who had gifted with premises by the deceased on a deed of gift. It is also not disputed that such determination as to who the 'proper person' to be substituted in the place of a deceased party would be based on the opinion of the Court on a finding of fact.

A similar view was expressed in the case of ***K.R Sumanawathie Vs. S. Seelawathie*** (SC Appeal No.199/2014, decided on 22nd June 2017) at p.7 per Prasanna Jayawardena J.,

"Section 760A provides that, where at any time during the pendency of an appeal, one of the parties to the appeal dies or undergoes a change of his legal status, the Court before which the appeal is pending may determine, in the manner provided in the Supreme Court Rules, ".... who, in the opinion of the court, is the proper person to be substituted or entered on the record in place of, or in addition to, the party who had died or undergone a change of status, and the name of such person shall thereupon be deemed to be substituted or entered on record as aforesaid." In terms

of Rule 38 of the Supreme Court Rules, that determination has to be made upon "sufficient material" submitted to the Court which establishes that the person who seeks to be substituted is the "proper person" to be substituted in the place of the deceased party to the appeal before that Court…Thus, the High Court, before which the appeal was pending, had the discretion to substitute, in place of the deceased plaintiff, such person whom the High Court, after examining the material submitted to it, deemed 'is the proper person to be substituted'"

The Appellant further contends that, when applying Section 404 of the Civil Procedure Code, it does not provide that when a party has failed to obtain leave of the Court to continue the action, should dismissed. This view was accepted in the case of ***Brunswick Exports Ltd Vs. Hatton National Bank Ltd*** (CA/Application No. 581/93, Decided on 5th May 1994- Bar Association Law Journal [1994] Vol 5 Part 2 at p.1). Ranaraja J. held that, Section 404 of the Civil Procedure Code makes provision for a person acquiring an interest in an action to continue with it having obtained leave of court. It does not provide that, if he does not obtain the leave of court to continue the action, the action should stand dismissed and the Plaintiff is still entitle to continue the suit and his successor will be bound by the result of the litigation even though he is not represented at the hearing. Further, in ***Kusumawathie Vs. Kanthi*** [2004] 1 Sri L.R 350, Somawansa J. held that, though in the original Court the person entitled to be substituted is the next of kin who has derived the inheritance, there is no such requirement in the case of an appeal. In the circumstances, the Court can consider the Appellant to be a fit and proper person to be substituted in the room of the deceased party.

In accordance with the above discussed legal materials, it is clear to this court that**,** Lanka Lands (Pvt) Ltd is no longer a legally existing entity and that there is no legal impediment to the Appellant to seek substitution in the room of Lanka Lands (Pvt) Ltd as a party who has died or undergone a change of status. Therefore, it is evident that the Appellant is entitled to invoke Section 404 of the Civil procedure Code, in order to prosecute the appeal from the District Court Judgement dated 04.07.2000.

The Learned Counsel for the Respondent repeatedly raised the question that, whether there is a delay and/or lack of *uberrima fides* on the part of the Appellant in making the Application for the substitution under Section 404 of the Civil Procedure Code. It was submitted that; the Appellant is guilty of lack of *uberrima fides* and as per the doctrine of laches, the Appellant exhibits an unreasonable delay in seeking substitution. The Respondent contends that Lanka Lands (Pvt) Ltd was struck off from the company register in 2010, and the preliminary objections of maintainability of the Appeal was taken up in 2011. The application for substitution was made in 2012, one year after the date of objections and two years after the Lanka Lands (Pvt) Ltd was struck off. The transfer of interest by deed of transfer No. 907 had taken place in 1994 where as substitution was sought in 2012, eighteen years after the transfer. Therefore, it is necessary to examine whether there was indeed a delay on the part of the Appellant in making the application for substitution and whether the appellant had violated the principle of *uberrima fides*.

The legal maxim *uberrima fides* refer to utmost good faith. Underlying principal that governs this maxim is that all human acts should be backed by good faith. Talking about contracture *uberrima fides*, phrase means that all kinds of contracts (commercial transactions) must be free from any kind of concealment, misrepresentation and fraud. The maxim majorly governs the insurance contracts. It is noteworthy to mention that, the legal maxim of *uberrima fides* cannot be applied in

an event where the Section 404 of the Civil procedure Code comes into play. Accordingly**,** legal maxim of *uberrima fides* cannot set in motion in the present application.

By carefully considering the aforesaid legal provisions and case law jurisprudence pertaining to the legal issue in question, can it be decided whether there is a delay on the part of the Appellant in making the application for substitution under Section 404 of the Civil Procedure Code? In the eyes of law, considering the legal effect of a transfer of a property while the partition action is pending before the court, whatever rights that will be allotted to the transferor by a final decree in a partition action, the transferee cannot justifiably claim to be added as a necessary party. The transferor is a party and his rights will be determined in the present action, the transferee of the yet undermined rights is not a necessary party. It cannot be accepted that the transferee has prima facie right to the property and that he is therefore entitled to be added as a party in terms of s.69 (1) b of the Partition Law. This legal interpretation is laid down in the case of ***Sirinatha Vs. Sirisena and others*** [1998] 3 Sri L.R 19.

Sirinatha Vs. Sirisena and others [1998] 3 Sri L.R 19 at p.24 per Ismail J.,

> *"Considering the legal effect of a transfer of whatever rights that will be allotted to the transferor by a final decree in a partition action, the transferee cannot justifiably claim to be added as a necessary party. The transferor is a party and his rights will be determined in the present action. The transferee of the yet undetermined rights is not a necessary party to the action. I do not accept the submission of counsel that the 3rd defendant-respondent Jayasiri has a prima facie interest in the land and that he is therefore entitled to be added as a party in terms of section 69 (1)(b) of the Partition Law as one claiming an 'interest in the land'.*

Admittedly Jayasiri claims to have a contingent interest in the land upon deed No. 406 dated 19.10.93. But there is no basis for the interpretation that the phrase 'interest in the land' in section 69 (1)(d) includes also his contingent interest. As the 3rd defendant-respondent has no present interest in the land and as no opinion could justifiably be formed by court that he should be made a party, the order permitting him to be added as a party to the action cannot stand."

In the present application, the original partition action was instituted on 02.10.1986. As per the submissions, Lanka Lands (Pvt) Ltd had transferred all its rights in the subject matter to the Appellant by the deed of transfer No.907 dated 09.08.1994. The Learned Judge of the District Court of Colombo Delivered the Judgement dated 04.07.2000 in favor of the Respondent and subsequently, Lanka Lands (Pvt) Ltd filed notice of Appeal on 04.07.2000. When considering all the above time lines and the legal context discussed above it appears that, since the transfer of the property took place after the institution of the partition action in 1986, there was no legal necessity for the Appellant to seek substitution in the room of the Lanka Lands (Pvt) Ltd. Further, seeing that, being aggrieved by the decree of the District Court, Lanka Lands (Pvt) Ltd has filed notice of Appeal, it is clear to this court that there was no compulsion in seeking substitution until the notice of the company registrar informing that the Lanka Lands (Pvt) Ltd had been struck off from the company register in 2010. Accordingly, it cannot be concluded that there was eighteen years delay from 1994 to the application of the substitution in 2012. And in fact, under the above legal context, the Appellant is not entitled to make such an Application**,** as long as Lanka Lands (Pvt) Ltd exists as a legal entity. Therefore, the Learned Judge of the Court of Appeal had erred in concluding evidence by deciding that there was a delay on the part of the Appellant in making the application for substitution and the Appellant has been sleeping on its rights.

The Appellant's position is that, deed of transfer No. 907 dated 19.08.1994 has not been executed for individual shares and it conveys divided and defined extend of the land. Accordingly, the said deed is for a divided and defined land what includes the entire corpus and not a deed which deals with or convey undivided shares and therefore not an infringement of Section 66 of the Partition Law. The Appellant further states that, the Appellant is the single owner of the land in suit and no *lis pendens* was registered under the folios of the Appellant's property. Appellant further states that its rights to the land in question is derived from a different pedigree, and the Appellant is of the persuasion that the single owner of the land in suit is the Appellant company.

Section 66 (1) of the Partition Law

> *"(1) After a partition action is duly registered as a lis pendens under the Registration of Documents Ordinance no voluntary alienation, lease or hypothecation of any undivided share or interest of or in the land to which the action relates shall be made or effected until the final determination of the action by dismissal thereof, or by the enter of a decree of partition under section 36 or by the entry of a certificate of sale."*

The learned counsel for the respondent submits that, once the *lis pendens* is duly registered under Section 66(1) of the Partition Law, no alienation can be registered and a divided undefined land cannot be a part of the subject matter of the action. However, when carefully observing the original partition action, 3rd Defendant (Lanka Lands (Pvt) Ltd) intervened in the partition action with the purpose of seeking the dismissal of the plaint. Further**,** the Appellant as well as its predecessor, Lanka Lands (Pvt) Ltd has not claimed that it too should be allocated a portion of the land by the final decree of the partition action. 3rd Defendant's (Lanka Lands (Pvt) Ltd) stand was that, 3rd

Defendant was the single owner of the subject matter and no *lis pendens* was registered under the folios of the Appellant's property. Accordingly, Lanka Lands (Pvt) Ltd had transferred all the rights and interests related to the subject matter to the Appellant company by the deed of transfer No.907 dated 09.08.1994, believing that he is the sole owner of the land. Therefore, the Learned Counsel for the Respondent's submission on the Section 66 of the Partition Law is questionable.

I answer the questions of law as follows,

1) No
2) Yes

By considering above circumstances, I set aside the order of the Court of Appeal and allow the Appellant to be substituted in the room of the 3rd Defendant-Appellant-Respondent-Respondent-Respondent.

Judge of the Supreme Court

S. Thurairaja PC, J.
I agree

Judge of the Supreme Court

Achala Wengappuli J.
I agree

Judge of the Supreme Court

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

Iluppengamu Appuhamylage
Martin Appuhamy
(Deceased)
Plaintiff

Iluppengamu Appuhamylage
Milrad Chandrawathie
(Formerly the 1st Defendant)
Substituted Plaintiff

Iluppengamu Appuhamylage
Dannet Ranasinghe
(Formerly the 5th Defendant)
All of
Balabowa, Dewalapola.
Substituted Plaintiff

SC APPEAL NO: SC/APPEAL/172/2015
SC LA NO: SC/HCCA/LA/247/2015
HCCA GAMPAHA NO: WP/HCCA/GPH/70/2010/F
DC GAMPAHA NO: 34660/P

Vs.

1. Iluppengamu Appuhamylage
Milrad Chandrawathie
(Deceased)

2. Iluppengamu Appuhamylage
   Ariyawansa Gemunudasa
3. Iluppengamu Appuhamylage
   Jacolis Appuhamy (Deceased)

3(a). Iluppengamu Appuhamylage
   Suraweera

4. Sangapala Arachchige Harriet
5. Iluppengamu Appuhamylage
   Dannet Ranasinghe
6. Iluppengamu Appuhamylage
   Sumithra Padmasilie
7. Iluppengamu Appuhamylage
   Swineetha
8. Iluppengamu Appuhamylage
   Violet
9. Iluppengamu Appuhamylage
   Kumaratunga
   All of
   Balabowa, Dewalapola.
10. Bowanayaka Arachchige
    Sumanawathie
11. Iluppengamu Appuhamylage
    Jayath
    Both of No. 63/14,
    Parakum Mawatha,
    Bandarawatta,
    Gampaha.
12. Milton Appuhamilage Milton
    Chandrawathie
    Balabowa,
    Dewalapola.

13. Iluppengamage Chandrawathie
No. 142, Balabowa,
Dewalapola.
Defendants

AND BETWEEN

Iluppengamu Appuhamylage
Dannet Ranasinghe
(Formerly the 5th Defendant)
Balabowa, Dewalapola.
Substituted-Plaintiff-Appellant

Vs.

1. Iluppengamu Appuhamylage
Milrad Chandrawathie (Deceased)
2. Iluppengamu Appuhamylage
Ariyawansa Gemunudasa
3. Iluppengamu Appuhamylage
Jacolis Appuhamy
(Deceased)

3(a). Iluppengamu Appuhamylage
Suraweera

4. Sangapala Arachchige Harriet
5. Iluppengamu Appuhamylage
Dannet Ranasinghe
6. Iluppengamu Appuhamylage
Sumithra Padmasilie
7. Iluppengamu Appuhamylage
Swineetha

8. Iluppengamu Appuhamylage
   Violet
9. Iluppengamu Appuhamylage
   Kumaratunga
   All of
   Balabowa, Dewalapola.
10. Bowanayaka Arachchige
    Sumanawathie
11. Iluppengamu Appuhamylage
    Jayalath
    Both of No. 63/14,
    Parakum Mawatha,
    Bandarawatta,
    Gampaha.
12. Milton Appuhamilage Milton
    Chandrawathie
    Balabowa, Dewalapola.
13. Iluppengamage Chandrawathie
    No. 142, Balabowa, Dewalapola.

Defendant-Respondent

AND NOW BETWEEN

Iluppengamu Appuhamylage
Suraweera,
Balabowa, Dewalapola
3A Substituted Defendant-
Respondent-Petitioner

Vs.

Iluppengamu Appuhamylage
Dannet Ranasinghe
(Formerly the 5th Defendant)
Balabowa, Dewalapola
Substituted Plaintiff-Appellant-Respondent

1. Iluppengamu Appuhamylage
   Milrad Chandrawathie
2. Iluppengamu Appuhamylage
   Ariyawansa Gemunudasa
4. Sangapala Arachchige Herriet
5. Iluppengamu Appuhamylage
   Dannet Ranasinghe
   (also the Substituted-Plaintiff-Appellant-Respondent)
6. Iluppengamu Appuhamylage
   Sumithra Padmasilie
7. Iluppengamu Appuhamylage
   Swineetha
8. Iluppengamu Appuhamylage
   Violet
9. Iluppengamu Appuhamylage
   Kumaratunga
   All of
   Balabowa, Dewalapola.
10. Bowanayaka Arachchige
    Sumanawathie
11. Iluppengamu Appuhamylage
    Jayalath
    Both of No. 63/14,

Parakum Mawatha,
Bandarawatta, Gampaha.

12. Milton Appuhamilage Milton Chandrawathie
Balabowa, Dewalapola.

13. Iluppengamu Appuhamylage Chandrawathie
No. 142, Balabowa,
Dewalapola.

Defendant-Respondent-Respondents

Before: Sisira J. De Abrew, J.
A. L. Shiran Gooneratne, J.
Mahinda Samayawardhena, J.

Counsel: B.O.P. Jayawardena with Oshada Rodrigo for the 3A Substituted-Defendant-Respondent-Petitioner.

J.C. Boange with S. Gurugalgoda for the Substituted-Plaintiff-Appellant-Respondent and the 6th, 7th, 8th and 9th Defendant-Respondent-Respondents.

Argued on: 01.04.2021

Further written submissions:

by the 3A Substituted-Defendant-Respondent-Appellant on 16.04.2021

by the Plaintiff-Appellant-Respondent on 20.04.2021

Decided on: 21.05.2021

Mahinda Samayawardhena, J.

The Plaintiff filed this action in the District Court of Gampaha seeking to partition among himself and the 1st to 11th Defendants a land named Wawe Ethana in extent of 1 acre and 3 roods, bounded on the North by the land of Thepanis Appu and others, on the East by the land of Thepanis Appu, on the South by the land of Romanis Appu, and on the West by the land belonging to the successors in title of Mudlier Silva.

Upon the death of the original Plaintiff, the 1st Defendant took over as the substituted Plaintiff. The commission to prepare the Preliminary Plan, which is the first step to identifying the land to be partitioned, was sent to the Surveyor who returned the commission duly executed with Plan No. 5733 and the Report. In the Report, the Surveyor states *inter alia* that the substituted Plaintiff and the 2nd to 7th, 9th and 10th Defendants were present at the survey, and the boundaries of the land were shown to him by the substituted Plaintiff and no other party raised objections by stating that the boundaries shown were wrong. The extent of the land depicted in this Plan is 2 acres and 25.5 perches.

The land is described in the schedule to the plaint in accordance with old title Deeds executed many decades ago. This includes title Deed No. 15355 executed in 1925. The extent of the land given in these Deeds is speculative. There were no Plans prepared at that time. Hence, a discrepancy of 1 rood and 25.5 perches between the land described in the old Deeds and the land shown in the more recently prepared Plan cannot be taken to mean a larger land than that sought to be partitioned was surveyed. No party raised such a point at the survey or thereafter.

The trial commenced on 18.05.2001 with the raising of issues and the substituted Plaintiff partly gave evidence. The 1st issue raised by the substituted Plaintiff was whether the land to be partitioned is depicted in Plan No. 5733. The substituted Plaintiff marked Plan No. 5733 as the Preliminary Plan depicting the land to be partitioned as described in the schedule to the plaint.

Conversely, the contesting 3(a) Defendant raised the issue whether the land depicted in Plan No. 5733 is not Wawe Ethana but a different land named Meegahahena alias Midellagahawatta as described in the statement of claim of the said Defendant. According to this Defendant, Meegahahena alias Midellagahawatta is a land of 2 acres, 2 roods and 15 perches in extent.

The substituted Plaintiff continued her evidence-in-chief on 18.06.2002 and 08.11.2002. During the course of her evidence, she stated *inter alia* that the land is known as Wewe Watta, Wawe Ethana, and Millagahawatta.

However, before the commencement of her cross examination, the substituted Plaintiff made an application to amend the plaint. An amended plaint was filed on 06.01.2005. The substituted Plaintiff thereafter moved the Court to issue a commission to prepare a new Preliminary Plan. The issuance of a fresh commission to prepare a new Preliminary Plan was unnecessary because there was no change in the schedule to the amended plaint as to the land to be partitioned. The schedules to the original plaint and the amended plaint are the same.

The new commission was issued to a different Surveyor who sent to Court Plan No. 2256 with the Report. In this second Plan, i.e. Plan No. 2256, a portion of the land on the southern boundary of about 2 roods in extent is excluded and a land of 1 acre, 2 roods and 22.25 perches is depicted. The Surveyor states in the Report that in the commission he received, he was directed to survey the land and prepare the Plan in the manner shown by the substituted Plaintiff, and therefore the survey was done according to the boundaries shown by the substituted Plaintiff. The Surveyor specifically points out that there is no identifiable southern boundary. In this Plan, the southern boundary is shown by a straight line drawn by the Surveyor and the southern boundary is described as part of Wawe Ethana claimed by the substituted Plaintiff. It may be recalled that the original Plaintiff filed this action to partition the land known as Wawe Ethana. The Surveyor has in effect excluded a part of Wawe Ethana on the request of the substituted Plaintiff.

With this new development, the trial commenced *de novo* and issues were raised afresh by the substituted Plaintiff *inter alia* on the basis that the land to be partitioned is depicted in new Plan No. 2256. The substituted Plaintiff gave evidence again and Plan No. 2256 was marked as the Preliminary Plan but subject to proof. Nevertheless, the Surveyor was not called to give evidence.

Thereafter, the 5th Defendant was added as the substituted Plaintiff on the basis that the 1st Defendant, who was initially substituted as the Plaintiff, did not prosecute the case with due diligence.

With the evidence of the new substituted Plaintiff (i.e. the 5th Defendant), the Plaintiff's case was closed, reading in evidence Deeds marked P1-P5. At the time of the closure of the Plaintiff's case, the contesting 3(a) Defendant informed Court that Plan No. 2256 marked subject to proof had not been proved by calling the Surveyor. Thereafter the 3(a) Defendant and the 13th Defendant gave evidence.

P1 of 1967 refers to a land known as Wewe Watta in extent of 1 acre and 3 roods. P2 of 1991 refers to a land known as Wawe Ethana in extent of 1 acre and 3 roods. P3 of 1991 refers to a land known as Wawe Ethana in extent of 1 acre and 3 roods. P4 of 1925 refers to a land known as Millagahawatta alias Wewe Watta in extent of 1 acre and 2 roods. P5 of 1970 refers to a land known as Millagahawatta in extent of 1 acre and 3 roods.

The learned District Judge by his Judgment dated 30.06.2010 dismissed the Plaintiff's action on the basis that the Plaintiff failed to properly identify the corpus.

Apart from the arbitrary removal of a part of the corpus, the learned District Judge says that the boundaries in the schedule to the plaint do not correspond with the boundaries depicted in Plan No. 2256.

The boundaries in the schedule to the plaint are given in accordance with the boundaries in old Deeds. Such boundaries are likely to have changed with the passage of time and, moreover, the existing boundaries have been identified by the Surveyor by the names of the owners of the adjoining lands. If the change in the names of the owners of the adjoining lands can be explained, a District Judge cannot dismiss a partition

action by making a superficial comparison of the boundaries in the schedule to the plaint with the existing boundaries as stated in the Preliminary Plan. No such explanation was given by the substituted plaintiff in this case. The substituted Plaintiff's evidence on the identification of the corpus as well as the pedigree was fragile.

On appeal by the substituted Plaintiff, the High Court of Civil Appeal by Judgment dated 02.07.2015 set aside the Judgment of the District Court and directed the District Judge to partition the land depicted in Plan No. 2256 according to the pedigree of the substituted Plaintiff.

It is against this Judgment of the High Court that the 3(a) Defendant has come before this Court. This Court granted leave to appeal on the questions of identification of the corpus, failure to investigate title to the land, and the prescriptive claim of the 3rd Defendant.

The brief Judgment of the High Court conspicuously lacks an analysis of evidence when it held with the Plaintiff on the identification of the corpus and the title to the land.

Although it was Plan No. 2256 which was marked subject to proof but not proved, the High Court states it was Plan No. 5733 which was marked subject to proof but not proved. Such was the care taken by the High Court in deciding the appeal.

It is abundantly clear from the Surveyor's Report on Plan No. 2256 that the Surveyor was compelled to exclude a part of Wawe Ethana, the land for the partition of which alone the original Plaintiff filed this action, at the instance of the substituted Plaintiff. The Surveyor had to yield to the substituted Plaintiff's

request because of the direction given to him by Court in the commission.

It may be recalled that it is the same substituted Plaintiff who showed the boundaries to the Surveyor who prepared the previous Plan No. 5733. No reasons were given by the substituted Plaintiff at the survey or in evidence for the change of mind.

However, the High Court in its Judgment states that in the first Plan, i.e. Plan No. 5733, a larger land is depicted and the reason for this may be the filling of the paddy field on the southern boundary. But no such evidence was given by the substituted Plaintiff at the trial and I am at a loss to understand how the High Court formulated such a defence to justify the arbitrary removal of a portion of the land from partitioning.

The High Court referring to Plan No. 5733 further states that if a larger land is made the subject matter of the action than what is stated in the schedule to the plaint, a land in excess of the registered *lis pendens* would need to be partitioned, which is unlawful. I am unable to understand this reasoning. This is not a question of enlarging the corpus but a question of identifying the corpus. The proper identification of the land described in the schedule to the plaint on the ground does not necessitate a fresh *lis pendens* being registered. Nor does it amount to partitioning a larger land not covered by the *lis pendens* presently registered.

Without analysing the evidence as to proof of pedigree, the High Court directed the District Court to enter a partition decree as prayed for by the Plaintiff in the amended plaint. This cannot be

done in a partition case. The District Judge did not engage in investigating the title to the land because he formed the opinion that the land to be partitioned had not been properly identified. The High Court did not consider the contest raised by the 3rd Defendant at all.

In the facts and circumstances of this case, the Court need not consider the contest raised by the 3(a) Defendant. The Court can dismiss the Plaintiff's action without considering the said contest.

A partition action cannot be filed to partition a portion of the land. The entire land should be brought into the action and the co-owners of the whole corpus should be made parties. If the land to be partitioned as described in the schedule to the plaint has not been properly identified, the Plaintiff's action shall fail. In such a situation the necessity to investigate title does not arise. Title shall be investigated on a properly identified parcel of land. The Court shall not first investigate title and then look for the land to be partitioned. It shall happen *vice versa*. *(Peris v. Peris (1903) 6 NLR 321, Abeysinghe v. Abeysinghe (1946) 47 NLR 509, Girigoris Appuhamy v. Maria Nona (1956) 60 NLR 330)*

The Plaintiff in this case has failed to bring the whole land into the action. In other words, the Plaintiff has failed to properly identify the land to be partitioned. Hence the Plaintiff's action shall fail.

The questions of law raised before this Court are answered in favour of the 3(a) Defendant-Appellant.

I set aside the Judgment of the High Court and restore the Judgment of the District Court. The appeal of the 3rd Defendant is allowed with costs.

Judge of the Supreme Court

Sisira J. de Abrew, J.
I agree.

Judge of the Supreme Court

A. L. Shiran Gooneratne, J.
I agree.

Judge of the Supreme Court

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

1. Morawakage Premawathie,
2. Ballantuda Achchige Padmini,
3. Ballantuda Achchige Rohini,
   All of
   350, Katuwana Road,
   Homagama.
   Plaintiffs

SC APPEAL NO: SC/APPEAL/176/2014
SC LA NO: SC/HC/CALA/24/2013
HCCA AVISSAWELLA NO: WP/HCCA/AV/242/2008/F
DC HOMAGAMA NO: 2673/L

Vs.

1. Ballantuda Achchige Jayasena
   (Deceased)

1A. M. Hemawathie,

1B. Ballantuda Achchige Lal
   Chandrasiri,

1C. Ballantuda Achchige Don
   Wasantha,

1D. Ballantuda Achchige Don
   Malkanthi,
   All of
   308, Narangaha Hena,
   Katuwana, Homagama.

2. Ballantuda Achchige Don
Wasantha,
308, Narangaha Hena,
Katuwana, Homagama.
Defendants

AND BETWEEN

Ballantuda Achchige Don
Wasantha,
308, Narangaha Hena,
Katuwana, Homagama.
1C and 2nd Defendant-Appellant

Vs.

1. Morawakage Premawathie,
2. Ballantuda Achchige Padmini,
3. Ballantuda Achchige Rohini,
All of
350, Katuwana Road,
Homagama.
Plaintiff-Respondents

1. Ballantuda Achchige Jayasena
(Deceased)
1A. M. Hemawathie
(Deceased)
1B. Ballantuda Achchige Lal
Chandrasiri,
1D. Ballantuda Achchige Don
Malkanthi,
All of

308, Narangaha Hena,
Katuwana, Homagama.
Defendant-Respondents

AND NOW BETWEEN

Ballantuda Achchige Don
Wasantha,
308, Narangaha Hena,
Katuwana, Homagama.
1C and 2nd Defendant-Appellant-
Appellant

Vs.

1. Morawakage Premawathie,
2. Ballantuda Achchige Padmini,
3. Ballantuda Achchige Rohini,
   All of 350, Katuwana Road,
   Homagama.
   Plaintiff-Respondent-Respondents

1. Ballantuda Achchige Jayasena
   (Deceased)

1A. M. Hemawathie
   (Deceased)

1B. Ballantuda Achchige Lal
   Chandrasiri,

1D. Ballantuda Achchige Don
   Malkanthi,
   All of 308, Narangaha Hena,
   Katuwana, Homagama.
   Defendant-Respondent-
   Respondents

Before: P. Padman Surasena, J.
Yasantha Kodagoda, P.C., J.
Mahinda Samayawardhena, J.

Counsel: Thishya Weragoda with Prathap Welikumbura for the 1C and 2nd Defendant-Appellant-Appellant.
Arjuna Kurukulasuriya for the Plaintiff-Respondent-Respondents.

Argued on : 12.02.2021

Further written submissions

by the Respondents on: 02.03.2021

by the Appellant on: 15.03.2021

Decided on: 17.05.2021

Mahinda Samayawardhena, J.

The Plaintiffs filed this action against the Defendant in the District Court of Homagama seeking a declaration of title to the land described in the schedule to the plaint, the ejectment of the Defendant therefrom, and damages. After the death of the original Defendant, namely Jayasena, his widow and children were substituted in his place. The Defendants filed answer claiming prescriptive title to the land. After trial, the District Court entered Judgment for the Plaintiffs and, on appeal, the High Court of Civil Appeal affirmed it. The Defendants have now come before this Court against the Judgment of the High Court of Civil Appeal.

This Court granted leave to appeal on the question whether the High Court of Civil Appeal erred in law in coming to the conclusion that the Plaintiffs proved title to the land despite Deed Nos. 36988 and 38247 as pleaded in the plaint not being tendered in evidence. The contention of learned counsel for the Defendants is that the Plaintiffs failed to prove the chain of title.

In paragraph 3 of the amended plaint, the Plaintiffs state that the original owner, namely William Singho, sold the land in suit, which is in extent of ½ an acre, to the deceased husband of the 1st Plaintiff who was also the father of the 2nd and 3rd Plaintiffs, namely Karunadasa, by Deed No. 7236. This Deed was marked P1 in evidence without any objection.

In paragraphs 4 and 5, the Plaintiffs further state that by Deed No. 36988, Karunadasa alienated the land to a person by the name of Weerasinghe on a conditional transfer, and Weerasinghe in turn retransferred the land to Karunadasa by Deed No. 38247 in fulfilment of the condition set out in the former Deed.

The Defendants, in paragraph 3 of the amended answer, accept that Karunadasa purchased the ½ acre mentioned above, but their position is that it is a portion of a larger land in extent of 4 acres, and the balance 3 ½ acres excluding the said ½ acre had been gifted to the original Defendant Jayasena by Deed No.1903. By the same paragraph, the Defendants further take up the position that they have possessed this ½ acre since 1950 with the leave and license of Karunadasa, together with the balance portion of the larger land as one entity, and acquired prescriptive title to it. Karunadasa and Jayasena are siblings.

Although the Defendants admit in their amended answer that Karunadasa purchased the disputed ½ acre, which is the subject matter of this action, in the District Court they never took up the position in their answer or by way of the issues or in evidence or written submissions that the Plaintiffs do not have paper title to the said ½ acre or that Karunadasa subsequently lost his paper title. Instead, the Defendants made a claim in reconvention to that ½ acre by way of prescriptive title.

It is well settled law that in a *rei vindicatio* action the burden is on the Plaintiff to prove title to the land in suit irrespective of weaknesses in the Defendant's case. H.N.G. Fernando J. (later C.J.) in *Pathirana v. Jayasundara (1955) 58 NLR 169 at 171* required "strict proof of the Plaintiff's title". But this shall not be understood that a Plaintiff in a *rei vindicatio* action shall prove his title beyond reasonable doubt such as in a criminal prosecution, or on a high degree of proof as in a partition action. The standard of proof of title is on a balance of probabilities as in any other civil suit. The stringent proof of chain of title, which is the norm in a partition action to prove the pedigree, is not required in a *rei vindicatio* action.

Professor George Wille, in his monumental work *Wille's Principles of South African Law*, 9th Edition, states at page 539:

> *To succeed with the rei vindicatio, the owner must prove on a balance of probabilities, first, his or her ownership in the property. If a movable is sought to be recovered, the owner must rebut the presumption that the possessor of the movable is the owner thereof. In the case of immovables, it is sufficient as a rule to show that title in the land is registered in his or her name.*

Dr. H.W. Tambiah opines in "*Survey of Laws Controlling Ownership of Lands in Sri Lanka*", International Property Investment Journal, Vol 2, pp. 217-246 at p. 244:

> *As a practical matter, the burden of proof in a rei vindicatio action is not burdensome. The Plaintiff must prove only that he is the probable owner of the property.*

Professor G.L. Peiris, in his treatise *Law of Property in Sri Lanka*, Vol I, stresses at page 304:

> *It must be emphasized, however, that the observations in these cases to the effect that the Plaintiff's title must be strictly proved in a rei vindicatio, cannot be accepted as containing the implication that a standard of exceptional stringency applies in this context. An extremely exacting standard is insisted upon in certain categories of action such as partition actions.*

The Full Bench of the Supreme Court in *Jinawathie v. Emalin Perera [1986] 2 Sri LR 121* held that the Plaintiff in a *rei vindicatio* action shall prove that he has title to the disputed property and that such title is superior to the title, if any, put forward by the Defendant, or that he has sufficient title which he can vindicate against the Defendant.

The Plaintiff in *Jinawathie*'s case filed a *rei vindicatio* action against the Defendants relying upon a Statutory Determination made under section 19 of the Land Reform Law, No. 1 of 1972. The Defendants sought the dismissal of the Plaintiff's action on the basis that the alleged Statutory Determination did not convey any title on the Plaintiff and that in the absence of the Plaintiff

demonstrating dominium over the land, the Plaintiff's action shall fail. Both the District Court and the Court of Appeal held with the Plaintiff and the Supreme Court affirmed it. Ranasinghe J. (later C.J.) with the agreement of Sharvananda C.J., Wanasundera J., Atukorale J., and Tambiah J., whilst emphasising that in a *rei vindicatio* action proper, the Plaintiff's ownership of the land is of the very essence of the action, expressed the view of the Supreme Court in the following terms at page 142:

> *This principle was re-affirmed once again by Gratiaen J. in the case of Palisena v. Perera (1954) 56 NLR 407 where the Plaintiff came into court to vindicate his title based upon a permit issued under the provisions of the land Development Ordinance (Chap. 320). In giving judgment for the Plaintiff, Gratiaen, J. said: "a permit-holder who has complied with the conditions of his permit enjoys, during the period for which the permit is valid, a sufficient title which he can vindicate against a trespasser in civil proceedings. The fact that the alleged trespasser had prevented him from entering upon the land does not afford a defence to the action."*
>
> *In a vindicatory action the Plaintiff must himself have title to the property in dispute: the burden is on the Plaintiff to prove that he has title to the disputed property, and that such title is superior to the title, if any, put forward by the Defendant in occupation. The Plaintiff can and must succeed only on the strength of his own title, and not upon the weakness of the defence.*
>
> *On a consideration of the foregoing principles – relating to the legal concept of ownership, and to an action rei*

> *vindicatio – it seems to me that the Plaintiff-respondent did, at the time of the institution of these proceedings, have, by virtue of P6 [Statutory Determination], "sufficient" title which she could have vindicated against the Defendants-appellants in proceedings such as these.*

In *Banda v. Soyza [1998] 1 Sri LR 255* — a *rei vindicatio* action proper — the Supreme Court took the view that in order for the Plaintiff to succeed in a *rei vindicatio* action he shall prove "superior title" to that of the Defendant.

In *Banda*'s case the Plaintiff sought a declaration of title to the land in suit, the ejectment of the Defendants and damages. After trial, Judgment was entered in favour of the Plaintiff. The Court of Appeal set aside the Judgment of the District Court and the Plaintiff's action was dismissed on the ground that the Plaintiff failed to establish title to the subject matter of the action or even to identify the land in suit. But the Supreme Court set aside the Judgment of the Court of Appeal and restored the Judgment of the District Court on the basis that there was "sufficient evidence led on behalf of the Plaintiff to prove the title and the identity of the lots in dispute." The Supreme Court particularly relied upon a Lease Bond executed in 1906, which was not considered by the Court of Appeal, to decide that the Plaintiff was the owner of the land. G.P.S. de Silva C.J., at page 259, laid down the criterion in the following manner:

> *In a case such as this, the true question that a court has to consider on the question of title is, who has the superior title? The answer has to be reached upon a consideration of the totality of the evidence led in the case.*

In *Preethi Anura v. William Silva (SC Appeal No. SC/LA/116/2014, Minutes of the Supreme Court on 05.06.2017)*, the Plaintiff filed a *rei vindicatio* action against the Defendant seeking a declaration of title to the land in suit and the ejectment of the Defendant therefrom. The District Court held with the Plaintiff but the High Court of Civil Appeal set aside the Judgment of the District Court on the basis that the Plaintiff failed to prove title to the land. The Plaintiff's title commenced with a Statutory Determination made under section 19 of the Land Reform Law in favour of his grandmother, who had bequeathed the land by way of a last will to the Plaintiff, with the land being later conveyed to the Plaintiff by way of an executor conveyance. No documentary evidence was tendered to establish that the last will was proved in Court and admitted to probate in order to validate the executor conveyance by which the Plaintiff claimed title to the land. The District Court was satisfied that the said factors were proved by oral evidence but the High Court found the same insufficient to discharge the burden that rests upon a Plaintiff in a *rei vindicatio* action, which the High Court considered to be very heavy. The Supreme Court reversed the Judgment of the High Court and restored the Judgment of the District Court, taking the view that the Plaintiff had proved title to the land despite the purported shortcomings. In the course of the Judgment, Dep C.J. remarked:

> *In a rei vindicatio action, the Plaintiff has to establish the title to the land. Plaintiff need not establish the title with mathematical precision nor to prove the case beyond reasonable doubt as in a criminal case. The Plaintiff's task is to establish the case on a balance of probability. In a partition case the situation is different as it is an action in*

> *rem and the trial judge is required to carefully examine the title and the devolution of title. This case being a rei vindicatio action this court has to consider whether the Plaintiff discharged the burden on balance of probability.*

What is the degree of proof expected when the standard of proof is on a balance of probabilities? In *Miller v. Minister of Pensions [1947] 2 All ER 372*, Lord Denning declared:

> *That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say, 'We think it more probable than not', the burden is discharged, but if the probabilities are equal, it is not.*

Notwithstanding that in a *rei vindicatio* action the burden is on the Plaintiff to prove title to the land no matter how fragile the case of the Defendant is, the Court is not debarred from taking into consideration the evidence of the Defendant in deciding whether or not the Plaintiff has proved his title. Not only is the Court not debarred from doing so, it is in fact the duty of the Court to give due regard to the Defendant's case, for otherwise there is no purpose in a *rei vindicatio* action in allowing the Defendant to lead evidence when all he seeks is for the dismissal of the Plaintiff's action.

The Court shall not protect rank trespassers and promote unlawful occupation to the detriment of the legitimate rights of lawful landowners by setting an excessively higher standard of proof in a *rei vindicatio* action than what is expected in an ordinary civil suit.

Bearing in mind the burden of proof cast upon the Plaintiff in a *rei vindicatio* action, if the Plaintiff in such a case has "sufficient title" or "superior title" than that of the Defendant, the Plaintiff shall succeed. No rule of thumb can be laid down on what circumstances the Court shall hold that the Plaintiff has discharged his burden. Whether or not the Plaintiff proved his title shall be decided upon a consideration of the totality of the evidence led in the case.

For completeness, let me add the following.

There is a difference between a *rei vindicatio* action proper and a declaration of title action in terms of the burden of proof of title, notwithstanding that a declaration of title and ejectment of the Defendant is the common relief sought in both actions.

In *Pathirana v. Jayasundara (supra)* at page 173 Gratiaen J. explained this in the following manner:

> *A decree for a declaration of title may, of course, be obtained by way of additional relief either in a rei vindicatio action proper (which is in truth an action in rem) or in a lessor's action against his overholding tenant (which is an action in personam). But in the former case, the declaration is based on proof of ownership; in the latter, on proof of the contractual relationship which forbids a denial that the lessor is the true owner.*

In simple terms, in an action filed by the Plaintiff seeking a declaration of title to and the ejectment of the Defendant from the land in suit, if the Plaintiff can prove that the Defendant came into possession as a licensee or lessee under him which

was later terminated, the Defendant cannot defeat the action of the Plaintiff on the ground that the Plaintiff is not the owner of the land. In such a situation, the Plaintiff can automatically obtain a declaration of title through the operation of the rule of estoppel contained in section 116 of the Evidence Ordinance:

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

In fact, a licensor, lessor or landlord need not necessarily be the owner of the property to grant leave and licence, lease or rent out the property. A person may let immovable property to another without having any right or title to it or without any authority from the true owner. Such a lease is valid between the landlord and the tenant, but the true owner is not bound by it. (Professor George Wille, *Landlord and Tenant in South Africa*, 4th Edition, page 20; Dr. H.W. Tambiah, *Landlord and Tenant in Ceylon*, page 48; *Imbuldeniya v. De Silva [1987] 1 Sri LR 367 at 372, 380*)

In the unique facts and circumstances of the instant case, failure to tender Deed Nos. 36988 and 38247 is not fatal and the Plaintiffs' action need not be dismissed on this ground. When the totality of the evidence led in this case is considered, I am satisfied that the Plaintiffs have proved title to the property on

the balance of probabilities and the Defendants' counter claim to the same on prescriptive title is bound to fail.

I answer the issue on which leave was granted in the negative.

The appeal is accordingly dismissed with costs.

Judge of the Supreme Court

P. Padman Surasena, J.
I agree.

Judge of the Supreme Court

Yasantha Kodagoda, P.C., J.
I agree.

Judge of the Supreme Court

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

In the matter of an Application for Leave to Appeal against the Judgment of the Provincial High Court of Central Province dated 11/02/2015 in Case No. CP/HCCA/Kandy/67/2012 (F) D.C. Kandy Case No. 12245 X

SC/APPEAL/177/17
SC/HCCA/LA/118/15
CP/HCCA/Kandy/67/2012(F)
D.C. Kandy Case No. 12245 X

In the District Court of Kandy

1. W. H. Wilson Perera,
2. K. A. Wimalawathie,

Both of at;

No. 4/6, Uduwela Road, Ampitiya

Plaintiffs

Vs.

1. Jayawardena Thambulage Kamalawathie,
2. G. V. M. M. Gunesekere,

Both of at;

No. 3/6, Uduwela Road, Ampitiya

Defendants

And Between in the Provincial High Court of Central Province

1. W. H. Wilson Perera,
2. K. A. Wimalawathie,

Both of at;

No. 4/6, Uduwela Road, Ampitiya

Plaintiff - Appellants

Vs.

1. Jayawardena Thambulage Kamalawathie,
2. G. V. M. M. Gunesekere,

Both of at;

No. 3/6, Uduwela Road, Ampitiya

Defendant – Respondents

And Now Between in the Supreme Court

1. W. H. Wilson Perera,
2. K. A. Wimalawathie,

Both of at;

No. 4/6, Uduwela Road, Ampitiya

Plaintiff – Appellant – Petitioners

Vs.

1. Jayawardena Thambulage Kamalawathie,
2. G. V. M. M. Gunesekere,

Both of at;

No. 3/6, Uduwela Road, Ampitiya

Defendant – Respondent – Respondents

Before : Sisira J. de Abrew J

L. T. B. Dehideniya J and

E. A. G. R. Amarasekara J

Counsel : Dr. S.F.A. Cooray for the Plaintiff – Appellant – Appellant

Nihal Jayawardena PC with S.W. Wilwaraarachchi instructed by Hasitha Amarasinghe for the Defendant – Respondent – Respondents

Argued on : 29.06.2020

Decided on : 31.05.2021

E. A. G. R. Amarasekara J

Plaintiff – Appellant – Petitioners (hereinafter sometimes referred to as the petitioners or the plaintiffs) by a plaint dated 03.05.1999, instituted case no.12245X in the District Court of Kandy against the Defendant – Respondent – Respondents (hereinafter sometimes referred to as the respondents or defendants); and by an amended Plaint dated 12.12.2002 prayed,

- For the demarcation of the east boundary of the land described in the schedule to the amended plaint, in accordance with the plan No. 914 (marked as V1 and P7 at the trial),
- For a declaration that the damages to the east boundary of the plaintiffs' land had been caused due to the negligence and wrongful actions of the defendants,
- For an order to compel the defendants to erect a retention wall at the east boundary of the plaintiffs' land at their own cost, or in the alternative, for an order that the plaintiffs can, jointly or severally, recover the cost for such retention wall from the defendants,
- For an order for damages owing to the acts of the defendants in breach of peaceful enjoyment and consumption of the plaintiffs' land,
- For costs and other reliefs.

As per the amended plaint,

- The plaintiffs are the lawful owners of Lot No.8 and the defendants are the lawful owners of Lot no.9 of plan no. 914 mentioned above.
- The land from lot 8 to lot 9 in the said plan is inclined to East from West. Thus, the Lot 8 is situated on a higher elevation of about 15 feet above the lot 9.

- The defendants, from the beginning of 1999, started to shovel off the soil in between the elevated land of the plaintiffs and the land of the defendants which was at a lower level to build unlawful constructions on the western boundary of the defendants' land causing soil erosion in the inclined area.
- Due to the removal of soil done by the defendants on the eastern boundary of the plaintiffs' land the said boundary has become dangerously unstable and the protective wall has been damaged on several places and further, it has caused considerable damage to the house and other buildings of the plaintiffs endangering the lives of the members of the plaintiffs' family.
- The plaintiffs requested the defendants to erect a protective wall prior to commencing any construction by the east boundary of the plaintiffs but the plaintiffs intentionally ignored the said request.
- The plaintiff states that the encroachment through excavation is shown in the plan no. 2360 of Bernard P. Rupasinghe, licensed surveyor (herein after mentioned as B.P. Rupasinghe, L.S.).
- The plaintiffs estimate the total compensation including the cost to build the protective wall for Rs.500000.00.

The defendants filed amended answer dated 02.10.2003 and, while denying the allegations and the cause of action mentioned in the plaint, the defendants stated that,

- After the defendants bought the land and house in lot 9 on 08.09.1997, they came to reside in the said house.
- Even at the time they came to reside in their land, the soil that had been gathered due to the construction of the Plaintiffs' house had been slid down with water and heaped up along the rear wall of the defendants' house causing damages to and resulting the collapse of the said rear wall.
- Accordingly, the defendants had to remove the said soil gathered against the rear wall of the defendants' house and build the said rear wall spending lot of money, and in 1998, even the plaintiffs too helped him in removing the said soil gathered against his rear wall; The defendants had not built any new building and had no intention to build a new one; As such the defendants' actions could not be the cause for damages to the plaintiffs' land and house.

- The plaintiffs while constructing their house had not appropriately constructed the system of drains and ditches for the proper flowing of water and as such, water flows to the defendants' land causing damages mentioned in the amended plaint as well as damages to the defendants' land.

However, the defendants had consented to demarcate the boundary as per the aforesaid plan no 194 and had stated in their amended answer and had further stated that the common boundary is correctly depicted in the plan no.1450 of S. M. K. B. Mawalagedara, licensed surveyor (hereinafter referred to as Mawalagedara, L.S.) as well as in plan no. 4006 of C. Palamakumbura, licensed surveyor (hereinafter referred to as Palamakumbura, L.S.).

Thus, the defendants prayed among other things,

- For a dismissal of the plaintiffs' action;
- To demarcate the Western boundary of the Defendants' land according to aforesaid plans no. 914 or no. 1450 or no. 4006,
- For a permanent injunction preventing the flowing of water in the manner plaintiffs have caused it to flow,
- For damages in a sum of Rs. 500,000/-.

By replication filed on 12/02/2004, the plaintiffs had denied an accrual of any cause of action against them to the defendants as described in paragraph 11 of the amended answer and, further took up the position that the said cause of action is time barred.

As per the admissions recorded at the commencement of the trial, it is clear that there was no dispute between the parties as to the ownership of lot 8 (the land in the 1st schedule to the amended plaint) and lot 9 (the land in the second schedule to the amended plaint and in the schedule to the amended answer) of the aforementioned plan no. 914, which respectively belonged to the plaintiffs and the defendants. It was further admitted that the dispute relates to the common boundary which is the east boundary of the plaintiffs' land and western boundary of the defendants' land and that parties had expressed their willingness to fix their common boundary through their pleadings. Even though, several issues were raised at the trial, the main contention between the parties were,

a) Whether the defendants removed the soil of the supportive embankment at the said east boundary of the plaintiffs' land, encroaching into plaintiffs' property causing harm to the lateral support given by the said embankment to the plaintiffs' property which in turn damaged the plaintiffs' land and buildings as described in the plaint or whether such harm and damage was due the acts and deeds of the plaintiffs themselves as stated by the defendants.
b) Whether the common boundary be demarcated on the ground as per the plan no. 2360 of B. P. Rupasinghe, L.S. or plan no.1450 of Mawalagedara, L.S., and/or plan no.4006 of Palamakumbura, L.S.

Aforesaid plan no. 2360 was made on a commission taken by the plaintiffs while the plan no. 1450 was made on a commission taken by the defendants. The case record itself indicates that plan no.4006 was taken on a joint commission taken by the parties in view of a settlement to demarcate the common boundary- vide journal entries dated 22.01.2001 and 24.01.2001. It appears that after the making of the plan on the joint commission to demarcate the common boundary, the plaintiffs had filed a petition praying to withdraw from the said settlement – vide journal entry dated 31.05.2001 and the petition dated 25.05.2001 in the district court brief. Even the report of the plan no.4006 indicates that the plaintiffs were not willing to accept the common boundary found as per the joint commission. Proceedings dated 27.11.2000 referred to in journal entry of the same date and in the order dated 05.06.2002, that appears to have contained the settlement cannot be found in the said district court brief. Though there was no reference to missing proceedings dated 27.11.2000, as per the proceedings dated 08.09.2011, 16.08.2011 and 17.08.2011, it appears that certain parts of the original case record had been missing for some time and later certain proceedings relating to trial were reconstituted. However, the aforesaid petition and the contents of the order dated 05.06 2002 indicate that the said settlement made on 27.11.2000 was limited to the demarcation of the common boundary and the rest of the dispute remained to be solved. Nevertheless, as per the case record, there is no order before us to show that any order was made with regard to the aforesaid petition allowing the plaintiffs to resile from the settlement. It is apparent from the brief, though the plan no.4006 was made due to a settlement on a joint commission, the plaintiffs refused to accept the result of the said commission, and the said plan.

After the trial, learned district judge granted relief only to demarcate the common boundary but as per the plan no.4006 of Palamakumbura, L.S. Even though, the plaintiffs also wanted to get the common boundary fixed by putting up a retention wall at the expense of the defendants which was not granted, the relief granted by the learned district judge is more in accordance with the relief prayed in the prayer 'c' of the amended answer dated 02.10 2003. In the appeal made to the Civil Appellate High Court of Kandy by the plaintiff, the learned district judge's judgment was confirmed subject to the variation which expressed the opinion of court that, if the parties are interested in the wellbeing of the two properties, both parties should bear the cost of building up the retaining wall on the common boundary. Since the said variation added by the High Court is an expression of an opinion subject to the phrase 'if the parties are interested' it cannot be enforced through a decree unless the parties are willing and interested in putting up a wall. As such the variation added by the High Court has no practical effect. In that sense, the High Court Judgment, as said before, only confirms the district court Judgment with an additional opinion which cannot be put into effect without the consent of the parties. It must be noted that it was only the plaintiffs who have prayed to build a retention wall at the expense of the defendants and the defendants' prayer was to demarcate the common boundary but without any prayer to put up a wall. Hence, the prayers do not indicate that both parties are interested in putting up a wall through a court order. However, proceedings recorded at the trial indicate that the defendants were willing to put up a wall at the expense of both the parties.

Being aggrieved, the plaintiffs preferred a leave to appeal application to this Court and leave has been granted on the following grounds as stated in paragraph 12 (1) (3) and (4) of the petition and on another question of law suggested in open court (which is reproduced below as issue of law no.4) by the counsel for the plaintiff, which are renumbered as follows;

(1). "Did the learned High Court err in coming to the conclusion that the learned trial Judge had observed that evidence does not support the fact that the Defendant – Respondent's actions had caused the Plaintiff Appellant's lateral support on the eastern boundary to be demolished?" - vide para 12(1) of the petition.

(2). “Did the learned High Court err in coming conclusion (Sic) that the Defendant Respondent has not acted in a manner which makes him liable to bear the entire cost of building?” – vide para 12(3) of the petition.

(3). “Did the learned High Court err in failing to give specific procedure to be followed by the Defendant and the Plaintiff when sharing the cost of construction of the retaining wall?” – vide para 12(4) of the petition.

(4) “In any event did the District Court err by holding the common boundary should be as set out in Plan No. 4006 made by Mr. C. Palamakumbura Survey (Sic) which was objected to by the plaintiff- appellant – petitioner at the time of the survey?” – vide proceedings dated 14.09.2017.

With regard to the renumbered question of law no.4 above, this Court observes that no relief is prayed for in the prayer to the petition to this court dated 23.03.2015 to set aside or amend or vary the district court judgment. What has mainly been prayed for was to set aside or reverse the High Court Judgment and to hold that defendants’ actions have caused the boundary of the plaintiffs’ land to deteriorate and that the defendants should bear the cost of the retaining wall to be built on the common boundary – vide prayer ‘c’ of the petition. To grant this relief this court may have to amend, vary or set aside the finding of the learned district judge which was to the effect that the defendants are not responsible for the deterioration of the embankment- vide page 13 of the district court judgment. Even if one considers the said prayer “c” as one impliedly praying to amend the relevant part of the learned district judge’s judgment, there is no prayer in the petition directly or indirectly praying to set aside, vary or amend the decision of the learned district judge which directs to fix the boundary as per the plan no. 4006 made by Palamakumbura, L.S. Thus, in relation to the district court judgment, there is no corresponding prayer in the petition to the issue of law no.4 above raised in open court. In other words, even though, the plaintiffs challenge the acceptance of plan no.4006 through the said question of law and rely on the plan no.2360 made by B. P. Rupasinghe L. S. in their submissions, no relief is made to set aside the district court judgment or to vary or amend the relevant portion of the district court judgment.

As far as the common boundary is concerned, the learned district judge has correctly observed that both parties have no objection in demarcation of the common

boundary and the plaintiffs' claim that the retention wall on the boundary has to be done by the defendants is based on the premise that defendants excavated the embankment to extend their land for new constructions to their house - vide page 10 of the district court judgment, also see the admission no.4 where parties expressed their consent to demarcate the common boundary. However, the learned district court judge, after referring to the plan no. 2360 made by B. P. Rupasighe, L.S. and plan no.1450 made by Mawalagedara, L.S., has decided to demarcate the common boundary as per plan no. 4006 made by Palamakumbura, L.S. for the reasons that it was a plan made on a joint commission pursuant to an agreement between the parties and the Palamakumbara, L.S. had used the plan no.914 in making the said plan and, further, the plaintiffs have not given any acceptable reason for not accepting the common boundary shown in that plan. It is apparent that the learned district judge has not given detailed reasons for not accepting the aforesaid plan no. 2360 which the plaintiffs argue as the one that shows the correct boundary. Even in the high court judgment, no reason is given for not preferring plan no.2360 over plan no. 4006. In that context, now I would consider the evidence at the trial to see whether there was evidence to show that plan no. 2360 of B.P. Rupasinghe L.S. could have been preferred over the plan no. 4006 of Palamakumbura L.S.

Even though, B.P. Rupasinghe L.S. states in his report (marked as X1) that he superimposed the plan no.914 of C.D. Adihetti L.S., he does not state in his report that he identified the common boundary through superimposition. Further he has not revealed what were the fixed points or positions or spots that he identified and used to do the superimposition. As per item 5 of the 1st page and paragraphs 1 and 3 of the 2nd page of his report, boundaries and lot 1 and 2 that purportedly belong to the plaintiffs were identified as shown by the plaintiffs. However, in the evidence given in open court he contradictorily says that he identified the common boundary by superimposition -vide page 186, but there also, to establish the accuracy of the superimposition, he has not revealed what are the fixed points or positions or spots he identified and used to do the superimposition. Furthermore, he has not marked the plan no.194 in his evidence in chief and also, has not revealed the nature of the copy of plan no.194 that he used for the said superimposition; that is to say whether it was the original, a tracing or a photocopy etc. It was only in his cross-examination he identifies the plan no.194 shown by the defendants' counsel which was marked as

V1. Even in the re-examination, it was the V1 marked by the defendants that has been shown to him. Plaintiffs have submitted a copy of plan no.194 as P7 but the signature placed by the learned district court judge by the marking of P7 indicates that it was tendered to court on 21.10.2007 which is a date after the close of plaintiffs' case. However, it seems that this plan marked P7 was actually marked on 21.10.2008 during the cross examination of the defendants' witness, Mawalagedara L.S.- vide page 302 of the brief. It appears that no witness called on behalf of the plaintiffs had referred to this P7. Reference to a P7 can also be found at the close of the plaintiffs' case but it appears to be another document marked as P7, namely a certificate from the mediation board which appears to have been marked on 21.06.2006. If B.P. Rupasinghe, L.S. had the original or a reliable copy of the plan no.194 for superimposition it is questionable why he did not produce it through his evidence to support the accuracy of his superimposition.

In contrast, the defendants have tendered plan no.1450 (V2) of Mawalagedara L.S. and plan no. 4006 of Palamakumbura L.S. to show the ground situation. Mawalagedara L.S. in his report (V2) at paragraph 8 has stated that he has shown the boundaries shown by the parties as well as the boundaries found by superimposition of plan no.194. However, he too has not disclosed in his report the fixed points or positions or spots that he considered in identifying the correct boundaries by superimposition. However, diagram of Mawalagedara's plan indicates that unlike B.P. Rupasinghe L.S.'s plan which takes into account only the area covered by the purported lots belonging to the parties and the adjoining part of the road, Mawalagedara L.S. has done a detailed superimposition taking into consideration the setting of the highway on the east end, and the setting of the 12 feet road (lot 12) in the original plan no.194 of C.D. Adihetti L.S.. While giving evidence Mawalagedara L.S. has identified plan no. 914 marked as V1 as the plan he used for superimposition and in cross examination he has repeatedly denied the suggestion that he used a photocopy. Original of V1 was marked by the defendants. Thus, it is more probable that it was used by this surveyor who surveyed on the commission taken by them. Aforesaid facts indicate the possibility of a better accuracy in Mawalagedara's plan when compared with the plan of B.P. Rupasinghe L.S. Further, through evidence of Mawalagedara, the defendants have marked the plan no.4006(V4) made by Palamakumbura, L.S., and its report(V4a) and no objections were raised at the time

of marking it as evidence. In terms of section 154 of the Civil Procedure Code plan no 4006 and its report become evidence of the case at hand. This was the plan made on a joint commission. As per this plan and paragraph 7(iii) of the report Palamakumbura L.S. has used 9 fixation points for the superimposition of plan no.194 including two fixation points situated on the corners of a house found to the east of Uduwela - Kandy high road even in plan 194. Like in Mawalagedara's plan, superimposition in this plan no.4006 also appears to have taken into more details such as setting of 12 feet wide road way and the setting of the high road in its superimposition when compared to the plan no. 2360 of B.P. Rupasinghe. Palamakumbara, L.S in his report has explained that to decide the positioning of the common boundary he surveyed the other necessary details in plan no.194. Like with the B.P Rupasinghe, L.S plan and report, it is not mentioned what type of copy of the plan no.194 was used for superimposition but, as this was a joint commission, it is probable that he was provided with the original copy marked by the defendants. Since the factual position indicates that he used several fixation points as described above and other details in the plan no. 194, it is more probable that the accuracy of superimposition in the plan made by Palamakumbura L.S. more acceptable than that of plan made by B.P. Rupasinghe, L.S. Further as observed by the learned district judge, plan no.4006 of Palamakumbura L.S. was made on a joint commission pursuant a settlement to demarcate the common boundary. The plaintiffs have not given any reason as to why they wanted to withdraw from the agreement. It may be for the reason that, after the survey, they found that the common boundary lies not on the place they want but on a place that benefits the defendants. Hence, even though the learned district judge or the learned high court judges have not given reasons in detail as to why they did not accept B.P. Rupasinghe, L.S.'s plan, the factual situation as described above does not warrant an interference of this court to change the decision with regard to the plan that should be used in deciding the location of the common boundary. On the other hand, as said before, the prayers to the petition does not ask for a relief to set aside or vary the district court judgment except for a judgment to state that the defendants are responsible for the deterioration of the common boundary and they should bear the cost of the retaining wall. Thus, the question of law no.4 raised at the support stage has to be answered in favour of the defendants.

As per the 1st question of law mentioned above, this Court has to ascertain whether the learned high court judges erred in coming to the conclusion that the learned trial Judge had observed that evidence does not support the fact that the defendant – respondents' actions had caused the deterioration of the plaintiffs' lateral support on the east boundary. As a matter of law, it is true that a land owner has a right to have lateral support from the adjacent lands. The need to have this lateral support from the land below may be much stronger when the adjoining lands are situated along a gradient or different level. Referring to **Bandappuhamy Vs Swamy Pillai (1950) 52 N L R 234, Thurston V Hancock 12 Mass 220, Lasala V Holbrook, 4 Paige Ch 169(1833),** the plaintiffs argue that this entitlement to lateral support is a natural right. I do not see any disagreement regarding this right but to impose liability on the defendant or defendants in a given case, it must be proved that it was the acts of the defendant/s that caused the deterioration or the removal of lateral support.

As per the judgment of the learned district judge it is clear that the learned judge has come to the conclusion that the defendants are not liable to the deterioration of the embankment as they have come to reside in the land belongs to them only after the cutting of embankment by their predecessors in title and therefore, they are not liable to bear the cost of putting up a retention wall. Further the learned district judge has come to the conclusion that the soil erosion shown as lot 2 in plan X of B P Rupasinghe L. S. was a result of irregular flow of water – vide page 13 of the district court judgment. Further, it appears the learned district judge opined that the impugned embankment was not a natural embankment but one created by predecessors of the defendant for the building of the house and that it was not proved that the defendants started excavating the embankment from the beginning of 1999 - vide answer to issue no.2. Even the learned high court judges were of the view that the witnesses of the plaintiffs do not support that the defendants had behaved in an irresponsible manner. Thus, the learned high court judges also endorsed the view of the learned district judge that the evidence led did not support that lateral support to the plaintiffs' land had been disturbed by the defendants.

The plaintiffs' stance was that to put up a new construction the defendants started to excavate the inclined area of the land that existed between the higher elevation of their land and the defendants' land which was on the lower level. The defendants' stance was that they bought the land with the house but the soil that had come with

the water flow from plaintiffs' land was stuck against the part of their wall making its collapse and they only removed said soil gathered against their wall and built that part. It appears that the same stance had been taken by the defendants even when they made statements to the police- vide P5. No independent witness who had seen the defendants cutting out soil had been called to give evidence on behalf of the plaintiffs, other than the surveyors and police officers who made observations after the incident. Hence it is the plaintiffs' version against the defendants' and the Court has to decide reliability of these versions on preponderance of evidence with the help of observations made by these witnesses.

One Seneviratne, an officer from the Pradeshiya Sabha, has been called as witness by the plaintiff to give evidence with regard to a building application made by the defendants. His evidence reveals that the proposed building as per the application have been mainly shown on the eastern side of the defendants' land and not on the side relating to the dispute. He also specifically has answered that between the wall of the old building and disputed embankment, no new building has been constructed - vide pages 1666 and 169 of the brief. Thus, it is clear that if any building or renovation has been done by the defendants on the side where the common boundary exists, it has been done within the limits of the old house. In certain occasions this witness has attempted to introduce defendants' buildings as unauthorized structures but at page 170 of the brief he has admitted that the relevant laws for approved plans came into force in 1983 in the towns and 1991 in the village areas and he does not know when the old building shown in P2 plan was built. This indicate that his evidence is not sufficient even to say that the house that was there when the defendants bought the land was an unauthorized structure. Whatever it is, as per his evidence, there is nothing to say that it was the defendants who excavated or removed soil from the embankment.

The police officer Weerawardane Weerasinghe who gave evidence for the plaintiffs to produce the police complaints and statements has not given any evidence with regard to the removal or cutting down of the embankment by the defendants. Tikiri Banda Rathnayake is the other police officer who had visited the subject matter for observations as per the complaint made by the plaintiffs. He has observed the erosion of soil but he does not reveal anything that is sufficient to set the liability on the defendant. As per his evidence, it appears the distance between the rear wall of

the defendants' house and the embankment is only about 3 feet. As per the evidence given by Mawalagedara L.S on behalf of the Defendant this gap is around 1meter and 25 centimeters. Since the defendants bought the land with the house, it is more probable if there was a cutting down of the embankment or the inclined area, it would have taken during the time the house was built. Otherwise, the rear wall might not have been built.

B.P Rupasinghe, L.S. also has given evidence for the plaintiff with regard to the preparation of his plan no. 2360 and the observations he made. He attempts to indicate that the damage to the plaintiffs' buildings and the soil erosion at lot 2 in his plan is due to the construction of part of the house shown as 'F' in his plan (vide page186 of the brief), but paragraph 4 of his report indicates that this was what the plaintiff told him. At page 188 of the brief, he suggests to put up a protective wall to reduce the threat of soil erosion caused by excavating inclined area but there also he expresses that the plaintiffs had stated that excavation of soil from the inclined area was done for the building of the part marked as F in his plan. Thus, it is clear he was not expressing his own opinion as to cutting down of soil in the slanted area between lot 2 and "F" in his plan, but expressing what he was told by the plaintiffs. However, his evidence at page 205 of the brief indicates that lot 2 is an area where soil was eroded with the flowing of water. This supports the stance taken by the defendants that soil that came with flowing of water was gathered against their rear wall damaging it and they only removed that soil and built that part, since even the part of building marked as 'F' in the said plan does not protrude beyond the other portion of the rear wall. It appears that 'F' has been built within the limits of the existing building. As such it is hard to believe that the defendants had to remove soil from the supporting embankment for the building of "F" other than removing the soil gathered against his wall. Even though, this witness had stated in paragraph 5 of his report marked X1, that cutting out of soil vertically on the area where the common boundary has caused the soil erosion, it is not sufficient to decide that the defendants are liable for it as the house made by their predecessors in title was there when they bought it, and the bank between the two lands would have been created for such construction. This situation is well explained by the Mawalagedara L.S when he gave evidence for the defendants while submitting the plan and report made by him. As per his report and evidence, both parties have built their houses by

cutting out the soil from the upper part of the land and filling part of the lower part secured by retention walls, and thus, levelling the area needed for building the house. He has also explained that there was no other alternative to prepare the lands for building due to the inclination of the area in its natural setting. This clarify if there was any cutting out of soil making vertical embankments or near vertical embankments, it would have taken place at the time the plaintiffs or the predecessors of defendants made their houses. He further has expressed that the damages caused to the plaintiffs' buildings has resulted due to the unsteadiness of the filled area as it has sunk. He opines that if it was due to the cutting out or loosening of soil in the embankment, it would have first caused damages to the retention wall that exists in between. As per his evidence common boundary is in the possession of the plaintiffs. He has also observed a ditch/trench marked as H, H1, F2and C1 in his plan which carry rain water and waste water from the plaintiffs' land towards the lower area. He has stated that part of this, namely H, H1, F2, was made of cement and concrete but the rest is on bare land across the inclined area. He has also expressed that flowing water from this ditch/trench causes soil erosion – vide evidence in chief of this witness and his plan and report marked as V2 and V2a. This court also observe that this ditch is situated in the area where the soil erosion is shown as lot 2 in the plan of B. P. Rupasinghe L.S. the plaintiffs, while referring to **Marikar vs de Rosairo (1912) 15 NLR 507** and **Fernando v Fernando 2 bal 202** submit that the lower proprietor is obliged to receive water that flows in the ordinary course of nature from the upper tenement. However, if the nature of the upper land has been changed to built houses or ditch or trench is constructed for the flow of water one may not be able to argue that the change of flow of water resulting due to such facts is still a flow in the ordinary course. Anyhow, in the case at hand, there is no injunction against the plaintiffs by the lower courts or a cross appeal made by the defendants for not giving such permanent injunction.

As explained above, the plaintiffs have failed in proving their case against the defendants and the defendants have also explained the causes for alleged damages to the plaintiffs through evidence. As such, this court cannot hold that the learned high court judges erred in coming to the conclusion that the learned trial Judge had observed that the evidence led at the trial does not support the fact that the

defendant – respondents' actions had caused the deterioration of the plaintiffs' lateral support on the east boundary.

If it is not proved that the defendants did cause the deterioration of the lateral support or damages to the embankment or the inclined area in between plaintiffs' land and the defendants' land, defendants cannot be asked to put up a retention wall at their expense or to contribute for the construction of a retention wall. This may be the very reason for,

- that the learned district judge limited the relief for demarcation of the common boundary which was consented through the admissions made and,
- that the learned high court judges made their opinion that both parties should bear the cost of building the retaining wall on the common boundary if both parties are interested, namely in a conditional manner, and for not to give specific procedure to be followed by the defendants and the plaintiffs when sharing the cost of construction of the retaining wall.

For the foregoing reasons it is the view of this court that all the questions of laws renumbered above has to be answered in the negative. Thus, this appeal shall be dismissed with costs.

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Judge of the Supreme Court

Sisira J de Abrew, J.

I agree.

……

Judge of the Supreme Court.

L. T. B. Dehideniya J.

I agree.

……..

Judge of the Supreme Court.

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

Supreme Court Case No.
SC/Appeal/186/18
HCCA Mt.Lavinia Case No.
WP/HCCA/MT/44/2017/LA
DC Mt.Lavinia Case No.
4116/03/M

In the matter of an application for Leave to Appeal made under Article 127 (2) of the Constitution of the Democratic Socialist Republic of Sri Lanka read together with Article 154P (3) (C) and section 5 C (1) and other provisions of the High Court of Provinces (Special Provisions) Act No.19 of 1990 as amended by Act No. 54 of 2006 in respect of the delivered by the Provincial High Court of the Western Province (Exercising in its Civil Appellate Jurisdiction) holden in Mount Lavinia dated 01/08/2018.

Kahandawela Knitwear Industries (Pvt) Limited,
770, Pannipitiya Road, Battaramulla.

Plaintiff

Vs.

Swan Feather (Pvt) Limited,
566, Lake Road, Boralesgamuwa

Defendant

THERE AFTER

Kavin Polymers (Pvt) Limited,
566, Lake Road, Boralesgamuwa

Claimant

Vs.

Kahandawela Knitwear Industries (Pvt) Limited,
770, Pannipitiya Road, Battaramulla.

Plaintiff – Respondent

Swan Feather (Pvt) Limited,
566, Lake Road, Boralesgamuwa

Defendant – Respondent

AND THERE AFTER

Kavin Polymers (Pvt) Limited,
566, Lake Road, Boralesgamuwa

Claimant – Petitioner

Vs.

Kahandawela Knitwear Industries (Pvt) Limited,
770, Pannipitiya Road, Battaramulla.

Plaintiff- Respondent- Respondent

Swan Feather (Pvt) Limited,
566, Lake Road, Boralesgamuwa

Defendant – Respondent- Respondent

AND NOW BETWEEN

Kavin Polymers (Pvt) Limited,
566, Lake Road, Boralesgamuwa

Claimant – Petitioner – Petitioner

Vs.

Kahandawela Knitwear Industries (Pvt) Limited,
770, Pannipitiya Road, Battaramulla.

Plaintiff- Respondent- Respondent- Respondent

Swan Feather (Pvt) Limited,
566, Lake Road, Boralesgamuwa

Defendant – Respondent- Respondent – Respondent

Before: Buwaneka Aluwihare PC, J.
L.T.B. Dehideniya, J.
S.Thurairaja, PC, J.

Counsels: Chandana Liyanapatabendy PC with Hansini Bandaranayake and Sanduni Madubashini instructed by H.C.de Silva for the claimant – Petitioner- Appellant.

Nuwan Bopage with Chathura Weththasinghe for the Plaintiff- Respondent – Respondent- Respondent.

Argued on: 14.01.2020

Decided on: 08.12.2021

L.T.B. Dehideniya, J.

Plaintiff – Respondent – Respondent - Respondent (hereinafter sometime referred to as the Respondent) instituted an action for the recovery of money amounting to 320, 325 USD against The Defendant- Respondent – Respondent – Respondent - Swan Feather (Pvt) Ltd (hereinafter sometime refer to as the Defendant). The District Court of Mount Lavinia delivered the judgement dated 05.04.2011 in favour of the Respondent. The Defendant subsequently filed a notice of appeal but had not filed the petition of appeal. Thereafter the Respondent filed an application to execute a writ against the Defendant. The Defendant objected on the basis that the Defendant Company is not functioning. The Learned District Judge, upon an inquiry, issued an order enabling the execution of the writ against the Defendant. At the instance where the writ was to be executed, the fiscal had been informed about the non-functioning of the Defendant Company and the specific address given by the Defendant Company namely No.566, Lake Road, Boralesgamuwa is already occupied by the present occupants who claimed that they have no connection with the Defendants. Subsequently, the Respondent again made an application to execute the writ to seize the property; the District Court, after an inquiry, issued the writ. The fiscal, on the said writ, seized 02 vehicles parked at the same premises. Kavin Polymers (Pvt) Ltd- Claimant- Petitioner- Petitioner (hereinafter sometimes refer to as the Petitioner) claim that the said vehicles belong to the Petitioner and made a claim under Sections 241 and 839 of the Civil Procedure Code. The learned District Judge, after an inquiry, dismissed the application filed by the Petitioner. Subsequently, the Petitioner filed a leave to appeal application in the High Court of Civil Appeal under section 754(2) of the Civil Procedure Code against the order issued by the learned District judge.

At the stage of considering whether the leave to appeal should be granted, preliminary objection was brought forth by the Respondent on the ground that, an appeal is not available against the order made under the section 245 of the Civil Procedure Code and the Petitioner is not entitled to maintain a leave to appeal application under section 754 (2). The learned judges of the Civil Appellate High Court upheld the preliminary objection of the Respondents. Being aggrieved by the very decision of the learned judges of the Civil Appellate High Court, the Petitioner instituted a leave to appeal application from the said order to this court.

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

1) Is the said order contrary to Law?
2) Did the Court err in law in arriving at the said conclusions embodied in the said Order dated 01/08/2018, when dismissing the said application without going into the merits of same?
3) Did the Court err in law in arriving at such and Order based on an incorrect legal and factual positions?
4) In view of the inherent defects in the Order of the District Court dated 10/10/2017, had the Learned Judges of the High Court got an ample opportunity to revise and/or review and/or reverse and/or made Order that documents marked as "X3" and "X4" which are the Certificates issued by the Registrar of Motor Vehicles were *ex facie* established that the said properties were not subject to such the said Order dated 01/08/2018 erred in not giving sufficient consideration thereby?

At the very inception of the discussion pertaining to the case, it is apt to consider the law applicable to the factual context of this application. It is clear, the court has the power to investigate a claim or an objection filed against the seizure or the sale of an immovable/movable property seized in pursuant to an execution of a writ. This provision is enshrined in the section 241 of the Civil Procedure Code where it specifies that,

> *'In the event of any claim being preferred to, or objection offered against the seizure or sale of, any immovable or movable property which may have been seized in execution of a decree or under any order passed before decree, as not liable to be sold, the Fiscal or Deputy Fiscal shall, as soon as the same is preferred or offered, as the case may be, report the same to the court which passed such decree or order; and the court shall thereupon proceed in a summary manner to investigate such claim or objection with*

the like power as regards the examination of the claimant or objector, and in all other respects, as if he were a party to the action; Provided always that when any such claim or objection is preferred or offered in the case of any property so seized outside the local limits of the jurisdiction of the court which passed the decree or order under which such seizure is made, such report shall be made to, and such investigation shall thereupon be held by, the court of the district or division within the local limits of which such seizure was made, and the proceedings on such report and investigation with the order thereon shall, at the expiry of the appealable time, if no appeal has been within that time taken therefrom, but if an appeal has been taken, immediately upon the receipt by such court of the judgment or order in appeal, be forwarded by such court to the court which passed the decree or order, and shall be and become part of the record in the action; Provided, further, that in every such case the court to which such report is made shall be nearer to the place of seizure than, and of co-ordinate jurisdiction with, the court which passed the decree or order'.

Under the provisions of the law, the District Court had the power to inquire and investigate into the claim brought forth by the Petitioner in regard to the seizure of two vehicles. It is evident that, the learned judge of the District Court has conducted an inquiry in conformity with the provisions of the Civil Procedure Code.

Section 243 provides for the claimant to lead evidence to establish the claim. The section 243 of the Civil Procedure Code states,

'The claimant or objector must on such investigation adduce evidence to show that at the date of the seizure he had some interest in, or was possessed of, the property seized.

The section 243 is a clear indication on the fact that, the law imposes a burden on the claimant to prove his/her entitlement to the property in an instance of the vindication of rights. The conduct of the Claimant in the adducing of evidence has a significant impact on the order of the court which is issued under the section 245.

The section 245 of the Civil Procedure Code states,

> *'If the court is satisfied that the property was, at the time it was seized, in possession of the judgment-debtor as his own property, and not on account of any other person or was in the possession of some other person, in trust for him, or in the occupancy of a tenant or other person paying rent to him, the court shall disallow the claim'.*

Further, section 247 of the Civil Procedure Code signifies the nature of the order given by the court at the instance of investigating in to a claim with the very remedy which is entitled to by a claimant against whom an order was issued. It is clear to this court that, the section in its essence provides the fact that, the conclusiveness of the order does not impede the potential claimant in seeking justice while instituting an action but not through an appeal.

> *'The party against whom an order under section 244, 245, or 246 is passed may institute an action within fourteen days from the date of such order to establish the right which he claims to the property in dispute, or to have the said property declared liable to be sold in execution of the decree in his favour; subject to the result of such action, if any, the order shall be conclusive'.*

As per the very provision, in an instance where an order was issued against a claimant, the claimant is entrusted with a right to file a separate action within fourteen days from the order and thereby to establish the right to the seized property. The order which is issued against the claimant becomes conclusive. Thus, on the face of this statutory provision, it is clear that, the law has facilitated the aggrieved party against whom an order is made to resort into a remedial action and it is clear that, the law has not left the aggrieved party in desperation, without offering a way to vindicate the rights.

When considering the factual context of the present application, it is clear that, the Petitioner being the claimant, Kavin Polymers (Pvt) Ltd, made an application against the writ of execution of two vehicles seized in pursuant to an order given against the Defendant Company - Swan Feather (Pvt) Ltd by the District Court, Mount Lavinia. Subsequent to the dismissal of such application by the learned District Judge, a leave to appeal was directed to the Civil Appellate High Court, Mount Lavinia which upheld the preliminary objection raised by the Respondent in this regard. Thus, the very essence of the view of the learned High Court judge

was that, an order which has been issued under the Section 245 of the Civil Procedure is non-appealable.

As the Petitioner being the Claimant has made an application for leave to appeal to this court against the order of the learned judges of the Civil Appellate High Court, it necessitates this court to scrutinize the fact whether the Petitioner is legally entitled to appeal from the said order. As mentioned in the former discussion, the section 245 read with the section 247 of the Civil Procedure Code signifies that, an order made by the court under the section 245 is conclusive provided that the party against whom the order was given has the opportunity to institute a separate action within 14 days of the given order. It is apparent to this court that, the section 247 of the Civil Procedure Code has provided an alternative to the aggrieved party. The section itself manifests that, it is on the side of the party who is in need of the protection of his/her particular rights must institute an action. But, still the fact of the conclusiveness of the order does remain constant.

The non-existence of the right to appeal has been discussed in the case law jurisprudence. Thus, in ***Marikkar v. Marikkar*** 22 NLR 438, pg 441, it has been stated by his Lordship Justice De Sampayo that,

> *'.....therefore it is the duty of the claimant to appear and adduce evidence in support of his claim but he fails to do so, the Court is within its powers in disallowing the claim, and that an order so made is equivalent to an order after investigation under section 245 of our Code, and is conclusive against the claimant, unless he brings an action under section 247'.*

The essence of the view presented by his Lordship denotes that, a claimant has a legal duty to support his claim by adducing evidence. At a failure on the side of the claimant, the court is empowered to disallow the claim. It has been made clear that, order issued by disallowing the claim is equivalent to an order which is made after an investigation. Thus, such an order has the unquestionable conclusiveness.

A similar view was expressed in the case of ***Muttu Menika v. Appuhamy*** 14 NLR 329 where Wood Renton J. held that,

> *'.....the object of the group of sections concerned with claims to property seized is to secure a summary inquiry into such claims, and to provide that the result of that inquiry shall be decisive as to the rights of parties, subject always to the*

remedy indicated in section 247. I do not think that it is necessary to decide the question as to whether the Court has an inherent power to set aside ex parte orders, for I think that we are bound by the principle that, where the Legislature has enacted a particular remedy for a grievance in terms which show that it intended that remedy to be the only one open to an aggrieved party, redress cannot be sought by any other form of proceedings.....'

The view expressed by his Lordship is of such a nature which gives out a balanced perspective. Thus, at one instance Justice Wood Renton insists on the inquiry and the decisiveness of the inquiry which has an influence over the rights of the parties. Secondly, his Lordship clearly elaborates on the remedy which is provided by the section 247 and lawfully upholds the very fact that, there is an intention on the part of the legislature to remedy a grievance directed towards the aggrieved party and the redress cannot be sought in the other form of proceedings. Thus, the same view can be applied to the present application.

In ***Isohamine v. Munasinghe*** 29 NLR 277, (at page 281), His Lordship Justice Garvin observed,

'.....But when the claimant who was bound by law to adduce evidence was not present in person and had not arranged for evidence to be adduced in support of his claim, the Court was, I think, entitled in the absence of such evidence to make an order disallowing the claim'

It is clear that, the court has the power to disallow the claim in an instance where it is legally obligatory for the claimant to present at the court in person and adduce evidence and the claimant has not complied with the legal requirements as mentioned in the statutes. The same view was held in ***Marikkar v. Vanik Incorporation Ltd and Others*** [2006] 1 Sri LR 281, where the claimant was absent on the date of inquiry and there was no readiness on the part of the counsel to proceed with the inquiry. Thus, the application to appeal was dismissed by the court, while signifying the necessity to comply with the provisions set out in the section 247 of the Civil Procedure Code.

The case ***L.B.Finance Company v. Walisinghe and Others*** [2012] BLR 294, emphasized the fact that, even though there is no appellate jurisdiction in relation to the section 247, the revisionary jurisdiction is capable of being exercised. But, in the present application, the learned High Court judge is of the view that, there are no exceptional circumstances with relation to this case which necessitates the exercise of the revisionary jurisdiction.

The Respondent further challenges the *uberima fides* of the Petitioner on the grounds of equitable principles. Thus, it is clear to this court that, the Respondent is making an attempt to strengthen the argument on the maxim 'He who comes into equity must come with clean hands'. The Respondent has argued on the matter that, both the Defendant and Petitioner companies engaged in the same business at the same premises and the transfer of the subject matter within the companies and shareholders. The Respondent's contention has been elaborated in ***Hatton National Bank v. Jayawardane and Others*** [2007]1 Sri LR 181 at pg 183, by his Lordship Justice Nihal Jayasinghe,

> *"The 1st and 2nd respondents cannot hide behind the veil of incorporation of Nalin Enterprises (Pvt) Ltd, whilst being the alter ego" of the said Company of which the 1st respondent has been the Managing Director and the 2nd respondent who is the wife of the 1st respondent has been a Director."*
>
> *(2) Although the independent personality of the Company is distinct from its Directors and shareholders Courts have in appropriate circumstances lifted the veil of incorporation. In particular Courts have been vigilant not to allow the veil of incorporation to be used for some illegal or improper purpose or as a devise to defraud creditors.''*

It is clear to this court that, the Respondent also argues on the matter that, the companies must not be given opportunities to use the veil of incorporation and the interference of this court is expected when the veil of incorporation is used for illegal and improper purposes, specifically to defraud the creditors.

With the perusal of the case laws pertaining to the present application, it is clear that, the Appellant's very conduct of making an appeal has outlawed the Civil Procedure Code. The Appellant has a remedy in terms of section 247. This court being the apex court of the country cannot accept the very conduct of the Appellant in seeking a remedy which outlaws the procedure established by the statutory provisions.

I answer the questions of law as follows,

1) No
2) No
3) No
4) No

By considering the above circumstances, the application is dismissed.

Appeal dismissed

Judge of the Supreme Court

Buwaneka Aluwihare, PC, J.

I agree **Judge of the Supreme Court**

S. Thurairaja, PC, J.

I agree **Judge of the Supreme Court**

In the Supreme Court of the Democratic Socialist Republic of Sri Lanka

In the matter of an application for Leave to Appeal from a Judgment of the Provincial High Court of the Western Province holden in Colombo dated 12th May 2016 in HC RA 96/2015, in terms of the Industrial Disputes Act and the High Court of the Provinces (Special Provisions) Act No. 10 read with the Rules of the Supreme Court.

M Ganeshmoorthy
No. 9/10 C New Stage
Grayline Park
Ekala
Ja-Ela

Applicant

SC Appeal No. 187/2017
SC HCLA 28/2016
HC (Revision) No. 96/2015
LT Application No. 1A/56/2014

-VS-

1. John Keells Holdings PLC
   No. 117, Sir Chittampalam A. Gardiner Mawatha
   Colombo 2

2. Jaykay Marketing Services (Private) Limited
   No. 148, Vauxhall Street
   Colombo 2

3. Keells Food Products PLC
   No. 16 Minuwangoda Road
   Ekala

Ja-Ela

Respondents

AND BETWEEN

1. John Keells Holdings PLC
   No. 117, Sir Chittampalam A. Gardiner
   Mawatha
   Colombo 2

2. Jaykay Marketing Services (Private)
   Limited
   No. 148, Vauxhall Street
   Colombo 2

3. Keells Food Products PLC
   No. 16 Minuwangoda Road
   Ekala
   Ja-Ela

Respondent -Petitioners

-VS-

M Ganeshmoorthy
No. 9/10 C New Stage
Grayline Park
Ekala
Ja-Ela

AND NOW BETWEEN

1. John Keells Holdings PLC
   No. 117, Sir Chittampalam A.
   Gardiner Mawatha
   Colombo 2.

2. Jaykay Marketing Services (Private) Limited
   No. 148, Vauxhall Street
   Colombo 2

3. Keells Food Products PLC
   No. 16 Minuwangoda Road
   Ekala
   Ja-Ela
   Respondents-Petitioners-Petitioners

-VS-

M Ganeshmoorthy
No. 9/10 C New Stage
Grayline Park
Ekala
Ja-Ela
Applicant-Respondent-Respondent

Before : Priyantha Jayawardena, PC, J
L.T.B. Dehideniya, J
S. Thurairaja, PC, J

Counsel : Suren Fernando for the Respondents-Petitioners-Petitioners

Chula Bandara with A.M.S. Hemali Atapattu for the Applicant-Respondent-Respondent

Argued on : 27th February, 2019

Decided on : 20th January, 2020

Priyantha Jayawardena, PC, J

This is an appeal to set aside the judgment of the Provincial High Court of the Western Province holden in Colombo which affirmed the order of the Labour Tribunal made in respect of the right to begin the inquiry before the Labour Tribunal.

The applicant-respondent-respondent (hereinafter referred to as the "workman") filed an application in the Labour Tribunal citing John Keells Holdings PLC, Jaykay Marketing Services (Private) Ltd and Keells Food Products PLC as the 1st, 2nd and 3rd respondents respectively for the unlawful termination of his services by the 1st respondent company.

The workman stated that he was appointed by the 2nd respondent-petitioner-appellant (hereinafter referred to as the "2nd respondent company") as a Junior Sales Representative on the 22nd of April, 1991.

The workman further stated that thereafter, on the 1st of May, 1996 he was appointed as an Executive by the 1st respondent-petitioner-appellant (hereinafter referred to as the "1st respondent company") and seconded to the 2nd respondent Company, which is a subsidiary of the 1st respondent company.

Thereafter, the workman had worked for both the 1st and 2nd respondent companies and was promoted as Sales Manager whilst working for the 1st respondent company.

The workman stated that a fresh letter of appointment was given to him by John Keells Foods India Private Limited on the 18th of January, 2010, which is also a subsidiary of the 1st respondent company and he was deployed to work in India as the Head of Sales to work in that company.

However, as the operations of the said company were closed down in 2010, the workman returned to Sri Lanka.

The workman further stated that after he returned to Sri Lanka, he was appointed as a Channel Manager Retail of the 3rd respondent-petitioner-appellant (hereinafter referred to as the "3rd respondent company"). However, he was not issued a letter of appointment for the said post.

By the letter dated 10th of February, 2014, the workman stated that he was suspended from work by the 3rd respondent company.

Thereafter, a letter of show cause was issued by the 3rd respondent dated 3rd of March, 2014 which contained the following charges:

"(1) That during the period December 2013 to February 2014, you did attempt to purchase pork from a Company Supplier, at a higher price, in commercial quantities as morefully set out in the preamble of this letter.

(2) (i) That your conduct as set out in charge (1) above indicates that you have established a business in competition with your employer, Keells Food Products PLC.

or in the alternative;

(ii) That you have attempted to carry on a business in competition with your employer, Keells Food Products PLC.

(3) That by your conduct set out in charges (1) and (2) above, you did blatantly and willfully violate Clause 'C' of the "Code of Conduct" of the company under the caption "conflict of interest" in your contract of employment and the law of the land.

(4) That you did fail to divulge your Spouse's business interests as morefully set out in the preamble of this letter which constitutes a further violation of Clause 'C' of the "Code of Conduct" under the Caption "Conflict of Interest."

(5) That by your conduct set out herein which has caused or intended to cause loss and damage to the company you did act in a manner which is unbecoming of a person holding the post of Channel Manager – Retail, and thereby breach the trust and confidence reposed in you by the Management."

The workman stated that he denied all the charges levelled against him in his response to the letter of show cause. Thereafter, a domestic inquiry was conducted by the 3rd respondent company to inquire into the charges levelled against the workman.

Later, by letter dated 23rd of June, 2014, the 1st respondent company terminated the services of the workman stating that he had been found guilty of the aforesaid charges levelled against him.

The workman stated that however, the termination of his services was unlawful and unjust.

Accordingly, the workman prayed *inter alia:*

(a) for reinstatement with back wages, or

(b) for compensation in lieu of such reinstatement

The respondents filed a common answer and stated that they are related parties of which the 1st respondent is the holding company. It was further stated that at all times material to the application filed in the Labour Tribunal, the workman was employed by the 1st respondent company and seconded to the 3rd respondent company.

In the said answer, it was further stated that the 3rd respondent company being a subsidiary of the 1st respondent company, whom the workman was seconded to, was authorised by the 1st respondent company to conduct the domestic inquiry in respect of the alleged misconduct of the workman. At the conclusion of the domestic inquiry, the workman was found guilty of the charges levelled against him.

The respondents further stated that in the foregoing circumstances, the termination of the workman's services by the 1st respondent company was just and equitable. Accordingly, the respondents prayed *inter alia* to have the application dismissed.

When the application was taken up for inquiry before the Labour Tribunal, the respondents had submitted that there was an ambiguity as to who the employer of the workman was, since two of the respondents had denied employment and termination of the services of the workman.

As the parties were unable to agree as to who should begin the inquiry and lead evidence, the learned President of the Labour Tribunal directed the parties to file written submissions on the right to begin the inquiry.

Thereafter, the Labour Tribunal has held that as the 1st respondent company admitted termination, it should justify the termination. Accordingly, it had been ordered that the 1st respondent company and the other subsidiary companies in the group which had been named as respondents should commence the inquiry.

Being aggrieved by the said order of the learned President of the Labour Tribunal, the respondents invoked the revisionary jurisdiction of the Provincial High Court of the Western Province holden in Colombo.

After hearing the said appeal, the learned High Court judge has held that since the respondents are part of the same group of companies, and as the 1st respondent had admitted the employment and

termination of the services of the workman, the order of the Labour Tribunal directing the respondents to commence the inquiry is not contrary to law.

Being aggrieved by the judgment of the Provincial High Court holden in Colombo, the respondents sought special leave to appeal from this court and special leave to appeal was granted on the following questions of law:

"(a) Did the learned High Court Judge err in failing to interpret and apply the established principles of the law of evidence on the burden of starting?

(b) Did the learned High Court Judge err in law by failing to appreciate that there was no consensus as to the identity of the Applicant's employer and/ or that two Respondents had denied employment and/ or termination?

(c) Did the learned High Court Judge err in law in failing to recognize that, in circumstances where there were more than one Respondent, some of whom had not admitted employment or termination, the burden of starting would be on the Applicant?

(d) Did the learned High Court Judge err in failing to recognize that the learned President of the Labour Tribunal erred in law in directing the Respondents to begin the case?"

Submissions of the respondents

The learned counsel for the respondents submitted that as there are three respondents, the burden is on the workman to prove who the real employer was.

In support of his submission, the learned counsel cited the case of *United Corporations and Mercantile Union v Vos* (Gazette of 6.5.77) referred to in the *Law of Dismissal* by S.R. De Silva at page 122 where it was held: "where an employer denies termination of the services of a worker, the burden of proof is on the worker to establish to the satisfaction of Court that his services had been terminated by the employer."

The learned counsel contended that the only exception to the said rule is where the employer admits termination.

It was further submitted that in the instant appeal, only the 1st respondent had admitted the employment and termination of the services of the workman. Neither, the 2nd nor the 3rd respondents have admitted employment and termination of the services of the workman.

Thus, where there is no agreement as to the identity of the employer, the workman should first establish the identity of his employer. In the absence of an admission, with regard to who the employer of the workman is, the burden is on the workman to prove the same.

Submissions of the workman

The learned counsel for the workman submitted that since the 1st respondent had admitted the employment and termination of the workman, and the 2nd and 3rd respondents were in the same group of companies, it is the respondents who should start the case to justify the termination of the workman.

The learned counsel cited the case of *The Ceylon Mercantile Union v Management Mount Lavinia Hotel CGG* SC Minutes 7th July, 1961 which held: '"In the case of termination of employment burden is on the employer to justify the termination on the principle that "He who alters the status quo, and not he who demands its restoration, must explain the reason for such alteration."' in support of his submission.

Further, the learned counsel cited the case of *The Associated Newspapers of Ceylon Ltd v Merven Perera* [C.A. 391/79] SC Minutes 25th September, 1981 which held; "the burden is on the employer to prove that the termination was justified."

Did the learned High Court Judge err in failing to recognize that the learned President of the Labour Tribunal erred in law in directing the Respondents to begin the case?

Section 31C (1) read with section 33 of the Industrial Disputes Act No. 43 of 1950 as amended stipulates the duties and powers of the Labour Tribunal with regard to an application made under section 31B (1) of the said Act.

Section 31C reads as follows:

> *"(1) Where an application under section 31B is made to a labour tribunal, it shall be the duty of that 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.*

(2) A labour tribunal conducting an inquiry shall observe the procedure prescribed under section 31A, in respect of the conduct of proceedings before the tribunal." [Emphasis added]

The scope of the aforementioned section was considered in *Merril J Fernando & Co v Deiman Singho* (1988) 2 SLR 242 where the Court of Appeal held;

> *"As was submitted by learned counsel for the appellant 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."*
>
> [Emphasis added]

Accordingly, the Labour Tribunal is required by law to hear all such evidence as the tribunal may consider necessary and make a "just and equitable" order.

The principle of "just and equitable" is based on fairness and justness. Equity ensures that the law does not produce unnecessarily or unintended harsh outcomes which unfairly prejudices a party. It solves an issue not according to the strict legal technicalities, but with the principles of justice and application of the established rules and principles after evaluation of facts and circumstances of a given case. It is a qualitative description of a conclusion reached after examination of a range of potentially competing considerations.

On the contrary, "justice" of an individual case refers to justice objectively and consistently evaluated and applied according to law and established principles, upon definite grounds.

A just and equitable order cannot be made in the subjective eye of the judge. It is not a discretionary judgment. A just and equitable order must be fair to all the parties in any given situation.

As stated above section 31C (1) of the Industrial Dispute Act as amended requires the Labour Tribunal to make a "just and equitable" order. Further, section 33 of the said act specifies *inter alia* the contents of an order.

However, like in any other litigation, before making an order under section of 31C (1) of the said Act there can be several interim orders that are required to be made in an inquiry before the Labour Tribunal. Some orders may be on a pure question of law or a mixed question of law and facts or purely on a factual position. All such interim orders will invariably have an impact on the final order made under the said section. Thus, in order to make a "just and equitable" order at the conclusion of the inquiry, all interim orders made during an inquiry, should also be just and equitable. If the interim orders are not just and equitable, the final order made after an inquiry cannot be a just and equitable.

The procedure applicable to Labour Tribunals are set out in the Regulations published under section 31A of the Industrial Disputes Act. Regulation 30 of the Industrial Disputes Regulations, 1958 states:

> *"At the hearing in regard to any matter before an Industrial Court or an arbitrator or a Labour Tribunal, such Court or arbitrator or the Tribunal may call upon the parties, in such order as the Court or the arbitrator or the Tribunal thinks fit, to state the case."* [Emphasis added]

Thus, Regulation 30 has conferred power on the Labour Tribunal to call upon parties to begin their respective cases in such order as the tribunal thinks fit. However, the discretion conferred on the Labour Tribunal to call upon the parties to begin their respective cases by the said regulation should be applied taking in to consideration; the procedure established by law, the jurisprudence developed by courts and the facts and circumstances of each case with the object of making a just and equitable order at the conclusion of the inquiry before the Labour Tribunal.

Further, in *W.A.A.M. Dharmasena v Superintendent, Kekunagoda Estate* (SC Appeal 142/2010) SC Minutes 13th August, 2015 at page 8, it was held:

> *"[….] Section 31C (1) of the Industrial Disputes Act, the Regulations published thereunder, the provisions of the Judicature Act No. 2 of 1978 as amended and the decided cases show that section 31C (1) of the Industrial Disputes (Amendment) Act No. 62 of 1957 conferred the inquisitorial powers on the Labour Tribunal which*

was later widened by Act No. 4 of 1962. However, section 41 of the Judicature Act as amended, the said Regulations and the requirement to make a just and equitable order in terms of section 31C (1) of the Industrial Disputes Act as amended require a Labour Tribunal to follow certain aspects of the adversarial system too. ***Thus, an inquiry before a Labour Tribunal under section 31C (1) is a mixture of an inquisitorial and adversarial systems.*** *[….]"* [Emphasis added]

Hence, in addition to the powers conferred on the Labour Tribunal by the said Rule, the Labour Tribunal has the power to decide how the inquiry should be conducted as inquisitorial powers are conferred on it, by the Industrial Disputes Act. The inquisitorial power conferred on the Labour Tribunal was discussed in detail in the aforementioned judgement.

In the instant appeal, the learned President of the Labour Tribunal directed the respondent companies to begin their cases on the basis that despite the 2nd and 3rd respondent companies had denied employment of the workman, the 1st respondent company had admitted the employment and termination of the workman and all 3 of the said companies are in the same group of companies. In fact, the workman has been working for all the respondent companies.

A cursus curiae has developed that an employer who admits terminating the services of a workman should commence leading evidence as the burden is on him to justify that termination.

In *Thevarayan v Balakrishnan* (1984) 1 SLR 194 it was held:

"In a case of termination of employment, the burden is on the employer to justify the termination on the principle that "he who alters the status quo, and not he who demands its restoration, must explain the reasons for such alteration."

However, when the employer has denied employment or termination, or in the case of vacation of post or constructive termination, the workman should start the case. Further, it is pertinent to note that even if the employer had admitted employment, the workman should begin the case if malice was pleaded or if the employee was on probation at the time of termination.

In *Anderson v Husni* [2001] 1 SLR 68 it was held:

"Let me add that that principle is the foundation of the cursus curiae in the Labour Tribunal where termination (of confirmed employment) is not admitted. In such cases the appellant must begin. Why? Because if no evidence at all were given on

either side, on the material available to the Tribunal, it is the applicant who would fail."

Further, in *State Distilleries Corporation v Rupasinghe* [1994] 2 SLR 395 it was held:

"What then is the principal difference between confirmed and probationary employment? In the former, the burden is on the employer to justify termination; and he must do by reference to objective standards. In the latter, upon proof that termination took place during probation the burden is on the employee to establish unjustifiable termination, and the employee must establish at least prima facie of mala fides, before the employer is called upon to adduce evidence as to his reasons for dismissal; and the employer does not have to show that the dismissal was, objectively, justified."

In the instant appeal, as stated above the workman alleged that he was employed by both the 1st and 2nd respondent companies. However, only the 1st respondent company had admitted the employment and termination of the workman. Both the 2nd and 3rd respondents have denied employment of the workman in the common answer filed by the respondent companies.

In *Ceylon Bank Employees' Union v Yatawara* 64 NLR 49, the definition of the word "employer" was considered by Sansoni, J as follows:

*"Apart from these considerations however, when one analyses the definition of the word "employer", one finds that its first meaning is "any person who employs", and the third meaning is "**a body of employers** (whether such body is a firm, **company**, corporation or trade union)"."* [Emphasis added]

Further, the word "employer" was considered in *Colombo Paints Ltd v De Mel* (1973) 76 NLR 381 at page 383 where it was held:

" [….] The legal intricacies that lay between the petitioner and the 3rd respondent have not been so mystifying and so distracting as to prevent me from coming to a clear finding that the 4th respondent's employment was within the same family of Companies. He did the same work under the same conditions at the same place under the same persons, with the petitioner. Whatever changed, the substantial nature and relationship in his employment did not change.

The facts placed before me lead to the only reasonable inference that the petitioner came within the meaning of the term employer as defined by the Act. [….]"

As stated above, the Labour Tribunal is required to make a just and equitable order not only at the conclusion of the inquiry but also with regard to interim orders. Moreover, Regulation 30 empowers the Labour Tribunal to call upon the parties as the Tribunal thinks fit to state their case. Further, the Labour Tribunal exercises inquisitorial powers when conducting an inquiry. Thus, it is entitled to use its discretion in conducting the inquiry in order to make a just and equitable order subject to the aforementioned criteria.

The case of *United Corporations and Mercantile Union v Vos* (supra) cited by the respondents has no application to the instant appeal as the 1st respondent company which is part of the group of companies had admitted termination.

Thus, I am of the opinion that the Labour Tribunal had acted in terms of the law when it made the order directing the 1st respondent company and the other subsidiary companies in the group to commence the inquiry. Further, the High Court did not err in law when it held that since the respondents are part of the same group of companies, and as the 1st respondent had admitted the employment and termination of the services of the workman, the order of the Labour Tribunal directing the respondents to commence the inquiry is not contrary to law.

Further, it is pertinent to note that the respondents had filed a common answer and stated that they are related parties of which the 1st respondent is the holding Company. In light of the above, the following question of law is answered as follows:

Did the learned High Court Judge err in failing to recognize that the learned President of the Labour Tribunal erred in law in directing the Respondents to begin the case?

No

In view of the foregoing answer, the other questions of law set out above, need not be considered.

The appeal is dismissed.

Taking into consideration of the fact that the services of the workman were terminated on the 23rd of June, 2014, the Labour Tribunal is directed to conclude the inquiry expeditiously. The Registrar

of this court is directed to send a copy of this judgment to the Labour Tribunal to take steps in accordance with the law.

I order no 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**

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

In the matter of an Application for Special Leave to Appeal under Article 154 P of the Constitution of the Democratic Socialist Republic of Sri Lanka read with Section 3 of the High Courts of the Provinces (Special Provisions) Act No. 19 of 1990

Officer-in-Charge,
Police Station,
Wennappuwa.

Plaintiff

Vs.

Wijesinghe Dewage Lalith Indrawansa Rupasinghe,
'Nishanthi Arts',
Suhadha Mawatha,
Potuwila, Madampe.

Accused

SC Appeal 191/2016
SC/SPL/LA/02/16
HC Chilaw Case No: HCA/16/15
MC Marawila Case No: 2389/D

AND NOW BETWEEN

Wijesinghe Dewage Lalith Indrawansa Rupasinghe,
'Nishanthi Arts',
Suhadha Mawatha,
Potuwila, Madampe.

Petitioner-Petitioner

Vs.

1. Officer-in-Charge,
   Police Station,
   Wennappuwa.

Plaintiff-Respondent-Respondent

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

Respondent-Respondent

Before: **Justice L.T.B. Dehideniya**

Justice A.L. Shiran Gooneratne

Justice Janak De Silva

Counsel: Wasantha Nawaratna Bandara, PC with Pasan Weerasinghe and Ashan Bandara **for the Accused-Appellant-Petitioner.**

Ms. V. Hettige, DSG **for the Hon. Attorney General.**

Argued on: 24/02/2021

Decided on: **04/08/2021**

A.L. Shiran Gooneratne J.

The Accused-Petitioner (hereinafter referred to as the Petitioner) was charged in the Magistrates Court of Marawila on 6 counts under the Penal Code and the Motor Traffic Act for negligently driving vehicle bearing number LA 3777, for causing the death of an individual and injury to another. When the charges were read out in open court, the Petitioner pleaded guilty to all 6 counts. Thereafter, the learned Magistrate passed sentence on the Petitioner in the following manner: 6 months Rigorous Imprisonment on count 1, Rs. 1500, Rs. 1000, Rs. 2000, and Rs. 15,000 fine on count 2, 3, 4 and 5 respectively and Rs. 7500 fine with a default sentence of 1 month Simple Imprisonment on count 6.

The Petitioner being aggrieved by the said order dated 07/09/2015, appealed to the High Court of Chilaw. The High Court having heard submissions made on behalf of the Petitioner and the Respondents, by order dated 24/11/2015, set aside the sentence imposed on count 2 and count 6 and imposed a substituted sentence on the said counts in the following manner.

On count 2, where the Petitioner was charged under Section 272 of the Penal Code, the sentence of Rs. 1500 as fine was set aside and substituted by a fine of Rs. 100 and on count 6, a charge under Section 214 (1) to be read with Section 151(1) (a) of the Motor Traffic Act and Section 216 B of the Increase of Fines Act No. 12 of 2005, the sentence of a fine of Rs. 7500 was set aside and substituted by a sentence of 2 years Rigorous Imprisonment and the cancellation of the Petitioners driving license. Having taken into consideration the 6 months Rigorous Imprisonment imposed on count 1, the learned High Court Judge made order that both custodial sentences to run concurrently. Thus, an aggregate of 2 years Rigorous Imprisonment was imposed.

Varying the sentence on count 2 in terms of Section 328 of the Code of Criminal Procedure Act, the learned High Court Judge stated that the sentence of Rs. 1,500 as a fine was not according to law. Taking into consideration the criminal negligence on the

part of the Petitioner for causing the death of a person and an injury to another and also having observed that the sentence imposed should act as a deterrent to society, proceeded to substitute the sentence on count 2 and 6 as noted above.

Aggrieved by the said order of the High Court Judge, the Petitioner preferred a Special Leave to Appeal application dated 04/01/2016 to this Court, *inter-alia*, to revise the sentence of Rigorous Imprisonment imposed under count 2 and count 6, by substituting it with a suspended sentence on each count, as prayed for. It is noted that the sentence imposed on count 2 is a fine of Rs. 1,500 which was substituted by a fine of Rs. 100, and not a sentence of 2 months Rigorous Imprisonment as stated in the written submissions tendered by the Petitioner.

This Court having considered the submissions made by the Counsel for the Petitioner, granted special leave to Appeal on the following questions of law as set out in paragraph 9(i), 9(v) and 9(vi) of the Petition of Appeal.

1. Is the order of the High Court of Chilaw marked "Y" wrong in law
2. Has the learned High Court Judge of Chilaw erred in law in failing to consider the relevant facts and the law in varying the verdict and sentence of the Magistrates Court of Chilaw
3. Has the learned High Court Judge of Chilaw acted in excess of his powers in dealing with the appeal after stating that an appeal does not lie and the only remedy available is an application to the Court of Appeal

It is the position of the Petitioner that on 07/09/2015, he was thrust into an unfortunate situation to enter a plea of guilty to the charges preferred against him without legal representation, which has caused a travesty of justice.

The Petitioner is challenging the plea of guilty entered in terms of Section 183 of the Code of Criminal Procedure Act. The written and oral submissions made by the learned Presidents Counsel for the Petitioner was structured on the basis that the facts relating to the offence charged, circumstantial and/or direct, remained unproven and therefore

there is no valid conviction or sentence made according to law. Further the learned President's Counsel alleged that the police hastily filed a charge sheet without awaiting the advice sought from the Attorney-General, which prevented the Petitioner to obtain the required legal assistance. The learned Counsel also contended that the Petitioner pleaded guilty to all charges without comprehending the gravity of the offence.

Soon after the alleged incident, the Petitioner was released on bail by the Magistrates Court. The Police thereafter moved for several dates to seek advice from the Hon. Attorney General to preferer charges against the Petitioner. However, with no instructions from the Hon. Attorney General, charges were framed in the Magistrates Court of Marawila. There is no procedural or statutory impediment preventing the police going ahead and filing a charge sheet against the Petitioner, as they did.

When the case was called on 07/09/2015, the Petitioner on summons appeared in Court in person and the framed charges were read out in open court. The Petitioner pleaded guilty to all counts as charged. No objections were raised in terms of Section 182(1) and (2) of the Code of Criminal Procedure Act when the particulars of the case were stated to the Petitioner.

When the court inquired as to whether the Petitioner wished to say anything in mitigation, prior to imposing sentence, the Petitioner replied, *"I admit the offence. Permit me to pay the sum in installments".*

Section 183 (1) of the Code of Criminal Procedure Act lays down the procedure to be followed by a Magistrate when there is an admission of the offence by an accused.

> *"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".

It is observed that the Magistrate has recorded the statement made by the Petitioner as nearly as possible in the same words used by him in keeping with the statutory requirement. It is important to note that, when an unqualified plea of guilty is entered by an accused, the Magistrate having knowledge of the facts becomes aware that the charges are proved and accordingly, proceed to record a verdict of guilty and pass sentence.

Section 317 of the Code of Criminal Procedure Act reads as follows;

(1) An appeal shall not lie from a conviction –

(a) Repealed

(b) where an accused has under Section 183 made an unqualified admission of his guilt and been convicted by a Magistrate's Court.

(2) An appeal upon a matter of law shall lie in all cases.

When an unqualified plea of guilty is recorded, an Appeal from such an order is subject to the limitation provided in terms of Section 317. Accordingly, when an accused makes an unqualified admission of his guilt under Section 183, and after conviction, an appeal will lie only upon a matter of law, in terms of Section 317 (2) of the said Act.

At this point, it would be pertinent to note that the Petitioner came before the High Court on the basis that he was deprived of the opportunity to withdraw his plea of guilty, in terms of the proviso to Section 183 of the Code of Criminal Procedure Act. The Petitioner contends that adequate time was not granted to him to seek legal counsel before sentence was passed and therefore, had no opportunity to avail himself of mitigating his sentence. Accordingly, the Petitioner prayed *inter alia*, that the sentence imposed by the learned Magistrate be suspended.

The learned Judge of the High Court, considered the submissions made by both parties and proceeded to act in terms of Section 328 of the said Act. Accordingly, the sentence imposed on count 2 and 6 was set aside and a substituted sentence was imposed on the said counts, as observed above. The Petitioner placed no evidence in mitigation of sentence before the High Court or before this Court to consider the imposition of a reduced sentence.

The Petitioner, on summons, appeared before the Magistrates court in person and made no application to Court seeking time to retain counsel. According to proceedings dated 07/09/2015, the charge sheet was read out in open court and the Petitioner pleaded guilty to all counts. The statement made in response to the charge sheet consists of a plea in mitigation of sentence. The Petitioner tendered the guilty plea prior to commencement of trial and therefore the evidence against him remained unchallenged. The conviction and sentence imposed were based on the Petitioners unqualified admission to the commission of the offence. Therefore, the statement made by the Petitioner soon after the charge sheet was read, constitutes an unqualified admission of the offence committed. "*A plea of guilty constitute an admission of all essential elements of the crime, proof of which is therefore unnecessary". (**R vs. O'Neill (1979) 2 NSWLR 582; (1979) 1 A Crim R 59)***

A Similar view was taken in ***Amadoru vs. Officer in Charge, Special Criminal investigation Unit, Wennappuwa (2011) 2 SLR 315, where*** Shiranee Thilakawardene J. stated,

> *"it is relevant to consider that the summary trial in criminal procedure is initiated by the framing of charges and, therefore, one of the first tasks of a Magistrate is to ascertain whether there is sufficient ground to frame a charge against the accused as set out in Section 182(1) of the Code of Criminal Procedure Act referred to above. On reading the charge to the accused, if the latter makes a statement amounting to an unqualified admission, the Magistrate has a mandatory obligation in terms of*

Section 182(1) of the said Act to record a verdict of guilty and pass sentence according to the law.

If the accused withdraws his admission with leave of the Court, the Magistrate shall proceed to trial as if a conviction has not been entered. If no such admission is tendered, the Magistrate will in terms of Section 183(1), (2) of the said Act, inquire as to whether the accused is ready for trial and, if so, proceed to try the case. If, however, the accused is not ready for whatever reason, the Magistrate holds discretion to postpone or proceed with the trial, and the accused's claim of insufficient or lack of readiness will not prevent the Magistrate from taking evidence of the prosecution and of any other witnesses of the defence as are available."

In ***Mudiyanselage Suraj Sanjeewa Vs. Officer in Charge Police Station And Others, CA (PHC) APN 17/19,*** the Court held that:

"In the instant case, admittedly, the plea of guilty by the Petitioner had been unequivocal. Nowhere the Petitioner says that he was misled or that he could not understand the charge. The reason adduced in the application for withdrawal of his guilty plea is that later he found that the sentence imposed would affect his employment. The learned Magistrate has not acted illegally or arbitrarily. He has not acted upon a wrong principle of law. Hence, the learned High Court Judge had no reason to interfere with the order of the learned Magistrate."

It is also observed that the learned Magistrate did not in any manner inhibit the Petitioner's right to withdraw his plea, in terms of the proviso to Section 183 (1) of the Code of Criminal Procedure Act. The Petitioner made no application to withdraw the statement made, before the sentence was passed. Therefore, the statement made by the Petitioner amounts to an unqualified admission of guilt of the offence of which he was charged. The learned Magistrate thereafter, recorded a verdict of guilty and the Petitioner was convicted and sentenced accordingly.

The learned High Court Judge, having affirmed the said conviction, proceeded to act in terms of Section 328 of the Code of Criminal Procedure Act, to set aside and substitute the sentence imposed on count 2 and 6, as noted above. Before making the said order, the learned High Court Judge invited both parties to file written submissions and thereafter, the parties moved Court that an order be delivered taking into consideration the written submissions filed of record.

As defined in terms of the proviso to ***Section 328,*** the Court sitting in appeal,

> "*shall not exceed the sentence which might have been awarded by the Court of first instance".*

On count 2, the Petitioner was charged under Section 272 of the Penal Code and a fine of Rs.1500 was imposed. However, the maximum fine that can be imposed in terms of the said section is Rs. 100. Therefore, the learned High Court Judge was correct in substituting the sentence of Rs. 100 as a fine on count 2. On count 6, the Petitioner was charged under Section 151(1) to be read with Section 216 B of the Motor Traffic Act. A fine of Rs. 7500, imposed on the said count was varied to 2 years Rigorous Imprisonment and also the cancellation of the driving license. The maximum fine that can be imposed in terms of *Section 216 B of the Motor Traffic Act* was amended by the ***Increase of Fines Act, No.12 of 2005***, which reads, thus;

> *"to a fine not less than five thousand rupees", of the words "to a fine not less than six thousand rupees and not exceeding fifty thousand rupees"*

Section 216 B (b) of the Motor Traffic Act states,

> *"where he causes injury to any person, to a fine not less than six thousand rupees and not exceeding fifty thousand rupees or to imprisonment of either description for a term not exceeding five years or to both such fine and imprisonment and to the cancellation of his driving license."*

In terms of Section 216 (b) of the Motor Traffic Act, (as amended) a person after conviction, is liable to a fine or imprisonment of either description or to both such fine and imprisonment and to the cancellation of the driving license.

On both counts, the Court sitting in appeal did not exceed the maximum punishment and therefore has varied the sentence on count 2 and 6, according to law.

Before substituting the sentence on count 6, the learned High Court Judge considered the written submissions filed of record. The Court also considered the criminal negligence on the part of the Petitioner in causing the death of a person and injuring to another and also the deterrent effect of the sentence.

*Deterrence has a twofold object. The first object relates to specific deterrence. It will deter the individual from committing the same or other offences in the future. The second object is as to general deterrence. It will convince or deter others that "crime does not pay" (**See Crime and Punishment' by Harry E. Allen & Ors. at 735**).*

As pointed out earlier, due to the Petitioners unqualified admission of guilt to all charges, the evidence against the Petitioner remains unchallenged. The learned Magistrate delivered his order based on unchallenged evidence, the nature of the offence and the fact that the Petitioner pleaded guilty to all counts on the first available opportunity.

The learned DSG made submissions in support of the substituted sentence imposed by the High Court, by citing a Judgment delivered by the Court of Appeal in ***Bandara vs. Republic of Sri Lanka CA. No. 134/99***, where Amaratunga J. enhanced the sentence of an accused in terms of Section 366 of the Code of Criminal Procedure Act. When the prosecution case was about to be closed, the accused retracted his earlier plea of not guilty and pleaded guilty to all counts. Therefore, in the said case the court had the opportunity to consider the evidence before passing sentence.

It is observed that the High Court granted an opportunity to the parties to show cause by way of written submissions, to justify mitigatory or aggravating circumstances, to be considered by Court.

In the circumstances, I find that there is due compliance of Section 183(1) of the Code of Criminal Procedure Act and there exists no illegality in the substituted sentence imposed in terms of Section 328 (b) (ii) of the said Act.

I now turn to the question of sentencing.

In the case at hand, the alleged offence was committed on or about 16/01/2006. On count 1, the Petitioner was charged under Section 298 of the Penal Code for causing the death of a person and was sentenced to 6 months Rigorous Imprisonment. There was no variation in sentence by the High Court judge on that count. On count 6 a fine of Rs. 7500 imposed under Section 151(1) to be read with Section 216 B of the Motor Traffic Act, was varied to 2 years Rigorous Imprisonment and the cancellation of the driving license. On both counts the sentencing judge had the discretion to impose a sentence which he thought was just, according to law.

In terms of ***Section 303 (1) of the Code of Criminal Procedure Act***,

> *"a Court which imposes a sentence of imprisonment on an offender for a term not exceeding two years for an offence may order that the sentence shall not take effect unless, during a period specified in the order being not less than 5 years from the date of the order (hereinafter referred to as the " operational period ") such offender commits another offence punishable with imprisonment (hereinafter referred to as " subsequent offence ").*

In terms of Section 303 (2),

> *"a Court which imposes a sentence of imprisonment for a term not exceeding six months in respect of one offence on an offender who had had no previous experience of imprisonment shall make an order under subsection (1) unless--*

(a) the offence involved the use or threat of violence, or the use or possession of a firearm, an explosive or an offensive weapon;

(b) the offence is one in respect of which a probation order or order for conditional discharge was originally made;

(c) the offender was subject to a suspended sentence at the time the offence was committed; or

(d) the court is of opinion that, for reasons to be stated in writing, it would be inappropriate in the circumstances of the case, to deal with the offender in terms of this subsection".

Therefore, it is mandatory on the part of a trial court to suspended the operational period of 6 months imprisonment imposed in terms of Section 303 (2) of the Code of Criminal Procedure Act, except in the circumstances specially provided for in Section 303 (2) (a) to (d) or as "the Court is of the opinion", for reasons to be stated in writing.

The learned Magistrate has given reasons for imposing an imprisonment of six months. As observed earlier, when varying the sentence imposed on count 6, the learned High Court Judge too has given reasons for doing so. Therefore, the variation of sentence in count 6, to two years rigorous imprisonment and the sentence of six months rigorous imprisonment imposed on count 1, is within the exercise of judicial discretion of the sentencing judge.

The question then is whether the said sentence of imprisonment can be suspended.

In ***Karunaratne vs. The State 78 NLR 413,*** the Court looked into the issues relating to suspension of sentence. In a majority decision the Court held that;

"while the trial judge was right in sentencing the accused to a term of two years rigorous imprisonment and to pay a fine of Rs. 1000 and that even if the provisions relating to the suspension of sentences were in operation at that time and the case was concluded in due time, this was not a case where the sentence would have been

suspended, having regard to the gravity of the offence. But, on the other hand, when a deserving conviction and sentence have to be confirmed ten years after the proved offence the judge cannot disregard the serious consequences and disorganization that it can cause to the accused's family".

In ***Attorney General vs. Mendis (1995) 1 SLR 138***, ***Gunasekara, J***. held that,

"Once an accused is found guilty and convicted on his own plea or after trial the judge in deciding on sentence, should consider the point of view of the accused on the one hand and the interest of society on the other. The nature of the offence committed the machinations and manipulations resorted to by the accused to commit the offence, the effect of committing such a crime insofar as the institution or organization in respect of which it has been committed, is concerned, 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 are matters which the judge should consider"

When addressing the question of suspending a sentence, the gravity of the offence, the impact on the offender's family, delay in sentencing, age or ill health, pleading guilty in the first given opportunity, previous convictions, subsequent conduct of the accused are some of the many mitigatory factors that a court may consider. Therefore, a case by case consideration of the offence, the offender based factors and the interest of society is essential to decide whether a sentence of imprisonment should remain or be suspended.

It is observed that there is no delay on the part of the sentencing court and that the Petitioner has failed to address this Court of any mitigatory circumstances which could reduce the severity of the sentence imposed by the Magistrates Court or the substituted sentence imposed by the court sitting in appeal. Therefore, I see no reason to deviate from the sentence of the lower court to substitute the sentence imposed on count 2 and 6.

In the circumstances, I answer the 1st and 2nd grounds of appeal contended by the Petitioner, in the negative.

In answering the 3rd ground of appeal, I find that the High Court Judge makes reference to Section 31 of the Judicature Act which deals with the powers and jurisdiction of the Magistrates Court with regard to a right of appeal. The learned High Court Judge makes a statement relating to Section 183(2) of the Code of Criminal Procedure Act, regarding the law as it stands.

Section 183(2) of the Act would be applicable where an accused does not make a statement or makes a statement which does not amount to an unqualified admission of guilt. Therefore, the application of the said section would be clearly irrelevant to the facts of this case.

Accordingly, I answer the 3rd ground of appeal contended by the Petitioner also in the negative. I am of the view that the learned High Court Judge has come to a correct finding based on the facts and the law.

For all the reasons stated above, I affirm the Judgment of the learned High Court Judge dated 24/11/2015, and dismiss the appeal. Registrar is hereby directed to send the case record to the Magistrate of Marawila to implement the sentence. I order no costs.

Appeal dismissed.

Judge of the Supreme Court

L.T.B. Dehideniya J.

I agree

Judge of the Supreme Court

Janak De Silva J.

I agree

Judge of the Supreme Court

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

In the matter of an Application for Leave to Appeal from the Order of the High Court of the Western Province (exercising Civil/Commercial jurisdiction) holden in Colombo dated 04/09/2015 under an in terms of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 read with Provisions of the Civil Procedure Code.

Merchant Bank of Sri Lanka PLC,
No. 189, Galle Road, Colombo 03
and presently of
No. 28, St. Michael's Road,
Colombo 03.

Plaintiff

SC Appeal No. 193/2015

SC/HC/LA 43/2015

HC Case No. HC/Civil/496/09/MR

Vs

1. Kumarasinghe Ranjith Rajakaruna,
   No. 223, Rajamaha Vihara Road,
   Mirihana,
   Kotte.

2. Albert Nadaraja Manoharan,
   No. 27, Janadhipathi Vidyala Mawatha,
   Rajagiriya.

Defendants

An Application under Sec. 402 of the Civil Procedure Code.

Kumarasinghe Ranjith Rajakaruna,
No. 223, Rajamaha Vihara Road,
Mirihana,
Kotte.

1st Defendant-Petitioner

Vs

Merchant Bank of Sri Lanka PLC,
No. 189, Galle Road, Colombo 03
and presently of
No. 28, St. Michael's Road,
Colombo 03.

Plaintiff-Respondent-Respondent

Albert Nadaraja Manoharan,
No. 27, Janadhipathi Vidyala Mawatha,
Rajagiriya.

2nd Defendant-Respondent

AND NOW

Kumarasinghe Ranjith Rajakaruna,
No. 223, Rajamaha Vihara Road,
Mirihana,
Kotte.

1st Defendant-Petitioner-Appellant

Vs

Merchant Bank of Sri Lanka PLC,
No. 189, Galle Road, Colombo 03
And presently of
No. 28, St. Michael's Road,
Colombo 03.

Plaintiff-Respondent-Respondent

Albert Nadaraja Manoharan,
No. 27, Janadhipathi Vidyala Mawatha,
Rajagiriya.

2nd Defendant-Respondent-Respondent

Before:	Buwaneka Aluwihare, PC, J. L. T. B. Dehideniya J. & P. Padman Surasena J.
Counsel:	Presanna S. Ekanayake with Mrs. Dilekha Weeratunga for the 1st Defendant-Petitioner-Appellant. Suresh Phillips with Ms. Pushpa Damayanthi instructed by Mrs. Theranjanie Attanayake for the Plaintiff-Respondent-Respondent.
Written Submissions:	Appellant- 17th December 2015 and 1st February 2021 Respondent- 18th February 2016
Argued on:	19. 01. 2021
Decided on:	24. 02. 2021

Judgement

Aluwihare PC J.,

The Plaintiff-Respondent-Respondent (hereinafter sometimes referred to as the 'Plaintiff') instituted action in the Commercial High Court of Colombo against the 1st and the 2nd Defendant-Respondent-Respondent (hereinafter sometimes referred to as the '1st and 2nd Defendants respectively') on the premise that they failed to honour the terms and conditions of a Guarantee Bond signed by the 1st and the 2nd Defendants, securing the re-payment of the monies lent to the Principal Debtor by the Respondent Bank.

The Sequence of Events

Court issued summons on the 1st and 2nd Defendants and the summons had been served on the 1st Defendant. On 5th May 2010, when the matter was called before the court, an Attorney-at-Law had appeared on behalf of the 1st Defendant and moved for time to file the Proxy and the Answer.

Accordingly, the matter was fixed for the 17th June 2010, for the filing of the 1st Defendant's Proxy and Answer. When the matter was called on 17th June 2010, both the Plaintiff and the Defendants had been absent, as such there had been no order made by the Court. The journal entry states "*Plaintiff is not present. Defendants are not present. No order.*"

More than three years later, on 7th November 2013 the Plaintiff moved the Court to re-issue summons against the 1st and 2nd Defendants. The Fiscal had reported that he was unable to serve summons, since the 1st Defendant's house was closed. Thereafter, on 4th July 2014 the Plaintiff moved Court to have summons served on the 1st Defendant by way of substituted service, which was allowed.

When this matter came up before the Court on 28th October 2014, a Proxy had been filed on behalf of the 1st Defendant. The 1st Defendant however, did not proceed to

file an answer, but moved court to apply the provisions embodied in Section 402 of the CPC and sought the dismissal of the Plaintiff's case. The Plaintiff filed objections [19th March 2015] against the said application of the 1st Defendant and the matter was fixed for inquiry on 23rd June 2015. The inquiry into the Section 402 application was concluded based on the written submissions filed by the respective parties and the Order was pronounced on 4th September 2015.

The Order of the High Court

The Court by the said order held that Section 402 of the CPC ought not to be applied in the given situation. The learned Trial Judge [predecessor of the learned High court judge whose order is impugned in these proceedings] observed that, although none of the parties was present when the matter came up before Court on the 17th June 2010 and the record was journalized as "*no order*", by motion dated 07th November 2013, the Attorney-at-Law for the Plaintiff, nevertheless, had got the case called on the 13th November 2013 [Journal entry No. 6]. The learned High Court Judge had also observed that, according to the journal entry No. 6, the Plaintiff had obtained an order to have summons re-issued on the 1st Defendant and had taken steps to have summons served on the 1st Defendant.

The learned High Court Judge having formed the view, that his predecessor, by making an order to have the summons re-issued, had thought it fit to entertain the application of the Plaintiff, it would not be appropriate at that juncture for him to exercise the discretion vested with the Court in terms of Section 402 of the CPC in favour of the 1st Defendant and rejected the application of the 1st Defendant.

Aggrieved by the aforesaid order, the 1st Defendant is now canvassing the legality of the same before this court.

This Court granted Leave to Appeal and the question that was raised before us was; "***whether the impugned order is contrary to Section 402 of the CPC in that the learned High Court Judge erred in law by failing to consider the material facts in the correct***

perspective, thus misdirecting himself in law.' [paragraph 2 of the petition of the 1st Defendant]

It was argued on behalf of the 1st Defendant that, since the Plaintiff had failed to take any steps to prosecute the action for a period exceeding three years, the Court ought to have made an order to abate the action in terms of Section 402 of the CPC.

The Learned Counsel for the 1st Defendant-Appellant argued that the Plaintiff defaulted, by not being present in court on 17th June 2010 and did not take any step to prosecute the case until 7th November 2013 thus, satisfying all the conditions for an order of abatement of the action, in terms of Section 402 of the CPC.

If I may refer to the sequence of events, as per the relevant journal entries they are as follows.

On 17th June 2010:

> Neither the Plaintiff nor the Defendant was present, and it was journalized as "*No order*".

On 7th November 2013:

> Plaintiff filed a motion and moved to have summons re-issued on the Defendants and to have the matter called on 17th January 2014 as the summons returnable date.

On 13th November 2013:

> The Court having considered the motion [dated 7th November 2013] ordered to have summons re-issued on the Defendants returnable on 17th January 2014.

Although there appears to be a lack of diligence on the part of the Plaintiff to take necessary steps with regard to the case, the Plaintiff also had faced numerous difficulties in having summons served on the Defendants. The 1st Defendant-Appellant appeared before Court on 3rd September 2014 only after summons were served through substituted service.

Section 402 of the CPC reads as follows;

"*If a period exceeding* ***twelve months*** *in the case of a* ***District Court*** *or Family Court, or six months in a Primary Court,* ***elapses*** *subsequently to the* ***date of the last entry*** *of an order or proceeding in the record* ***without the plaintiff taking any steps*** *to prosecute the action where any such step is necessary, the* ***court may*** *pass an order that the action shall abate.*" [emphasis is mine]

What is significant is that, in terms of Section 402 of the CPC, making an order *'that the action shall abate'*, is discretionary as indicated by the choice of the word 'may'; "*the court* ***may*** *pass an order*". Thus, even in instances where twelve months had lapsed, subsequent to the date of the last entry of an order or proceeding, without the Plaintiff taking any step to prosecute action, there is no compulsion on the court to pass an order to abate the action.

Although the statutory provision does not so stipulate, the jurisprudence developed over the years now requires the court to make an order abating the action, only after due notice to the Plaintiff. The court should never exercise the power (under section 402) *ex mero motu* (*vide* **Fernando v. Peris** 3 NLR 77). In the case of **Supramaniam et al v. Symons** 18 NLR 229 [at page 231] Wood Renton CJ observed "*It is now, I believe the practice in many of the District Courts for the Judge himself to take the initiative and pass orders of abatement under Section 402* ***after having given due public notice of his intention to do so.***" [emphasis added]

The Learned High Court Judge necessarily would have been alive to the fact that more than three years had lapsed since the last entry, when he was called upon to consider the motion of the Plaintiff, moving to have summons reissued. Thus, when he (upon consideration of the motion) permitted the application of the Plaintiff and allowed summons be re-issued, it has to be construed that such permission was given after addressing his judicial mind to the application of the Plaintiff. Thus, it is clear that the Learned High Court Judge, even when he could have exercised his discretion against the Plaintiff under Section 402 and caused the action to abate, decided otherwise. The fact that he did not take steps to inform the Plaintiff (as now required by law) about

any intention to abate the action and that he decided to make an order to reissue summons, is clearly demonstrative of that decision. In my view, the exercise of the discretion by the learned High Court Judge in favour of the Plaintiff is neither unreasonable nor arbitrary, considering the facts and circumstances of this case.

The Learned Counsel for the 1st Defendant-Appellant drew the attention of court to the case of **Buffin v. Anthony Neville and Another** SC Appeal 63/16 SC Minutes 14. 06. 2018. The circumstances of the case of **Buffin** (*supra*) can be clearly distinguished from the case before us. The facts were these. In October 1994 the case was laid by for the reason that the Plaintiff had not taken any steps. In December of the same year (1994) the Plaintiff moved to have the proxy revoked and the court permitted the same. In 2009, almost 16 years later, by way of a motion the Plaintiff, filing a fresh proxy, moved to proceed against two of the Defendants.

When this motion came up for consideration, the court gave its mind to whether Section 402 of the CPC should be applied in view of the fact that the Plaintiff had been dormant for sixteen years and ordered summons on the Defendants affording them also an opportunity to place their position with regard to abating the action of the Plaintiff in terms of Section 402 of the CPC.

Thus it is seen [in the case of **Buffin**], that there had been an uninterrupted gap of sixteen years between the date on which the Plaintiff got the proxy revoked (December 1994) and the date on which the court took into consideration the Plaintiff's application to proceed against some of the Defendants in 2009. Furthermore, the court did not consider the application of the Plaintiff nor did the court make "any entry" relating to the application of the Plaintiff, moving to accept the new proxy. The court, however, gave its mind as to whether that was a fit instance to make an order of abatement in terms of Section 402 of the CPC.

The questions of law that were raised in the case of **Buffin** [*supra*] was quite different to the question of law raised in the present case. The main question that was raised in the case of **Buffin** [*supra*] was whether the motion [fresh proxy] filed by the Plaintiff in that case in 2009 which was journalized as journal entry No.6 should be

considered as the ***'last entry'*** from which the period of 12 months should be counted for the purposes of Section 402 of the CPC.

This was rightly rejected by the Supreme Court for the reason that, the journal entry No.6 referred to above remained merely as an administrative or clerical act which was not visited with a 'judicial mind'. [see the case of **Kumarihamy v. Keerthirathne** 12 Times Law Report pg. 80]

As opposed to that, in the present case the court had considered the application of the Plaintiff on the13th November 2013 and made an order [an entry] allowing the application of the Plaintiff without proceeding to act under Section 402 of the CPC. Thus, it is clear that the Plaintiff had taken "**a step"** in 2013, to prosecute the action and by the order dated 13th November 2013, the court had permitted it.

When the Defendant made the application to abate the action of the Plaintiff on the 28th of October 2014, in terms of Section 402 of the CPC, the learned High Court Judge was required consider;

(1) Whether there was an entry of an order or proceeding in the record in the 12-month period, immediately preceding 28th October 2014.
And if so,

(2) Whether such entry relates to any step taken by the Plaintiff to prosecute the action.

Having given his mind to the conditions referred to above, the learned High Court Judge correctly held that although three years have elapsed between 7th November 2010 and 28th October 2014, by allowing the Plaintiff's application on 13th November 2013, his predecessor had permitted the Plaintiff to take a step to prosecute the action. Therefore, the relevant date for computing the period of 12 months referred to in Section 402 of the CPC is 13th November 2013. Hence, when the learned High court judge was called upon to apply section 402 of the CPC, the Plaintiff had, within a period of 12 months, taken a step rendered necessary by a positive requirement of the law.

In the case of **Samsudeen v. Eagle Star Insurance Co LTD.** 64 NLR 372, Justice Tambiah, after considering a long line of cases held that; *"Both on principle and on authority it seems to us that unless the plaintiff has failed to take a step rendered necessary by the law to prosecute his action, an order of abatement should not be made under section 402 of the Civil Procedure Code".*

Considering the above I am of the view that the Learned High Court Judge had not erred in overruling the preliminary objection raised on behalf of the 1st Defendants and I answer the question of law in the negative.

Accordingly, the appeal is dismissed, and the Respondents would be entitled to the costs of this application.

Appeal dismissed.

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 appeal after obtaining from the Supreme Court leave to appeal against the Judgment dated 03/08/2010 delivered by the High Court of the Sabaragamuwa Province in Appeal No: SP/HCCA/KAG/587/2008(F) DC Kegalle Case No: 23878

Vidanalage Dingiri Banda (Deceased), of Kurunegoda, Kotiyakumbura.

Plaintiff

Vithanalage Senathileke of Kurunegoda, Kotiyakumbura.

Substituted Plaintiff

S.C. Appeal No. 198/2012
SP/HCCA/KAG Case No. 587/2008(F)
D.C. Kegalle Case No. 23878/P

Vs.

1. Henaka Ralalage Punchi Banda alias Vijitha Bandara,
   Kurunegoda,
   Kotiyakumbura.

2. Henaka Ralalage Podi Appuhamy (Deceased),
   No. 29, Kurunegoda,
   Kotiyakumbura.

2A. Henaka Ralalage Wimalasiri Menike,
   No. D27, Kurunegoda,
   Kotiyakumbura.

3. V.P.C. Vitharana,
   No. D34, Kurunegoda,
   Kotiyakumbura.

4. Henaka Ralalage Somarathne,
   No. D33, Kurunegoda,
   Kotiyakumbura.

5. Henaka Ralalage Wijeratne (Deceased),
   No. D33/1, Kurunegoda,
   Kotiyakumbura.

5A. Henka Ralalage Sriyani Wijeratne,
   No. 400/1, Kadurugashena, Hiyare East,
   Hiyare, Galle.

6. Henaka Ralalage Dingiri Appuhamy
   (Deceased),
   Kurunegoda, Kotiyakumbura.

6A. Henaka Ralalage Piyarathne,
   Kurunegoda, Kotiyakumbura.

7. Henaka Ralalage Mohotti Appuhamy
   (Deceased),
   Kurunegoda, Kotiyakumbura.

7A. Henaka Ralalage Kamalawathie,
   No. D29, Kurunegoda,
   Kotiyakumbura.

8. Henaka Ralalage Gunathilake,
   Kurunegoda, Kotiyakumbura.

9. Henaka Ralalage Dingiri Appuhamy
   (Deceased),
   Kurunegoda, Kotiyakumbura.

9A. Henaka Ralalage Piyaratne,
Kurunegoda, Kotiyakumbura.

10. Ranasinghe Hettiarachchige Gunasekara,
Kurunegoda, Kotiyakumbura.

11. H.R. Podiralahamy (Deceased),
Kurunegoda, Kotiyakumbura.

11A. Henaka Ralalge Premadasa,
Kurunegoda, Kotiyakumbura.

12. Henaka Ralalage Piyaratne,
Kurunegoda, Kotiyakumbura.

13. Henaka Ralalge Wimalsiri Manike (legal representative of the 2nd Defendant deceased),
Kurunegoda, Kotiyakumbura.

14. P.R.Ranmenike,
Kurunegoda, Kotiyakumbura.

Defendants

AND

3. V.P.C. Vitharana,
No. D34, Kurunegoda,
Kotiyakumbura.

4. Henaka Ralalage Somarathne,
No. D33, Kurunegoda,
Kotiyakumbura.

5. Henaka Ralalage Wijeratne (Deceased),
No. D33/1, Kurunegoda,
Kotiyakumbura.

5A. Henka Ralalage Sriyani Wijeratne,
No. 400/1, Kadurugashena, Hiyare East,
Hiyare, Galle.

10. Ranasinghe Hettiarachchige Gunasekara,
Kurunegoda, Kotiyakumbura.

Defendant-Appellants

Vs.

Vidanalage Dingiri Banda (Deceased), of
Kurunegoda, Kotiyakumbura.

Plaintiff-Respondent

Vithanalage Senathileke of Kurunegoda,
Kotiyakumbura.

Substituted Plaintiff-Respondent

1. Henaka Ralalage Punchi Banda alias
Vijitha Bandara,
Kurunegoda, Kotiyakumbura.

2. Henaka Ralalage Podi Appuhamy
(Deceased),
No. 29, Kurunegoda,
Kotiyakumbura.

2A. Henaka Ralalage Wimalasiri Menike,
No. D27, Kurunegoda,
Kotiyakumbura.

6. Henaka Ralalage Dingiri Appuhamy
(Deceased),
Kurunegoda, Kotiyakumbura.

6A. Henaka Ralalage Piyarathne,
Kurunegoda, Kotiyakumbura.

7. Henaka Ralalage Mohotti Appuhamy
(Deceased),
Kurunegoda, Kotiyakumbura.

7A. Henaka Ralalage Kamalawathie,
No. D29, Kurunegoda,
Kotiyakumbura.

8. Henaka Ralalage
Gunathilake,Kurunegoda,
Kotiyakumbura.

9. Henaka Ralalage Dingiri Appuhamy
(Deceased),
Kurunegoda, Kotiyakumbura.

9A. Henaka Ralalage Piyaratne,
Kurunegoda, Kotiyakumbura.

11. H.R. Podiralahamy (Deceased),
Kurunegoda, Kotiyakumbura.

11A. Henaka Ralalge Premadasa,
Kurunegoda, Kotiyakumbura.

12. Henaka Ralalage Piyaratne,
Kurunegoda, Kotiyakumbura.

13. Henaka Ralalge Wimalsiri Manike (legal
representative of the 2nd Defendant
deceased),
Kurunegoda, Kotiyakumbura.

14. P.R.Ranmenike,
Kurunegoda, Kotiyakumbura.

Defendant-Respondents

AND NOW BETWEEN

3. V.P.C. Vitharana,
No. D34, Kurunegoda,
Kotiyakumbura.

10. Ranasinghe Hettiarachchige Gunasekara,
Kurunegoda, Kotiyakumbura.

Defendant-Appellant-Petitioners

Vs.

Vidanalage Dingiri Banda (Deceased), of
Kurunegoda, Kotiyakumbura.

Plaintiff-Respondent

Vithanalage Senathileke of Kurunegoda,
Kotiyakumbura.

Substituted Plaintiff-Respondent

1. Henaka Ralalage Punchi Banda alias
Vijitha Bandara,
Kurunegoda, Kotiyakumbura.

2. Henaka Ralalage Podi Appuhamy
(Deceased),
No. 29, Kurunegoda,
Kotiyakumbura.

2A. Henaka Ralalage Wimalasiri Menike,
No. D27, Kurunegoda,
Kotiyakumbura.

6. Henaka Ralalage Dingiri Appuhamy
(Deceased),
Kurunegoda, Kotiyakumbura.

6A. Henaka Ralalage Piyarathne,
Kurunegoda, Kotiyakumbura.

7. Henaka Ralalage Mohotti Appuhamy
(Deceased),
Kurunegoda, Kotiyakumbura.

7A. Henaka Ralalage Kamalawathie,
No. D29, Kurunegoda,
Kotiyakumbura.

8. Henaka Ralalage
Gunathilake,Kurunegoda,
Kotiyakumbura.

9. Henaka Ralalage Dingiri Appuhamy
(Deceased),
Kurunegoda, Kotiyakumbura.

9A. Henaka Ralalage Piyaratne,
Kurunegoda, Kotiyakumbura.

11. H.R. Podiralahamy (Deceased),
Kurunegoda, Kotiyakumbura.

11A. Henaka Ralalge Premadasa,
Kurunegoda, Kotiyakumbura.

12. Henaka Ralalage Piyaratne,
    Kurunegoda, Kotiyakumbura.

13. Henaka Ralalge Wimalsiri Manike (legal representative of the 2nd Defendant deceased),
    Kurunegoda, Kotiyakumbura.

14. P.R.Ranmenike,
    Kurunegoda, Kotiyakumbura.

Defendant-Respondent-Respondents

4. Henaka Ralalage Somarathne,
   No. D33, Kurunegoda,
   Kotiyakumbura.

5. Henaka Ralalage Wijeratne (Deceased),
   No. D33/1, Kurunegoda,
   Kotiyakumbura.

5A. Henka Ralalage Sriyani Wijeratne,
    No. 400/1, Kadurugashena, Hiyare East,
    Hiyare, Galle.

Defendant-Appellant-Respondents

Before: **L.T.B. Dehideniya, J.**

Janak De Silva, J.

Achala Wengappuli, J.

Counsel:

Dr. F.A. Sunil Cooray with Nilanga Perera for the 3rd and 10th Defendants-Appellants-Appellants

Ranil Samarasooriya with Shashiranga Sooriyapatabendi for the Substituted Plaintiff-Respondent-Respondent

Niranjan De Silva with Isuri Jayawardena for the 1A Defendant-Respondent-Respondent

Tharanga Edirisinghe for the 2A and 13th Defendants-Respondents-Respondents

Written Submissions on :

28.03.2013 by the 3rd and 10th Defendants-Appellants-Appellants

06.05.2013 by the 1A Defendant-Respondent-Respondent

05.04.2017 and 16.03.2021 by the 2A and 13th Defendants-Respondents-Respondents

Argued on: 19.02.2021

Decided on: 06.07.2021

Janak De Silva J.

The Plaintiff filed this action in the District Court of Kegalle seeking to partition two contiguous lands called Narangahamulahena containing in extent 12 lahas of paddy sowing and Kalahugahamulahena containing in extent 3 pelas and 5 lahas of paddy sowing.

The dispute between the parties related only to the devolution of title to the corpus.

The learned District Judge upheld the pedigree pleaded by the Plaintiff. Aggrieved by the judgment of the learned District Judge, the 3rd and 10th Defendants-Appellants-Appellants (hereinafter referred to as "Appellants") and the 4th and 5th Defendants-Appellants-Respondents appealed to the High Court (Civil Appeal) Sabaragamuwa Province holden at Kegalle.

By judgment dated 30.08.2010, the appeal was dismissed by the High Court and hence this appeal. Court has granted leave to appeal on the following questions of law:

(a) Has the High Court erred by holding that apart from the oral testimony of the 3rd Defendant there is no evidence to arrive at the conclusion that Siyathuhamy was a child of Menik Ethana, because the judgment in the earlier partition case between the parties, namely Case No. 1661/P, produced marked P15 upholds the same position (pp. 508-509)?

(d) Did the High Court come to the finding that the Defendant-Appellants had not established prescriptive possession of the respective lots, in that the High Court only considered the law relating to prescription contained in certain decided cases, but not the evidence led in this case?

(e) Had the Defendant-Appellants established by oral and documentary evidence led in this case the devolution of title set out in their amended statement of claim?

I will address the issues raised in the same order. The first point to be considered is the maternity of Siyathuhamy and the second is whether the necessary conditions to establish prescription among co-owners have been fulfilled.

The pedigree pleaded by the Appellants was based upon Menik Ethana being the mother of Siyathuhamy which fact was contested by the Plaintiff.

The best evidence of this fact in issue would have been the birth certificate of Siyathuhamy. The evidence indicates that he was born sometime in the 1830s. Due to the absence of a formalized system of registration of births in the country at that time, no adverse inference should be drawn against the Appellants for the failure to produce the birth certificate of Siyathuhamy.

The learned counsel for the Appellants submitted that there was a previous partition action in the District Court of Kegalle bearing No. 1661/P between the parties where it was held that Menik Ethana is the mother of Siyathuhamy and that this finding was disregarded by the High Court. I observe that the evidence in that case as to the mother of Siyathuhamy was inconsistent and various documents suggested that the name of the mother was Menik Ethana, Kuda Ethana or Dingiri Ethana. Upon a careful examination of the judgment in D.C. Kegalle 1661/P (P15), I find that the learned District Judge did not come to any definitive finding that Menik Ethana is the mother of Siyathuhamy. On the contrary he proceeds to hold that irrespective of the name of his mother, Siyathuhamy inherited a share of the corpus on maternal inheritance.

The learned counsel for the Appellant further submitted that the death certificate of Siyathuhamy (4D4) indicated that his mother was Henaka Ralalage Menik Ethana which fact was also overlooked by the High Court. This raises an important question *viz.* the relevancy and probative value of the details of the father or the mother contained in the death certificate of the deceased.

The registration of births and deaths was first brought within a legislative framework by Ordinance No. 18 of 1867 which was repealed by Ordinance to Amend the Laws on Registration of Births and Deaths No. 1 of 1895. The death certificate of Siyathuhamy (4D4) was issued in terms of this Ordinance. Section 42 therein mandates that a certified copy of a death certificate shall be received as prima facie evidence of the birth or death or still-birth to which it refers without

any further or other proof of such entry. This is descriptive of the probative value of the details of the birth or death or still-birth only. Ordinance No. 1 of 1895 did not give any probative value to other details contained in a death certificate.

The present law relating to the registration of births and deaths is contained in Births and Deaths Registration Act No. 17 of 1951 as amended. Section 57 therein mandates that a certified copy of a death certificate shall be received as prima facie evidence of the birth or death or still-birth to which it refers and applies to death certificates issued under Ordinance No. 1 of 1895 as well as this Act. This is descriptive of the probative value of the details of the birth or death or still-birth only. Thus, the Births and Deaths Registration Act No. 17 of 1951 as amended also did not give any probative value to other details contained in the death certificate.

Accordingly, I hold that the probative value of the contents of a death certificate issued under both Ordinance No. 1 of 1895 and Births and Deaths Registration Act No. 17 of 1951 is limited in terms of those two enactments to the details of the birth or death or still-birth to which it refers and applies to. The two enactments do not confer any probative value to any of the other details contained in a death certificate. Hence the details of the mother of Siyathuhamy contained in his death certificate (4D4) have no probative value in terms of those two enactments.

However, it does not necessarily mean that this information has no relevancy in terms of the Evidence Ordinance. Its relevancy depends on sections 32(5) and 32(6) of the Evidence Ordinance, which deal with the proof of relationship by blood, marriage or adoption between deceased persons, and section 50 of the Evidence Ordinance which deals with the relationship of one person to another.

Upon an examination of these provisions, I am of the view that the details of the mother of Siyathuhamy contained in (4D4) may be relevant only if the required conditions in section 32(5) of the Evidence Ordinance are satisfied as the other provisions have no application to the details of the paternity or maternity contained in the death certificate.

Section 32(5) of the Evidence Ordinance reads:

> "When the statement relates to the existence of any relationship by blood, marriage, or adoption between persons as to whose relationship by blood, marriage, adoption the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised."

According to the death certificate of Siyathuhamy (4D4), the details contained therein were provided by one Henaka Ralalage Dingiri Banda who is described therein as a close relative. Whilst this information has been provided *ante litem motam*, no evidence has been led as to the special means of knowledge of Dingiri Banda about the family details of Siyathuhamy. The importance of establishing the special means of knowledge of the person providing the information was emphasized in *Chellammah v. Vyravan Kanapathy and Others* (65 N.L.R. 49) where the Privy Council did not act on the details of the mother of the deceased included in the death certificate as it was never proved from whom that information came. Therefore, I hold that the details of the mother of Siyathuhamy set out in the death certificate (4D4) are not relevant in terms of section 32(5) of the Evidence Ordinance.

In any event, the mere fact that Dingiri Banda is identified as a close relative of Siyathuhamy is insufficient by itself to make the information about his mother relevant in terms of section 32(5) of the Evidence Ordinance in view of the contradictory nature of the evidence before court on this issue.

In particular, I observe that in deed No. 16288 (2V5), the vendor of which is Siyathuhamy, the recital states that Siyathuhamy became the owner on maternal inheritance from his mother Kuda Ethana. This is relevant, as an admission, in terms of section 21 of the Evidence Ordinance or in terms of section 32(5) of the Evidence Ordinance due to the special knowledge of Siyathuhamy.

Indeed, such evidence would be very strong evidence of the family relationship as decided in *Cooray v. Wijesuriya* (62 NLR 158 at 162) where Sinnetamby J. stated:

> *"It is a practice with some notaries to recite the vendor's title in the deed they attest. For instance, a deed may recite that the vendor's title to a share is derived by inheritance from a deceased father and the father's name is given. Such a recital being a statement made by a deceased vendor having special means of knowledge and made ante litem motam would be admissible to establish relationship: in fact it would be very strong evidence of the family relationship."*

On the contrary, deed No. 15345 (4V1) tendered on behalf of the 4th Defendant-Appellant-Respondent, where also the vendor is Siyathuhamy, the recital does not identify the mother of Siyathuhamy although it is claimed that he derived title to the land on maternal inheritance.

The burden of proof of the pedigree pleaded by the Appellants was on them. Consequently, they should have proved that Menik Ethana was the mother of Siyathuhamy. Although the Appellants placed much reliance on the death certificate of Siyathuhamy (4D4), its probative value is limited to the details of the death. The fact that his mother is identified as Menik Ethana in the death certificate (4D4) is irrelevant as the required conditions in section 32(5) of the Evidence Ordinance are not met. The learned District Judge in the judgment in D.C. Kegalle 1661/P (P15) did not come to any definitive finding that Menik Ethana is the mother of Siyathuhamy.

For the foregoing reasons, I hold that the Appellants have failed to prove that Siyathuhamy was the son of Menik Ethana.

On the issue of prescription, the case of the Appellants, in terms of points of contest 44 and 46, is that they have prescribed to lot 5 in plan No. 979 and lot 7A in plan No. 979A. Where a party invokes the provisions of Section 3 of the Prescription Ordinance in order to defeat the ownership of an adverse claimant to immovable property, the burden of proof rests fairly and squarely on him to establish a starting point for his or her acquisition of prescriptive rights [*Chelliah v. Wijenathan et al* (54 N.L.R. 337)]. In their statement of claim, the Appellants claim to have possessed these two lots for more than 60 years prior to the institution of the action in 1983 after an amicable partition. Hence it was incumbent on the Appellants to prove that at least by 1933 they had prescribed to the lots claimed by them.

The legal position on prescription among co-owners is well-settled. In *Corea v. Iseris Appuhamy* (15 NLR 65) the Privy Council held that, in law, the possession of one co-owner is also the possession of his co-owners and that it was not possible to put an end to that possession by any secret intention in his mind and that nothing short of ouster or something equivalent to ouster could put an end to that possession. In *Tillekeratne v. Bastian* (21 NLR 12) it was held that it was open to the Court, from lapse of time in conjunction with the circumstances of the case, to presume that possession originally that of a co-owner had since become adverse. Whether the presumption of ouster is to be drawn or not depends on the circumstances of each case.

The preliminary plan no. 979 indicates that lot 5 had defined boundaries at the time of the survey. The fact that co-owners possessed lots having defined boundaries on the ground has probative value indicating that an amicable partition may indeed have taken place amongst the co-owners. However, in my view this by itself is not conclusive of a change of circumstances amounting to an ouster required to put an

end to co-ownership. Indeed, there is other evidence available in this case which negates any such conclusion.

In *Abdul Majeed v. Ummu Zaneera* (61 N.L.R. 361) De Silva J. with Fernando J. agreeing held that in considering whether or not a presumption of ouster should be drawn by reason of long-continued possession alone, of the property owned in common, it is relevant to consider *inter alia* documents executed on the basis of exclusive ownership. However, I observe that in this case evidence of the execution of several deeds over a period of nearly fifty years indicates the contrary. Several deeds executed after 1933 by the co-owners, such as deed No. 1999 (P4) executed in 1935, deed No, 2779 (P5) executed in 1940, deed No. 13100 (2V2) executed in 1946, deed No. 6120 (P7) executed in 1960, deed No. 3745 (P6) executed in 1965, deed No. 21744 (4V6) executed in 1967 and deed No. 927 (P8) executed in 1972 describe their share of the corpus as undivided shares which indicate that the co-owners continued to consider the corpus as co-owned.

Furthermore, the preliminary survey plan prepared in 1985 indicates that admittedly there was common plantation ranging from 20 to 50 years in the several lots identified therein which in my view negates any presumption of ouster by long possession beginning from 1933.

For the foregoing reasons I hold that the Appellants have failed to establish that the co-ownership came to an end by amicable partition and them prescribing to the lots claimed by them. I agree with the conclusion of the learned High Court Judge that the only conclusion one could arrive at from the evidence adduced in this case is that the co-owners possessed the corpus in separate lots for the convenience of possession and not with the intention of ending the co-ownership.

Therefore, I answer all three questions of law in the negative.

Accordingly, I affirm the judgment of the learned District Judge of Kegalle dated 16th September 2008 and the judgment of the High Court (Civil Appeal) Sabaragamuwa Province holden at Kegalle dated 30th August 2010 and dismiss this appeal with costs. The Registrar is directed to take steps accordingly.

The Substituted Plaintiff-Respondent-Respondent shall be entitled to his costs both in the High Court (Civil Appeal) Sabaragamuwa Province holden at Kegalle and in this court.

Appeal dismissed.

Judge of the Supreme Court

L.T.B. Dehideniya, J.

I agree.

Judge of the Supreme Court

Achala Wengappuli, J.

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.

Veerasamy Sivathasan
Pillaiyar Kovil,
Uppukulam,
Mannar.

1st Accused – 1st Appellant – Appellant

Vs.

SC Appeal 208/2012
CA Appeal No. 46/2008
HC Vavuniya Case No. HCV/1946/07

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

Complainant – Respondent – Respondent

Before : **B.P. Aluwihare, PC, J**
Yasantha Kodagoda, PC, J
Janak De Silva, J

Appearance: Anil Silva, PC with Nandana Perera, instructed by Gowry Thavarasha for the 1st Accused – 1st Appellant - Appellant.
Ayesha Jinasena, PC, Additional Solicitor General with Chathuranga Bandara, State Counsel for the Complainant – Respondent - Respondent.

Argued on: 22nd January, 2021

Written Submissions:
For the 1st Accused – 1st Appellant – Appellant filed on 4th January 2013 and 16th February 2021.
For the Complainant – Respondent - Respondent filed on 16th February 2021.

Decided on: 15th December, 2021

Yasantha Kodagoda, PC, J

This judgment relates to an Appeal against a judgment of the Court of Appeal. The impugned judgment of the Court of Appeal resulted in the dismissal of an Appeal against a conviction and sentence imposed on the Appellant before this Court (1st Appellant before the Court of Appeal) by the High Court of Vavuniya. By the same judgment, the Court of Appeal had allowed the Appeal of the 2nd Appellant before the Court of Appeal, and accordingly acquitted him.

The two Appellants before the Court of Appeal had been indicted in the High Court of Vavuniya by the Honourable Attorney-General for having on or about 16th August 2004, in Mannar, trafficked 1,503 grammes of Diacetyl Morphine (Heroin) and in the course of the same transaction, for having possessed the same quantity of heroin. Thereby, the Honourable Attorney-General had alleged that both accused had committed offences in terms of sections 54A (b) and 54A (d), respectively, of the Poisons, Opium and Dangerous Drugs Ordinance, as amended by Act No. 13 of 1984. It is common ground that the two accused who are brothers were indicted on the footing that these offences had been committed by them jointly. Following a trial before the High Court of Vavuniya, both Accused were found "*guilty*" of having committed the afore-stated offences. Accordingly, they were convicted, and sentenced to serve life imprisonment. Both Accused appealed to the Court of Appeal against their convictions and sentences, and following argument, the Court of Appeal allowed the Appeal presented on behalf of the 2nd Accused – 2nd Appellant, and set aside his conviction and sentence. The conviction and sentence of the 1st Accused (the present Appellant) was affirmed, and accordingly his Appeal was dismissed.

Having considered a Petition seeking Special Leave to Appeal against the afore-mentioned judgment of the Court of Appeal, this Court has been pleased to grant Special Leave to Appeal on the following three questions of law, which are reproduced verbatim:

(i) Did the learned Judges of the Court of Appeal misdirect themselves in not considering the defence version at all, and affirming the conviction of the Appellant?

(ii) Did the learned Judges of the Court of Appeal misdirect themselves when they failed to consider that although credibility of a witness is primarily the function

of the trier of facts, when the said trier of facts has failed to analyse the defence evidence and has deprived the accused of his constitutional protection to a *fair trial*, a duty is cast on the Court of Appeal to ensure that a miscarriage of justice does not occur?

(iii) Did the learned Judges of the Court of Appeal misdirect themselves when they failed to appreciate that the learned trial judge did not analyse the evidence led by the prosecution with caution resulting in a miscarriage of justice?

Case for the prosecution

Albeit brief, the case for the prosecution is that the commission of the offences of trafficking and possession of heroin, jointly committed by the two accused was detected on 16th August 2004, in Mannar, by officers of the Police Narcotics Bureau (PNB). According to prosecution witnesses Inspector of Police (IP) C.K. Welagedera and Woman Sub Inspector of Police (WSI) Dayanee Gamage (who had been promoted as a Woman Inspector of Police at the time of the trial), the commission of offences was detected sequel to an information received by WSI Gamage from a personal informant of hers and an ensuing raid (planned detection of the committing of the offence) conducted by officers of the PNB.

Upon receipt of information, WSI Gamage had communicated its contents to IP Welagedera. On 15th August 2004, a team of police officers of the PNB which included IP Welagedera and WSI Gamage left Colombo to Mannar. On the way, at Medawachchiya (located on the Anuradhapura – Mannar Road), WSI Gamage met with the informant and discussed matters with him. Thereafter, the informant proceeded to Mannar. On the early hours of the 16th, WSI Gamage received further information from the informant, and accordingly, the PNB officers also proceeded to Mannar. They met the informant near the Mannar Hospital.

Based on the guidance given by the informant (who proceeded with them), the team had gone up to the Pillaiyar Kovil (also referred to as the *Sithy Vinayagar Alayam Kovil*) in Uppukulam, Mannar. According to the testimony of WSI Gamage, they stopped the van in which they were travelling near a culvert opposite the kovil. Two persons were seen standing in front of the entrance to the kovil. The informant pointed them out and said that they were the drug traffickers he previously referred to, and that there was heroin in the bag one of them was carrying. (As the informant did not testify at the trial, the contents of the information received are inadmissible and hence were not treated as substantive evidence against the accused. However, it is admissible and relevant for the limited purpose of providing an explanation of the conduct of the two PNB officers. Thus, the afore-stated reference to what the informant told the two PNB officers.) Consequently, IP Welagedera and WSI Gamage got down from the van. The driver of the van was asked to drive the van away to Mannar town and drop off the informant.

According to IP Welagedera, the two accused were seen initially standing near some pillars that were at the entrance to the kovil, and was subsequently seen walking out of the kovil. IP Welagedera saw the 1st Accused carrying a bag (referred to by him as a *'polysack bag'* and by WSI Gamage as a *'manure bag'*, which is evidently colloquial synonyms) and the 2nd accused walking besides him. IP Welagedera approached the 1st accused, introduced who he was to the two accused, and attempted to apprehend him while taking control of the bag the 1st Accused was carrying. Both accused resisted. The 2nd Accused started assaulting IP Welagedera and attempted to regain control of the bag, which by that time was under the control of IP Welagedera. Meanwhile, the 1st Accused put his hand around the neck of IP Welegedera and clutched his neck. WSI Gamage intervened. In the ensuing struggle, WSI Gamage bit the hand of the 1st Accused and thereby relieved IP Welegedera. In the meantime, she apprehended the 2nd Accused and hand-cuffed him. Soon thereafter, IP Welagedera arrested the 1st Accused. At this time, two other persons came towards IP Welagedera and WSI Gamage. The two police officers

assumed that they came to aid the two apprehended accused. Thus, two police sergeants of the PNB team who had previously got down from the van, arrested those two persons as well. PNB officers were able to apprehend them (Veerasamy Sivabalan and Wickremasinghe Gunasinghe) without much difficulty.

According to prosecution witnesses, the incident involving the arrest of the two accused and the other two suspects had given rise to a commotion in the area. There is some evidence that IP Welagedera was assaulted. In the circumstances, the officers had concerns about their security. Thus, they rushed away from the scene along with the four suspects in the two vans they travelled in, and proceeded initially to Medawachchiya. WSI Gamage reported what had happened to SSP Pujitha Jayasundera who was their superior officer (at that time, the officer-in-charge of the PNB). On his instructions, on the same day they proceeded to Anuradhapura, and instead of producing the suspects before the Magistrate of Mannar (before whom, ordinarily the suspects ought to have been produced), they produced all four suspects before the Magistrate of Anuradhapura. On the request of the PNB (made in terms of section 82(3) of the Poisons, Opium and Dangerous Drugs Ordinance), the learned Magistrate had issued permission for the PNB to detain the suspects in police custody for a period not exceeding seven days. Subsequently, the suspects had been brought to Colombo and detained at the PNB Headquarters. This had been to facilitate the conduct of further investigations. On the 19th, the suspects had been taken to Mannar, and on the 20th produced before the Magistrate of Mannar. On an application by the PNB, the learned Magistrate had discharged suspect Sivabalan from the proceedings. The other suspects had been placed in remand custody. On a subsequent occasion, once again on an application by the PNB, suspect Wickremasinghe Gunasinghe had also been discharged by Court.

The position of IP Welagedera supported by the testimony of WSI Gamage is that, on an examination of the *polysack* bag, it transpired that inside the bag was a black colour parcel

on which the term *'tulip'* was printed. This parcel was found to contain four smaller parcels containing a brown colour powder, which they believed to be heroin. Subsequent investigations conducted using a field test kit had revealed that the powder which the 1st accused was carrying inside the *polysack* bag contained heroin. These parcels were later sealed and forwarded directly by the PNB to the Government Analyst, for analysis and report. By his report dated 5th October 2004 (produced by the prosecution marked "P9"), the Government Analyst had reported that the gross weight of the powder that was received by his department inside sealed parcels, weighed 4,120 grammes. An analysis of the powder revealed that it contained 1,503 grammes of Diacetyl Morphine (heroin). The evidence relating to the submission of the productions recovered during the raid to the Government Analyst (the integrity of the chain of evidence regarding the productions) and the findings and related expert opinion of the Government Analyst has not been challenged by the Defence.

Case for the defence

Three witnesses including the two accused, testified for the defence. The first defence who testified was Veerasamy Sivabalan - the elder brother of the accused. It is necessary to note that the trial procedure pertaining to the receipt of the defence evidence had been flawed, in that, Sivabalan had been permitted to testify before the two accused testified. Section 201 of the Code of Criminal Procedure Act regulates the receipt of defence evidence in a criminal trial in the High Court presided over by a judge of the High Court sitting without a jury. Though section 201 does not specifically state so, when the defence is called and the accused indicates that he will be giving evidence either from the witness box or by making a statement from the dock, the testimony of the accused must be first received by Court, before permitting other defence witnesses to testify. That procedure is adopted to prevent the accused from listening to the testimonies of other defence witnesses and then shaping his evidence in a particular manner, so as to make it compatible with the testimonies of other defence witnesses who testified before him. In

The Queen v. Tennakone Mudiyanselage Appuhamy*, 60 NLR 313,* Chief Justice Basnayake has observed that permitting an accused to testify after other defence witnesses have testified, is contrary to the practice of both our country and England. Requiring the accused to give evidence (if he chooses to) before other witnesses on his behalf testify, should be necessarily adhered to, unless due to attendant circumstances, doing so is not possible. Where this procedure has not been followed and following the correct procedure was possible, as in this case, the evidence of the accused would be of little value.

Be that as it may, according to Sivabalan, his residence is situated very close to the Sithy Vinayagar Alayam Kovil. The two accused lived with him. On 16th August 2004 around 11.00 – 11.45am, as a child of his had not returned from school, he ventured out in search of the child. On that occasion, he saw three people dragging a known person - one Wickremasinghe Gunasinghe *alias* Ragu and attempting to put him into a van. Sivabalan went up to them, and made inquiries. Then, he had also been apprehended by a member of the team that had apprehended Ragu, and bundled him into the van. He shouted for his safety. His brothers (the two accused) who were at the nearby kovil, came running towards the van. A fight erupted between them and those who apprehended Ragu and him. In the process, Sivabalan had been assaulted. He had also heard a gunshot. Consequently, the group had put the two brothers of the witness (the two accused) into the van, and the van had left the area. The witness denies that any heroin was found in the possession of either of the accused or from the possession of anyone else. Subsequently, all four of them had been taken to the Anuradhapura police station. He had been questioned and his statement had been recorded. The rest of the narrative regarding subsequent events is similar to evidence given by prosecution witnesses.

The second witness for the defence was the 1st accused (Appellant) Sivathasan. According to his testimony, he and his younger brother Pavadasan, are Davil players. They regularly

perform at the kovil. At the time of the incident, he and Pavadasan had been inside the kovil. When he heard his elder brother Sivabalan shouting, he along with Pavadasan had rushed out. He saw Sivabalan being dragged into a van by some persons. He went up to the group of persons and started to assault them. Subsequently, he and his brother had also been bundled into the van and taken away. He denies that at the time he was apprehended, he had in his possession any offensive substance.

The testimony of the 2nd accused – Pavadasan, is parallel to that of Sivathasan. He too denies having along with Sivathasan, been in possession of heroin.

Submissions made on behalf of the Appellant

Learned President's Counsel for the Appellant submitted that, as in the instant matter, when there are two divergent narratives as to how the incident occurred, the trier of facts (High Court judge) without superficially looking at the evidence presented by the prosecution, should have carefully analysed the evidence, including that of the defence, and arrived at a final decision. His position is that the learned judge of the High Court had believed the evidence of the two prosecution witnesses on the basis that there were no *'reasonable contradictions observed'* (quoting words contained in the judgment of the learned judge of the High Court). On the other hand, the learned judge had disbelieved the testimony of defence witness Sivabalan, notwithstanding the absence of any contradictions *per-se*; that being, notwithstanding Sivabalan having made a prompt statement in a hostile situation. Learned President's Counsel further submitted that in those circumstances, the evidence of Sivabalan should not have been rejected.

Turning on to the prosecution evidence, learned counsel for the Appellant submitted that the two key witnesses for the prosecution, namely Welagedera and Gamage were experienced officers of the PNB, and had been trained to give evidence based on notes purported to have been written immediately after the raid. Under such circumstances, he

submitted that it would in any event be difficult to find contradictions in their testimonies. He submitted that therefore, the testimonies of prosecution witnesses should have been considered cautiously. He further submitted that there were *inter-se* contradictions between the testimonies of IP Welagedera and WSI Gamage, regarding the manner in which accused were arrested. Learned judge of the High Court had 'brushed them aside', on the basis that, *'what one person had seen the other witness need not necessarily have seen'*. Counsel's position was that the learned judge had gravely misdirected himself in assessing the evidence of the two prosecution witnesses, which in the circumstances of the case amounted to a denial of a *fair trial*.

Learned President's Counsel for the Appellant also submitted that the learned judge of the High Court had misdirected himself in having formed the view that there existed a contradiction between the testimonies of Sivabalan and the Appellant. This purported contradiction arose due to the cross-examination of Sivabalan, regarding the alleged existence of a 'room' or a *'mudam'* for the two accused, inside the kovil. It was submitted that, the Appellant had testified that while he did not have a 'room' inside the kovil, they had been given a *'mudam'* which was situated within the kovil premises. According to Sivabalan too, the accused did not have a 'room' inside the kovil but they had been given a *'mudam'* by the kovil authorities, which was situated within the kovil 'premises' on the Kovil Road. He thus submitted that Sivabalan had not contradicted himself, nor had a contradiction arisen between the testimonies of Sivabalan and the Appellant. He submitted that this purported non-existent contradiction was not a valid ground for the rejection of Sivabalan's testimony.

Learned counsel also submitted that, if Sivabalan's evidence is accepted, at the lowest, it creates a *'reasonable doubt'* regarding the case for the prosecution, and hence the Appellant would be entitled to an acquittal.

It was further submitted by the learned President's Counsel, that the Appellant (1st accused) and the 2nd Accused gave evidence under oath and were subjected to cross-examination. Their evidence did not give rise to any contradictions or omissions, and there were no contradictions *inter-se* between their testimonies. He submitted that therefore, there was no basis for the Court to have rejected their testimonies.

Finally, learned President's Counsel submitted that the failure on the part of the Appellant to show a reason for the officers of the PNB to have fabricated a story and falsely implicate him and the 2nd Accused, should not be viewed as a factor that strengthens the case for the prosecution or *ipso facto* justifies the rejection of the case for the defence.

In view of the foregoing submissions, learned President's Counsel for the Appellant submitted that the conviction of the Appellant cannot be sustained in law, and hence should be set aside and the Appeal be allowed.

Submissions made on behalf of the Respondent

Learned Additional Solicitor General representing the Respondent prefaced her submissions by submitting that the questions of law raised on behalf of the Appellant were based on *'frivolous and unsupported grounds'*, and therefore should be answered by this Court in the negative. She submitted that the duty of an appellate court is to be satisfied affirmatively, that the prosecution's case was *'substantially true'* and that the guilt of the appellant has been *'established beyond reasonable doubt'*. Unless the appellant has on reasonable grounds satisfied the appellate court that the trial judge had erred in arriving at the finding of guilt, the Court of Appeal cannot reverse the finding of the trial judge. She highlighted that in this matter, the Court of Appeal had arrived at its findings, having carefully examined the evidence placed before the High Court by the prosecution and by

the defence. She submitted that when considering the evidence, the Court of Appeal had been conscious of the denial of the commission of the offence by the defence.

Learned ASG submitted that the Court of Appeal had initially considered the credibility of prosecution witnesses, and satisfied itself regarding the credibility of the two key witnesses, namely Inspectors Welagedera and Gamage. The Court of Appeal had considered the particular aspect of the case which revolved around WSI Gamage's testimony that she bit the hand of the 1st accused and thereby relieved IP Welagedera from the firm grip of the 1st accused, and that aspect of the prosecution's narrative not having been testified to by IP Welagedera. Citing certain observations of Justice Shiranee Tilakawardane in ***The Attorney General v. Sandanam Pitchi Mary Theresa***, *[2011] 2 Sri L.R. 292,* and those contained in ***Bharwada Bhoginbhai Hirjibhai v. State of Gujarat***, AIR 1983 SC 753, the learned Additional Solicitor General submitted that *"it was human for IP Welagedera to not have recalled the incident of 'biting', which resulted in his release of the 1st Accused – Appellant who had tightened the grip"*. She further submitted that in the impugned judgment, the Court of Appeal has observed that, *"… when things occurred in rapid succession it would not be possible for some witnesses to observe as well as certain other witnesses, the sequence and the things that happened."* She submitted that, as concluded by both the High Court and the Court of Appeal, this particular omission in IP Welagedera's testimony had not affected the credibility of prosecution witnesses and the overall case for the prosecution.

Learned Additional Solicitor General further observed that the learned trial judge had the benefit of observing the demeanour and deportment of both key witnesses for the prosecution. They had been subjected to lengthy cross-examination. She submitted that *"their Lordships had been mindful of the priceless advantage the trial judge had over the Court of Appeal in observing the demeanour and deportment of the witnesses … their Lordships had been reluctant to disturb the findings of the learned trial judge …"*. Learned Additional Solicitor

General brought to the attention of this Court the following paragraph in the impugned judgement:

> *"A witness may not observe and remember better than another, the manner in which the incident took place, especially when he was the person who was attempting to subdue and overpower a criminal in order to apprehend him with the contraband, rather than a witness who observes the incident. The person really involved may sometimes be oblivious to the blows he received and the injuries suffered or how and the manner in which he received and suffered, his primary concern being the arrest of the accused, come what may."*

Learned ASG submitted that in view of the prosecution having established *"a very strong prima facie case against the accused … the defence had to offer an explanation for their conduct"*. She submitted that the Court of Appeal had given due consideration to the evidence presented on behalf of the defence. She quoted the following passage contained in the impugned judgment of the Court of Appeal:

> *"… in considering the totality of the evidence, the judge could not be faulted for his conclusions and findings with regard to the 1st Accused – Appellant."*

Learned Additional Solicitor General in her post-argument written submissions submitted that *"… although their decision confined to a single sentence, a careful perusal of the judgment proves that their Lordships had arrived at this conclusion only after giving due consideration to the culpability of the two accused and their conduct"*. Referring to the acquittal of the 2nd accused by the Court of Appeal, learned ASG submitted that, *"… judges of the Court of Appeal did not disbelieve the prosecution witnesses or doubted their credibility in entering the acquittal, but had purely acted in abundance of caution"*.

Due to the defence of 'denial of the commission of the offence', learned ASG submitted that it was necessary to consider whether there was any basis to doubt whether prosecution witnesses had falsely implicated the accused due to some personal animosity. She submitted that the accused being previously unknown to the prosecution

witnesses, and the detection having been conducted in Mannar whereas the witnesses were from Colombo, militates against the possibility of a false implication of the accused by PNB officers. Furthermore, that the gross quantity of heroin detected being 4.12 kg (with a net weight of 1,503 grammes of pure heroin), necessitates the possibility of an 'introduction' being ruled out. She further submitted that the Court of Appeal had observed that there was no reason suggested by the Accused – Appellants as to the motive or a very good reason to foist such a large quantity of heroin on the 1st accused and then arrest the 1st and 2nd accused – Appellants.

Referring to the position of the defence, learned ASG submitted that the defence version was presented to the High Court for the first time only after the case for the defence commenced, and that the position of the defence was not suggested to the two main witnesses for the prosecution during their cross examination.

In this regard, the learned ASG submitted the following:
"It is to be noted that courts have considered the importance of a party putting its case in cross-examination to the witnesses of the other party. This will facilitate the opposing party to challenge such positions. It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross examination, it must follow that the evidence tendered on that issue ought not to be accepted. Sri Lankan Courts have followed this line of thinking with approval."

Learned ASG also highlighted the fact that the defence did not present the testimony of Wickremasinghe Gunasinghe *alias* Ragu, who could have supported the defence position, particularly as he was, according to the defence, the first person to have been apprehended by PNB officers.

In conclusion, learned ASG submitted that, the Court of Appeal had very carefully examined the evidence submitted by both the prosecution as well as the defence and

following careful consideration had decided that the decision of the learned trial judge to convict the 1st Accused – Appellant was correct and can be justified.

In view of the foregoing, learned ASG for the Respondent submitted that the questions raised by the Appellant should be answered in the negative, and that this Appeal should be dismissed.

Consideration and analysis of the evidence

The Appellant launched challenges against his conviction, from two frontiers.

(i) That the version presented by the prosecution is not credible, and hence should be rejected in toto. This assertion was made by learned President's Counsel alternative to the main submission that the prosecution had failed to prove its case beyond reasonable doubt. In both these scenarios, if the Appellant is successful, the accused-appellant would be entitled to an acquittal.

(ii) That the defence version gives rise to a minimum of a reasonable doubt regarding the case for the prosecution, and hence the Appellant should have been acquitted. This assertion is premised upon the footing that, should the case for the defence give rise to a reasonable doubt, the accused would be entitled to an acquittal.

These two issues are necessarily inter-related. A case for the prosecution not being proven beyond a reasonable doubt, arises out of the existence of a reasonable doubt emanating from the case for the prosecution itself. Nevertheless, for clarity, I will deal with these two issues separately. The second argument will be considered first, and consideration will be given to whether the defence version is credible and gives rise to a minimum of a reasonable doubt regarding the case for the prosecution.

Does the case for the defence give rise to a minimum of a reasonable doubt?

A reasonable doubt is a real or actual and a substantial doubt, as opposed to an imaginary or flimsy doubt that may arise in the mind of the decider of facts (judge or the jury, as the case may be), following an objective consideration of all the attendant facts and circumstances. It is a doubt founded on logical and substantial reasoning (well-founded) which a normal prudent person with not less than average intelligence and learnedness in men, matters and worldly affairs, would naturally and inevitably develop in his mind following a comprehensive, objective, independent, impartial and neutral consideration of the totality of the evidence and associated attendant circumstances. It is a doubt that makes the case for the prosecution significantly less probable to have occurred than in the manner purported to have occurred.

A reasonable doubt is not the type of doubt that arises due to incorrect, abnormal or unreasonable comprehension of testimonies and other material which amount to evidence presented at the trial, or due to irrational fear, inappropriate sympathy, or unjustifiable mercy. It is not a doubt that develops in the mind of an imbecile, indecisive or timid person, or in a weak or vacillating mind. A shadow of a doubt, an imaginary doubt, a vague doubt or a speculative or trivial doubt should not be confused with a reasonable doubt. A reasonable doubt is not a doubt that a partisan individual with vested interests would entertain in his mind, or a doubt that such a person would advocate that purportedly exists.

The principle that the prosecution must prove its case beyond reasonable doubt and the accused is entitled to an acquittal if there exists a reasonable doubt, has been engraved in the criminal justice system of this country and in the rest of the common law world. That is to ensure that only those actually guilty of having committed crimes are convicted and the innocent are acquitted. Thus, the application of this principle should cause the advancement of the primary objective of criminal justice (that being 'the conviction of the

guilty through a lawful and fair trial and if found guilty the imposition of an appropriate punishment, and the acquittal of the innocent) and not frustrate it.

In ***Shivaji Sahebrao Bobade & Anr. v. State of Maharashtra***, *AIR 1973 SC 2622,* the Supreme Court of India has commented that, "*the cherished principles of the golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace every hunch and degree of doubt. … Only reasonable doubts belong to the accused. Otherwise any practical system of justice will break down and lose credibility with the community.*"

In ***Dharm Das Wadhwani v. The State of Uttar Pradesh***, *1974 Cri. LJ (SC) 1249,* the Supreme Court of India has observed that, "*… The rule of benefit of reasonable doubt does not imply a frail willow bending to every whiff of hesitancy. Judges are made of sterner stuff and must take a practical view of legitimate inferences flowing from evidence, circumstantial or direct. …*"

In ***Wijesekera (Excise Inspector) v Arnolis***, *(1940) [17 CLW 138],* Justice Wijeyewardene has held that "*… it is not every kind of doubt the benefit of which an accused person is entitled. An accused person could claim only the benefit of a reasonable doubt. It is always possible to conjure up a doubt of a very flimsy nature. But an accused person cannot be acquitted on the ground of such doubt…The guilt or innocence of an accused person must be determined on evidence and not on some suggestion made in the course of an argument…*".

If the testimonies provided by Sivabalan and the two accused are true, the testimonies of IP Welagedera and WSI Gamage are totally false other than for the fact that the incident in issue occurred on 16th August 2004 near the Pillaiyar Kovil (also known as the '*Sithy Vinayagar Alayam Kovil*') in Uppukulam, Mannar. Further, if the defence version is true, the arrest and custody of the two accused, Sivabalan and Wickremasinghe Gunasinghe *alias* Ragu had been without any valid reason and had been unlawful. Thus, in those

circumstances, one would expect them to have reacted in a different manner, without succumbing in silence to the allegedly unlawful conduct of the PNB officers. Had they initiated legal action against the officers for having unlawfully arrested them (which action they were not legally obliged to take), it would have enabled them to have got themselves vindicated. Neither of the accused nor Sivabalan claim to have taken such action. That, to say the least, is somewhat surprising.

According to the defence version, the string of events surrounding the arrest of Wickremasinghe Gunasinghe *alias* Ragu, Sivabalan, and the two accused had commenced when the police team apprehended Wickremasinghe Gunasinghe *alias* Ragu for no valid reason. In fact, the defence version offers no explanation as to why PNB officers would have wanted to apprehend Wickremasinghe Gunasinghe. Thus, the all-important probabilities factor does not support the defence version. Wickremasinghe Gunasinghe would have been in an ideal position to reveal what exactly happened. According to the case record relating to the trial proceedings, the defence has not even attempted to procure his attendance at the trial by moving for the issue of summons on him. As pointed out by the learned Additional Solicitor General, the absence of the testimony of Wickremasinghe Gunasinghe *alias* Ragu in support of the position of the defence, casts a doubt regarding the authenticity of the position of the defence.

Learned Counsel for the Appellant relied heavily on the testimony given by defence witness Sivabalan, who is admittedly the elder brother of the two accused. Therefore, he is to be treated an 'interested witness', who would have certainly wanted to protect his two brothers from being convicted. That a particular witness is an 'interested witness' causes a negative impact on the assessment of that witness's credibility. In ***The Attorney General v. Sandanam Pitchi Mary Theresa****, [(2011) 2 Sri L.R. 292],* which was brought to the attention of this Court by the learned ASG, Justice Shiranee Tilakawardane has made

the following observations regarding the assessment of credibility of interested witnesses:

> *"… not all witnesses are reliable. A witness may fabricate or provide a distorted account of the evidence through a personal interest or through genuine error. …* ***A key test of credibility is whether the witness is an interested or disinterested witness****. …* ***when considering the evidence of an interested witness who may desire to conceal the truth, such evidence must be scrutinized with some care****. The independent witness will normally be preferred to an interested witness in case of conflict. Matters of motive, prejudice, partiality, accuracy, incentive and reliability have all to be weighed.* ***Therefore, the relative weight attached to the evidence of an interested witness who is a near relative of the accused or whose interests are closely identified with one party may not prevail over the testimony of an independent witness.*** *…"*
> (Emphasis added by me.)

It is noteworthy that Justice Tilakawardane had made these observations in the course of commenting upon the credibility that may be attached to the testimony given by a defence witness, who in that case was a sister of the accused. In that case, the evidence of an officer of the PNB which was sought to be contradicted by presenting the evidence of this particular defence witness, was rejected by Court, primarily on the footing that she was an interested witness and therefore had reasons to give false evidence to secure the acquittal of the accused. The observations of Justice Tilakawardane in this regard is of particular relevance to this Appeal, as defence witness Sivabalan is a brother of the two accused.

Furthermore, a careful scrutiny of the proceedings of the trial, reveals that the main position taken up by the defence, that (i) Wickremasinghe Gunasinghe *alias* Ragu was initially apprehended for no valid reason, (ii) thereafter when Sivabalan approached the police to find out why Wickremasinghe Gunasinghe *alias* Ragu was being bungled into a van, he was arrested, and (iii) the two accused were thereafter apprehended, has not been

put in the form of specific **suggestions** to either IP Welagedera or WSI Gamage, when they testified. It has not been suggested to prosecution witnesses that the team of police officers initially apprehended Wickremasinghe Gunasinghe *alias* Ragu, then apprehended Sivabalan and bungled both of them into the police van, well before the two accused were arrested. All what has been suggested to prosecution witnesses is that at the time the two accused were arrested, they did not have anything offensive in their possession, and thus a mere denial of the accusation against them.

In ***Mananage Susil Dharmapala v. Officer-in-Charge, Special Crimes Division, Colombo*** (SC Appeal No. 155/14, SC Minutes of 28th June 2021) this Court has observed the following:

> *"It is necessary to observe that **suggestions** are in fact a component of a comprehensive cross-examination. **Suggestions are factual assertions or propositions put to a witness during cross-examination** by the counsel conducting such cross-examination, for the purposes of (i)impeaching the credibility and testimonial trustworthiness of a witness, (ii) attempting to elicit an item of evidence favourable to the party on whose behalf the cross-examination is being conducted, such as an admission, (iii) indicating to Court the position of the party on whose behalf the cross-examination is being conducted, regarding the testimony given by the particular witness, and (iv) **indicating to Court the position of the party on whose behalf the cross-examination is being conducted, the overall case of the opposing party**."* (Emphasis added by me.)

It would therefore be seen that **suggestions** to prosecution witnesses are very important, and *inter-alia* serve as an opportunity for the defence to place before prosecution witnesses the position of the defence. It enables the Court to take early cognizance of the position of the defence, and also enable prosecution witnesses to respond to the defence position. That the defence placed before Court their position at the first available opportunity also enables it to satisfy the 'test of spontaneity'. Therefore, it is of importance that the defence uses this opportunity to specifically and in unambiguous

terms indicate both to the Court and to prosecution witnesses, the position of the defence. Should the defence not make use of this opportunity and take up a particular position for the first time during the case for the defence, that position will suffer from the weakness of 'belatedness'. Furthermore, when the defence takes up its position belatedly, without putting it to prosecution witnesses, it is not possible to check its veracity. A belatedly taken up defence position would affect the credibility that may be attached to defence witnesses who testify in support of that position, and will also have a negative impact on the evidential weight that could be attached to the position of the defence. I must record my agreement with the submission made in this regard by the learned Additional Solicitor General. Her submission in this regard reflects the *cursus curiae* of both this Court and that of the Court of Appeal on this matter.

According to a suggestion made by learned counsel for the accused to IP Welagedera, the heroin which the prosecution claims to have been in the possession of the 1st Accused (Appellant) had been found by the police on a bicycle parked near the kovil. However, none of the defence witnesses have testified that they saw an occurrence to that effect. It is to be noted that the contents of a suggestion unsupported by evidence, does not have any evidential value. In ***The King v Andris Silva,*** *[(1940) 41 NLR 433],* Moseley, SPJ held that it was not a misdirection to tell the jury that they must not pay the slightest attention to any suggestion put to a witness in cross-examination, unless such suggestion is supported by proof. Thus, a suggestion unsupported by evidence serves hardly any purpose.

Another suggestion made to IP Welagedera has been, that at the time of the incident the two accused were playing drums inside the kovil. Neither of the accused have testified to that effect. In fact, such suggestions which are not subsequently supported by evidence, negatively affect the *bona-fides* of the party that made such suggestions. Furthermore, in their testimonies, the accused have not explained why they were inside

the kovil at that particular time. Furthermore, if at the time the other two suspects were apprehended, the two accused were inside the kovil and they came out when they heard their brother Sivabalan shouting *'ayyo'* (as claimed by the accused), they could have provided some corroborative evidence to that effect from an independent person who was at the kovil at that time, such as a *Poosari.* [Also referred to as a *'Pujari'*, a *Poosari* is a Hindu priest who performs *pooja* (temple rituals) in a *Kovil* (Hindu temple).]

Whether or not the two accused had a room inside the kovil proper or whether it was in the form of a *'mudam'* in the compound of the kovil, and whether there existed a contradiction within the testimony of Sivabalan or between the testimonies of the Appellant and Sivabalan, were matters highly debated between the learned President's Counsel for the Appellant and learned Additional Solicitor General for the Respondent. As to whether there are such contradictions cannot be conclusively determined particularly because neither party has clarified whether the term *'mudam'* is synonymous with the word 'room' and the exact coverage which comes within the purview of the 'kovil premises' and the 'compound of the kovil'. Further, the Appellant and Sivabalan had testified in Tamil language and what was used by both the Court of Appeal and the Supreme Court was an English translation of the trial proceedings. In the circumstances, this Court has decided not to pronounce a finding on that matter. In any event, this Court is of the view that a determination on that matter would not be necessary for the final determination of this Appeal, due to the abundance of reasons which justifies the conclusion reached by this Court.

The testimony provided by the defence does not tender any explanation from where the PNB officers had obtained the *polysack bag* containing over 4 kilogrammes of a brown powder (which contained over 1 kilogramme of heroin). Even according to the defence, the PNB officers did not have any pre-existing reason (such as a previous unsuccessful raid) or any animosity which may have propelled the PNB, to foist heroin on the

Appellant and fabricate a case. It is inconceivable that the PNB officers carried with them this large quantity of heroin from Colombo to be foisted on either the Appellant or any other person. If they found the heroin parcel from the kovil, why should they fabricate a 'story' revealing that the heroin was recovered from the possession of the Appellant? Furthermore, according to the defence version, PNB officers initially apprehended Wickremasinghe Gunasinghe *alias* Ragu. Thus, according to the defence, he had been the prime target of the PNB. If so, why did not PNB officers 'fabricate a story' alleging that it was Wickremasinghe Gunasinghe who had heroin in his possession? Thus, in my view, the version of the defence is riddled with substantial improbabilities and questions which beg answers.

In view of the foregoing, it is necessary to point out that, neither the High Court nor the Court of Appeal can be faulted for not having placed any reliance on the position and alleged version of events presented to the High Court by the defence. Both Courts have in my view, rightly rejected the defence evidence. The conclusion reached by the learned judges, that through the testimonies presented by the three defence witnesses, the defence has not cast a reasonable doubt regarding the case for the prosecution, is in my opinion well-founded.

Is the case for the prosecution of such nature that it should be rejected in its totality? In the alternative, has the prosecution proved its case beyond a reasonable doubt?

The answer to the first question above, should be founded upon a consideration of the totality of the case for the prosecution. If the evidence for the prosecution (i) suffers from inherent improbabilities or is otherwise *ex-facie* incredible and therefore the judge discredits the totality of the evidence on the part of the prosecution, (ii) even if taken at its highest and accepted fully, is insufficient to prove the ingredients of the offence (and thereby the commission of the offence charged against the accused), or (iii) does not give rise to a minimum of a strong *prima-facie* case against the accused, then, the case for the

prosecution should be rejected, and the accused should be acquitted. That could be done either in terms of section 200 of the Code of Criminal Procedure Act at the end of the case for the prosecution, or following a consideration of the defence evidence if any, at the time of the pronouncement of the verdict. If at the time of the closure of the case for the prosecution, one out of the three afore-mentioned deficiencies in the case for the prosecution is detected, then the learned trial judge shall, acting in terms of section 200 of the Code of Criminal Procedure Act, acquit the accused. The accused should be acquitted, without placing an unnecessary and heavy burden on him of having to continue facing the trial.

Though learned President's Counsel for the Appellant couched and presented an argument alleging that the case for the prosecution should be rejected in its totality, he did not advance a basis for moving for the total rejection of the case for the prosecution. His actual focus was on the ground that the case for the prosecution viewed particularly in the light of the case for the defence, was not credible, and hence the prosecution had failed to prove its case beyond a reasonable doubt. His position was that when viewed from the context of the evidence presented by the defence, the prosecution had failed to prove its case beyond reasonable doubt. Thus, the focus of this part of the judgment would be on whether the prosecution had proven its case beyond reasonable doubt.

Relying on evidence presented to Court by the prosecution, it is the legal duty (burden of proof) of the prosecution to prove its case beyond reasonable doubt. That is to prove its case to an extent which does not leave room for a reasonable doubt to arise. That is a high degree of proof, which gives rise to a mental state of satisfaction, to be convinced that the accused had committed the offence.

Former Chief Justice of India M. Monir in ***Law of Evidence*** (5th edition, 1994) (which is a commentary on the Indian Evidence Act, 1 of 1872), at page 353, has stated the following:

"The basic principle of criminal jurisprudence is that a person must be presumed to be innocent until his guilt has been established beyond reasonable doubt. A criminal trial begins with the presumption as to the innocence of the accused, and that presumption continues right up to the time when, after considering all the evidence, the Court comes to the conclusion that the commission of an offence by the accused has been proved beyond the pale of reasonable doubt. … There is no burden on the accused to prove his innocence. The difficulty of proving the necessary ingredients of the offence is no ground for exempting the prosecutor from that duty."

Marcus Stone in ***Proof of Fact in Criminal Trials*** (published by W. Green & Son, 1984, at page 354), has explained 'proof beyond reasonable doubt' in the following manner:

"The standard of proof required for conviction, i.e. beyond reasonable doubt, is stated in terms of belief and not as a degree of probability ... Proof beyond reasonable doubt transcends any acceptance of probability when it produces that state of belief. A tribunal of fact could not convict unless it was actually convinced of guilt to that extent. It must believe in the reality of guilt. A mere mechanical comparison of probabilities, however strong this might point to guilt, would not be enough. The criterion is human and not mathematical. It is a judgment that the facts are established. …

The phrase 'beyond reasonable doubt' is the essential verbal formulation which has been devised by law to express the necessary standard of belief for a criminal conviction. Attempts to improve on or to elaborate on that formulation are discouraged by appeal courts. The phrase appears to be as precise as any other words which could be substituted for it. Proof of facts in court inevitably falls short of absolute certainty, as was said by Lord Guthrie: "Outside the region of mathematics, proof is never anything more than probability. It is for the Court in each case to say whether the probability is so slight, or so equally balanced by counter-probabilities, that nothing more results than a surmise; or whether the probabilities are so strong and so one-sided as to amount to legal proof. The abstract possibility of mistake can never be excluded."

…The standard of proof beyond reasonable doubt refers to the verdict, which is based on the cumulative effect of the whole of the evidence. It may be thought to be a question of law or of logic whether the standard should also apply to each item of evidence upon which a conviction is based…"

As regards the standard of proof to be satisfied in a criminal case, there is no doubt that the prosecution must prove its case beyond reasonable doubt. However, one must take a realistic and pragmatic view of what can be reasonably expected of a prosecution. It is important in my view to bear in mind that a prosecution cannot be expected to prove its case to a degree of mathematical accuracy or scientific certainty. The degree of accuracy and certainty that a prosecution can be reasonably expected to satisfy is much less. That is quite natural, as prosecutions have to rely primarily on human testimony, which is subject to the inherent frailties associated with human observation, memory, recollection, and verbal articulation through oral testimony.

The following type of questioning and questions, (i) repetitive and unnecessarily lengthy cross-examination, (ii) strategically worded questions founded on non-existent or irrelevant facts, a confusing mixture of facts or on trivial matters, (iii) questions using an inappropriately aggressive tone, reverberating noise or intimidating body language, (iv) questions asked without reasonable grounds, (v) indecent or scandalous questions and (vi) questions intended to insult or annoy, can blur memory, cause confusion, instill fear, embarrass, or cause stress, trauma and strain in the mind of a witness. It is the duty of the trial judge to control proceedings and forbid questions which an Attorney-at-Law is precluded or disentitled in terms of the Evidence Ordinance and professional ethics from asking, or are inappropriate, and are aimed at or may result in the obstruction of the course of justice, causing secondary victimization of victims of crime who testify or denying witnesses the entitlement of testifying at a fair trial. Such questions adversely affect the ability of the witness to provide a truthful and detailed account of the incident with clarity and precision. The impact of such unlawful or inappropriate cross-

examination is compounded by the fact that to most lay witnesses, the sheer atmosphere of our Courts can be quite alien, intimidating and fear generating. It is the duty of the trial judge to prevent or control such unlawful or inappropriate cross-examination, and to provide witnesses a conducive environment in which they could testify without any fear or favour. The absence of a conducive environment can have the effect of subverting the course of justice.

Unfortunate delays in the commencement and completion of criminal trials, and long and unjustifiable intervals between successive trial dates (which must be avoided, particularly as in terms of the proviso to section 263(1) of the Code of Criminal Procedure Act, trials must be conducted on a day-today basis unless doing so is impracticable, in the literal sense of the word 'impracticable') are contributory factors that have an adverse impact on the accuracy and quality of human testimony. This is because human testimony is primarily based on human memory, which tends to fade away and get adversely affected due to the passage of time. Indeed, if the testimony of a witness contains intentionally uttered falsehood, such testimony must be rejected, particularly if there is no legal justification to separate the truth from the falsehood. Nevertheless, unintentional errors which may creep into or be embedded in human testimony should not result in the total rejection of the testimony of any particular witness.

The reasons enumerated above necessitate the adoption of a pragmatic view when assessing and determining the credibility of a witness and the trustworthiness of his testimony. Criteria pertaining to the assessment of credibility and testimonial trustworthiness must be applied, acutely conscious of the backdrop of all the attendant facts and circumstances, including (i) the background and profile of the relevant witness, (ii) circumstances pertaining to the initial observation, (iii) developments that may have occurred during the interval between the initial observation and the giving of evidence,

(iv) the situation that prevailed when the witness testified, and (v) the nature of the examination-in-chief, cross-examination and re-examination.

Natural defects in human testimony which are to be expected due to the afore-stated factors, should not be misconstrued as giving rise to a reasonable doubt. A reasonable doubt is not a theoretical legal construct which should be applied to enable a perpetrator of crime to secure an acquittal.

In ***Miller v. Minister of Pensions***, *[(1947) 2 A.E.R. 372]* Lord Denning has explained what proof beyond reasonable doubt is, in the following lucid manner:

"…the evidence must reach the same degree of cogency as is required in a criminal case before an accused person is found guilty. That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence, 'of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice."

The trier of facts as well as appellate court judges should not fall prey to the argumentative theorizing and magnification given to theoretical, flimsy or imaginative doubts developed through a theatrical performance of skillful and robust advocacy of an ingenious counsel. The judge must decide objectively and dispassionately, upon a mature, realistic, pragmatic and fearless consideration of the totality of evidence and the entirety of the attendant facts and circumstances. During such consideration, he must take into account not only the evidence presented by both parties, but inferences and presumptions recognized by the law which arise out of such evidence, and matters in respect of which a judge is entitled to take judicial notice.

If a reasonable doubt exists, the *cursus curiae* of our courts and those of the rest of the common law world which recognize the adversarial system of criminal justice, insist on the 'presumption of innocence', which unequivocally demands that the benefit of that reasonable doubt accrues to the benefit of the accused and that the accused be acquitted.

Learned President's Counsel for the Appellant emphasized that in this case, the prosecution had not proven its case beyond reasonable doubt. In order to prove a case beyond reasonable doubt, the prosecution must present to Court the testimonies of witnesses who are subsequently assessed and determined by the trial judge or the jury, as the case may be, to be 'credible'. The trial Court must be able determine that the prosecution witnesses are not only credible, but that their testimonies are 'trustworthy' as well. For the prosecution to plead that the testimonies of their witnesses be accepted as being truthful of the facts deposed to by such witnesses, those two primary conditions must be satisfied. Thus, the trial judge must be able to assess and determine that prosecution witnesses on whose testimonies the prosecution relied on, are credible and their testimonies are trustworthy. Furthermore, the testimonies so provided by such witnesses must be compliant with section 5 of the Evidence Ordinance, and thus should relate to only 'facts in issue' and 'relevant facts'. Their oral testimonies pertaining to such facts should also be 'admissible'. Such oral evidence testified to by prosecution witnesses, along with other evidence, if any, of the prosecution's case (such as documentary evidence, real evidence, contemporaneous audio-visual recordings and computer evidence) must be capable of proving the ingredients of the offence(s) to the extent provided in section 3 of the Evidence Ordinance.

A consideration of the totality of the evidence should result in the trier of facts being convinced that the case for the prosecution is true, and that the accused is guilty of having committed the offence he has been charged with. Merely developing (i) a case for the prosecution giving rise to suspicion that the accused 'may' have committed the offence

or that it is 'probable' that the accused committed the offence, (ii) a case theory founded on 'conjecture' that it was the accused who committed the offence, or (iii) a state of mind in the trial judge or the jury (as the case may be) that the case for the prosecution is 'more probable' than the case for the defence, is wholly insufficient. On a whole, the prosecution must, relying on cogent evidence of a **high degree of probative value** presented to Court through its own witnesses, be capable of proving its case beyond reasonable doubt. That threshold reflects a high degree of **sufficiency of evidence**, which is adequate to eliminate a reasonable doubt and vacate the presumption of innocence.

The prosecution must prove its case beyond reasonable doubt, relying on its own evidence. Colloquially, it is often said that the prosecution must *'stand on its own legs'*.

The following observations of Justice P.R.P. Perera, in ***Karunadasa v OIC, Motor Traffic Division, Police Station, Nittambuwa****, [(1987) 1 Sri L.R. 155]* are of great importance.

> *"It is an imperative requirement in a criminal case, that the prosecution must be convincing, no matter how weak the defence is, before a court is entitled to convict on it. It has necessarily to be borne in mind that the general rule is that the burden is on the prosecution, to prove the guilt of the accused. The prosecution must prove their case apart from any statement made by the accused or any evidence tendered by him. The weakness of the defence must not be allowed to bolster up a weak case for the prosecution. This rule is based on the principle that every man is presumed innocent until the contrary is proved, and criminality is never presumed. This presumption is so fundamental and strong that in order to rebut it, the crime must be brought home to the accused, beyond reasonable doubt. There is only one final question in every criminal case; does the evidence establish beyond a reasonable doubt the guilt of the accused?*
>
> *In The Attorney General v Rawther, Ennis, J states thus "The evidence must establish the guilt of the accused, not his innocence. His innocence is presumed in law, from the start of the case, and his guilt must be established beyond a reasonable doubt." "*

Save exceptional situations [where, the dictum of *Lord Ellenborough* said to be contained in *R. v. Lord Cochrane* has been recognized, such as in *The King v. Seeder de Silva* [41 NLR 337] and *Seetin v. The Queen* [68 NLR 316], and the rule of law arising out of logical reasoning and the application of rules of evidence recognized in *Ilangatilaka and Others v. The Republic* [(1984) 2 Sri L.R. 38], *Basnayake v. OIC, Special Crimes Detection Unit, Anuradhapura* [(1988) 2 Sri L.R. 50], *The Attorney General v. Potta Naufer and Others* [(2007) 2 Sri L.R. 144], and *Somaratne Rajapakse and Others v. Honourable Attorney General* [(2010) 2 Sri L.R. 113] would be applicable], for the purpose of discharging its burden of proving the case against the accused beyond reasonable doubt, the prosecution cannot take advantage of and through prosecutorial argumentation seek the strengthening of the case for the prosecution by (i) the accused having elected to exercise his right to remain silent, (ii) the weaknesses of the case for the defence, or (iii) the case for the defence having been proven by the prosecution to be false.

In view of the foregoing analysis of the law, and in the light of the submissions made by learned President's Counsel for the Appellant and learned Additional Solicitor General for the Respondent, it is necessary to consider the testimonies provided by the two key prosecution witnesses; IP Welagedera and WSI Gamage, with the view to determining whether the prosecution has proven its case beyond reasonable doubt.

The position advanced on behalf of the Appellant was that there exists an irreconcilable contradiction *inter-se* between the testimonies given by IP Welagedera and WSI Gamage. That submission is founded upon the testimony given by IP Welagedera not having contained details of - (i) the resistance shown by the two accused against their arrest, (ii) the action taken by WSI Gamage to secure control of the situation that spontaneously arose, (iii) the manner in which she was able to loosen the grip the 1st accused had on IP Welagedera, and (iv) the manner in which she brought the 2nd Accused under control and arrest him. Particularly in view of the artful, strenuous and compelling manner in which

the learned President's Counsel for the Appellant advocated this point, I examined the proceedings relating to the testimonies given by these two prosecution witnesses with a high degree of attention and circumspection.

The examination of the proceedings and related evidence revealed the following:
IP Welagedera has not provided any testimony which 'contradicts' the testimony given by WSI Gamage. However, it remains a fact that, IP Welagedera has not provided details regarding the manner in which WSI Gamage assisted him in apprehending the two accused. He has stated that WSI Gamage participated with him in arresting the two accused. He has also briefly stated that the accused showed resistance towards their being arrested. On a consideration of the totality of IP Welagedera's testimony, it appears that his testimony has been confined to his role in the arrest of the two accused and what he personally witnessed. It is necessary to note that, the learned State Counsel who had conducted the prosecution, has also not questioned IP Welagedera about the role performed by WSI Gamage or regarding the manner in which she assisted him. Furthermore, it appears from the testimony given by WSI Gamage that her action towards relieving IP Welagedera from the grip of the 1st Accused was spontaneous and momentary. Thus, it is quite possible as well as probable that IP Welagedera may not have noticed what exactly WSI Gamage did to secure his release from the clutches of the 1st Accused. In the circumstances, I am unable to agree with the submission of learned President's Counsel for the Appellant that the difference in the testimonies of IP Welagedera and WSI Gamage affect their credibility and testimonial trustworthiness. I am of the view that the submission made in this regard by learned Additional Solicitor General that the purported omission in the testimony of IP Welagedera does not reasonably affect the credibility that may be attached to him, is quite plausible and hence acceptable. It is also pertinent to note that both the learned judge of the High Court and the learned judges of the Court of Appeal have paid attention to this aspect of the case, and concluded for reasons given in their respective judgments, that the purported

discrepancy between the testimonies of the two key prosecution witnesses does not cast a doubt regarding the case for the prosecution.

As regards the submission that the prosecution's evidence regarding the raid (given by IP Welagedera and WSI Gamage), is not full of details and mutually corroborative, I must also observe the following: In an incident of this nature, where unexpected events have occurred during a short period of time at rapid succession and some events have occurred simultaneously, and the very same witnesses were subject to resistance and attempted overpowering (and thus could not observe the incident passively), one cannot reasonably expect them to provide a picture perfect narrative complete with all details of what actually happened. Further, it is quite possible that IP Welagedera did not see the exact manner in which WSI Gamage conducted herself, particularly as he would have been concentrating on relieving himself from the grip of the 1st Accused and on preventing the 1st Accused from evading arrest and fleeing from the scene along with the polysack bag. When 'participant-witnesses' as opposed to 'passive-observer-witnesses' give evidence regarding an incident that occurred quite suddenly, it is not humanly possible for their testimonies to mirror each other. Furthermore, their testimonies which had been in response to the examination-in-chief conducted by the learned State Counsel, appear not to have been complete with all the possible details of the event, particularly as the examination of IP Welagedera seems to have been conducted in a somewhat sketchy manner; so apparently, his examination had been far less than a comprehensive examination-in-chief that may be reasonably expected of an experienced State Counsel.

It is necessary to also record that, notwithstanding lengthy cross-examination of both IP Welagedera and WSI Gamage, the defence had not been able to establish that, (i) these two witnesses had been belated in recording their detailed notes relating to the raid, (ii) there exists inconsistencies of any particular significance between their oral testimonies and the detailed notes, (iii) their testimonies suffer from inconsistencies *per-se,* (iv) the

evidence of the two main prosecution witnesses are incompatible with any other independently proven material fact, (v) the prosecution's version is either highly or inherently improbable, (vi) during their testimonies they displayed a particular demeanour or deportment which reflects that they were intentionally uttering falsehood, or (vii) the prosecution witnesses entertained a cause or a motive to falsely implicate the accused. Further, the cross-examination of these two witnesses did not give rise to an inference that they had fabricated a case by foisting heroin on the 1st Accused. Further, the defence was not able to elicit during cross-examination any admission favourable to the position of the defence.

In ***State of Uttar Pradesh v M. K. Anthony***, *[AIR 1985 SC 48]* Justice Desai, has 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 scrutinise the evidence more particularly keeping in view of the deficiencies, draw-backs and infirmities pointed out in 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 on 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 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. … Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals. Cross-examination is an unequal duel between a rustic and refined lawyer.*"

In ***Mananage Susil Dharmapala v. Officer-in-Charge, Special Crimes Division, Colombo,*** referring to the degree of proof the prosecution is obliged to fulfill, the Supreme Court had the occasion to observe the following:

> *"In terms of section 3 of the Evidence Ordinance, 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. Therefore, on an application of the principle contained in section 3 of the Evidence Ordinance buttressed by the earlier mentioned judicial precedents, I am of the opinion that, a criminal case can be considered to have been proved by the prosecution beyond reasonable doubt, if in the objective mind of the Judge or the jury, as the case may be, the prosecution has presented sufficient cogent evidence which causes the Judge or the jury to believe that the accused had committed the offence he has been charged with, or the judge or the jury considers that the accused having committed the offence to be so probable that the judge or the jury ought, under the circumstances of the case, act upon the supposition that the accused committed the offence. A case is 'proven beyond reasonable doubt', when a state of mind develops in the judge or the jury as the case may be, as to belief in the truthfulness of the assertion made by the prosecution, and the absence of a logically sound reason to doubt that assertion."*

In view of the foregoing, I am convinced and therefore do not entertain a reasonable doubt in my own mind, that the narrative which has been given by IP Welagedera and WSI Gamage in their testimonies, reflect an accurate and reliable picture of the events that had taken place on 16th August 2004 in Mannar near the Pillaiyar Kovil pertaining to the 1st Accused - Appellant and the 2nd Accused. I am also of the view that the prosecution has proven its case against the Appellant beyond reasonable doubt.

The law and its application as regards the impugned judgments of the High Court and the Court of Appeal

During the course of the hearing, learned President's Counsel for the Appellant and the learned Additional Solicitor General for the Respondent addressed this Court on several aspects pertaining to the impugned judgments of the High Court and the Court of Appeal. Those submissions necessitate that a description be provided of the applicable law regarding the scope, nature and degree of scrutiny required to be performed by this Court in respect of those two judgments.

Testimony and evidence related functions of the trial judge

A key challenge launched by learned President's Counsel for the Appellant regarding the judgment of the High Court, was based on the assessment of credibility of prosecution and defence witnesses by the learned High Court Judge. Learned counsel argued that, the Judge of the High Court had not properly performed the function of assessment of credibility, and had believed the version of the prosecution while not paying due attention to the defence position and the evidence adduced on behalf of the defence. He submitted that this had resulted in the Appellant not having received a *fair trial* in the High Court. In this regard, learned Counsel for the Appellant in his post-argument written submissions has critiqued the judgement of the High Court as amounting to a *"scanty judgment"*.

In response, learned Additional Solicitor General submitted that the impugned judgment of the Court of Appeal reflects that the appellate court had given due consideration to whether the High Court Judge had correctly assessed the credibility of prosecution witnesses, and that the Judge of the High Court had, due to valid reasons, accepted the testimonies of prosecution witnesses and rejected the testimonies given by the defence witnesses.

The core submission made in this regard by learned President's Counsel for the Appellant was that the learned Judge of the High Court had not in terms of the applicable law, duly performed his functions as a trial judge. Thus, the following description of the role and functions of a trial judge is provided:

Particularly in a criminal trial conducted before a judge sitting without a jury, **testimony and evidence related functions** to be performed by the presiding judge, which I wish to refer to as the **primary functions of the trial judge to be performed after the recording of evidence**, are the following:

(i) Assessment and determination of 'credibility' of witnesses.

(ii) Determination of 'testimonial trustworthiness' of the testimonies given by witnesses.

(iii) Analysis of the evidence.

(iv) Determination of the 'probative value' (weight) to be attached to evidence and the 'sufficiency' of evidence to prove the charges.

(v) Determination of whether the prosecution has 'proven the ingredients of the offence(s)' the accused stands charged.

(vi) If the defence has relied on a 'general or special exception to criminal liability', whether the defence has proven such exception.

(vii) Determination of whether the prosecution has proven its case 'beyond reasonable doubt', and contra wise, whether the defence has raised a 'reasonable doubt' regarding the case for the prosecution.

It is to be noted that the performance of these evidence related functions would require application of certain legal principles and therefore a correct appreciation and application of such legal principles would be necessary for the lawful performance of these functions. A methodical and rational approach to discharging each of these functions is necessary. However, it must be appreciated that performing each of these functions individually,

separately from each other (as if in watertight compartments), and incrementally adopting a segmented or phased-out approach, (in the manner scientific experiments are conducted), may not be practically feasible. That is mainly due to the inter-relationship and interdependency of these functions and in view of the nature of the material to be taken into consideration. The adjudication of every criminal trial, must necessarily be founded upon *inter-alia* the performance of these critical functions. If a verdict of *'guilt'* of an accused is arrived at without performing these functions in a lawful manner, indeed, as rightly pointed out by the learned President's Counsel for the Appellant, the accused can rightfully claim that he was deprived of a *fair trial.* A judgment of a criminal trial Court which does not reflect that these functions have been carried out by the learned trial judge in a lawful and sufficient manner, cannot be relied upon to satisfy an appellate Court that the accused had received a *fair trial,* and that he had been found *'guilty'* in a lawful manner. However, a determination of whether or not the accused has been deprived of the constitutional right (in terms of Article 13(3) of the Constitution) to a *fair trial* should be founded upon not only whether or not the trial judge has correctly performed the above-mentioned functions, but also on a careful consideration of the totality of testimonies given by witnesses and the evidence of the case. However, it is important to note that a verdict arrived at without the proper performance of the afore-stated testimony and evidence related functions would be unlawful and hence should be vacated in appeal, only if such failure on the part of the trial judge had **prejudiced the substantial rights of the accused or occasioned a failure of justice**.

In this regard, it is important to note that the nature and the extent to which these testimony and evidence related functions are to be performed by the trial judge would depend upon the nature of the issues placed in dispute by the parties. For example, it would not be necessary to assess and determine credibility of a witness whose testimony has not been impeached through cross-examination or adversely commented upon during submissions of counsel. In view of the compelling need to save precious judicial

time and associated resources, what is either admitted, or not challenged or critiqued, need not be judicially considered and determined.

Jurisdiction of the Court of Appeal

As regards the impugned judgment of the Court of Appeal, learned President's Counsel submitted that the Court of Appeal had failed to consider whether the prosecution has proved its case *beyond reasonable doubt*. He asserted that the assessment of credibility of prosecution witnesses was totally flawed and hence the learned Judges' decision to believe the two main prosecution witnesses was erroneous. He further submitted that the version of the defence had not been carefully considered, and that was vital, as in his opinion, the defence evidence at its minimum raised a reasonable doubt regarding the case for the prosecution. The sum-total of those submissions was that the Court of Appeal had not properly performed its appellate functions. Learned Additional Solicitor General submitted that the Court of Appeal had performed its functions in terms of the law, and had affirmed the conviction of the Appellant, only after careful scrutiny of the evidence led at the trial by both the prosecution and the defence and upon a consideration of the judgment of the High Court. Thus, in my view it is necessary to refer to the following description of the jurisdiction and functions of the Court of Appeal:

Article 138(1) of the Constitution which confers appellate jurisdiction on the Court of Appeal, provides as follows:

> *"The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law,* ***an appellate jurisdiction for the correction of all errors in fact or 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:*

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 parties or occasioned a failure of justice." (Emphasis added.)

It would thus be seen that while the Court of Appeal has been vested with wide appellate jurisdiction in respect of a judgment or final order of the High Court, the exercise of that jurisdiction should result in the vacation of the judgment or final order appealed against, only if in the opinion of the Court of Appeal, the procedure adopted or the impugned judgment or final order of the High Court contains an error, defect or irregularity, and such error, defect or irregularity had caused prejudice to the substantive rights of the parties or occasioned a failure of justice. As an infringement of the substantive rights of parties would also result in a failure of justice, in the final analysis, what would give rise to the Court of Appeal vacating, varying or otherwise interfering with the impugned judgment or final order, is the Court of Appeal forming the view that in the totality of the circumstances, the impugned judgment of the High Court had occasioned a **failure or miscarriage of justice**.

In practice, what defines the scope of the exercise of the appellate jurisdiction of the Court of Appeal, are the **grounds of appeal** urged on behalf of the Appellant during the hearing. The scrutiny of the procedural aspects of the impugned proceedings and the contents of the impugned judgment or final order, is founded upon the grounds of appeal actually urged before the appellate court. The Court of Appeal need not go into and focus on matters that have not been urged and argued by Counsel. That is of fundamental importance.

In the present matter, the impugned judgment of the Court of Appeal contains the 'grounds of appeal' urged by learned counsel for the Appellant during the hearing of the Appeal in the Court of Appeal. (It is noted that, in this matter, one and the same counsel

appeared for the Appellant and the Respondent before the Court of Appeal and the Supreme Court.) The grounds of appeal urged before the Court of Appeal as contained in the judgment of the Court of Appeal (reproduced verbatim), are as follows:

> *"1st ground of appeal:- The trial judge did not analyze the evidence led by the prosecution with caution, resulting in a miscarriage of justice.*
>
> *2nd and 3rd grounds of appeal:- The evidence of IP Welagedera with regard to the raid is scanty and not credible.*
>
> *4th ground of appeal:- The contradictions in the evidence and the probability or improbability of the prosecution version have not been properly evaluated by the learned judge.*
>
> *5th ground of appeal:- In any case there was no evidence whatsoever against the 2nd accused-appellant and therefore the conviction of the 2nd accused-appellant was wrong."*

Therefore, in the instant matter, the duty cast on the Court of Appeal, was to scrutinize the impugned judgment in the backdrop of the afore-stated grounds of appeal. It is evident from the impugned judgement of the Court of Appeal, that following a consideration of the afore-stated grounds of appeal and the proceedings of the High Court, it had answered the first three questions in the negative, and the fourth question in the affirmative. That had resulted in the conviction of the 1st Accused being affirmed and the conviction of the 2nd Accused being vacated and therefore he being acquitted.

From a generic perspective, in an appeal against a conviction, the primary task of the appellate court is to scrutinize the proceedings, including the recorded testimonies of witnesses and the impugned judgment of the High Court, and determine whether the trial judge had performed the functions expected of a trial judge in terms of the law, objectively, diligently and correctly; in other words, determine whether the trial judge has performed his functions **judicially**. This does not require the appellate court to assume the position of the trial judge, and re-adjudicate the case. For example, the duty cast on an appellate court does not require re-assessment of the credibility of witnesses.

What is necessary is for the appellate court to carefully consider and determine whether the functions the law requires the trial judge to perform, have been lawfully and correctly performed. This scrutiny should be performed while recognizing that the trial judge is vested by law with a degree of discretionary authority. That there could be a difference between the objective view of the learned judges of the Court of Appeal and the learned judge of the High Court, does not necessarily make the latter view unlawful or unsafe. One judge needs to recognize and respect individual, independent and objective views founded upon a judicial consideration of evidence and the applicable law, by another judge.

In the instant matter, what would be necessary is for the Court of Appeal to have considered whether the trial judge had assessed the credibility and testimonial trustworthiness of witnesses having applied criteria recognized by law, and done so correctly. However, during the hearing of the appeal, if the assessment and determination of credibility of a particular witness has not been challenged on specific grounds, the appellate court would not be required to perform the task of determining whether the trial judge had lawfully assessed and determined credibility of that particular witness. It is seen that the grounds on which the credibility of prosecution witnesses IP Welagedera and WSI Gamage were challenged was on the footing that there was a contradiction *inter-se* (inconsistency) between the evidence of the two witnesses, and that the prosecution's version of events was improbable. Therefore, the scrutiny of the assessment of credibility of those two witnesses should be based on those two grounds, only.

In ***King v. Gunaratne and Another*** *[14 Ceylon Law Recorder, 144],* the objective of the scrutiny of the trial proceedings and the impugned judgment by the appellate Court has been captured by Chief Justice Macdonnell in the following manner:

> *"This is an appeal mainly on the facts from a Court which saw and heard the witnesses to a Court which has not seen or heard them. …"* Chief Justice Macdonnell has enumerated

three tests which a Court sitting in appeal should apply when determining questions of fact. They are as follows:

(i) Was the verdict of the Judge unreasonable and against the weight of the evidence?

(ii) Was there a misdirection either on the law or on the evidence?

(iii) Has the trial Court drawn wrong inferences from matters in evidence?

Indeed, it is the *cursus curiae* of appellate Courts of this country, that an appellate Court will not lightly interfere with the assessment and determination of credibility of witnesses and testimonial trustworthiness, arrived at by a trial judge. Chief Justice G.P.S. de Silva's views regarding this aspect in ***Alwis v. Piyasena Fernando****, [(1993) 1 Sri L.R. 119]* are of particular relevance. His Lordship has held as follows:

> *"It is well established that findings of primary facts by a trial judge who hears and sees witnesses are not to be lightly disturbed on appeal. The findings in this case are based largely on credibility of witnesses. …".*

In ***Kumara de Silva and two others v Attorney-General****, [(2010) 2 Sri L.R. 169] [CA Minutes of 15.11.2007],* Sarath de Abrew, J held as follows:

> *"Credibility is a question of fact, not of law. Appeal Court judges repeatedly stress the importance of the trial Judge's observations of the demeanour of witnesses in deciding questions of fact. The acceptance or rejection of evidence of witnesses is therefore a question of fact for the trial Judge, since he or she is in the best position to hear and observe witnesses. In such a situation the Appellate courts will be slow to interfere with the findings of the trial Judge unless such evidence could be shown to be totally inconsistent or perverse and lacking credibility."*

In ***Ariyadasa v Attorney-General,*** *[(2012) 1 Sri. L.R. 84],* Sisira de Abrew, J in holding that the witness whose credibility was challenged was in fact a credible witness, and having done so based on the trial judge's finding to that effect, has held as follows:

> *"Court of Appeal will not lightly disturb a finding of a trial Judge with regard to the acceptance or rejection of a testimony of a witness, unless it is manifestly wrong, when the trial judge has taken such a decision after observing the demeanour and the deportment of a witness. This is because the trial Judge has the priceless advantage to observe the demeanour and deportment of the witness which the Court of Appeal does not have."*

One key reason for the afore-stated approach is that the trial court has the invaluable advantage of observing the demeanour and deportment of witnesses who testify at the trial, and using such observations for the purpose of assessing and determining the credibility of witnesses. Furthermore, the gradual and incremental unfolding of human testimony and other evidence during the course of a trial, and the ability of the trial judge to question witnesses and obtain clarifications, place the trial judge in an advantageous position in appreciating the evidence and the respective positions of the prosecution and the defence. These advantages are not available to an appellate Court, which is called upon to determine the lawfulness of the finding of the trial Court, based on a consideration of the verbatim transcript of the trial proceedings together with the judgment of the trial judge, aided by submissions of counsel and the reasons for the findings contained in the judgment. That is the legal basis for an appellate Court to be hesitant to disturb the findings of a trial judge regarding the credibility of witnesses and the trustworthiness of the testimonies given by witnesses. However, for an appellate Court to be respectful of the trial judge's assessment and determination of credibility and testimonial trustworthiness of witnesses, the record of the trial proceedings and the judgment should reflect that the trial judge had paid due attention to the demeanour and deportment of the relevant witnesses, and formed a view regarding their credibility and testimonial trustworthiness *inter-alia* based on such demeanour and deportment. Furthermore, the judgment should reflect that the trial judge was acutely aware of the others tests and the criteria available for the assessment of credibility and testimonial trustworthiness, had applied those criteria in an appropriate manner to the extent that is warranted, and had objectively and diligently arrived at findings thereon. A sweeping

averment by the trial judge that he believes the testimony given by a witness without giving reasons therefor, would not enable proper judicial scrutiny of the judgment of the trial judge. He must explain the process and the criteria by which credibility and testimonial trustworthiness were assessed and determined, and give reasons for his findings.

Furthermore, the judgment must reflect that the trial judge had developed a correct appreciation of the case for the prosecution and the defence. A mere reproduction of the testimonies given by witnesses in the form of a summation, and a sweeping averment that the testimonies given by witnesses are believable and hence acceptable, would not meet with the standard expected of a trial judge.

If the judgment of the trial court depicts that -

(i) the trial judge had not functioned independently, impartially and neutrally,

(ii) the trial judge had not judicially performed the functions of assessment and determination of credibility of witnesses and testimonial trustworthiness of the testimonies given by witnesses,

(iii) the trial judge had not appreciated the evidence correctly,

(iv) the evidence had not been correctly analyzed, weighed, the sufficiency of evidence presented by the prosecution had not been considered and the probative value of such evidence had not been determined,

(v) the trial judge had taken into consideration inadmissible or irrelevant material and had been substantially influenced or prejudiced by such material,

(vi) the trial judge had not correctly appreciated and applied the applicable law,

(vii) the trial judge had not taken into consideration and determined whether the constituent ingredients of the offence(s) have been proven by the prosecution,

(viii) the trial judge had not considered whether the prosecution has proven its case beyond reasonable doubt, or conversely, whether the defence has raised a

reasonable doubt through either cross-examination of prosecution witnesses, presentation of defence evidence or through submissions, or

(ix) the trial judge had arrived at a perverse finding (verdict),

and in view of the evidence and the applicable law, a **substantial miscarriage of justice has occurred** to the accused – appellant due to one or more failures enumerated above, or in the circumstances of the case including the totality of the evidence, the conviction of the accused is wholly unreasonable, arbitrary or unreliable (unsafe), the finding of the trial judge must be classified as being **'unlawful'**, and thus the **verdict** must be **quashed** by the appellate court.

Therefore, if the appellate Court is to affirm the conviction of the accused – appellant, the impugned judgment of the trial court should *ex-facie* reflect that the trial judge has performed the earlier mentioned functions in the manner the law demands that he should perform in the circumstances of the particular case, and the finding of *'guilt'* should in the opinion of the Court of Appeal not be unreasonable, arbitrary, perverse or unreliable (unsafe).

Jurisdiction of the Supreme Court

Learned President's Counsel for the Appellant, insisted that this Court scrutinizes the evidence presented by the prosecution and the defence afresh (as if combing the evidence with a fine tooth-comb), and hold that the prosecution had failed to prove its case beyond a reasonable doubt. Somewhat hesitantly though, in deference to the detailed submissions made by both counsel with regard to the testimonies given by prosecution and defence witnesses, in the earlier part of this judgment, I have engaged in a detailed analysis of the testimonies given by witnesses for the prosecution and the defence and stated the conclusions that was reached thereon.

Nevertheless, it is necessary for me to provide the following description pertaining to the jurisdiction of the Supreme Court and its duties and functions in the consideration of an Appeal from a judgment of the Court of Appeal, in a criminal matter:

In terms of article 118 of the Constitution, the Supreme Court is the highest and final superior Court of record, and shall, subject to the provisions of the Constitution, exercise *inter-alia* final appellate jurisdiction. As regard its final appellate jurisdiction, in terms of Article 127(1) of the Constitution, the Supreme Court has been conferred with the jurisdiction to correct all errors in fact or in law which had been committed by the Court of Appeal. In terms of Article 127(2) of the Constitution, in the exercise of that final appellate jurisdiction, the Supreme Court may affirm, reverse or vary any order, judgment, or sentence of the Court of Appeal, and may issue such directions to any Court of First Instance or order a new trial or further hearing in any proceedings as the justice of the case may require. In a criminal appeal to the Supreme Court, while answering the questions of law in respect of which special leave to appeal or leave to appeal (as the case may be) had been granted, the primary function of this Court is to determine whether in the backdrop of the grounds of appeal urged before the Court of Appeal, the afore-stated functions of the Court of Appeal which sat in appeal against the judgment of the High Court, had been performed in a lawful and correct manner. Additionally, this Court has the overarching duty to consider whether (a) the failure if any on the part of the Court of Appeal performing its appellate function had occasioned a miscarriage of justice, and (b) in any event, for cogent reasons to be enumerated, the finding of the trial court, should be allowed to stand.

The following avenues would pave the way for the Supreme Court to exercise its appellate jurisdiction:

(i) In terms of Article 128(1) of the Constitution, where the Court of Appeal either *ex-mero motu* or at the instance of any aggrieved party to a matter or proceedings, grants *leave to appeal to the Supreme Court.*

(ii) In terms of Article 128(2) of the Constitution, where the Supreme Court in its discretion grants *special leave to appeal to the Supreme Court,* in instances where the Court of Appeal has refused to grant *leave to appeal* to the Supreme Court or where in the opinion of the Supreme Court, the case is fit for review by the Supreme Court.

(iii) In terms of the proviso to Article 128(2) of the Constitution, where the Supreme Court grants *leave to appeal* in a matter or proceedings as it is satisfied that the question to be decided is of public or general importance.

It would be seen that the instant Appeal has come up through the second avenue enumerated above, due to the reason that the Supreme Court in the exercise of its discretion has deemed it fit to grant *special leave to appeal to the Supreme Court* on the premise that in view of the three questions of law identified by this Court (referred to at the outset of this judgment) this matter is fit for review by the Supreme Court. It must be noted that the entitlement granted by the Constitution to prefer an appeal to the Supreme Court, should necessarily be with *leave* first having been obtained (which is a pre-condition to be satisfied), and exercised founded upon a **substantial question of law** which arises out of the impugned judgment of the Court of Appeal. It is important to bear in mind that raising a question of law should not be strategy based, with the view to causing the Supreme Court to re-assess and re-determine fundamental testimony-related issues such as credibility of witnesses and testimonial trustworthiness of evidence contained in testimonies of witnesses.

In matters such as the instant appeal, **the findings of facts by both the High Court and the Court of Appeal are concurrent**. That the Supreme Court should not interfere with concurrent findings of fact arrived at by the trial Court and the Court of Appeal is not a cast-iron rule. Nevertheless, it is necessary for this Court to express the view that, the Supreme Court would only in '**special circumstances'** (in the true sense of that term)

founded upon compelling reasons of law and facts, disturb such **concurrent findings** of the two lower courts. As held by Justice Kulatunge in ***Rev. Mathew Peiris v. The Attorney General*** *[(1992) 2 Sri L.R. 372],* where the final decision is reached (as is the case here), on the basis of antecedent determinations of facts on several issues, a court of final appeal (the Supreme Court) should be slow to interfere with the findings of the trial court. This Court should not be called upon to perform the functions of the trial Court or that of the Court of Appeal. There should be a substantial question of law, which requires to be answered by the apex Court of this country. Thus, I would be inclined not to accept the suggestion by learned President's Counsel for the Appellant, that this Court interferes with the findings of the learned trial judge on the assessment of credibility of witnesses arrived at by him. Indeed, if the Appellant could establish that the learned trial judge had grievously erred in the application of legal criteria in the assessment of credibility and testimonial trustworthiness, and upon the attention of the Court of Appeal having been drawn to such error, the Court of Appeal had overlooked that aspect of the case, then I would not have hesitated to go to the extent of exercising jurisdiction which the Court of Appeal ought to have exercised and scrutinized whether a failure of justice had been caused regarding the assessment of credibility and testimonial trustworthiness of witnesses. I must state that in the instant Appeal, for the reasons I have stated in the earlier part of this judgement (relating to the analysis of testimonies given by witnesses and their evidence) the Appellant has not satisfied that high threshold, which warrants this Court to re-assess and determine afresh, credibility and testimonial trustworthiness of witnesses.

Ideally, in an Appeal to the Supreme Court against a judgment of the Court of Appeal, the appeal should be argued by counsel based on an agreed set of evidence-based facts which emerged at the trial. This Court should be invited to determine a substantial question of law arising out of the judgment of the Court of Appeal, which may either be a pure question of law, or be a question of law which to some extent is founded upon or

mixed with facts that have emerged through evidence presented at the trial. Whether the trial judge had performed his functions in accordance with the law and done so correctly, is a matter to be argued and considered during the first appeal, and not before this Court. The objective of this Court exercising the final appellate jurisdiction in respect of a judgment of the Court of Appeal, is to determine whether the impugned judgment of the Court of Appeal is in accordance with the law, and if the said judgment raises questions of law, to answer them in accordance with the law. An Appeal to the Supreme Court against a judgment of the Court of Appeal, unless unavoidable due to the nature of the questions of law raised pertaining to the judgment of the Court of Appeal, should not be used by the Appellant to critique the judgment of the High Court. In any event, the judgment of the High Court should not be critiqued, founded upon grounds not urged before the Court of Appeal. In colloquial terms, the Appeal to the Supreme Court should not be an occasion to *'take a bite at the cherry for a second time'*.

However, as pointed out by Justice Soza in ***Attorney General v. D. Seneviratne***, *[(1982) 1 Sri L.R. 302],* once special leave to appeal has been granted, the Supreme Court need not limit the scope of its consideration of the impugned judgment and the corresponding proceedings to the question of law in respect of which special leave to appeal has been granted. It may, in the interests of justice, consider the entire matter and correct any errors of fact or law that may have been committed by a subordinate court.

Justice Sharvananda in ***Sri Lanka Ports Authority v. Pieris*** *[(1981) 1 Sri L.R. 101],* had expressed the following view as regards the scope of the final appellate jurisdiction of the Supreme Court:

> *"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.]

In ***Bandaranaike v. Jagathsena and Others,*** *[(1984) 2 Sri L.R. 397],* Justice Colin-Thome, referring to the wide final appellate jurisdiction vested in the Supreme Court, has observed that, the wide power vested in the Supreme Court must be used with circumspection. The Court must attach the greatest weight to the opinion of the judge who saw the witnesses and heard their evidence. Consequently, the Court should not disturb a judgment of fact, unless it is 'unsound'.

In ***Bharwada Bhoginbhai Hirjibhai v. State of Gujarat****, [1983 AIR SC 753],* cited by learned Additional Solicitor General, Justice Thakkar, referring to the testimonies given by two young ladies who were children at the time of the incident and sexually abused by the Appellant, has expressed the following view:

"… Their evidence has been considered to be worthy of acceptance. It is a pure finding of fact recorded by the Sessions Court and affirmed by the High Court. Such a concurrent finding of fact cannot be reopened in an appeal by special leave unless it is established: (1) that the finding is based on no evidence, or (2) that the finding is perverse, it being such as no reasonable person could have arrived at even if the evidence was taken at its face value

or (3) the finding is based and built on inadmissible evidence, which evidence, if excluded from vision, would negate the prosecution case or substantially discredit or impair it, or (4) some vital piece of evidence which would tilt the balance in favour of the convict has been overlooked, disregarded, or wrongly discarded. … We do not consider it appropriate or permissible to enter upon a re-appraisal or reappreciation of the evidence in the context of the minor discrepancies painstakingly highlighted by learned counsel for the appellant. Overmuch importance cannot be attached to minor discrepancies. …"

I find myself in agreement with the afore-stated views.

Questions of law

I will now deal with the questions of law in respect of which special leave to appeal had been granted.

(i) Did the learned Judges of the Court of Appeal misdirect themselves in not considering the defence version at all and affirming the conviction of the Appellant?

This question of law is founded upon the assertion that an appellate court has a duty to consider the version of the defence presented at the trial, and that in the instant appeal, the Court of Appeal had failed to perform that duty. It is necessary to point out that one function of the Court of Appeal is to consider the version of the defence (if any) presented at the trial, and thereafter consider whether the High Court had considered that version and arrived at lawful conclusions thereon. Such a consideration of the version of the defence raised at the trial is necessary for the purpose of considering whether such version (a) gives rise to a reasonable doubt regarding the case for the prosecution, or (b) gives rise to a general or special exception to criminal responsibility. In the instant appeal, the first of these two grounds is applicable. Therefore, it is necessary to point out that the

afore-stated question of law will be viewed by this Court from that slightly varied legal footing.

The submission of the learned President's Counsel for the Appellant was that the Court of Appeal had not given due consideration to the evidence presented on behalf of the defence. In response, learned Additional Solicitor General submitted that the judgment of the Court of Appeal clearly reflects that it had given due consideration to the position of the defence and the evidence presented on behalf of the accused and had been mindful of that position throughout the scrutiny of the judgment of the High Court.

It is necessary to point out that the purported non-consideration by the learned High Court Judge of the evidence presented by the defence, has not been a ground based upon which the judgment of the High Court was challenged before the Court of Appeal. That is seen when one considers the grounds of appeal presented to the Court of Appeal (as contained in the judgment of the Court of Appeal and referred to previously in this judgment). That position is strengthened when one considers the contents of the written submissions tendered on behalf of the Appellant to the Court of Appeal. Thus, in my opinion, the necessity did not arise for the Court of Appeal to have considered whether the learned judge of the High Court had given due consideration to the evidence presented by the Defence. A consideration of the impugned judgment of the Court of Appeal reveals that the judgment contains and is limited, to the views of the Court of Appeal regarding the grounds of appeal urged on behalf of the Appellant. As the learned Counsel for the Appellant had not raised a ground of appeal alleging that there was a failure on the part of the trial judge to have considered the evidence presented on behalf of the defence, understandably the Court of Appeal has not considered that aspect.

However, a careful scrutiny of the judgement of the High Court reveals clearly that the learned judge had in fact considered the defence version (both the defence evidence and

the suggestions made to prosecution witnesses during their cross-examination) and decided to reject it. The judgment of the High Court reveals two more aspects. They are, that the learned Judge of the High Court had for reasons stated, decided (i) not to believe the evidence given by defence witness Sivabalan, and (ii) that the case for the defence does not give rise to a reasonable doubt regarding the case for the prosecution.

Be that as it may, it is observed that this question of law seems to have been raised on behalf of the Appellant on the footing that the position of the defence and the defence evidence give rise to a reasonable doubt regarding the case for the prosecution, which aspect is claimed by the Appellant as not having been considered by the learned trial judge and by the Court of Appeal. However, a perusal of the judgment of the High Court clearly reveals that the learned High Court Judge has considered the evidence of IP Welagedera and WSI Gamage from the perspective of (a) the probability of the prosecution's version, (b) consistency between the version of events testified to by IP Welagedera vs. WSI Gamage, (c) suggestions made to both prosecution witnesses, and (d) the evidence presented on behalf of the accused (defence evidence). The learned trial judge has concluded that the prosecution witnesses were credible and that their evidence could be acted upon. In that backdrop, the Court of Appeal while referring to the purported discrepancy between the testimonies of IP Welagedera and WSI Gamage, has observed the following:

> *"In this regard the learned High Court Judge has vividly described how certain witnesses may observe certain things the others may not. … A witness may not observe and remember better than another the manner in which the incident took place, especially when he was the person who was attempting to subdue and overpower a criminal in order to apprehend him with the contraband, rather than a witness who observes the incident. The person really involved may sometimes be oblivious to the blows he received and the injuries suffered or how and the manner in which he received and suffered, his primary concern being the arrest of the accused, come what may. … The learned Judge has also stated that*

when things occurred in rapid succession it would not be possible for some witnesses to observe as well as certain other witnesses, the sequence and the things that happened."

The above-quoted extract of the impugned judgment of the Court of Appeal shows (a) the extent to which the learned judge of the High Court had considered issues pertaining to the credibility and testimonial trustworthiness of key prosecution witnesses, and (b) the manner in which the learned judges of the Court of Appeal had addressed their minds to whether the learned judge of the High Court had correctly assessed and determined credibility and testimonial trustworthiness of key prosecution witnesses.

In view of the foregoing, I hold that, the impugned judgment of the Court of Appeal cannot be impeached on the premise that the Court of Appeal had failed to specifically consider the defence evidence. Thus, I conclude that the impugned judgment of the Court of Appeal does not contain a misdirection, and that in any event, the non-consideration of the defence evidence by the Court of Appeal has not occasioned a failure of justice.

(ii) Did the learned Judges of the Court of Appeal misdirect themselves when they failed to consider that although credibility of a witness is primarily the function of the trier of facts, when the said trier of facts has failed to analyze the defence evidence and has deprived the accused of his constitutional protection to a fair trial, a duty is cast on the Court of Appeal to ensure that a miscarriage of justice does not occur?

This ground of appeal has been formulated on the premise that the learned judge of the High Court had failed to analyze the defence evidence and has thereby deprived the accused of his constitutional protection to a *fair trial*. However, a scrutiny of the judgment of the High Court reveals that the learned judge of the High Court had after considering the case for the prosecution, engaged in a detailed consideration of the evidence given by the Appellant and defence witness Sivabalan. Consequent to the narration and

consideration of their evidence, the learned judge of the High Court has concluded that he does not believe the defence evidence. That amounts to a rejection of the defence evidence following a consideration of such evidence. Therefore, I hold that the premise on which this question had been raised is faulty, and thus does not require further consideration.

(iii) Did the learned Judges of the Court of Appeal misdirect themselves when they failed to appreciate that the learned trial judge did not analyze the evidence led by the prosecution with caution resulting in a miscarriage of justice?

Once again, this question of law is also founded on the assumption that the judge of the High Court had failed to analyze the evidence led by the prosecution.

The Judgement of the High Court clearly shows that the learned judge of the High Court had -

(a) appreciated the nature of the charges framed against the accused,

(b) recorded a summation of the evidence given by each witness for the prosecution and provided a description of the prosecution's narrative,

(c) considered the evidence given by IP Welagedera and WSI Gamage and thereby assessed the credibility and testimonial trustworthiness of their testimonies,

(d) considered whether there exists any discrepancy between the testimonies of IP Welagedera and WSI Gamage,

(e) considered whether IP Welagedera not having testified regarding certain aspects which WSI Gamage had testified, affects their credibility,

(f) arrived at the finding that notwithstanding lengthy cross-examination, defence counsel had not proved a single contradiction,

(g) considered whether the officers of the PNB had followed an unlawful procedure by producing the suspects before the Magistrate of Anuradhapura instead of producing them before the Magistrate of Mannar,

(h) considered whether the defence had suggested any reason for officers of the PNB to have falsely implicated the accused,
(i) considered the defence evidence,
(j) arrived at the conclusion that due to a reason cited in the judgment, defence witness Sivabalan had given false testimony,
(k) concluded that the prosecution version is true, and that the defence version cannot be believed, and
(l) held that the prosecution has proved its case beyond reasonable doubt.

In the circumstances, I cannot agree with the submission made by learned President's Counsel and the premise contained in the afore-stated question of law, that there has been a tangible ill-consideration of testimonies given by witnesses and an absence of analysis of the evidence presented by the prosecution and the defence. In the circumstances, I must record my strong disapproval of the classification given by learned President's Counsel for the Appellant to the judgment of the High Court, that it is a *'scanty judgment'*. Even though the judgment of the High Court does not reflect a methodical and detailed discharge of the testimony and evidence related functions expected of a trial judge, I am of the view that there has been a judicious consideration of credibility of witnesses and the evidence placed before Court by the prosecution and the defence. Particularly in view of the totality of the evidence, I hold that there has not been a failure of justice or any prejudice caused to the Appellant. In the circumstances, in my view, the Appellant has not been denied of a *fair trial*. In any event, as the available evidence amply supports the conviction of the Appellant, I hold that there has been no miscarriage of justice.

A perusal of the judgment of the Court of Appeal reveals the following features:

(i) A consideration of the charges framed against the accused by the Attorney-General.

(ii) Grounds of appeal urged by counsel for the Appellants at the hearing.

(iii) Appreciation of the law pertaining to the role of the Court of Appeal regarding finding of facts by the High Court.

(iv) A narrative of the evidence presented.

(v) A description of the main features of the case relating to assessment of credibility of prosecution witnesses: that notwithstanding lengthy cross-examination, there are no contradictions *inter-se* ; that in view of the attendant circumstances, the absence of certain details in the testimony of IP Welagedera in comparison with the testimony of WSI Gamage, does not affect the credibility that may be attached to their testimonies ; that the Court concurs with the finding of the trial judge in that regard, together with reasons thereof.

(vi) A finding that the defence had not suggested any motive on the part of prosecution witnesses to falsely implicate the accused by foisting a large quantity of heroin on the accused.

(vii) A conclusion that in the totality of the circumstances of the case, the findings of the trial judge cannot be classified as being perverse or unreasonable. That there is ample evidence presented by the prosecution to convict the 1st accused – appellant.

(viii) A conclusion that the evidence presented by the prosecution falls short of proving beyond reasonable doubt that the 2nd Accused – Appellant had the requisite knowledge of the contents of the parcel that was in the possession of the 1st Accused – Appellant, and hence that there is a reasonable doubt as to the culpability of the 2nd Accused – Appellant with regard to the offences of trafficking and possession of heroin.

In my view, the forgoing features of the impugned judgment of the Court of Appeal is clearly in consonance with the proper and lawful exercise of the appellate jurisdiction of the Court of Appeal (in a criminal matter). It is seen that, it had only been after a careful and correct consideration of the testimonies of witnesses, evidence presented at the trial

and the judgment of the High Court, that the Court of Appeal has affirmed the conviction of the Appellant.

In view of the foregoing analysis, the answers to the questions of law stated above and the totality of the evidence, I hold that the Judgment of the Court of Appeal is lawful, and the Appellant's conviction having been affirmed by the Court of Appeal should not be interfered with.

In the circumstances, I affirm the conviction of the Appellant and the sentence imposed on him, and dismiss this Appeal.

Judge of the Supreme Court

B.P. Aluwihare, PC, J

I agree.

Judge of the Supreme Court

Janak De Silva, J

I agree.

Judge of the Supreme Court

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

G.B. Piyadasa,
Baddewewa Udakella,
Near the Primary Court,
Embilipitiya.
Plaintiff

SC APPEAL NO: SC/APPEAL/208/2014
SC LA NO: SC/SPL/LA/05/2012
CA NO: CA/787/96 (F)
DC EMBILIPITIYA NO: 3621/L

Vs.

G.W. Dayasena,
Near Concrete Yard,
New Town, Embilipitiya.
Defendant

AND BETWEEN

G.B. Piyadasa,
Baddewewa Udakella,
Near the Primary Court,
Embilipitiya.
Plaintiff-Appellant

Vs.

G.W. Dayasena,
Near Concrete Yard,
New Town,
Embilipitiya.
Defendant-Respondent

AND NOW BETWEEN

G.B. Piyadasa,
Baddewewa Udakella,
Near the Primary Court,
Embilipitiya.
Plaintiff-Appellant-Appellant

Vs.

G.W. Dayasena,
Near Concrete Yard,
New Town,
Embilipitiya.
Defendant-Respondent-
Respondent

Before: Vijith K. Malalgoda, P.C., J.
Yasantha Kodagoda, P.C., J.
Mahinda Samayawardhena, J.

Counsel: Rohan Sahabandu, P.C. with Hasitha Amarasinghe for the Plaintiff-Appellant-Appellant.
Defendant-Respondent-Respondent absent and unrepresented.

Argued on : 22.07.2021

Written submissions:

by the Plaintiff-Appellant-Appellant on 23.04.2015.

Decided on: 15.10.2021

Mahinda Samayawardhena, J.

The plaintiff filed this action in the District Court of Embilipitiya seeking a declaration of title to the land described in the first schedule to the plaint, ejectment of the defendant from a portion thereof as described in the second schedule to the plaint, and damages. The defendant sought dismissal of the plaintiff's action. After trial, the District Court dismissed the plaintiff's action on the basis that the plaintiff failed to prove title to the land. On appeal, the Court of Appeal affirmed the judgment of the District Court. This appeal by the plaintiff is from the judgment of the Court of Appeal.

This Court granted leave to appeal to the plaintiff on the following two questions of law:

> *As there was an erroneous observation by the trial judge as to deed P16 should the Court of Appeal have returned the matter back to the District Court to adjudicate on the issue*

of prescription as the District Court had not explained the issue?

When the Court of Appeal finds that the plaintiff is entitled to ½ share of the corpus only, could a declaration be granted to the said ½ share and order eviction of the trespasser as the trial Court has not held that the defendant has prescribed to the land or has paper title as he stands in the shoes of a trespasser?

The plaintiff filed this action on the basis that he is the paper title holder of the land described in the first schedule to the plaint by deed marked P1 from his father. The District Judge rightly concluded that P1 cannot be relied upon as the plaintiff did not prove how his father had obtained title to the land in order for the father to have conveyed it to the plaintiff, since mere execution of deeds does not confer title.

During the course of his evidence, the plaintiff stated that his father got title to the land by deed No. 12205. According to the proceedings of the District Court, this deed had not been marked in evidence and therefore the District Judge stated that it had not been produced. But as the Court of Appeal correctly notes in its judgment, this deed is available in the brief marked P16 and there is an error in recording the proceedings.

Nevertheless, the Court of Appeal does not state that the plaintiff's father obtained title to the land by P16. What the Court of Appeal states is "*Even if P16 is considered as having conveyed title to the father of the plaintiff, yet he is only entitled to an undivided ½ share of the subject matter*." This cannot be

interpreted to mean that the Court of Appeal came to the definite finding that the plaintiff's father became entitled to an undivided ½ share of the land by virtue of P16 and that this ½ share was transferred by P1 to the plaintiff.

As the Court of Appeal has remarked, there is no mention of P16 in P1 as the source of title of the transferor. In P1, the plaintiff's father traces his title to an order delivered in a section 66 application under the Primary Courts' Procedure Act to which the defendant was not a party. Even if this is correct, the Primary Court does not decide on ownership of the land but only on possession.

Moreover, perusal of P16 reveals that it has nothing to do with the land the plaintiff claims title to in the instant action. The land in suit is known as *Baddawewe Udakella* alias *Udakella* but there is no such land described in the schedule to P16.

The position of the defendant is that this is state land. The plaintiff also stated in cross examination that the Mahaweli Authority took preliminary steps to issue permits in respect of this land but the permits were never issued. His evidence on this question is not clear.

By the aforesaid first question of law, the plaintiff seeks to remit the case to the District Court for adjudication on the issue of prescription upon P16 being available in the case record. This has no meaning. There is no correlation between P16 and the plea of prescription.

What is this prescriptive title the plaintiff claims? Whilst stating that he is the owner of the land by deed P1, the plaintiff by issue number 3 states that he has acquired prescriptive title to the land by undisturbed, uninterrupted and adverse possession against the defendant for well over ten years. Does this mean the plaintiff considers the defendant the true owner of the land? The plaintiff filed this case on the basis that the defendant forcibly entered his land described in the schedule to the plaint on a particular day about one year before the institution of the action. The plaintiff's plea of prescription is intrinsically inconsistent and unsustainable.

Both the District Court and the Court of Appeal have correctly concluded that the plaintiff has not proved title to the land.

I answer both questions of law in the negative and dismiss the appeal of the plaintiff but without costs.

Judge of the Supreme Court

Vijith K. Malalgoda, P.C., J.
I agree.

Judge of the Supreme Court

Yasantha Kodagoda, 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 under and in terms Article 128 (2) of the Constitution

Kariyawasam Bendigodagamage Premawathi
No. 83,
Rajagiriya Road,
Rajagiriya.

Plaintiff

SC Appeal 212/2014

SC SPL LA 141/2014
CA Appeal1037/99 (F)
DC Colombo Case No. 17595/L

Vs,

Mahavithanage Dona Engalthinahamy (deceased)
No. 100,
Rajagiriya Road,
Rajagiriya.

Defendant

And

Kariyawasam Bendigodagamage Premawathi
No. 83,
Rajagiriya Road,
Rajagiriya.

Plaintiff-Appellant-Petitioner

Vs.

Paranavithanage Don Jayathilake Perera
No. 100,
Rajagiriya Road,
Rajagiriya.

Substituted Defendant- Respondent- Respondent

And Now Between

Kariyawasam Bendigodagamage Premawathi

No. 83,

Rajagiriya Road,

Rajagiriya.

Plaintiff-Appellant-Petitioner-Appellant

Vs,

Paranavithanage Don Jayathilake Perera (dead)

No. 100,

Rajagiriya Road,

Rajagiriya.

Paranavithanage Don Nishantha Kumara Perera

No. 100,

Rajagiriya Road,

Rajagiriya.

Substituted Defendant- Respondent-Respondent

Before: Justice Vijith K. Malalgoda, PC

Justice E.A.G.R. Amarasekara

Justice Yasantha Kodagoda, PC

Counsel: Jagath Wickramanayake, PC with Ms. Gimhani Jayaweera for the Plaintiff-Appellant-Appellant

Sanath Weerasinghe with Jayalath Hissella for the Defendant-Respondent-Respondent

Argued on: 01.07.2020

Judgment on:10.03.2021

Vijith K. Malalgoda PC J

The Plaintiff-Appellant-Appellant (hereinafter referred to as "the Appellant") instituted proceedings before the District Court of Colombo, against the original Defendant namely, Mahavithanage Dona Engalthinahamy seeking *inter alia* a declaration of title and ejectment from the premises described in the Second Schedule to the Plaint. However, the substituted Defendant-Respondent-Respondent (hereinafter referred to as "the Respondent") has filed his answer denying the averments contended in the plaint and took up the position that the said premises is governed by the Rent Act No 07 of 1972 (hereinafter referred to as "the Rent Act") and prayed for a dismissal of the action, as he was the lawful tenant of the premises in question.

At the trial 8 issues were framed and no admissions were recorded on behalf of the parties. Based on the evidence led at the trial, the learned Judge of the District Court had delivered Judgment dated 02nd of December 1999 dismissing the plaint. Being aggrieved by the said Judgment of the District Court, the Appellant appealed to the Court of Appeal, but the said appeal too was dismissed by the Court of Appeal by its judgement dated 26th on June 2014.

The Appellant had preferred the instant appeal against the said judgement of the Court of Appeal. This Court on 14th November 2014, having heard the submissions made by the Counsel for the Appellant, granted Special Leave on the following questions of law, which reads as follows:

i. Is the Judgment dated 26th June 2014 by the Court of Appeal wrong in Law?
ii. Has the Court of Appeal erred in law in failing to consider that neither the Defendant nor the Substituted Defendant were/are tenants of the Appellant in relation to the premises in suit?
iii. Has the Court of Appeal erred in law in failing to consider that the Defendant and the substituted Defendant have failed to discharge the burden of proving their right to possession of the premises in suit?

As revealed before us, the original position taken by the Appellant before the District Court was that the Appellant being the lawful owner of the premises referred to in the schedule, is entitled for the declaration and ejectment of the original Defendant namely Mahavithanage Dona Engalthinahamy who was in illegal occupation of the said premises claiming to be a tenant. The Appellant had further denied the tenancy of the said Defendant.

In the said plaint there is no reference to any tenancy agreement with any person by the Appellant or by the Appellant's predecessor in title. The original Defendant Engalthinahamy had passed away immediately after the instant case was filed before the District Court and Paranavithanage Don Jayathilake Perera the son of Engalthinahamy was substituted in her place (the Respondent)

Even though the Respondent did not directly admit the Appellant's title to the land by his answer, he took up the position that until the death of his father Martin Perera, he was the tenant of the Appellant and the Appellant's predecessor in title. The Appellant has accepted the rent deposited at the Municipal Council by late Martin Perera and after the death of his father, his mother namely Mahavithanage Dona Engalthinahamy succeeded to the tenancy by operation of law and similarly he too succeeded to the tenancy on the demise of his mother by operation of law. It was the position of the Respondent that both his late mother and himself were occupants of the said premises during the tenancy of his late father.

As further observed by this court, the plaint before the District Court was instituted seeking a Declaration of Title and to eject the Defendant (the Respondent) from the premises in question. However, the evidence transpired a vindicatory action in order to recover possession of the said property.

Availability of a vindicatory action as against a Declaratory action was discussed by *Gratiaen J* in the case of ***Pathirana Vs. Jayasundara 58 NLR 169 at page 173*** as follows;

> "A decree for a declaration of title may, of course be obtained by way of additional relief *either* in a *rei vindicatio* action proper (which is in truth an action *in rem*) or in a lessor's action against his overholding tenant (which is an action *in personam*). But in the former case, the declaration is based on proof of ownership; in the latter, on proof of contractual relationship which forbids a denial that the lessor is the true owner"

Therefore, it is necessary to consider whether the Appellant had succeeded in establishing a vindicatory action before the District Court. This position was considered both, by the learned District Judge who delivered the original judgment, as well as their Lordships of the Court of Appeal. In the absence of any valid challenge by the Respondent to the title of the property in question, the learned District Judge had correctly decided the title to the property in question in favour of the Appellant as follows;

"මෙම ස්ථානයට අදාල අයිතිය සම්බන්ධයෙන් පැහැදිලි සාක්ෂි පැමිණිල්ලෙන් ඉදිරිපත් කර ඇත. පැ.1 වශයෙන් ඉදිරිපත් කර ඇති ප්‍රසිද්ධ නොතාරිස් පේ. ඒ. රොබට් පෙරේරා යන අයගේ අංක 1623 දරණ ඔප්පුව මගින් මේ ස්ථානයේ අයිතිය පැමිණිලිකාරිය සතුවී ඇත. ඒ බව සනාථ කරමින් ඇය සාක්ෂි ඉදිරිපත් කර ඇත. පැමිණිලිකාරියගෙන් ඒ සම්බන්ධයෙන් හරස් ප්‍රශ්න විත්තිය අසා ඇතත් පැමිණිලිකාරිය සතු එකී අයිතිවාසිකම දුර්වල කිරීමට තරම් බලවත් සාක්ෂියක් විත්තියෙන් ඉදිරිපත් නොකරන ලදී. ස්ථානයට අදාල අයිතිය සම්බන්ධයෙන් පැමිණිලිකාරිය දී ඇති එම සාක්ෂිය බිඳ හෙලීමට ද විත්තියට පුළුවන්කමක් ලැබී නැත. ඒ අනුව මෙම ස්ථානයට අදාල අයිතිය සම්බන්ධයෙන් පැමිණිලිකාරිය දී ඇති එම සාක්ෂිය පිළිගනිමින්, නඩුවට අදාල ස්ථානයේ අයිතිය පැමිණිලිකාරිය සතු බව තීරණය කරමි." [at page 105 of the brief]

Even though there was no dispute with regard to the paper title of the property or ownership, the action was mainly intended to eject the original Defendant and the Respondent in the instant appeal who were the wife and the child of the original tenant, said Martin Perera. The main contention of this action and the evidence led before the trial seems to be, the ejectment of the original Defendant and the Respondent, after the death of Martin Perera. In this regard, the Appellant took up the position that the original defendant as well as the Respondent were unlawful occupiers of the said property but not tenants under the provisions of the Rent Act.

At this juncture, it is important to consider whether the original Defendant or the Respondent in the instant appeal are protected tenants under the provisions of the Rent Act. The Appellant in her evidence before the District Court admitted that Martin Perera was the tenant of the property in question until his death and the original defendant was his wife and the Respondent was his son. Appellant admitted the above fact in her evidence as follows;

ප්‍ර: තමා කොයි අවස්ථාවකදීවත් උත්සාහ කලේ නෑ මේ විත්තිකරුගේ මවවත් පියාවත් මේ විත්තිකරුවත් ඔය ස්ථනයේ කුලී කරුවන් ලෙස සිටියා කියලා කියන්න?

උ: පියා කුලී නිවසියෙක් කියලා පිලිගන්නවා. ඊට පසුව අනිත් අය කුලී ගෙව්වේ නෑ. මිය ගිය අය නමින්මයි කුලී ගෙව්වේ.

ප්‍ර: තමා පියා කිව්වේ මාටින් පෙරේරාට?

උ: ඔව්

ප්‍ර: එතකොට මාටින් පෙරේරා කුලී නිවසියෙක් ?

උ: ඔව්

……

ප්‍ර: මාටින් පෙරේරා කෝට්ටේ නගර සභාවේ තැන්පත් කරපු කුලී මුදල් තමා කෝට්ටේ නගර සභාවෙන් ලබා ගත්තා ?

උ: ඔව්

[At page 82 of the brief: Evidence given by the Appellant at the trial dated 9th of December 1998]

Even though the Appellant accepted Martin Perera as the tenant, the position taken by the Appellant with regard to the original Defendant and the Respondent was that, none of them were accepted as the tenants of the property in question since Engalthinahamy the original Defendant and Jayathilake Perera the Respondent continued to deposit the rent to the Municipality under the name of Martin Perera. Neither of them had made any application either to the rent board or to the Appellant, requesting them to continue as the tenants at the premises in question.

When considering the above argument, it is necessary to first consider whether the premises in question is governed by the Rent Act. The facts of the case clearly shows that the tenancy of the Martin Perera was admitted by the Appellant while giving evidence at the trial. Further, there was an application before the Rent Board, but no objection was raised on the ground of lack of jurisdiction. Other than that, the rent of the premises was continuously deposited at the Municipality during the latter part of the time of Martin Perera which was accepted by the Plaintiff. In the said circumstances I have no doubt in concluding that the premises in question is covered by the provisions of the Rent Act.

In the above context, it is necessary to consider the legality of the position taken up by the Appellant before this court.

Section 36 of the Rent Act deals with the question of the continuance of a tenancy upon the death of the tenant. Under Common law, the contract of tenancy comes to an end on the death of the tenant. Therefore, it is open for the landlord to decide who his tenant should be. On the other hand, under Section 18 of the Rent Restriction Act, No. 29 of 1948, it was possible for certain persons to continue the tenancy on the death of the tenant with giving notice prescribed by the said Act to the landlord [*vide:* ***Karunaratne vs Fernando, 73 NLR 457***]. In the said circumstances the failure to give such notice would result in him losing his right to continue with the Tenancy.

However, with the introduction of the new Rent Act, the question of such notice does not arise, since giving of notice by prospective tenant has been excluded and the Section 36 of the Rent Act precisely defines the continuance of the tenancy after the death of the tenant. Therefore, giving notice is not required to continue the tenancy. Under this section, the landlord has no choice and is bound to accept as tenant one of the persons specified in the said section.

Section 36 reads as follows;

Section 36;

(1) Notwithstanding anything in any other law, the succeeding provisions of this section shall have effect in the event of the death of the tenant of any premises. For the purposes of this sub-section, a person shall be deemed to be the tenant of any premises notwithstanding that his tenancy of such premises has been terminated by the expiry of the notice of the termination of the tenancy given by the landlord thereof, if at the time of his death he was in occupation of such premises.

(2) Any person who-

a) in the case of residential premises, is the surviving spouse or child or parent or unmarried brother or sister of the deceased tenant or brother or sister of the deceased tenant if he was unmarried at the time of death, and was a member of the household of the deceased tenant during the whole of the period of six months immediately preceding his death, and

b) …….

In the Court of Appeal decision of ***Abdul Kalyoom and others vs Mohomed Mansoor (1988) 1 SLR 361***, *S. N Silva J* (as he then was) has examined the said Section 36 as follows;

> "Tenancy right being personal do not pass to the tenant's heirs but under the Rent Laws special provision has been made for such tenancy rights to pass to successors eligible under the special statutory criteria – Section 18 of the Rent Restriction Act and now Section 36 of the Rent Act of 1972. While under S. 18 of the Rent Restriction Act succession to the tenancy would depend upon the eligible person giving written notice to the landlord, under S. 36 of the Rent Act, no such notice is required. The eligible person succeeds to the tenancy without such notice….."

As observed by this court, the Appellant had not disputed the fact, that the original Defendant and the Respondent were the surviving, or the lawful spouse and the child of the said tenant, Martin Perera.

ප්‍ර: 72. 11. 23 වෙනිදා වෙනකොට උසාවියේ ඉන්න විත්තිකරු මේ ස්ථානයේ බුක්තියේ සිටියා කියලා තමා දන්නවාද? 72. 11. 23 වෙනිදා වෙනකොට අද අධිකරණයේ සිටින විත්තිකරු අදාල ස්ථානයේ බුක්තියේ සිටියා නේද?

උ: මාටින් පෙරේරා සමඟ තමා සිටියේ.

ප්‍ර: මාටින් පෙරේරා කියන්නේ කවුද?

උ: එයාගේ පියා. විත්තිකරුගේ පියා.

[At page 68 & 69 of the Brief: Evidence given by the Appellant at the trial dated 9th of December 1998]

Further,

ප්‍ර: ඒ අනුව තමා දන්නවා 43 ඉදලා තමාට කියන්න බැරී වුනත් , සාමාන්‍යයෙන් තමාගේ තේරෙන වයසේ ඉදලා කවුද පදිංචි වෙලා හිටියේ කියලා ?

උ: මාටින් පෙරේරා සමඟ එයාගේ දරුවෝ පදිංචි වෙලා හිටියා

ප්‍ර: මාටින් පෙරේරා ඇරෙන්න කවුද තව පදිංචි වෙලා හිටියේ ?

උ: එංගල්තිනාහාමි

ප්‍ර: මාටින් පෙරේරාගේ කවුද එංගල්තිනාහාමි ?

උ: පවුල

ප්‍ර: තව කවුද පදිංචි වෙලා හිටියේ ?

උ: දරුවෝ හිටියා

ප්‍ර: අද අධිකරණයේ ඉන්නේ මාටින් පෙරේරාගේ දරුවෙක් නේද ?

උ: ඔව්

[At page 71 & 72 of the brief: Evidence given by the Appellant at the trial dated 9th of December 1998]

It is trite law that if the material facts are not challenged at the trial, there is no need to prove such undisputed facts. Accordingly, the evidence at the trial reveals the acceptance of this relationship by the Appellant. In the said circumstances, it is observed that the Respondent is entitled to continue with the tenancy following the death of the tenant, said Martin Perera. [***Croos Vs. Sakaff (1998) 1 SLR 68***]

However, the Appellant argued that, there cannot be double succession, based on the death of the Original Defendant but I do not think it is necessary to consider the said argument at this juncture, since the court has to decide the case as at the date of instituting the action.

The next argument of the Appellant was the Respondent's failure to attorn their names as the new tenants. However, on the perusal of the submissions made by the Counsel for the Appellant with regard to the attornment and presumption of attornment, it is clear that this question will only arise if there is a change of the ownership. There was no change of ownership in the instant case after the death of Martin Perera whose tenancy was not in dispute. In addition, as already observed in this judgement, no notice is required to be given to the landlord, under Section 36 of the Rent Act.

The learned Judge of the District Court has clearly discussed this point in the Judgment, as;

> "ඇටෝර්න්මන්ට් යනුවෙන් සඳහන් කරන්නේ, යම් කිසි ස්ථානයකට ඇති අයිතිය වෙනස්වීම පිළිබඳව දැනුම් දීම මත, කුලී නිවසියා විසින් ක්‍රියා කර තිබිය යුතුය යන්නයි. එසේ නම් මෙහිදී බල පැවැත් වෙන්නේ, අයිතිය වෙනස්වීම පිළිබඳව කුලී නිවසියාට දැනුම් දීමයි. මෙම ස්ථානයේ අයිතිය පැමිණිලිකාරිය බව පිළිගනිමින් මාටින් පෙරේරා යන අය කුලී ගෙවා ඇති අතර , එම කුලිය පැමිණිලිකාරිය විසින් භාරගෙනද ඇත. ඉන් අනතුරුව පැමිණිලිකාරිය සතු අයිතිය වෙනස් වීමක් සිදුව නොමැත. කුලී ගෙවන අය වෙනස් වුවත් අයිතිකාරියගේ නමින් තවදුරටත් සියලුම මුදල් තැන්පත් කර ඇති බව ඉදිරිපත් වී ඇති සියලුම සාක්ෂි අනුව පැහැදිලි වන කරුණකි. එසේ නම් ඇටෝර්න්මන්ට් යන ක්‍රියාව මෙම නඩුවට අදාල කර ගත නොහැකි කරුණකි ....."
>
> [At page 109 of the brief]

The Appellant has further argued that the said Respondent has failed to pay the rent and therefore, he was in unlawful occupation of the said premises. During the trial before the District Court, the documents marked V1 to V9 were submitted as evidence to show the rent deposited with the Municipal Council which was accepted by the Appellant.

On the other hand, the evidence of the Witness from the Municipal Council revealed that the original Defendant and the Respondent too had continued to pay rent to the Municipal Council under the name of the said Martin Perera (*vide*: page 97 to 100 of the Appeal brief). Although the Appellant has

collected the rent deposited by said Martin Perera, she did not collect the rent deposited by the Respondent in the absence of a new contract between the Appellant and the Defendant.

In this regard the Appellant took up the position that the original Defendant as well as the Respondent have failed to pay the rent in their names and therefore, she refused to accept those payments.

The situation which had arisen in the instant case can be considered under the provisions of Section 36 (3) of the Rent Act which reads as follows;

> "the Landlord of any premises referred to in subsection (I) shall make application, to the board for an order declaring which, if any, of the persons who may be deemed to be the tenants under subsection (2) shall be the person who shall for the purposes of this Act be deemed to be the tenant of the premises."

The above requirement under the Rent Act was discussed by *Sarath N Silva* J in ***Abdul Kalyoom and Others Vs. Mohomed Mansoor* (*Supra*)** as follows;

> "Under the section 36 (3) of the Rent Act the landlord is obliged to apply to the Rent Board for an order declaring which if any of the persons who may be deemed to be tenants under subsection 2 shall be the person who shall for the purpose of the Act be the tenant. In every situation where prima facie there are one or more persons eligible to succeed to the deceased tenant on the stipulated criteria the landlord is obliged to make an application to the Board for a determination.
>
> The Board has exclusive power to make positive order declaring that a person who is qualified to succeed to the deceased tenant on the criteria stipulated in Section 36 (2), is the tenant for the purpose of the Act or to make a negative order declaring that no such person will succeed the deceased tenant. Consequently, an action filed by a landlord in the regular courts, without making an application to the Board, will fail, if it is established that any of the Defendants may be deemed a tenant of the premises in terms of section 36 (2)"

In this regard, it is also necessary to consider the provisions of Section 36 (6) of the Rent Act. The said provisions reads thus;

> "Notwithstanding anything in any other provisions of this Act, the landlord of any premises referred to in subsection (1) shall not be entitled to institute any action or proceedings for the

ejectment from such premises of any person referred to in subsection (2) of the ground that the rent of such premises has been in arrear for any period ending on the date on which the board made order under subsection (4)."

When considering the above provisions of the Act, specially, sections 36 (1), (2), (3) and (6) it appears that the Appellant had failed to follow the provisions of the Act after the death of Martin Perera, even though he had accepted that Martin Perera was his tenant whilst giving evidence before the District Court. In those circumstances the Original Defendant and/or the Respondent cannot be found fault for making the payment in the name of the deceased tenant Martin Perera.

The succeeding tenants are also entitled to make payments with the authorized person as stipulated in Section 21 of the Rent Act.

In these circumstances it is useful to consider the provisions of Section 21 of the Rent Act which relates to the payment of rent by a tenant.

Section 21 states as follows;

(1) The tenant of any premises may pay the rent of the premises to the authorized person instead of the landlord

(2) …….

(3) Where the rent of any premises is paid to the authorized person, the authorized person shall issue to the tenant of the premises a receipt in acknowledgment of such payment, and shall transmit the amount of such payment to the landlord of the premises. It shall be the duty of such landlord to issue to the authorized person a receipt in acknowledgment of the amount so transmitted to him

(4) In this section, "authorized person", with reference to any premises, means the Mayor or Chairman of the local authority within whose administrative limits the premises are situated or the person authorized in writing by the Mayor or Chairman to receive rents paid under this section or where the Minister so determines the board of the area within which the premises are situated.

Accordingly, it is possible for a tenant, in the event of the landlord refusing to accept rent, or for any other cause, to pay the rent of the premises to the authorized person instead of the landlord. Payment of the rent to the authorized person shall be deemed to be payment to the landlord. Further, this

section does not stipulate that the rent should be paid in the name of the personal representative or the deceased tenant. The facts of the instant case reveal that the original Defendant and the Respondent too had continued to pay the rent to the authorized person under the name of the deceased tenant since the land lord had refused to accept the Rent even from the tenant Martin Perera when he was alive. Therefore, it is incorrect to argue that the original defendant as well as the Respondent had failed to pay the rent, when they deposited the rent with the authorized person in the name of the deceased tenant Martin Perera.

In the case of the ***Husseniya Vs. Jayawardena and Another 1981 (1) SLR 93*** **SC,** it was held that, when depositing rent in the Municipal Council, it has to be paid in the name of the tenant or on behalf of the tenant. [Vide: ***DMJ De Silva Vs. Mallika Perera 1989 (2) SLR 352***]

Accordingly, it is crystal clear that the original Defendant and the Respondent were the lawful successors to the tenancy, Martin Perera. Upon the death of the tenant, continuance of the tenancy is statutorily recognized and there is no requirement to attorn their names as new tenants.

When considering the material already discussed in my judgement, it is clear that the Respondent was successful in establishing before the District Court that the Defendant was the statutory tenant of the Appellant and therefore entitled to continue with the tenancy agreement and therefore to continue as the tenant of the Appellant. In the said circumstances, it is further observed that the Appellant was not entitled to bring a suit to vindicate title and therefore it is misconceived in law.

When coming to the above conclusion I am further mindful of the decision in ***Hewamallika Vs. Soma Munasinghe (1982) 1 SLR 339***, where *Soza J* has observed;

> "…..As it would appear, the Plaintiff filed the present action without any prior demand. Hence the defendant's pleading that she is not aware of the plaintiff's title is justified. The Plaintiff really stands in the shoes of his father as landlord and is therefore not entitled to bring a suit to vindicate title. Presently the defendant has acknowledged plaintiff's title. It is not denied that rents due in respect of these premises are being paid in the plaintiff's name to the Colombo Municipality. The defendant's contention that she is the tenant of these premises under the plaintiff is entitled to succeed. She is entitled to the protection of the Rent Laws. In any event tenancy has not been terminated. In these circumstances a vindicatory suit is misconceived and does not lie."

In ***Mensina Vs. Joslin reported in 1 Sris Kantha's Law Report 76***, it was further held, that

> "…….. The plaintiff was not entitled to institute a vindicatory action as the Defendant had become his tenant by the operation of law."
>
> "…….. The plaintiff however has not brought the action on the contract of tenancy that has arisen in his favour by operation of law. He has brought the action for declaration of title and for the ejectment of the defendant as a trespasser. This action is therefore misconceived"

In the said circumstances, this court is of the opinion that the Appellant cannot bring an action on *rei vindicatio* since the tenancy agreement had continued between the Appellant and the Respondent upon the death of the original tenant, the said Martin Perera. Based on the evidence led before the trial court, this Court can further conclude that the Respondent has a right to possess the land in suit.

When answering the questions of law raised in the instant appeal, this court accepts the analysis of the evidence clearly made by the trial judge and the judgment delivered by the Court of Appeal. I therefore answer the questions of law raised in this case in favour of the Respondent.

Accordingly, the judgments of the Court of Appeal and the District Court are affirmed by this Court.

Appeal dismissed.

Judge of the Supreme Court

Justice E. A. G. R. Amarasekara

I agree,

Judge of the Supreme Court

Justice Yasantha Kodagoda 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 against the Judgement of the Provincial High Court of the Western Province (exercising its Civil Appellate Jurisdiction) holden at Avissawella, dated 30th June 2015 in terms of the Article 128 of the Constitution read with Section 5C (1) of the High Court of the Provinces (Special Provisions) Act No.19 of 1990 as amended by the High Court of the Provinces (Special Provisions) (Amendment) Act No.54 of 2006

Case no.: SC/APPEAL/222/2016

Leave to Appeal No: SC/HC/CALA/ 246/2015
HCCA (Avissawella): WP/HCCA/AV/1393/2012/F
D.C (Avissawella): 22844/P

Kuruwita Arachchillage Jagath Kumara Abeythunga,
A27, Galpatha,
Ruwanwella.

PLAINTIFF

Vs

1. Kuruwita Arachchillage Jayatilake
   Kiriporuwa,
   Ampagala
2. Agas Pathirennehelage Gunaratna,

Galpatha,

Ruwanwella.

DEFENDANTS

AND BETWEEN

1. Kuruwita Arachchillage Jayatilake
   Kiriporuwa,
   Ampagala
2. Agas Pathirennehelage Gunaratna,
   Galpatha,
   Ruwanwella.

DEFENDANT- APELLANTS

Vs

Kuruwita Arachchillage Jagath Kumara Abeythunga,
A27, Galpatha,
Ruwanwella.

PLAINTIFF- RESPONDENT

AND NOW BETWEEN

1. Kuruwita Arachchillage Jayatilake
   Kiriporuwa,
   Ampagala
2. Agas Pathirennehelage Gunaratna,
   Galpatha,
   Ruwanwella.

DEFENDANT-APELLANTS- APPELLANTS

Vs

Kuruwita Arachchillage Jagath Kumara Abeythunga,
A27, Galpatha,
Ruwanwella.

PLAINTIFF-RESPONDENT- RESPONDENT

BEFORE : **L.T.B. DEHIDENYA, J.,**
S. THURAIRAJA, PC, J. and
YASANTHA KODAGODA PC, J

COUNSEL : Thishya Weragoda with Prathap Welikumbura, Meinusha Gamage and Sashya Karunapalage for the Defendants-Appellants–Appellants.

S. A. D. S Suraweera or the Plaintiff-Respondent-Respondent

ARGUED ON : 6th October 2020

WRITTEN SUBMISSIONS: Written Submissions for Defendants-Appellants-Appellants submitted on 17/01/2017 and 25/01/2021

Written Submissions for Plaintiff-Respondent-Respondent submitted on 18/01/2018 and 25/01/2021.

DECIDED ON : 29th September 2021

S. THURAIRAJA, PC, J.

The Facts

The Plaintiff-Respondent-Respondent namely Kuruwita Arachchillage Jagath Kumara Abeythunga (hereinafter referred to as the "Respondent") instituted Partition action before the District Court of Avissawella by Plaint dated 30th August 2006 against the Defendants; Kuruwita Arachillage Jayathilaka (1st Defendant-Appellant-Appellant, hereinafter referred to as the "1st Appellant") and Agas Pathirennehelage Gunaratna (2nd Defendant-Appellant-Appellant, hereinafter referred to as "2nd Appellant").

The original owner of the land sought to be partitioned was one Kuruwita Arachchillage Peter Appuhamy who became entitled by virtue of final decree in Partition Action bearing No.7160 in the District Court of Avissawella and thereafter transferred his rights to one Kuruwita Arachchillage Hemaratne by Deed of Transfer No.36180 dated 11th November 1968.

The said Hemaratne died intestate leaving behind 1/2 share to his wife Danasuriya Arachchige Baby Nona and the remainder 1/2 share to his six siblings namely Kuruwita Arachillage Kusumawathie, Jayathilaka (1st Appellant), Kamalawathie, Gnanalatha (referred to as Gunathilaka in the District Court Judgement), Thilakalatha and Abeytunga. The said Baby Nona transferred her rights to the Respondent by the Deed of Transfer No.1628 dated 1st June 2004. The aforesaid Kusumawathie, Kamalawathie, Gnanalatha and Thilakalatha transferred their rights to Jayathilaka (1st Appellant) by Deed of Transfer No. 9925 and thereafter the 1st Appellant transferred his rights to Agas Pathirennehelage Gunaratna (2nd Appellant).

The Appellants by their joint Statement of Claims dated 29th January 2009, prayed for dismissal of the action on the grounds that the said Hemaratne was a person Subject to Kandyan Law and that Baby Nona, wife of said deceased Hemaratne, was not entitled to any share of the land sought to be Partitioned, as the devolution of title from him has to be determined in accordance with Kandyan Law where the

widow is only entitled to Life Interest in the land and that even the said rights were extinguished upon her remarrying in 1980.

The Respondent pleaded that the rights of said Baby Nona have been determined in a previous District Court (Avissawella) Case bearing No. 20316/P and therefore the matter operates as *Res Judicata*. It must be clarified that the Case no. 20316/P was a Partition Action instituted by the 1st Appellant, regarding a different land, previously owned by the same Hemaratne. In the case 20316/P, the application of personal laws was not discussed or contested, and the land was partitioned considering that Baby Nona (said Hemaratne's widow) was not governed by any Personal Laws, namely Kandyan Law.

The Respondent argued in the plaint that in the case 20316/P as it was an undisputed fact that was accepted by all parties, including the 1st Appellant, that Baby Nona was not subject to Kandyan law, her interest in the land is not merely that of Life Interest, thus enabling her to transfer her interest in the land to the Respondent by Deed bearing No. 1628, as was done by her. Thereby he sought the land in the instant case to be Partitioned accordingly.

The Additional District Judge of Avissawella held in favor of the Respondent by Judgement dated 28th August 2012.

Being aggrieved and dissatisfied thereof, the Appellants preferred an appeal to the Provincial High Court of the Western Province (exercising its Civil Appellate Jurisdiction) holden in Avissawella under and in terms of Section 754(1) of the Civil Procedure Code.

The learned High Court Judge, in the judgment dated 30th June 2015, considers two questions of law. Firstly, the question of whether the said Hemaratne was a Kandyan and secondly, whether the case bearing 20316/P operates as *Res Judicata* as against the parties in this case.

In answering the first question of law, the learned High Court Judge affirms that the Appellants have failed to adduce sufficient evidence to prove that Hemaratne was a Kandyan and that Kandyan law must apply to the inheritance of his estate.

In answering the second question of law, the Learned Judge noted that the 1st Appellant of the present case was the 1st Plaintiff in the Partition action bearing No. 20316/P and that the case was concluded without contest. It is manifest from the Judgment of the 20316/P case that Baby Nona was allotted her share of the land without any questions being raised as to the law applicable to the estate of Hemaratne.

The Learned Judge notes that as the 1st Appellant was the 1st Plaintiff of the earlier case, he is bound by the judgment of the said case and is therefore estopped from claiming that devolution of the title must be determined in accordance with Kandyan Law. In view of this fact, it was held in the High Court Judgement that the Additional District Judge was correct in concluding that the judgement in the earlier partition decree (case bearing No.20316/P), operates as *Res Judicata* in regard to the devolution of title from Hemaratne in the present case.

Being aggrieved thereof, the Appellants preferred a Leave to Appeal application to this court and Leave was granted on the following grounds:

a. Has the learned High Court Judge erred in law in applying the principles *Res Judicata* in the instant matter?
b. Has the learned High Court Judge erred in law in failing to appreciate that the land sought to be partitioned in Case No. 20316/P and the land sought to be partitioned in the instant matter bearing No. 22844/P were not the same land?
c. Has the learned High Court Judge erred in law in failing to appreciate and apply the Judgment in **Jayasinghe v. Kiribindu** (1997) 2 Sri L.R. 1 and **Gunaratne v. Punchibanda** (1927) 29 NLR 249 in determining whether a person is subject to Kandyan Law or not is a pure question of law?

d. Has the learned High Court Judge erred in law in failing to conclude that the plea of *res judicate* is not applicable in the instant matter since the subject matter of the present action has not been concluded in a previous action within the provisions of Section 34, 207 or 406 of the Civil Procedure Code?

Application of Kandyan Law instead and the application of *Res Judicata*

Examining the facts of the instant case, I believe it is prudent to first acknowledge the central underlying question put forward to this Court by the parties. It is clear that the Respondent, who has received his interest in the land by widow of said Hemaratne by Deed of Transfer No. 1628, wishes to Partition this land. It is also an established fact that the Appellants in the present case maintain that the said Hemaratne was a Kandyan and thus, the devolution of title from him must be determined in accordance with Kandyan Law where the widow shall only get an estate for life.

Section 11 of the **Kandyan Law Declaration and Amendment Ordinance No.39 of 1938** (hereinafter referred to as the "Ordinance") clearly states that:

> *(1) When a man shall die intestate after the commencement of this Ordinance leaving a spouse him surviving, then -*
>
> > *(a) the surviving spouse shall be entitled to an estate for life in the acquired property of the deceased intestate…*
> >
> > *(b) if the surviving spouse shall contract a diga marriage, she shall cease to be entitled to maintenance out of the paraveni property of the deceased but shall not by reason of such re-marriage forfeit her aforesaid life estate in the acquired property;*

This provision was applied in the case of **Tikiri Banda V. Dingiri Banda (1970) 76 NLR 203**, and this principle was followed well before the enactment of the Ordinance in the case of **Dingiri V. Undiya (1918) 20 NLR 186**.

It must be noted that there is no mention of a child of said Hemaratne in the documents before this court. In terms of succession by siblings, which is of significance to this case, **Section 17** of the Ordinance must be referred to, which states as follows:

> *17. In the devolution of the estate of any person who shall die intestate after the commencement of this Ordinance,*
>
> > *(a) whenever the estate or any part thereof shall devolve upon heirs other than a child or the descendant of a child, and such heirs are in relation to one another brothers or sisters, or brothers and sisters, or the descendants of any deceased brother or sister, such heirs shall inherit inter se the like shares and in like manner as they would have done had they been the children or descendants of the deceased intestate*

Thus, it is clearly advantageous for the Appellants to adopt the stance Kandyan Law applies due to the above principles. As through the application of the above principles to the instant case, Baby Nona would not have the power to transfer her interest to the Respondent and instead of the Appellants and Respondent having a respective interest of ½ share of the land each, the Respondent would have no interest in the land at all.

Upon perusal of evidence, we find that in the Examination of witnesses conducted in the District Court of Avissawella on the 30th of September 2010, in the present Partition action bearing no.22844/P, the 1st Appellant himself admits the fact that he wishes different stances to be adopted in the two Partition cases:

> *ප්‍ර: තමන්ට තිබෙන මේ ප්‍රශ්නය මේ 20316 දී හේමරත්නගේ අයිතිවාසිකම් බිරිඳට ගියා කියන එක ගරු අධිකරණය පිළිගත්තා?*

(Q: Is your problem that in the case 20316, the Court accepted that the said Hemaratne's Rights transfer to his wife?)

උ: ඔව්.

(A: Yes.)

ප්‍ර: තමන් මේ 22844 කියන මේ නඩුවේ හේමරත්නගේ අයිතිවාසිකම් බිරිඳට යනවා කියන එක කියන්න කැමති නැහැ?

(Q: Do you not want to say in this 22844 case that Hemaratne's Rights transfer to his wife?)

උ: නැහැ.

(A: No.)

The 1st Appellant further admits that he did not raise the issue regarding the law applicable to Baby Nona in the District Court case 20316P due to the fact that he was suffering from poor health conditions and wished for the proceedings to be concluded quickly and for that land to be partitioned without any contest. However, in the instant case the 1st Appellant himself persists in requesting the court to apply Kandyan Law, to the same Baby Nona whose status was not disputed in a case with similar circumstances to the present case. Based on this observation it is clear that the Appellants wish for the court to apply different laws to the same person in two separate but similar cases, with no other basis but their own preference and benefit.

Further, the Appellants point out that *Res Judicata* cannot be used due to the difference in subject matter, namely the lands of the two separate cases. However, it must be noted that while the instant case and the case bearing no.20316P are similar in the parties and the lineage of the lands, the Judgements by the District Court and the High Court Judge state that the Courts have used the case 20316P only to the extent of the law applicable to Baby Nona, and the High Court Judge even notes that the previous case was about a separate land with parties including but not limited to

some of the parties of the present case (namely, the 1st Appellant and Respondent). To this extent it is clear that both the High Court and the District court was concerned with the consistency of the application of law. This is given that if, in this case Kandyan Law was to be applied, it would lead to a disparity between the judgement of the instant case and the judgement in the case bearing no.20316P as different laws would apply to the same person.

In terms of the substance of the present dispute, it is clear that the parties' disagreement in the use of the principle of *Res Judicata* pertains to the application or disapplication of Kandyan Law to the rights of Baby Nona over this property. Thus, I am of the view that answering the questions of law before this court pertaining to *Res Judicata* is not in itself relevant or necessary for the resolution of this dispute, as the most pressing concern is the potential applicability of Kandyan Law. Thus, prior to examining the facts, both similar and contrasting, between the instant Partition case and that bearing no. 20316P, it must be understood that application of the principle of *Res Judicata* is of little consequence as the Appellants have failed to prove the applicability of Kandyan Law to Baby Nona, the deceased Hemaratne, or any parties to the present dispute.

Applicability of Kandyan Law not proved by the Appellants

It is an established view that where a person contends that a special Personal Law applies in the place of the General Law, the burden of proof is upon the party making such a claim. In the case of **Kandiah. vs. Saraswathy** 54 NLR 137, where the applicability of Thesavalamai Law to a particular party was discussed, Dias S. P. J stated as follows:

> *"No authority has been cited to show that there is any presumption of law by which a Court can say without proof that the Thesavalamai applies to a particular Tamil who happens to reside in the Jaffna Peninsula. In the absence of such a presumption I am of opinion that the burden of proof is*

on the party who contends that a special law has displaced the general law in a given case to prove the applicability of such special law.'

(Emphasis added)

I am inclined to follow the precedent set and long followed in terms of the applicability of the special Personal laws, particularly Kandyan Law, whereby the party claiming that the special law applies must discharge the burden of proof upon them to rebut the presumption that General Law is applicable.

In order to determine whether the Appellants have discharged the burden upon them to prove that the said Hemaratne is indeed a Kandyan, I find it pertinent to firstly pay attention to the statements of the 1st Appellant himself. Upon perusal of evidence, we find that in the Examination of witnesses conducted in the District Court of Avissawella on the 30th of September 2010, in the initial Partition action bearing no. 22844/P for the present case, the 1st Appellant has given the following answers to the questions asked during cross-examination which I have reproduced below for reference:

ප්‍ර: තමන් උඩරට විවාහයක්ද කරගෙනද තිබෙන්නේ?

(Q: Do you have a Kandyan marriage?)

උ: සාමාන්‍යයෙන් විවාහයක් හැටියට මේක තිබෙන්නේ

(A: This exists as a normal marriage)

Further:

ප්‍ර: තමන්ගේ අබේතුංග මල්ලී විවාහ වුණෙත් සාමාන්‍ය විවාහ ආඥා පනත යටතේ 112 පරිච්ඡේදය යටතේ නේද?

(Q: Didn't your brother Abeythunga also get married under the General Marriage Registration Ordinance under Chapter 112?)

උ: ඔව්.

(A: Yes.)

ප්‍ර: තමන් කිව්වානේ නඩුවේ පලවෙනි නඩුවෙන් පසුව උපදෙස් ලැබුණා කියලා උඩරට කියලා?

(Q: You said that after the first hearing of the case you were adviced that you were Kandyan right?)

උ: උඩරට කියලා නෙවෙයි උඩරට නීතිය බලපානවා කියලා

(A: not saying Kandyan, but that Kandyan Law applies)

ප්‍ර: මොකක්හරි ලේඛනයක් ඉදිරිපත් කරනවාද තමන්ගේ පියාට, මවට, සහෝදරියන්ට හෝ උඩරට නීතිය බලපාන ලේඛනයක්?

(Q: Are you presenting any document that shows that Kandyan Law applies to you father, mother, or sisters?)

උ: මම එහෙම ඉදිරිපත් කරන්නේ නැහැ

(A: I am not presenting such a document)

In examining the above excerpts of the witness statements, it is evident that the Appellants do not have substantial evidence proving that the law applicable to the deceased Hemaratne, Baby Nona or even any of the siblings of Hemaratne including himself is Kandyan Law.

He also states that he is only aware of his lineage to the extent of his Father's Father, who he insists was born of persons who were Kandyan from before 1815. However, the Appellants have not provided this court, The High Court, or the court of first instance with any substantial evidence to prove that they are subject to Kandyan law or that any of the relevant persons have even married under Kandyan Law. He is aware that his own marriage and more importantly, the marriage of the deceased Hemaratne was under the General Marriages Ordinance

It must also be noted that the Judgement by the District Court Judge and the High Court Judge clearly state that the only reason for the use of the case 20316P is in

that the same law must apply to the person, as the Appellants have failed to discharge the burden of proof upon them.

Therefore, the applicability of *Res Judicata* is a moot point of discussion as the objection of the Appellants to the Partitioning of the land as per the plaint of the Respondent, does not stand when considered upon the merits of this case, the witness statements of the parties and the submissions before this court, as even if the case bearing 20316P is not applied *Res Judicata*, Baby Nona would be Governed by general law, allowing for the Respondent to have a valid legal claim over ½ of this property through Deed of Transfer No.1628 as the Appellants have failed to prove the applicability of Kandyan law.

Application of *Res Judicata*

The Principle of *Res Judicata* is founded upon the key maxims of *Nemo debet lis vaxari pro eadem causa* (no person should be vexed twice for the same cause), *Interest republicae ut sit finis litium* (it is in the interest of the state that there should be an end of litigation) and *Res Judicata pro veritate occipitur* (Decision of the court should be adjudged as true). Through the application of the principle of *Res Judicata* a party is barred from re-examining a case which has been adjudicated by a competent court.

In the instant case, the questions of law raised by the parties pertain to *Res Judicata* and the application or disapplication of this principle thereof. Thus, I find it pertinent to establish the facts of the instant case which are of relevance to this principle.

As mentioned prior, in the District Court case bearing no. 20316P, the current 1st Appellant instituted a partition action for a different land owned by the same Hemaratne. In the mentioned case, both the 1st Respondent and said Baby Nona are among the many parties to the action. However, it is pertinent to note that the 2nd Appellant is not among the parties to said action. Further, it can be averred upon an examination of the facts that the lands in the case bearing 20316P and the instant case

are different lands as the names, extent, and the preliminary partition actions which gave the rights to said Hemaratne are all different.

The Partition action bearing 20316P was concluded with no contest and the land was partitioned accordingly, with Baby Nona claiming her portion of the land. As mentioned above, the 1st Appellant himself admits that he did not raise any claim of the law applicable to Baby Nona as he was unwell and did not wish to delay proceedings.

However, this Court finds that in the present case, when it is not in the interest of the 1st Appellant, he raises a claim of the applicability of Kandyan Law to Baby Nona. If in the unlikely event, this Court, the District Court, or the High Court were to decide that Kandyan Law does apply to Baby Nona, it would be a judgement conflicting with the earlier partition case 20316P. It is not prudent to apply two separate personal laws to the same party in nearly identical circumstances in two separate and similar cases. Baby Nona is either a person subject to Kandyan Law or she is not. This court cannot say she is both at the same time due to the failure of the 1st Appellant to raise the question in the initial case bearing number 20316P.

In arriving at the conclusion that the principle of *Res Judicata* applies to the present dispute the District Court and the High Court have taken certain relevant factors into account. The learned District Court Judge in his judgement for the instant case, bearing no.22844P has stated in page 3 that in arriving at a decision, he has taken into consideration the argument by the Respondent that the Judgement in the District Court case bearing 20316P between the same parties regarding a different land is a material fact for the instant case in determining whether the deceased Hemaratne is a Kandyan, the objection by the Appellants refuting that claim, and the judgement of the case ***Jayasinghe v Kiribindu and others (1997) 2 SLR 1*** relied on by the Defense to support their objection.

Upon examining the evidence, the District Court Judge had come to the conclusion that the Appellants failed to prove that the deceased Hemaratne was a Kandyan.

In terms of the judgement of the case ***Jayasinghe v Kiribindu and others (ibid),*** the District Court Judge has noted that in this case that while the Supreme Court had decided that the question of whether a daughter married in Diga can claim rights of a Binna married daughter is a pure question of law, and that thus, a previous case before the court between the parties was immaterial, the Supreme Court did not necessarily decide that the question of whether Kandyan Law applies or not is a pure question of law. On the contrary, Justice Dheeraratne has stated that a question arising out of a question of fact or a question which is a combination of a question of fact and a question of law, a previous judgment is a material consideration.

Upon this basis, the District Court Judge has concluded that the question of whether a person is a subject of Kandyan law or not is not a pure question of law owing to the requirement of the proving the circumstantial fact of whether the person in question is a descendant of a resident of the Kandyan regions as of 1815. As such, the evidence presented before the court by the 1st Appellant and the Judgement in the previous case bearing no. 20316P was considered a material fact in the instant case pertaining to the inheritance of the estate of the said Hemaratne.

Thereafter, the learned High Court Judge in his judgement has reaffirmed that the 1st and 2nd Appellants failed to adduce sufficient evidence to prove that Hemaratne was a Kandyan, and Kandyan Law applies to the inheritance of his estate. Further, the judgement sufficiently notes the difference between the lands in question in the instant case and the previous 20316P case, by expressly stating the differences of the names and lot numbers of each land. The High Court Judge has also noted that in the previous case was concluded without contest and the 1st Appellant as the only party

giving evidence was not cross examined and 1st Appellant admitted that Baby Nona is entitled to her share of the land from marital inheritance from Hemaratne.

The High Court Judge further notes that as the 1st Appellant of the present case was the 1st Plaintiff of the previous case, he is bound by the judgement of the said case and therefore he is estopped from claiming that devolution of title from Hemaratne should be determined in accordance with Kandyan Law. In view of the above mentioned circumstances the High Court Judge has concluded that he is in agreement with the Additional District Judge in concluding that the judgement of the earlier partition action operates as *Res Judicata* in regard to the devolution of title from Hemaratne in the present case.

I find it pertinent to note that in both the District Court Judgement and the High Court Judgement of the instant case, the learned Judges have aptly noted the failure of the Appellants to prove the applicability of Kandyan Law to the said Hemaratne, the difference between the lands in the previous case bearing no. 20316P and the instant case bearing no. 22844P, and the observation that the judgement of the previous case is only relevant to the question of determining the law applicable. As mentioned by the learned High Court Judge, I am of the view that the Appellants are estopped from bringing the present claim.

As further enumerated upon by Basnayake C.J in **Herath v. The Attorney General [1958] 60 NLR 193,** at pages 217 and 218, unlike in Roman Law, English Law classifies *Res Judicata* as a branch of estoppel. A distinction between these two principles were drawn by Beaman, J. in the Indian case **Casamally vs Currimbhoy, I.L.R 36 BOM. 214** as follows:

> *"Put in the most simple and colloquial way, Res Judicata precludes a man averring the same thing twice over in successive litigations, while estoppel prevents him saying one thing at one time and the opposite at another.*

The instant case in addition to the principle of *Res Judicata,* the concepts pertaining to estoppel, especially judicial estoppel, are of relevance. Where a competent court which has jurisdiction over the parties and the subject matter of a dispute, has pronounced final decision, any party to such litigation, or in the case of a decision *in rem* any party whomsoever, as against any other party, is estopped from disputing such a decision on the merits in a subsequent litigation on the basis of *Res Judicata estoppel*. The decision by the District Court Judge in the case bearing no. 20316P operates as *Res Judicata* as the decision of the law applicable to Baby Nona pertains to the merits of the case.

In addressing the matter of whether questions not raised in earlier proceedings, can operate as *Res Judicata* in a subsequent proceeding, the opinions expressed by Wingram VC in **Henderson v Henderson (18430) 3 Hare 100** which are of relevance are reproduced below:

> *"In trying this question I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction,* ***the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances} permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case.*** *The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time"*

(Emphasis added)

Further as per **Spencer Bower, Turner and Handley** in their book **The Doctrine of Res Judicata** a party is entitled to the claim that the issue estoppel does not take effect if a party was excusably ignorant of some matter which would have altered the whole aspect of the case. However, the estoppel stands if there were no newly discovered facts, if it was only newly discovered in the sense that the party realized its importance, if the party had actual knowledge of the fact or might with reasonable diligence have acquired such knowledge.

This stance is not one that is new to our legal system**. The Administration of Justice (Amendment) Law No. 25 of 1975** which was later repealed stated in Chapter 6 as follows:

> *Section 491*
>
> *(1) Subject to the provisions in regard to co-defendants or co-plaintiffs contained in this section, where a final decision on a controverted question of law or issue of fact has been pronounced in any action before it by a Court of competent jurisdiction, any party or privy to such action as against any other party or privy thereto, and in the case of a decision In rem any person whomsoever as against any other person, shall in any subsequent action wherein such question of law or issue of fact is directly and substantially in issue between them be estopped from disputing or questioning such decision.*
>
> *(4) Where the determination of the question of law or issue of fact is not expressly recorded but is necessarily involved in the adjudication, such adjudication is itself a decision on the controverted question of law or issue of fact.*

Further in Section 493:

(6) Any matter which might or ought to have been made a ground of defence or attack in the former action shall be deemed to have been a matter in issue in such action, whether in fact made a ground of defence or attack or not.

Taking all the above principles of law into account, I find that in the instant case the question of law applicable to Baby Nona was a question that should have been raised in the previous case and the 1st Appellant is not entitled to claim ignorance as there are no newly discovered facts or circumstances. As such the District Court decision in the case bearing no. 20316P operates as *Res Judicata* in the present case.

In answering the question of law pertaining to the interpretation of the judgement of **Jayasinghe v. Kiribindu (supra)**, I am inclined to agree with the interpretation afforded by the learned District Court Judge, especially in light of the statements by Justice Dheeraratne in the judgment. It is apparent that the question of law raised by the parties in the case of **Jayasinghe v. Kiribindu** was the interpretation of the relevant statute in determining whether the daughter married in Diga could acquire Binna rights. An instance of such a pure question of law where the only dispute is as to the interpretation of law and not of facts or surrounding circumstances, is dissimilar to a situation as that of the instant case, where the applicability of the law itself must be proven with facts disputed by the parties.

Decision

Upon perusal of all evidence and submission presented to this Court by the parties, I find that the 1st Appellant has not provided the court with sufficient evidence to support the claim that the said Hemaratne is a person subject to Kandyan law and thus Baby Nona is only entitled to claim Life Interest over the Property. Further, I find that the learned Additional District Court Judge and the learned High Court Judge have not erred in law in asserting that the judgment in the previous District Court case bearing no. 20316P operates as *Res Judicata* in the instant case.

Taking the aforementioned circumstances into consideration I answer the first question of law in the negative. I answer the second question of law in the negative as the learned Judge has acknowledged the differences of the lands as enumerated above. I am of the view that the third question of law must be answered in the negative as the learned Judges of the District Court and the High Court have correctly applied the law established by the mentioned cases as clarified above. Finally, the final question of law shall be answered in the negative as well. The Respondent shall be entitled to costs of the litigation to this court, and to costs in respect of the appeal filed in the High Court.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

L.T.B. DEHIDENIYA, 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 to the Supreme Court of the Democratic Socialist Republic of Sri Lanka under Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka read with Section 5(c) of the High Court of the Provinces (Special Provisions) (Amendment)Act No. 54 of 2006, against the judgment delivered in Civil Appellate High Court of the Central Province holden in Kandy Case N0. CALA 63/2013, and dated 23rd September 2016.

SC/Appeal/227/16

SC/HCCA/LA/520/2016

HC CIVIL Kandy: CALA 63/2013

DC Nawalapitiya: 387/2013

Santak Power (Pvt) Ltd,

No. 132, Old Kottawa Road,

Nawinna, Maharagama.

Plaintiff.

Vs.

1. Janatha Estate Development Board,
   No. 55/75, Vauxhall Lane,
   Colombo 02.
2. Ramya Nirmali Illeperuma,
   No.141, Ketawelamulla Road,
   Colombo 09.

3. Ajith Bathiya Illeperuma,
   No.141, Ketawelamulla Road,
   Colombo 09.
4. Ophelia Iyselin Illeperuma,
   No.141, Ketawelamulla Road,
   Colombo 09.
5. Ceylon Electricity Board,
   Sri Chittampalam A Gardiner Mawatha,
   Colombo 02.

Defendants.

And between

Ramya Nirmali Illeperuma,
No.141, Ketawelamulla Road,
Colombo 09.

2nd Defendant – Appellant.

Vs.

1. Santak Power (Pvt) Ltd,
   No. 132, Old Kottawa Road,
   Nawinna, Maharagama.

Plaintiff – Respondent.

2. Ajith Bathiya Illeperuma,
   No.141, Ketawelamulla Road,
   Colombo 09.

   Presently of
   5511 Katey Inn,
   Arlington,
   Texas - 76017
3. Janatha Estate Development Board,
   No. 55/75, Vauxhall Lane,
   Colombo 02.
4. Ceylon Electricity Board,
   Sri Chittampalam A Gardiner Mawatha,

Colombo 02.

Defendant – Respondents.

And Now between

Santak Power (Pvt) Ltd,
No. 132, Old Kottawa Road,
Nawinna, Maharagama.

Plaintiff – Respondent – Petitioner.

Vs.

1. Janatha Estate Development Board,
   No. 55/75, Vauxhall Lane,
   Colombo 02.
   1st Defendant – Respondent – Respondent.
2. Ramya Nirmali Illeperuma,
   No.141, Ketawelamulla Road,
   Colombo 09.
   2nd Defendant – Appellant – Respondent.
3. Ajith Bathiya Illeperuma,
   No.141, Ketawelamulla Road,
   Colombo 09.

   Presently of
   5511 Katey Inn,
   Arlington,
   Texas - 76017
   3rd Defendant – Respondent – Respondent.
5. Ceylon Electricity Board,
   Sri Chittampalam A Gardiner Mawatha,
   Colombo 02.

5th Defendant – Respondent – Respondent.

6. Sri Lanka Sustainable Energy Authority,
   Block 5, 1st floor,
   BMICH,
   Colombo 07.

Added Respondent.

Before: Sisira J de Abrew J

Murdu N.B. Fernando J

E. A. G. R. Amarasekara J

Counsel: Kalinga Indatissa PC with Mahesh Senaratne, Rashmini Indatissa and Dhanushka Sigera for the Plaintiff – Respondent – Petitioner – Appellant.

R.C. Gooneratne for the 2nd Defendant – Appellant – Respondent and the 3rd Defendant – Respondent – Respondent.

Sumathi Dharmawardena, DSG, PC with Sureka Ahmed SC for the 1st Defendant – Respondent – Respondent and Added Respondent (Sustainable Energy Authority Sri Lanka).

Argued on: 10.10.2019

Decided on: 20.05.2021

E.A.G.R. Amarasekara J

2nd Defendant – Appellant – Respondent of this application(hereinafter sometimes referred to as the 2nd Defendant or 2nd Defendant Respondent) and 3rd

Defendant – Respondent – Respondent of this application (hereinafter sometimes referred to as the 3rd Defendant or 3rd Defendant Respondent) had instituted an action bearing no. 21371/L as plaintiffs in the District Court of Colombo against the 1st Defendant – Respondent – Respondent of this application who was also the 1st Defendant in the said action (hereinafter sometimes referred to as the 1st Defendant or 1st Defendant Respondent), without making the Plaintiff – Respondent – Petitioner of this application (hereinafter sometimes referred to as the Plaintiff or Plaintiff – Petitioner or Petitioner) a party to the said action, inter alia praying for a declaration of title in respect of the lands described in the schedule to the plaint in the said action and praying for an order ejecting the 1st Defendant Respondent of this application from the said lands. The lands in the schedule of the said plaint were parts of Bowhill Estate described as lot 1 and 2 of plan no. 1379 and lot 1 of plan no. 1378, both made by S.H.P. Tennekoon, Licensed Surveyor. Subsequently, the 1st Defendant Respondent had filed its answer in the said action and after the trial, judgment was delivered granting all reliefs as prayed for by the 2nd and 3rd Defendant Respondents of this application who were the plaintiffs in that action, by the Learned District Court Judge of Colombo.

The District Court of Colombo in the said action had served the Plaintiff Petitioner of this application who was not a party to the said action, a court order dated 17th May 2013 which ordered the 5th Defendant – Respondent – Respondent of this application (hereinafter sometimes referred to as the 5th Defendant or 5th Defendant Respondent) to disconnect the supply of electricity to the Plaintiff Petitioner of this application. In the said action, the Plaintiff Petitioner of this application had later on filed an application under section 839 of the Civil Procedure Code. However, the said application had been refused- vide paragraph 39 of the Petition.

Thereafter, the Plaintiff Petitioner instituted an action in the District Court of Nawalapitiya by the plaint dated 27th May 2013, bearing No. DC Nawalapitiya Case No 387/2013 and pleaded inter alia that;

- The land described in the schedule to the plaint, which is a part of Bowhill Estate, is situated within the jurisdiction of the said court, and is depicted as Lots 1-6 in Plan No. 3120 dated 2003.01.15 prepared by

A. A. Padmadasa, Licensed Surveyor as a land in extent of 17 Acres and 27 perches.

- The said land was vested in the 1st Defendant, Janatha Estate Development Board (JEDB) by an order made by the then Minister of Agricultural Development and Research under section 22 and 23 read with section 27A of the Land Reform Law.
- Thereby, the 1st Defendant became the owner of the land with the right and authority to lease out the property.
- Thereafter, 1st Defendant by Deed of Lease No. 394 dated 2004.02.13 attested by Sudhath Perera, Notary Public had leased out the premises to the Plaintiff for 50 years. Thereby, the Plaintiff has become the lessee of the 1st Defendant.
- Having acted accordingly, on 2004.12.24, the Plaintiff commenced the "Korawak Oya Hydropower Project" on the said land.
- Plaintiff invested around Rs.147 million and had been in possession from 13.02.2004 and has employed 16 people and was supplying the electricity generated from the project to the 5th Defendant.
- When the circumstances were as such, on or around 2005.05.20, the Plaintiff was served with an order issued by the District Court of Colombo in the Case No. 21371/L directing the 5th Defendant to disconnect the electricity supply given to the Plaintiff. Accordingly, the Plaintiff came to know that the 2nd Defendant and the 3rd Defendant have instituted an action against the 1st Defendant without making the Plaintiff a party to the said action.
- Since the Plaintiff was not made a party to the said DC action No. 21371/L, any order made in the said case has no applicability to the Plaintiff.
- Judgment of the District Court Case No. 21371/L was given granting all the reliefs prayed by the 2nd and the 3rd defendants.
- The 2nd and 3rd Defendants had acted in collusion in the Colombo District Court case to evict the Plaintiff from the land depicted in the schedule to the Plaint.

Accordingly, the Plaintiff inter alia prayed in the Nawalapitiya District Court case;

a) A judgment and a decree to the effect that under and by virtue of the Deed of Lease No. 394 dated 13.02.2004, the Plaintiff has the lawful right to possess the land described in the schedule.

b) A judgment and a decree to the effect that the Deed of Lease No. 394 is a valid deed and that it is still in effect.

c) To demarcate the boundaries of the land described in the schedule of the said Deed of Lease.

d) To issue an enjoining order restraining the 1st to 4th defendants and their agents from evicting the plaintiff and its agents from the land described in the schedule unless any condition in the said Deed of Lease is breached.

e) To issue an interim injunction restraining the 1st to 4th defendants and their agents from evicting the plaintiff and its agents from the land described in the schedule to the plaint unless any condition in the said Deed of Lease is breached.

f) To issue a permanent injunction restraining the 1st to 4th defendants and their agents from evicting the plaintiff and its agents from the land described in the schedule to the plaint unless any condition in the said Deed of Lease is breached.

g) To issue an enjoining order restraining the 1st to 4th Defendants and their agents from obstructing the plaintiff and its agents from enjoying its rights with regard to the land possessed by it under and by virtue of the said Deed of Lease.

h) To issue an interim injunction restraining the 1st to 4th Defendants and their agents from obstructing the plaintiff and its agents from enjoying its rights with regard to the land possessed by it under and by virtue of the Deed of Lease.

i) To issue permanent injunction restraining the 1st to 4th Defendants and their agents from obstructing the plaintiff and its agents from enjoying its rights with regard to the land possessed by it under and by virtue of the Deed of Lease.

j) To issue an enjoining order restraining the 5th defendant and their agents from disconnecting the power supply to the Plaintiff.

k) To issue an interim injunction restraining the 5th defendant and their agents from disconnecting the power supply to the Plaintiff.

l) To issue permanent injunction restraining the 5th defendant and their agents from disconnecting the power supply to the Plaintiff

The matter was supported on 28.05.2013 and the learned District Judge by its order granted the enjoining orders as prayed in d), g) and j) mentioned above.

Thereafter, 2nd and 3rd defendants filed their objections and stated inter alia that;

- The land in the plaint depicted in the plan no.3120 made by A. Padmadasa, Licensed surveyor is part of the land in plan no. 3179 made by S.P.M. Tennekoon, Licensed Surveyor. (It appears, here the position was that it is part of the land in the aforesaid Colombo District Court action).
- Said land originally belonged to the father of the 2nd and 3rd Defendants and later was vested with the 1st Defendant, as per the sections 27A, 22 and 23 and 39 as amended of the Land reform Law.
- Land Reform Commission had given the said land to the 1st Defendant only to possess the same. In the judgment of the case No.21371/L, it is stated that the 1st Defendant admitted the same and the 1st Defendant recorded an admission to that effect in the aforesaid Colombo District Court case. Therefore, 1st Defendant, has no right to lease out the land in issue.
- Thereby, the Deed of Lease No. 394 is null and void and the Plaintiff did not become the lawful lessee of the 1st Defendant.
- The Plaintiff had no legal right to become a party to the Colombo District Court case No.21371/L and the Plaintiff was a person who was under the 1st Defendant, and in cases other than partition cases, even if a person was not made a party to an action, said judgment do not become null and void and since the Plaintiff entered into the subject matter under the rights of the 1st Defendant, the judgment in the Case No.21371/L is applicable to the plaintiff.
- As per the Gazette No. 1457/22 dated 2006.08.11, a part of Bowhill Estate was given back to the 2nd and 3rd Defendants. (In fact, this court

observes that the said Gazette revoked the order which vested the Bowhill Estate in the 1st Defendant to the extent as described in the schedule in the Gazette.)

- Thereafter, the lands described in the plaint were transferred to the 2nd and 3rd Defendants by the Land Reform Commission by Deed No. 392 dated 2006.12.14 attested by N.H.S. Herath, Notary Public. (This Court observes that as per the deed the lands conveyed to the Defendants are depicted in the Plans No.1378 and 1379 dated 25.05.2006 made by S P H Tennekoon, Licensed Surveyor and lands mentioned in the schedule to the plaint in the case at hand referred to a different plan).
- The Chairman of the Land Reform Commission by letter dated 2006.11.03 had requested the Chairman of the 1st Defendant to handover the possession of the land described in the schedule to the Plaint to the 2nd and 3rd Defendants.
- When the Registrar of the District Court Colombo went to the land in issue to handover the possession to the 2nd and 3rd Defendants it was obstructed and it has been reported to the District Court of Colombo.
- If the Plaintiff has an independent right, it can claim it before the fiscal and legally object to it and without exercising that right it does not have any right to file this action.

Accordingly, the 2nd and 3rd Defendants prayed for a dismissal of the action filed by the Plaintiff, to vacate the enjoining orders issued and to reject the request made for the interim injunctions.

Thereafter on 10.12.2013 the learned District Court judge delivered its order granting the interim injunctions as prayed in prayers (e), (h) and (k) and held *inter alia* that;

- Although an objection has been filed by the 2nd Defendant and the 2nd Defendant acting as the power of attorney holder for the 3rd Defendant, the said objection could be considered as an objection filed by the 2nd Defendant only, since the said power of attorney is invalid due to the defects morefully described in the order itself.

- Thus, only the 2nd Defendant has filed objections and the 1st,3rd,4th and 5th Defendants have not filed their objections.
- To obtain an interim injunction a prima facie case must be established. Further that if there is an irremediable loss or damage, an injunction will be granted and the applicant must come to courts with clean hands and maintain *uberima fide*.
- The deed of lease no.394 was not subject to the scrutiny of the Colombo District Court. Hence, there is no hindrance to file and maintain an action on a cause of action based on that lease and to see whether the said lease is valid and, whether the Plaintiff is entitled to the possession on that deed.
- As per the order published in the Gazette to vest the property in the 1st Defendant, there was no condition imposed that it cannot be given on lease.
- The 1st Defendant has given it on a lease to the Plaintiff for 50 years, in a manner binding its successors for the obligation created by the lease agreement.
- As per the circumstances of the case at hand, 2nd and 3rd Defendants can be interpreted as the successors of the 1st Defendant.
- Hence, there is a strong prima facie case for the Plaintiff.
- Still the 2nd and 3rd Defendants are awaiting to take the possession, and if the interim injunction is not given the huge money invested by the Plaintiff to the Hydropower project is at a loss and even the supply of electricity to the national grid and the function of the project itself are also at a risk. Interim injunction will not harm the 5th Defendant which gain electricity from the Project. The harm caused to the 1st ,2nd and 3rd Defendants by issuing an interim injunction would be comparatively less than the harm to the plaintiff if it is not issued. Thus, the balance of convenience was in favour of the Plaintiff.
- The Plaintiff is not guilty of not disclosing material facts or for misrepresentation and also not in breach of *Uberima Fide*. Thus, equitable considerations favour the Plaintiff.

Being aggrieved by the said order of the District Court grating the interim injunctions as prayed by the Plaintiff, the 2nd Defendant filed a leave to appeal

application in the Civil Appellate High Court Kandy, bearing No. CALA 63/2013 against the said order.

Order on the leave to appeal application was delivered on 23.09.2016 by the learned High Court Judges allowing the appeal made by the 2nd Defendant and vacating the order issuing interim injunctions, dated 10.12.2013, made by the Learned District Judge of Nawalapitiya.

The learned High Court judges among other things based their decision on the following grounds;

- Since an attempt has been made to oust the 2nd and 3rd Defendants from the land in dispute, a problematic situation has arisen – vide page 6 of the High Court Judgment.
- The cause of action arisen due to the occupation of the 2nd ,3rd and 4th Defendant in the land given to the Plaintiff by the 1st Defendant has been continuously supported through various arguments, since it appears that the actions of the 2nd and 3rd Defendants caused a situation of persisting hindrance to the continuation of the hydropower project – vide page 6 and 7 of the High Court Judgment.
- Even though, the Land Reform Commission has given permission for the Defendants to occupy at the beginning, it has been cancelled by the letter dated 26.11.2006 but it is not within the task of the high court to decide the legality of that cancellation – vide page 7 of the said Judgment.
- As per the submissions made by the 2nd Defendant, it can be decided that due to the interim injunction issued by the District court, the 1st,2nd,3rd and 5th Defendants lost their possession in the land in dispute – vide page 7 of the said judgment.
- The Plaintiff Company has got the final reliefs through the interim injunction which is contrary to law. - vide page 8 of the said judgment.
- The Plaintiff company has asked for an interim injunction to remove the 2nd Defendant from the possession of the land and learned District Judge has not given due consideration to that fact. – vide page 8 of the Judgment.

- The damage that may be caused to the plaintiff if the interim injunction is not issued has not been assessed and submitted to court and since the defendants lose the possession of the land by issuing the interim injunction, the damage that may cause to the defendants cannot be considered as one that can be assessed monetarily – vide page 9 of the said judgment.
- Although a loss may cause to the plaintiff the same can be compensated at the end of the case. Thus, it is not reasonable to grant an interim injunction at the beginning of the case.

Thus, the Learned High Court Judges allowed the appeal and vacated the order made by the learned District Judge.

Being aggrieved by the said order made by the Civil Appellate High Court of Kandy, the Plaintiff preferred a leave to appeal application. Upon supporting the leave to appeal application this Court was inclined to grant leave on the following questions of law - vide journal entry dated 18.11.2016.

"(b) Have the Learned High Court judges of HC Civil Appellate Kandy erred in law in understanding the nature of the possession and occupation of the petitioner to this application?

(c) Have the Learned High Court judges of HC Civil Appellate Kandy erred in law in understanding the nature of the interim injunctions issued in DC Nawalapitiya Case No. 387/2013 on 10th December 2013?

(d) Did the Learned High Court judges of HC Civil Appellate Kandy err in law and in fact in determining that the 2nd Defendant – Appellant – Respondent and the 3rd Defendant – Respondent – Respondent were in possession of the land in question which formed the subject matter of DC Nawalapitiya Case No. 387/2013?

(h) Did the Learned High Court judges of HC Civil Appellate Kandy err in law in understanding the basic grounds/tests to be satisfied in the issue of an interim injunction?

(i) Did the Learned High Court judges of HC Civil Appellate Kandy err in law in determining that the Learned District Judge of Nawalapitiya had failed to consider the grounds for the issue of injunctive relief?

(j) Did the Learned High Court judges err in law and in fact in applying the prima facie test and the balance of convenience test regarding the interim injunction issued in the DC Nawalapitiya Case No. 387/2013?

(n) Is the determination by the learned judges of the Civil Appellate High Court of Kandy in the said judgment marked 'X35' on the question that the effect of the injunction issued in DC Nawalapitiya Case No. 387/2013 was to dispossess the 2nd Defendant – Appellant – Respondent and the 3rd Defendant – Respondent – Respondent contrary to the evidence adduced before the said High Court? "

Moreover, the learned counsel for the 2nd and 3rd defendants also raised consequential issues at this stage which are as follows;

(X1) In terms of the settlement entered into between the parties dated 27.10.2014 before the High Court of Civil Appeal Kandy, did the plaintiff agree to handover possession with any portion of the land described in the lease Bond falls within the said land that described in the schedule to the plaint in D.C.Colombo Case No. 21371/L?

(X2) Is the Petitioner in unlawful occupation of the land of the 1st and 2nd defendants and therefore is the petitioner entitled to an injunctive relief?

When one looks at the reasons given by learned High Court Judges in their judgment, it is apparent that they have misapprehended the factual background of the case at hand since the defendants were not in the possession or occupation of the land and, the cause of action was not based on an attempt to oust them from the land. Thus, the finding of the learned High Court judges that the Defendants may lose their possession due to the interim injunction is wrong and, in that context, comparing that aspect with the possible harm caused to the plaintiff by not issuing the interim injunction to decide the balance of convenience is not tenable. Further, the finding of the High Court that the damage caused by such dispossession cannot be assessed monetarily is also not tenable, since such dispossession could not have taken place with the issuance of the interim injunction. It is also clear that the finding that the interim injunction was prayed to remove the 2nd Defendant from the possession of the land is also wrong. Nowhere in the pleadings the Plaintiff or 2nd and 3rd defendants have averred that the Defendants were in possession of the land in dispute. It is an undisputed fact that the DC Colombo Case No. 21371/L was filed by the 2nd and

3rd Defendants to obtain the possession of the lands released to them by the Land Reform Commission which lands appear to fall within Bowhill Estate once vested with the 1st Defendant, part of which may have been occupied by the Plaintiff – Petitioner in the case at hand. The cause of action in the Nawalapitiya District Court case is based on the imminent threat of eviction and disconnection of electricity supply of the Plaintiff owing to a court order in the said Colombo District Court case where the Plaintiff was not a party. It is true that the Plaintiff could have legally objected to the execution of decree or may tender a written statement of claim during the execution process or can make an application after the dispossession -vide section325 and 328 of the Civil Procedure Code. Even when such a claim fails, the Plaintiff Petitioner has the right to file an action to establish his right or title to the property – vide section 329 of the said code. However, there is no prohibition that, when a party has a cause of action due to imminent threat of eviction or disturbance to his possession (like disconnecting of electricity) he cannot straightly institute an action. It is difficult to understand how an order to disconnect electricity supply to the Plaintiff which affects his rights went out from the Colombo District Court when there was no prayer to that effect and when the Plaintiff was not a party to that case. However, these circumstances were not contemplated by the learned High Court Judges in allowing the appeal and vacating the interim injunctions. The learned High Court judges have come to a conclusion that the Land Reform Commission has given permission for the Defendants to occupy at the beginning, and it has been cancelled by the letter dated 26.11.2006. This also indicate that the High Court did not comprehend the facts and cause of action. As per the undisputed facts, through a Gazette notification dated 31.05.1982 the land, Bowhill estate was vested with the 1st Defendant and it was revoked with regard to the extent of lands described in the Extraordinary Gazette no.1457/22 dated 11.08.2006. After that a letter dated 29.11.2006 had been issued by the Land Reform Commission to the Superintendent of the Bowhill Estate of the 1st Defendant to hand over the said lands referred to in the latter Gazette. Further, the learned High Court Judges have expressed the view that the interim injunctions prayed by the Plaintiff, if granted, give the final reliefs prayed by the Plaintiff. However, the prayer in the plaint separately contained the declaratory reliefs and permanent injunctions which are of a final and permanent nature but the interim injunctions were prayed to maintain the status quo till the final decision of the case. Since, the

Judgment of the learned High Court judges is full of misapprehensions, conclusions reached by the learned High Court judges cannot be considered as valid conclusions.

However, before confirming the decision to issue injunctions by the learned District Judge it is necessary to see whether his conclusions were correct.

As per the sequence of events, it is clear that once the Bowhill Estate belonged to the 2nd and 3rd Defendant's father and later on, as per the land reform laws, it was vested in the Land Reform Commission. Thereafter, as per the order made by the Minister of Agricultural Research and Development in terms of sections 27A, 22 and 23 of the Land Reform Law, published in the Gazette dated 31.051982, marked as X3, that estate was vested with the 1st Defendant, Janatha Estate Development Board. It must be noted that there are no conditions or prohibitions laid down in that order with regard to the title, possession or with regard to giving it on lease. The 1st Defendant thereafter, leased out lots 1-6 of the plan no. 3120 made by A. A. Padmadasa, Licensed surveyor by deed of lease no.394 dated 13.02.2004, marked X5, to the Plaintiff Company for the purpose of putting up a Mini Hydropower Project. The extent so leased out was 17 Acres and 27 perches. Meanwhile, it appears, by an order published in the Extra Ordinary Gazette No.1457/22 dated 11.08.2006, the Minister revoked the vesting order that gave the Bowhill Estate to the 1st Defendant with regard to the lots and extents described in the schedule to the said gazette, which described the areas as lot 1 and 2 of plan no.1379 dated 29.05.2006 and lot 1 of plan no.1378 dated 29.05.2006 made by licensed surveyor S P H Thennekoon. Total Extent of the said lots were 100 Acres. Thereafter, the Land Reform Commission has transferred the said land to the 2nd and 3rd defendants by deed no.392. It appears that on the strength of the said documents and circumstances the 2nd and 3rd Defendants instituted the Colombo District Court case against the 1st Defendant to get a declaration of title and recover the possession of said 100 Acres. It must be noted that even though the 1st Defendant had given a part of the Bowhill Estate to the Plaintiff on lease, neither that fact has been revealed nor it was prayed to add the Plaintiff as a party to that case by any of the parties to that action. It is also pertinent to note that even though, the portion given to the Plaintiff by the said lease and the portion released to the 2nd and 3rd defendants are parts of Bowhill Estate, there was no finding in that case that the parts of Bowhill Estate given to

the Plaintiff by the 1st Defendant falls within the Parts of Bowhill estate released to the 2nd and 3rd defendant. In the aforesaid backdrop, it is questionable how the District Court issued an order in the said action affecting the rights of the Plaintiff who was not a party to the said action. This Court observes that there had been an admission made in the Colombo District Court case that the 1st Defendant was given only the right to possess by the Land Reform Commission. However, the Plaintiff was not a party to that admission and he is not bound by that admission. The Plaintiff's rights have to be decided as per the law and as said before, there was no condition or limitation or prohibition on the 1st Defendant when the Bowhill Estate was given to it by the aforesaid order published in the Gazette. As per Section 27A (2) of the land reform Law, once the vesting order is made, the relevant State Corporation gets the right, title and interest as was held by the Land reform Commission on the day immediately preceding the date on which the vesting order takes effect. As such the Plaintiff in the Nawalapitiya District Court Case had a *Prima facie* case to establish that its deed of lease is valid as it was given by one of the predecessors of title to the 2nd and 3rd Defendants even if the land contemplated in the deed of lease falls within the land given to the 2nd and 3rd Defendants. On the other hand, if the lots given to the Plaintiff fall outside the lots given to the 2nd and 3rd Defendants, the decision in the Colombo District Court has no relevance to the case filed in the District Court of Nawalapitiya, and still the Plaintiff has a prima facie case against the Defendants as there appears to be an imminent threat to its rights by using the Colombo District Court case decision against him. As per the objections filed by the 2nd and 3rd Defendants in the Nawalapitiya District Court case, they have taken up the position that the 1st Defendant had no right to enter into lease agreements and also that the Plaintiff need not have been made a party in the Colombo District Court case since he was a lessee of the 1st Defendant and came to the land in that case under him. As indicated above the Plaintiff could have presented a *prima facie* case that the lease is valid as he is not bound by the admissions made in the Colombo District Court. On the other hand, there was no finding in the Colombo District Court case that lots in the Plaintiff's lease fall within the lots in the schedule to the Plaint in the Colombo District Court case. Even for the sake of argument one accepts that the lease is not valid, there appears to be ample material that the Plaintiff is a bona fide possessor and he has invested and made improvements. Without making the Plaintiff a party to Colombo case and deciding its rights, the

Defendants cannot evict the Plaintiff or disturb its possession using the Colombo District Court case since in such a situation, it has the right to remain in possession till the compensation is paid. Thus, this court is not inclined to accept the argument that the Plaintiff need not have been made party to the Colombo District Court case and therefore there was no Prima facie case for it in the Nawalapitiya case. Contrary to the said position the 2nd and 3rd Defendants in their written submission attempt to argue that the Plaintiff has encroached the 2nd and 3rd Defendants' land when it belonged to the 1st Defendant. If it is an encroachment of a different part of the Bowhill Estate that did not fall within the land given on lease, it is a different cause of action for a case that has to be filed against the Plaintiff. In such situation, the 2nd and 3rd Defendants cannot rely on the judgment given against the 1st Defendant as such encroachment is not an act of the 1st Defendant but an independent act of the Plaintiff.

The counsel for the 2nd and 3rd Defendants in his written submission refers to a settlement that took place in the High Court but it appears that the said settlement was not properly carried out as per the submission the survey had to be done by two surveyors named by both the parties. Nothing is there to say that parties settled the matters relating to the issuance of Interim injunction as agreed. Even the learned High Court judge has not mentioned that as there is a valid settlement, it is not necessary to make an order on the appeal made.

As per the reasons given above, this Court is of the view that there was a strong *prima facie* case[1] for the Plaintiff in the Nawalapitiya District Court action where there were serious[2] questions to be tried with regard to the Plaintiff's rights, with a reasonable prospect of success[3]. If the interim injunctions were not issued it was not only the investment made by the Plaintiff that can be assessed monetarily was to be affected but its future profits, obligation towards its employees and other parties such as 5th Defendant where it might have entered into contracts, progress of the hydropower project and its goodwill also were at risk. Such harm may be irremediable. Learned District Judge has observed some of these and decided that there was a prima facie case for the Plaintiff and the

[1] Felix Dias Bandaranayake V The State Film Corporation (1981) 2 Sri L R 287

[2] Felix Dias Bandaranayake V The State Film Corporation (1981) 2 Sri L R 287, Gulamhusein V Cohen (1995) 2 S L R 365,

[3] Ibid, and also see Amarasekere V Misui & Company Ltd. (1993) 1 Sri L R 22, Ratnayake Vs Wijesinghe (1989) 1 Sri L R 406

balance of convenience favours the Plaintiff. Hence, the learned District Judge's decision to issue interim injunctions was correct. As observed by the learned District Judge, there is nothing to say that equitable considerations stand against the granting of reliefs to the Plaintiff.

Thus, the questions of law (b) (c) (d) (h) (i) (j) and (n) mentioned above has to be answered in the affirmative and, the questions of law X1 and X2 are answered as follows.

X1 – There is no proof that the matter was concluded as per the settlement reached and a survey was done as agreed.

X2 - The Plaintiff Petitioner has placed materials to show that it has prima facie a lawful right to occupy the land. Thus, it is entitled to injunctive reliefs.

Hence, this court decides to allow the appeal and vacate the judgment dated 23.09.2016 of the Civil Appellate High Court of Kandy and to affirm the order dated 10.12.2013 made by the Learned District Court Judge of Nawalapitiya and to reinforce the Interim Injunctions issued by the said Order. The Plaintiff is entitled to the costs of this Court and lower Courts in relation to the applications for interim injunctions.

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

Seylan Bank PLC,
(formerly Seylan Bank Limited)
No. 90, Galle Road,
Colombo 03.
Having branch at No. 315-317,
Old Moor Street,
Colombo 12.

Plaintiff

SC Appeal No. 237/2014
SC/HCCA/LA: 447/14
HCCA/A/No.12/14
Case No. DDR/69/13

Vs.

Mohamed Rasheed Mohamed Farook,
No. 185, Old Moor Street,
Colombo 12.

Defendant

AND NOW

In the matter of an application under sections 754(2) and 757 of the Civil Procedure Code read together with section 5A of the High Court of the Provinces (Special Provisions) (Amendment) Act, No. 54 of 2006.

Seylan Bank PLC,
(formerly Seylan Bank Limited)
No. 90, Galle Road,
Colombo 03.
Having branch at No. 315-317,
Old Moor Street,
Colombo 12.

Plaintiff-Appellant

Vs.

Mohamed Rasheed Mohamed Farook,
No. 185, Old Moor Street,
Colombo 12.

Defendant-Respondent

AND NOW

In the matter of an appeal under section 5C of the High Court of the Provinces (Special Provisions) (Amendment) Act, No. 54 of 2006.

Seylan Bank PLC,
(formerly Seylan Bank Limited)
No. 90, Galle Road,
Colombo 03.
Having branch at No. 315-317,
Old Moor Street,
Colombo 12.

Plaintiff-Appellant-Appellant

Vs.

Mohamed Rasheed Mohamed Farook,
No. 185, Old Moor Street,
Colombo 12.

Defendant-Respondent-Respondent

Before	:	Priyantha Jayawardena PC, J Vijith K. Malalgoda PC, J Yasantha Kodagoda PC, J
Counsel	:	Palitha Kumarasinghe PC, with Nuwan Rupasinghe for the plaintiff-appellant-appellant Murshid Maharoof with Shaib Ahamed for the defendant-respondent-respondent
Argued on	:	14th of September, 2020
Decided on	:	29th of November, 2021

Priyantha Jayawardena PC, J

This is an appeal from a judgment of the High Court of the Western Province holden in Colombo exercising civil jurisdiction (hereinafter referred to as "the Civil Appellate High Court"), which dismissed an interlocutory appeal preferred against an order of the District Court of Colombo, granting leave to appear and show cause against the decree *nisi* under section 6 of the Debt Recovery (Special Provisions) Act, No. 2 of 1990, as amended.

Facts of the case

The plaintiff-appellant-appellant (hereinafter referred to as "the plaintiff bank") had instituted action in the District Court of Colombo against the defendant-respondent-respondent (hereinafter referred to as "the defendant") under the said Act, and pleaded that the defendant had requested for an overdraft facility of up to Rs. 13 million on his current account. Further, he had furnished a letter of guarantee dated 19th May, 2005, issued by Ceylinco Profit Sharing Investment Corporation Limited (hereinafter referred to as "the guarantor company"), which is a sister company of the plaintiff bank, as security for the said facility. In the said letter of guarantee, the guarantor company stated that the defendant had deposited a sum of Rs. 13 million with the guarantor company, and the said letter of guarantee was issued against the said deposit.

Thereafter, the plaintiff bank had entered into an agreement with the defendant on the 20th of May, 2005, to grant an overdraft facility of up to Rs. 13 million at an interest rate of 15% per annum.

It was further pleaded that the defendant had subsequently requested to enhance the said overdraft limit. Accordingly, the plaintiff bank had agreed to enhance the limit of the said facility and entered into another agreement with the defendant on the 9th of June, 2005, subject to the condition that any sum drawn in excess of Rs. 13 million would be charged at an interest rate of 30% per annum.

It is pertinent to note that the enhanced amount of the said overdraft facility is over and above the guarantee furnished by the defendant, and he did not furnish any additional security to obtain the enhanced facility.

Thereafter, the defendant had utilized the said facility from time to time and, as at the 30th of July, 2010, he had overdrawn his current account up to a sum of Rs. 18,527,978/66.

Hence, the plaintiff bank had sent letters of demand to the defendant and the guarantor company demanding payment of the said overdrawn sum together with interest. However, neither the defendant, nor the guarantor company, had settled the overdrawn sum and interest, or any part thereof. Further, the guarantor company had subsequently become defunct.

After the application for a decree *nisi* was supported by the plaintiff bank, the learned Additional District Judge had entered a decree *nisi* against the defendant for a sum of Rs. 18,527,978/66 as prayed for in the said plaint, and the same was served on the defendant.

On the date of decree *nisi* returnable, the defendant had filed an application supported by an affidavit under section 6(2) of the said Act seeking, *inter alia*, leave to 'file answer' unconditionally.

In the said application, the defendant pleaded that he had invested a sum of Rs. 13 million with the guarantor company, which was a sister company of the plaintiff bank. Accordingly, he had tried to withdraw the said investment. However, the guarantor company had informed him that it was unable to release the said money as it was facing a financial difficulty at the time. As an alternative, the guarantor company had agreed to arrange for the defendant to obtain a loan from a company within the group. As the defendant already had banking facilities with the plaintiff bank, the guarantor company had agreed to issue a guarantee in order for the defendant to obtain the said overdraft facility of up to Rs. 13 million from the plaintiff bank.

It was further stated that the guarantor company had agreed to pay the monthly interest from the said deposit directly to the plaintiff bank, and therefore he would be absolved of any liability towards the plaintiff bank in respect of the said overdraft facility.

Thereafter, an inquiry had been held under section 6(2) of the said Act, and the learned Additional District Judge held, *inter alia,* that the **defendant had failed to disclose a defence which is *prima facie* sustainable. However, the defendant was granted leave to 'file answer' upon him paying into court a sum of Rs. 800,000/- or furnishing security sufficient to satisfy the said sum.**

Being aggrieved by the said order of the learned Additional District Judge, the plaintiff bank had filed an interlocutory appeal to the Civil Appellate High Court.

Having heard submissions of both parties, the Civil Appellate High Court had dismissed the appeal of the plaintiff bank, on the basis that the failure by the plaintiff bank to recover the debt due to it from the money held on lien by the guarantor company, which was a sister company of the plaintiff bank, and suing the defendant without making the guarantor company a party to the action, was a pure abuse of the provisions of the said Act.

Further, being aggrieved by the said judgment of the Civil Appellate High Court, the plaintiff bank had filed an application for leave to appeal in this court, and leave to appeal was granted on the following questions of law;

"a) Have the Learned Judges of the Provincial High Court exercising Civil Jurisdiction WP/HCCA/COL/12/2014(LA) erred in law in holding that the learned trial judge could have granted leave to appear and show cause <u>without security</u> against decree nisi entered in an action under the Debt Recovery (Special Provisions) Act No. 2 of 1990 as amended?

b) Have the Learned Judges of the Provincial High Court exercising Civil Jurisdiction WP/HCCA/COL/12/2014(LA) erred in law in not considering that if the Respondent has failed to establish "<u>a prima facie sustainable defence</u>", the Court has no jurisdiction to grant the Respondent leave to appear and show cause in terms of sections 6(2)(c) and 6(3) of the Debt Recovery (Special Provisions) Act No. 2 of 1990 as amended?

c) Have the Learned Judges of the Provincial High Court exercising Civil Jurisdiction WP/HCCA/COL/12/2014(LA) erred in law in not considering that the District Court

*has no jurisdiction to permit the Respondent to file "**Answer**" in view of provisions of section 7 of the Debt Recovery (Special Provisions) Act No. 2 of 1990 as amended?*

d) *Have the Learned Judges of the Provincial High Court exercising Civil Jurisdiction WP/HCCA/COL/12/2014(LA) erred in law in reversing findings on factual matters made by the Learned Additional District Judge, in absence of any legal challenge to such findings by the Respondent, by way of Appeal or Revision?*

e) *Does the circumstances of this case warrant the Plaintiff to file action under the Debt Recovery Law?"*

Submissions of the plaintiff bank

At the hearing of the instant appeal, learned President's Counsel for the plaintiff bank submitted that in terms of the judgments delivered in *People's Bank v Lanka Queen Int'l Private Limited* (1999) 1 SLR 233 and *Kiran Atapattu v Pan Asia Bank Limited* (2005) 3 SLR 276, the court has no jurisdiction to grant 'unconditional leave' to appear and show cause against the decree *nisi* in terms of section 6(2)(c) of the said Act.

Further, learned President's Counsel submitted that in view of the finding of the learned Additional District Judge that the defendant had failed to disclose a *prima facie* sustainable defense, the court has no jurisdiction under section 6(2)(c) of the said Act to grant the defendant leave to appear and show cause against the decree *nisi* upon furnishing security which is not sufficient to satisfy the sum mentioned in the decree *nisi* entered by court.

In support of the above contention, he cited *National Development Bank v Chrys Tea (Pvt) Ltd and Another* (2000) 2 SLR 206 at 209 which held;

> *"It is to be observed that under Section 6(2)(a) or 6(2)(b) the Court has no discretion to order security which is not sufficient to satisfy the sum mentioned in the decree nisi.*
>
> *...*
>
> *If the Court had acted under section 6(2)(c) then prior to ordering security which is not sufficient to satisfy the sum mentioned in the decree nisi the Court must first come to the conclusion that the Court is satisfied on the contents of the affidavit filed by the respondents that they disclose a defence which is prima facie sustainable."*

[Emphasis added]

Moreover, learned President's Counsel submitted that the District Court cannot grant leave to 'file answer' as the said Act applies the summary procedure for trials and therefore, there is no provision to file answer.

Furthermore, it was submitted that after the said order was delivered by the learned Additional District Judge, the defendant had filed an answer setting up a claim in reconvention, which is contrary to the provisions of the said Act.

It was further submitted that the defendant did not file an application for leave to appeal challenging the finding of the learned Additional District Judge with regards to the lack of a *prima facie* sustainable defence. However, the Civil Appellate High Court had held, *inter alia*, that *'this was a case where the trial judge could have granted leave to appear and defend the action without security'.*

Submissions of the defendant

Learned counsel for the defendant submitted that though the Civil Appellate High Court held that *'this was a case where the trial judge could have granted leave to appear and defend the action without security'*, it neither reversed the said finding of fact by the learned Additional District Judge, nor varied the conditions upon which leave to appear and show cause against the decree *nisi* was granted.

Furthermore, learned counsel submitted that the plaintiff bank had suppressed documents and misrepresented the true nature of the transaction in order to obtain the decree *nisi.* However, it is pertinent to note that there is no finding to that effect either by the District Court, or the Civil Appellate High Court, and therefore the matter cannot be considered at this stage of the appeal.

It was further submitted that section 6(2) of the said Act does not require a defendant to specifically use the words 'leave to appear and show cause' when making an application to court. Therefore, when the defendant prayed for 'leave to file answer' in the prayer of the application filed under section 6(2) of the said Act, he intended to obtain 'leave to appear and show cause'.

Moreover, it was submitted that the defendant had filed an answer setting up a claim in reconvention, after the order was made by the learned Additional District Judge and the plaintiff bank had filed an application for leave to appeal in the Civil Appellate High Court. Therefore, such a matter does not require consideration in the instant appeal.

Have the Learned Judges of the Provincial High Court exercising Civil Jurisdiction WP/HCCA/COL/12/2014(LA) erred in law in holding that the learned trial judge could have granted leave to appear and show cause without security against decree *nisi* entered in an action under the Debt Recovery (Special Provisions) Act No. 2 of 1990 as amended?

In order to consider the above question of law, it is necessary to examine section 6 of the Debt Recovery (Special Provisions) Act, No. 2 of 1990, as amended.

Requirement to obtain leave from the court

Section 6(1) of the said Act states;

> "In an action instituted under this Act the defendant shall not appear or show cause against the decree *nisi* unless he obtains leave from the court to appear and show cause."
>
> [Emphasis added]

Accordingly, a defendant is not entitled to appear and defend the suit as of right. The above section has made it mandatory for a defendant to obtain leave from court to appear and show cause against the decree *nisi* entered by court.

Procedure to obtain leave from court

The procedure for a defendant to obtain leave from court to appear and show cause against the decree *nisi* is set out in section 6(2) of the said Act.

Section 6(2) of the said Act, as amended, states;

> "The court **shall** upon the filing by the defendant of an application for leave to appear and show cause supported by affidavit which **shall** deal specifically with the plaintiff's claim and state clearly and concisely what the defence to the claim is and what facts are relied upon to support it, and after giving the defendant an opportunity of being heard, grant leave to appear and show cause against the decree *nisi*, **either-**
>
> (a) upon the defendant **paying** into court the sum mentioned in the decree *nisi*; **or**

(b) upon the defendant furnishing such **security** as to the court may appear reasonable and sufficient for satisfying the sum mentioned in the decree *nisi* in the event of it being made absolute; **or**

(c) upon the court being satisfied on the contents of the affidavit filed, that they disclose a defence which is *prima facie* sustainable and on such terms as to **security**, framing and recording of issues, **or otherwise as the court thinks fit**."

[Emphasis added]

Accordingly, the phrase *"upon the filing by the defendant of an application for leave to appear and show cause supported by affidavit"* in the above section requires a defendant to file an application for leave to appear and show cause, supported by an affidavit, on the date of decree *nisi* returnable, in order to obtain leave from court to appear and show cause against the decree *nisi* served on him.

Requirement to make an application in writing

The words *"upon the filing by the defendant of an application"* requires the defendant to make an application for leave to appear and show cause in writing, and file it in court, along with a supporting affidavit and other relevant documents (if any). A defendant, or lawyer appearing on his behalf, is not entitled to make an oral application for leave to appear and show cause.

The above view was discussed in *People's Bank v. Lanka Queen Int'l Private Limited* (1999) 1 SLR 233 at 239, where the Court of Appeal held;

"[…] Therefore, in the absence of an application to show cause in writing as contemplated by section 6(2) it is possible to say that there is no proper application supported by an affidavit before court. If this interpretation is not given the amendment would become superfluous."

[Emphasis added]

Moreover, a written application is necessary as the said Act does not permit the parties to lead oral evidence and/or produce fresh documentary evidence in an inquiry held in respect of an application filed under section 6(2) of the said Act to obtain leave to appear and show cause against the decree *nisi* entered by court. The court will only consider the plaint filed by the plaintiff, the application

filed by the defendant, supporting affidavits and the documents produced by both parties (if any) when making an order under section 6 of the said Act.

However, it is pertinent to note that if the case proceeds to trial, the parties are permitted to adduce fresh oral and/or documentary evidence, subject to the procedure laid down in section 7 read with section 19 of the said Act.

Requirement to file an affidavit

Prior to the amendment of section 6(2) of the principal Act, there was an ambiguity as to whether an affidavit was required in support of all applications made under the said section, or only an application seeking leave to appear and show cause against the decree *nisi* under section 6(2)(c) of the principal Act.

Section 6(2) of the principal Act stated;

> "The court shall upon the application of the defendant give leave to appear and show cause against the decree *nisi* either,-
>
> (a) upon the defendant paying into court the sum mentioned in the decree *nisi*; or
>
> (b) upon the defendant furnishing such security as to the court may appear reasonable and sufficient for satisfying the sum mentioned in the decree *nisi* in the event of it being made absolute; or
>
> (c) upon affidavits satisfactory to the court that there is an issue or a question in dispute which ought to be tried. The affidavit of the defendant shall deal specifically with the plaintiff's claim and state clearly and concisely what the defence is and what facts are relied on as supporting it."
>
> [Emphasis added]

However, the Debt Recovery (Special Provisions) (Amendment) Act, No. 9 of 1994, amended section 6(2) of the principal Act to, *inter alia*, clear the said ambiguity and make it mandatory for the defendant to file an affidavit in support of every application made under the said section.

The effect of the amendment of section 6(2) of the principal Act was discussed in *People's Bank v Lanka Queen Int'l Private Limited* (supra at 237) where the Court of Appeal held;

"This new subsection clears any doubt that would have prevailed earlier in respect of the procedure a defendant has to follow in applying for leave to appear and show cause. On an examination of the amendment introduced in subsection 6(2) it is abundantly clear that the word "application" which appeared in the original section has been qualified with the following words: "upon the filing of an application for leave to appear and show cause supported by affidavit."

This shows that-
(a) it is mandatory for the defendant to file an application for leave to appear and show cause,
(b) such application must be supported by an affidavit which deals specifically with the plaintiff's claim and state clearly and concisely what the defence to the claim is and what facts are relied upon to support it."

[Emphasis added]

Contents of an application and the affidavit under section 6(2) of the said Act

Section 6(2) of the said Act states;

*"The court **shall** upon the filing by the defendant of an application for leave to appear and show cause supported by affidavit which **shall** deal specifically with the plaintiff's claim and state clearly and concisely what the defence to the claim is and what facts are relied upon to support it, […]."*

[Emphasis added]

The phrase *"application for leave to appear and show cause supported by affidavit"* requires the facts averred by the defendant in his application, to be supported by an affidavit. Particularly, since the summary procedure is applicable to the said Act, and affidavits are admissible to prove or disprove the facts averred by the parties.

Further, the word 'shall' in the phrase *"which shall deal specifically with the plaintiff's claim and state clearly and concisely what the defence to the claim is and what facts are relied upon to support it"* has made it mandatory for the application and affidavit of the defendant to comply with the requirements set out in the said phrase.

Hence, a bare denial of the several averments in the plaint and/or setting out frivolous technical objections in the application, without stating a defence to the plaintiff's claim and the facts relied upon in support of the defence, does not satisfy the criteria set out in section 6(2) of the said Act. A defendant should not be allowed to delay the administration of justice and prevent the plaintiff from obtaining an early judgment by making such an application, as it would defeat the object of the said Act to ensure an expeditious recovery of debts. However, a defendant who has disclosed a defence to the plaintiff's claim, should not be deprived of his right to appear and defend the claim of the plaintiff.

Duty of the court under section 6(2) of the said Act

The phrase *"after giving the defendant an opportunity of being heard"* in section 6(2) of the said Act requires the court to give the defendant an opportunity of being heard, if he has made an application in terms of the said section. Principles of natural justice require all parties to be heard on the matter before a decision is made. Therefore, the plaintiff cannot be prevented from participating in such an inquiry. Particularly, since the decree *nisi* was entered at the instance of the plaintiff.

Moreover, the word 'shall' has been used twice in section 6(2) of the said Act. Where a word is used more than once in an Act, principles of interpretation require such a word to be given the same meaning wherever it appears, unless there are compelling reasons to give different interpretations to the same word depending on the context in which it has been used in the Act.

Earlier in this judgment, it was stated that the word 'shall' used in the phrase *"application for leave to appear and show cause supported by affidavit which <u>shall</u> deal specifically with the plaintiff claim and state clearly and concisely what the defence to the claim is and what facts are relied upon to support it"* in section 6(2) of the said Act, should be given a mandatory meaning.

Therefore, the word 'shall' used in the phrase *"The court <u>shall</u> […] grant leave to appear and show cause against the decree nisi"* in section 6(2) of the said Act, should also be given a mandatory meaning, as there are no compelling reasons to give two different interpretations to the same word used in the said Act. Accordingly, if the defendant makes an application **in terms of the said section**, it is mandatory for the court to grant leave to appear and show cause against the decree *nisi* subject to the terms set out therein.

The terms of an order granting leave to appear and show cause against the decree *nisi* are set out in sections 6(2)(a), (b) and (c) of the said Act. The use of the conjunction 'or' between the said sections requires the court to make an appropriate order either under sections 6(2)(a) or (b) or (c) of the said Act. Hence, it is not possible to make an order combining the terms stated in two or more of the said sub-sections.

A similar view was expressed in *Ramanayake v. Sampath Bank Ltd and Others* [1993] 1 SLR 145 at 152 where the Court of Appeal held;

> *"The court has to decide which of the alternatives under section 6(2)- whether (a), (b) or (c)- is to be followed when granting leave. The court has to exercise its discretion judicially in the matter. The court must briefly examine the facts of the case before it, set out the substance of the defence, and disclose reasons in support of the order."*
>
> [Emphasis added]

Further, the said order should stipulate a time within which the defendant must fulfill the conditions imposed (if any) prior to appearing and showing cause against the decree *nisi* entered by court.

Moreover, the court is required to give reasons for the order made under section 6(2) of the said Act. However, since such an order is made before leading evidence in the case, it is not necessary to give lengthy and comprehensive reasons which might result in allegations that the trial judge has prejudged the case.

Scope of section 6(2)(c) of the said Act

Section 6(2)(c) of the said Act states;

> "upon the court being satisfied on the contents of the affidavit filed, that they disclose a defence which is *prima facie* sustainable and on such terms as to **security**, framing and recording of issues, **or otherwise as the court thinks fit**."
>
> [Emphasis added]

Accordingly, the above section has cast a duty on the court to be satisfied that the defendant has disclosed a defence which is *prima facie* sustainable against the claim made by the plaintiff, prior to making an order under and in terms of the said section.

It is pertinent to note that the words *"prima facie"* has been qualified by the addition of the adjective *"sustainable".* Thus, the court should not only be satisfied that the defendant has a *prima facie* defence, but that the defence of the defendant is *prima facie* **sustainable**. Accordingly, the court is required to consider whether the defence disclosed by the defendant can be sustained at the conclusion of the trial.

If the court is not satisfied that the defendant has disclosed a *prima facie* sustainable defence, it has no jurisdiction to make an order under section 6(2)(c) of the said Act. In such an instance, the court should make an order either under sections 6(2)(a) or (b) of the said Act.

On the contrary, if the court is satisfied that the defendant has disclosed a *prima facie* sustainable defence, leave to appear and show cause against the decree *nisi* should be granted on the terms set out in section 6(2)(c) of the said Act.

The phrases *"on such terms as to security" "framing and recording of issues" "or otherwise as the court thinks fit"* set out the terms upon which the court can make an order granting leave to appear and show cause against the decree *nisi* under section 6(2)(c) of the Act.

When interpreting provisions of an Act, it is necessary to give a meaning to every word or phrase used in the Act, as far as possible. The legislature is presumed not to waste its words and therefore, the court must avoid interpreting legislation in a manner which would render a word or phrase of the Act devoid of any meaning or application.

The above view was expressed in *N. S. Bindra's Interpretation of Statutes*, 9th edition, at 196 and 197, which states;

> *"As far as possible, full meaning must be given to every word of a statute. No word should be regarded as superfluous unless it is not possible to give a proper interpretation to the enactment, or the meaning given is absurd or inequitable. A court should not be prompt to ascribe and indeed should not, without necessity or some sound reason, impute to the language of a statute, tautology or superfluity. In other words, although surplusage or even tautology is not an uncommon feature in legislative enactments, the ordinary rule is that a statute is never supposed to use words without a meaning. It is a well-settled principle of construction that words in a statute are designedly used, and an interpretation must be avoided, which would render the provision either nugatory or part thereof otiose. No part of a provision of*

a statute can be just ignored by saying that the legislature enacted the same not knowing what it was saying. We must assume that the legislature deliberately used that expression and it intended to convey some meaning thereby. It is not to be assumed that the legislature has used words meaning nothing."

[Emphasis added]

Accordingly, the phrases *"on such terms as to security," "framing and recording of issues" "or otherwise as the court thinks fit"* in section 6(2)(c) of the said Act, should be interpreted to give distinct meanings.

The phrase *"on such terms as to security"* should be interpreted to confer power on the court to exercise its discretion and decide the quantum of security, in an amount less than the sum mentioned in the decree *nisi*, to be furnished by the defendant as a condition precedent to appearing and showing cause against the decree *nisi* entered by court.

The above view was expressed in *National Development Bank v. Chrys Tea (Pvt) Ltd and Another* (2000) 2 SLR 206 at 209 where the Court of Appeal held;

"It is to be observed that under section 6(2)(a) or 6(2)(b) the Court has no discretion to order security which is not sufficient to satisfy the sum mentioned in the decree nisi.

...

If the Court had acted under section 6(2)(c) then prior to ordering security which is not sufficient to satisfy the sum mentioned in the decree nisi the Court must first come to the conclusion that the Court is satisfied on the contents of the affidavit filed by the respondents that they disclose a defence which is prima facie sustainable."

[Emphasis added]

However, in a case where the defendant admits liability to a part of the sum mentioned in the decree *nisi*, the court should not grant leave to appear and show cause against the decree *nisi* under section 6(2)(c) of the said Act, without requiring the defendant to pay into court the said sum so admitted as a minimum condition to appear and show cause against the decree *nisi.*

Further, a plain reading of the phrase *"or otherwise as the court thinks fit"* shows that a wide discretion is conferred on the court to make an appropriate order under section 6(2)(c) of the said Act.

Moreover, when the literal rule of interpretation is applied to the phrases *"on such terms as to security" "**or** otherwise as the court thinks fit"*, it is clear that the legislature has intentionally used two different phrases to enable the court to make two different types of orders. The use of the conjunction 'or' empowers the court to make either of the orders as is necessary to safeguard the interests of the plaintiff.

Accordingly, I am of the view that the phrase *"or otherwise as the court thinks fit"* should be interpreted to enable the court to make an appropriate order as it thinks fit, including an order granting leave to appear and show cause against the decree *nisi* without the defendant furnishing any security.

In *Ramanayake v. Sampath Bank Ltd and Others* (supra at 152) the Court of Appeal considered section 6(2)(c) of the principal Act and expressed a similar view;

> *"Leave may be granted unconditionally under section 6(2)(c) where the court is satisfied that the defendant's affidavit raises an issue or question which ought to be tried."*
>
> [Emphasis added]

However, in *People's Bank v. Lanka Queen Int'l Private Limited* (supra at 237 and 238) the Court of Appeal held;

> *"This section does not permit unconditional leave to defend the case as the defendant-respondent has requested from the District Court. The minimum requirement according to subsection (c) is for the furnishing of security.*
>
> *…*
>
> *[…] Thus, it is imperative that before the court acts on section 6(2)(c) it has to be satisfied;*
>
> *i. with the contents of the affidavit filed by the defendant;*
> *ii. that the contents disclose a defence which is prima facie sustainable; AND*

iii. determine the amount of security to be furnished by the defendant, ***AND*** *permit framing and recording of issues or otherwise as the court thinks fit."*

[Emphasis added]

Further, in *Mahavidanage Simpson Kularatne v. People's Bank* (SC Appeal No. 04/2015) SC Minutes dated 15th September, 2020, the majority of the Supreme Court held;

> *"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."*
>
> [Emphasis added]

In the case of *People's Bank v. Lanka Queen Int'l Private Limited* (supra at 238) the court held "*determine the amount of security to be furnished by the defendant,* ***AND*** *permit framing and recording of issues or otherwise as the court thinks fit."* As such, the District Court is required to order security that the defendant should furnish, and in addition, frame and record issues or otherwise as the court thinks fit.

However, the word 'and' does not appear between the phrases *"on such terms as to security"* and *"framing and recording of issues or otherwise as the court thinks fit"* in section 6(2)(c) of the said Act. Therefore, I am unable to agree with the judgment in *People's Bank v. Lanka Queen Int'l Private Limited* (supra), as a court should not read additional words into an Act, in the absence of clear necessity.

The above view was expressed in *Maxwell on The Interpretation of Statutes*, 12th edition, at 33 which states;

> *"It is a corollary to the general rule of literal construction that nothing is to be added to or taken from a statute unless there are adequate grounds to justify the inference that the legislature intended something which it omitted to express. Lord Mersey said:*

> *"It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do.""*
>
> [Emphasis added]

Further, I am unable to agree with the majority judgment of *Mahavidanage Simpson Kularatne v People's Bank* (supra) as a distinct meaning from the phrase *"on such terms as to security"* has not been given to the phrase *"or otherwise as the court thinks fit"*. Accordingly, the phrase "*or otherwise as the court thinks fit*" in section 6(2)(c) of the said Act has become superfluous.

Due to the foregoing reasons, I am of the opinion that the court is empowered to grant leave to appear and show cause against the decree *nisi*, without ordering security, under section 6(2)(c) of the said Act.

Scope of section 6(2)(a) of the said Act

Section 6(2)(a) of the said Act states;

> "upon the defendant paying into court the sum mentioned in the decree *nisi*; or"

Accordingly, the court may order the defendant to pay into court the sum mentioned in the decree *nisi* as a condition to appear and show cause against the decree *nisi* under section 6(2)(a) of the said Act. Such an order enables the defendant to deposit the said sum and participate at the trial, whilst protecting the interests of the plaintiff.

However, as stated above, the court is required to make an order either under sections 6(2)(a) or (b) of the said Act, only if the court is not satisfied that the defendant has disclosed a *prima facie* sustainable defence in terms of section 6(2)(c) of the said Act.

Scope of section 6(2)(b) of the said Act

Section 6(2)(b) of the said Act states;

> "upon the defendant furnishing such security as to the court may appear reasonable and sufficient for satisfying the sum mentioned in the decree *nisi* in the event of it being made absolute; or"
>
> [Emphasis added]

Where the defendant is unable to pay into court the sum mentioned in the decree *nisi*, the court may consider all the facts and circumstances of the case, and alternatively grant leave to appear and show cause against the decree *nisi* upon the defendant furnishing security which appears to the court reasonable and sufficient to satisfy the sum mentioned in the decree *nisi* under section 6(2)(b) of the said Act.

The difference between sections 6(2)(a) and (b) of the said Act was discussed in *People's Bank v. Lanka Queen Int'l Private Limited* (supra at 238) where the Court of Appeal held;

> *"[…] The difference between this provision [b] and the (a) above is that instead of paying the full sum mentioned in the decree nisi, it will be sufficient for the defendant to furnish security, such as banker's draft, and then defend the action."*

Section 6(3) of the said Act

If the defendant fails to appear in court upon service of the decree *nisi*, or having appeared, his application for leave to appear and show cause is refused by court for non-compliance with the requirements set out in section 6(2) of the said Act, or because the defendant did not fulfill the conditions imposed by the court in the order made under section 6(2) of the said Act, the court shall make the decree *nisi* absolute under section 6(3) of the said Act.

Section 6(3) of the said Act states;

> "Where the defendant either fails to appear and show cause or having appeared, his application to show cause is refused, the court shall make the decree nisi absolute. For this purpose, the judge shall endorse the words "Decree nisi made absolute" (or words to the like effect) upon the decree nisi and shall date and sign such endorsement:
>
> Provided that a decree nisi, if it consists of separate parts, may be discharged in part and made absolute in part and nothing herein enacted shall prevent any order being made by consent of the plaintiff and the defendant on the footing of the decree nisi."
>
> [Emphasis added]

Judgment of the District Court

After an *inter partes* inquiry held under section 6(2) of the said Act in respect of an application made by the defendant to obtain leave to appear and show cause against the decree *nisi*, the learned Additional District Judge held, *inter alia*, that the defendant had admitted that he obtained an overdraft facility, and had not challenged the sum claimed by the plaintiff bank.

Further, it was held that although the defendant had claimed that he deposited a sum of Rs. 13 million with the guarantor company, the materials filed by him did not disclose that he had settled the money lent by the plaintiff bank. Hence, the learned Additional District Judge had come to a finding that the defendant had failed to disclose a defence which is *prima facie* sustainable.

Notwithstanding the said finding, the learned Additional District Judge had granted leave to 'file answer' upon paying into court a sum of Rs. 800,000/- or furnishing security equivalent to the said sum.

Judgment of the Civil Appellate High Court

Being aggrieved by the said order of the District Court, the plaintiff bank had preferred an interlocutory appeal to the Civil Appellate High Court on the following grounds;

"a) Whether the learned District Judge erred in law allowing the defendant to file answer?

b) Whether the learned District Judge erred in law ordering the defendant to deposit a sum of Rs. 800,000/- as security when he himself found that there was no prima facie case made out?"

It is common ground that neither party contested the finding of the learned Additional District Judge with regard to the defendant failing to disclose a defence which is *prima facie* sustainable. Accordingly, the said finding was neither a ground urged before the Civil Appellate High Court, nor the Supreme Court. Therefore, the correctness of the said finding is not considered in the instant judgment.

After hearing the appeal, the Civil Appellate High Court had dismissed the said interlocutory appeal. However, in the judgment it was stated as a passing remark, that the failure by the plaintiff bank to recover the debt due to it from the money held on lien by the guarantor company, which was a sister company of the plaintiff bank, and suing the defendant without making the guarantor company a party to the action, was a pure abuse of the provisions of the said Act.

In this regard, it is pertinent to note that in banking law, the recovery procedure is governed by the agreement the bank enters into with the principal debtor and guarantor. Hence, I am not inclined to agree with the said remarks made by the Civil Appellate High Court.

Further, the finding of the learned Additional District Judge with regard to the defendant failing to disclose a defence which is *prima facie* sustainable, was neither considered nor set aside by the Civil Appellate High Court, as it was not an issue urged by the parties before the Civil Appellate High Court. Thus, without setting aside the said finding of the learned Additional District Judge, the court cannot make an order under section 6(2)(c) of the said Act. Further, it should only make an order either under sections 6(2)(a) or (b) of the said Act.

However, the learned judges of the Civil Appellate High Court had held that the trial judge could have granted leave to appear and show cause against the decree *nisi* without security. As discussed earlier, such an order can be made under section 6(2)(c) of the said Act only if the defendant has disclosed a defence which is *prima facie* sustainable.

Thus, in view of the finding by the learned Additional District Judge that the defendant has failed to disclose a defence which is *prima facie* sustainable, the learned judges of the Civil Appellate High Court have erred in law in stating in the judgment that the trial judge could have granted leave to appear and show cause against the decree *nisi* without security under the said Debt Recovery (Special Provisions) Act, as amended.

Have the Learned Judges of the Provincial High Court exercising Civil Jurisdiction WP/HCCA/COL/12/2014(LA) erred in law in not considering that the District Court has no jurisdiction to permit the Respondent to file "Answer" in view of provisions of section 7 of the Debt Recovery (Special Provisions) Act No. 2 of 1990 as amended?

Section 7 of the Civil Procedure Code as amended states that the procedure of an action may be either "regular" or "summary". Further, section 8 of the said Code states that unless the law specially provides for the summary procedure, every action shall commence and proceed under the regular procedure.

In an action filed under the **regular procedure**, the court will issue summons on the defendant in the first instance. If the defendant appears on the day specified in the summons, either in person or by a registered attorney, and he does not admit the plaintiff's claim, he must file an answer or move for time to file answer.

The requisites of an answer are contained in section 75 of the said Code. Accordingly, if the defendant wishes, he may set up a claim in reconvention against the plaintiff in terms of section 75(e) of the said Code. If a claim in reconvention is set up in the answer, the plaintiff is allowed to file a replication to answer the claim in reconvention under section 79 of the said Code.

However, the primary purpose of summary procedure is to provide a speedy and expeditious method of disposing cases. Therefore, the summary procedure set out in the said Code does not contain a provision for the defendant to file an answer. Hence, the question of setting up a claim in reconvention against the claim of the plaintiff would not arise in an action filed under the summary procedure.

The procedure applicable to an action filed under the Debt Recovery (Special Provisions) Act, No. 2 of 1990, as amended, is set out in section 7 of the said Act.

Section 7 of the said Act states;

> "If the defendant appears and leave to appear and show cause is given the provisions of sections 384, 385, 386, 387, 390 and 391 of the Civil Procedure Code (Chapter 101) shall, *mutatis mutandis*, apply to the trial of the action."

It is pertinent to note that the sections referred to above are found in Chapter XXIV of the Civil Procedure Code which deals with the summary procedure. Hence, section 7 of the said Debt

Recovery (Special Provisions) Act has specifically provided that the summary procedure will be the applicable procedure for an action instituted under the said Act. Accordingly, the regular procedure has no application to an action filed under the said Act, and therefore it is not possible to file answer under Debt Recovery (Special Provisions) Act, No. 2 of 1990, as amended.

With regard to the instant case, section 6(2) of the said Act requires the defendant to obtain leave of court to appear and show cause against the decree *nisi* entered by court. However, the defendant had made an application under section 6(2) of the said Act, and prayed *inter-alia* for the court to;

(a) dismiss the plaint,
(b) set aside the decree *nisi* entered by court, and
(c) grant unconditional leave to file answer.

[Emphasis added]

Therefore, instead of seeking 'leave to appear and show cause against the decree *nisi'* in the said prayer, the defendant had prayed for unconditional 'leave to file answer'. However, on a careful consideration of the totality of the application made by the defendant, it is apparent that he intended to obtain leave to appear and show cause against the decree *nisi* entered by the District Court.

Drafting of pleadings is a special skill of lawyers. Thus, it is the duty of the lawyer who drafts the pleadings that are filed in court to ensure that the said pleadings are in conformity with the relevant procedural laws. A shortcoming of a lawyer in drafting the pleadings should not deprive a litigant obtaining redress from court, unless any prejudice is caused to the other party. The duty of courts is to administer justice, and the duty of a lawyer is to assist the court in the administration of justice.

Referring to technical objections raised by a party to prevent the court from granting redress to a litigant, Abrahams C.J. observed in *Vellupillai v The Chairman, Urban District Council* 39 NLR 464 at 465, "This is a Court of Justice, it is not an Academy of Law."

In the instant appeal, the plaintiff bank was aware that the procedure set out in the said Act does not contain a provision to file answer. Therefore, the plaintiff bank was not misled or prejudiced by the above said prayer in the application made by the defendant.

Thus, I am inclined to agree with the finding of the learned judges of the Civil Appellate High Court that the objection raised by the plaintiff bank with regards to the defendant seeking 'leave

to file answer' instead of 'leave to appear and show cause against the decree *nisi'* is purely a technical objection, and therefore cannot be sustained.

However, the learned Additional District Judge had erred in law in making an order under section 6(2) of the said Act by granting the defendant leave to 'file answer'. During the course of the hearing of this appeal, it was submitted by the parties that after the order was delivered by the Additional District Judge, the defendant had filed an answer setting up a claim in reconvention. Therefore, as there is no such provision to file answer in a case instituted under the said Debt Recovery (Special Provisions) Act, as amended, the District Court should reject the answer filed by the defendant and proceed with the trial in terms of section 7 of the said Act.

Accordingly, the questions of law on which leave to appeal was granted are answered as follows;

a) **Have the Learned Judges of the Provincial High Court exercising Civil Jurisdiction WP/HCCA/COL/12/2014(LA) erred in law in holding that the learned trial judge could have granted leave to appear and show cause <u>without security</u> against decree *nisi* entered in an action under the Debt Recovery (Special Provisions) Act No. 2 of 1990 as amended?**

   Yes. However, in an appropriate case, the court may grant leave to appear and show cause against the decree nisi without security, under section 6(2)(c) of the said Act.

b) **Have the Learned Judges of the Provincial High Court exercising Civil Jurisdiction WP/HCCA/COL/12/2014(LA) erred in law in not considering that if the Respondent has failed to establish "a *prima facie* sustainable defence", the Court has no jurisdiction to grant the Respondent leave to appear and show cause in terms of sections 6(2)(c) and 6(3) of the Debt Recovery (Special Provisions) Act No. 2 of 1990 as amended?**

   Yes, the learned judges of the Civil Appellate High Court had erred in law in not considering the finding of the learned Additional District Judge that the defendant had failed to establish "a *prima facie* sustainable defence". Hence, the court has no jurisdiction to grant the defendant leave to appear and show cause in terms of sections 6(2)(c) of the Debt Recovery (Special Provisions) Act, No. 2 of 1990, as amended.

However, such a finding does not trigger section 6(3) of the said Act. The said section will apply only if there is no proper application made by the defendant in terms of section 6(2) of the said Act.

c) **Have the Learned Judges of the Provincial High Court exercising Civil Jurisdiction WP/HCCA/COL/12/2014(LA) erred in law in not considering that the District Court has no jurisdiction to permit the Respondent to file "Answer" in view of provisions of section 7 of the Debt Recovery (Special Provisions) Act No. 2 of 1990 as amended?**

Yes. There is no provision in the aforementioned Act to file answer. Particularly, since the said Act states that the applicable procedure is the summary procedure.

In view of the foregoing answers, the remaining questions of law need not be considered.

Accordingly, I set aside the judgment of the learned judges of the Civil Appellate High Court dated 1st August, 2014, and the order of the learned Additional District Judge dated 3rd February, 2014.

I further direct the learned Additional District Judge to reject the answer filed by the defendant, and grant leave to appear and show cause against the decree *nisi* either under sections 6(2)(a) or (b) of the said Act.

Subject to the above, appeal is allowed.

I order no costs.

Judge of the Supreme Court

Vijith K. Malalgoda 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

Thiththalapitige Tilakaratne,
Rukgahawila, Walpola.
Plaintiff

SC APPEAL NO: SC/APPEAL/125/2016
SC LA NO: SC/HC/CALA/290/2015
HCCA GAMPAHA NO: WP/HCCA/GPH/69/2009/F
DC GAMPAHA NO: 39762/P

Vs.

1. Thiththalapitige Chandrawathi Perera, (Deceased)
2. Thiththalapitige Wilbert Perera,
3. Thiththalapitige Ruban Perera,

All of
Rukgahawila, Walpola.
Defendants

AND BETWEEN

1. Thiththalapitige Tilakaratne,
Rukgahawila, Walpola.
Plaintiff-Appellant

Vs.

1. Thiththalapitige Chandrawathi Perera, (Deceased)
2. Thiththalapitige Wilbert Perera,
3. Thiththalapitige Ruban Perera,

All of
Rukgahawila, Walpola.
Defendant-Respondents

AND NOW BETWEEN

3. Thiththalapitige Ruban Perera, (Deceased)

3A. Thiththalapitige Vipula Namal Priyadharshana Perera,
All of
Rukgahawila, Walpola.
3rd Defendant-Respondent-Appellant

Vs.

1. Thiththalapitige Tilakaratne,
Rukgahawila, Walpola.
Plaintiff-Appellant-Respondent
2. Thiththalapitige Wilbert Perera
Rukgahawila,
Walpola.
2nd Defendant-Respondent-Respondent

Before: Sisira J. De Abrew, J.
S. Thurairaja, P.C., J.
Mahinda Samayawardhena, J.

Counsel: Amarasiri Panditharatne with Gaithri De Silva for the substituted 3rd Defendant-Respondent-Appellant.
Dr. Sunil F.A. Coorey with Sudarshani Coorey for the Plaintiff-Appellant-Respondent.

Argued on : 03.05.2021

Written submissions:

by the 3rd Defendant-Respondent-Appellant on 29.07.2016.

by the Plaintiff-Appellant-Respondent on 09.04.2021.

Decided on: 21.05.2021

Mahinda Samayawardhena, J.

The Plaintiff filed this action in the District Court of Gampaha naming three parties as Defendants seeking to partition the land described in the schedule to the plaint among the parties to the action. Only the 3rd Defendant contested the case. After trial the learned District Judge dismissed the Plaintiff's action without answering the issues on the basis that the land sought to be partitioned had not been properly identified. In addition, the learned District Judge also briefly stated that the Plaintiff had failed to present a comprehensive pedigree. On appeal, the High Court of Civil Appeal set aside the Judgment of the District

Court and entered Judgment as prayed for by the Plaintiff. It is from this Judgment of the High Court that the 3rd Defendant preferred this appeal.

This Court granted leave to appeal predominantly on three questions of law: (a) whether the corpus has been properly identified, (b) whether the Plaintiff proved his pedigree, and (c) whether the Court considered the 3rd Defendant's paper title and prescriptive title.

Let me first consider the question of identification of the corpus. It is the contention of the 3rd Defendant that notwithstanding the land to be partitioned as described in the schedule to the plaint is about three acres, the Preliminary Plan depicts only a land in extent of 1 acre, 3 roods and 3.46 perches and therefore the Plaintiff's action shall fail as the corpus has not been properly identified.

In a partition action, if the corpus cannot be identified, *ipso facto*, the action shall fail. There is no necessity to investigate title until the corpus is properly identified. The decision that the corpus has not been properly identified decides the fate of the action without further ado. This underscores the great care with which this decision shall be taken by Court. It shall not be used as a convenient method to summarily dispose of long-drawn-out and complicated partition actions without embarking on the arduous task of investigating the title of each party.

The decision of the learned District Judge in the instant case that the corpus has not been identified is erroneous. Let me explain.

The land described in the schedule to the plaint is as follows:

> *The land called Meegahawatta situated at Walpola in Udugaha Pattu of Siyane Korale of Colombo District in the Western Province and bounded on the North by the Live Fence of the Lands belonging to Biyanwilage Don Luwis and Tittalapitige Karanis Perera and others, East by the Paddy Field belonging to Karanis Perera and others, South by Live Fence of the Land belonging to Tittalapitige Yohanis and others, and West by the Land belonging to the Native Physician Gasin Achchige Karolis and others, and containing in extent about 3 Acres.*

All the title Deeds marked by the Plaintiff at the trial – P2 of 1987, P3 of 1987, P4 of 1960, P5 of 1959, P6 of 1962, P7 of 1976, P8 of 1984, P9 of 1984, and P10 of 1976 – describe the land in the same manner.

The 3rd Defendant marked two Deeds at the trial in claiming rights to the land to be partitioned. One is 3V1 of 1930 and the other is 3V2 of 1976. It is significant to note that in these two Deeds also the land is described in the same manner as it is described in the schedule to the plaint.

Simply put, the land described in the schedule to the plaint is a reproduction of the land described in the title Deeds of both the Plaintiff and the 3rd Defendant.

A commission to prepare the Preliminary Plan was issued to the Surveyor in terms of section 16 of the Partition Law, No. 21 of 1977, as amended. The Surveyor sent the Preliminary Plan and

Report to Court in accordance with section 18. In the Preliminary Plan, the land surveyed is described in the following manner:

> *The land called Meegahawatta situated at Walpola in Udugaha Pattu of Siyane Korale of Colombo District in the Western Province and bounded on the North by the Lands claimed by K. Sumanawathie, S.M. Somawathie, T. Somawathie, Shanthi Jaya Manike and T.P. Karunaratne, East by the Lands claimed by T.P. Karunaratne, S.A. Padmini, K. Piyadasa, the Road and the Canal, South by the Canal and the Land claimed by T. Victor Perera, and West by the Lands claimed by K. Sumanawathie and T. Victor Perera, and containing in extent 1 Acre, 3 Roods and 3.46 Perches.*

The Surveyor states in his Report that the Plaintiff and the 2nd and 3rd Defendants were present at the time of the survey and all three of them showed him the land to be surveyed. At the time of the survey, the 3rd Defendant had not told the surveyor that a larger land was to be surveyed. The 3rd Defendant does not dispute the content of this Report.

Section 16(2) of the Partition Law reads as follows:

> *The commission issued to a surveyor under subsection (1) of this section shall be substantially in the form set out in the Second Schedule to this Law and shall have attached thereto a copy of the plaint certified as a true copy by the registered attorney for the Plaintiff. The court may, on such terms as to costs of survey or otherwise, issue a*

commission at the instance of any party to the action, authorizing the surveyor to survey any larger or smaller land than that pointed out by the Plaintiff where such party claims that such survey is necessary for the adjudication of the action.

The Surveyor in his Report answers the question "*Whether or not the land surveyed by him is in his opinion substantially the same as the land sought to be partitioned as described in the schedule to the plaint*" in the affirmative.

After the Preliminary Plan and Report were received by Court on 18.05.1998, the 3rd Defendant filed a statement of claim dated 02.11.1998. Thereafter, as seen from the proceedings dated 15.11.1999 and Journal Entry No. 17, on the second date of trial, with the 3rd Defendant fully represented by Counsel, uncontested evidence of the Plaintiff was led and the Court fixed the case for Judgment. As per Journal Entry No. 18, on the date of the Judgment, the 3rd Defendant (after apparently retaining another Counsel) made an application to refix the case for trial and also sought permission for a commission to be issued to prepare an alternative Plan. The Court allowed this application as there was no objection from the other parties. However, no steps were taken by the 3rd Defendant to issue a commission for an alternative plan. Thereafter, as per Journal Entry No. 19, the 3rd Defendant informed Court on the commission returnable date that he did not require an alternative Plan but only wanted to amend the statement of claim. This was allowed and the amended statement of claim dated 15.09.2000 was tendered. In this amended statement of

claim, the 3rd Defendant stresses that the Plaintiff cannot maintain the action as the entire land to be partitioned is not depicted in the Preliminary Plan. But the 3rd Defendant does not specify the portion of land not surveyed or even the approximate extent of that portion.

The conduct of the 3rd Defendant was contrary to section 19(2) of the Partition Law, which lays down the procedure to be followed by a Defendant who seeks to have a larger land partitioned. Section 19(2) reads as follows:

> *19(2)(a) Where a Defendant seeks to have a larger land than that sought to be partitioned by the Plaintiff made the subject-matter of the action in order to obtain a decree for the partition or, sale of such larger land under the provisions of this Law, his statement of claim shall include a statement of the particulars required by section 4 in respect of such larger land; and he shall comply with the requirements of section 5, as if his statement of claim were a plaint under this Law in respect of such larger land.*
>
> *(b) Where any defendant seeks to have a larger land made the subject-matter of the action as provided in paragraph (a) of this subsection, the court shall specify the party to the action by whom and the date on or before which an application for the registration of the action as a lis pendens affecting such larger land shall be filed in court, and the estimated costs of survey of such larger land as determined by court shall be deposited in court.*

(c) Where the party specified under paragraph (b) of this subsection fails to comply with the requirements of that paragraph, the court shall make order rejecting the claim to make the larger land the subject-matter of the action, unless any other party, in whose statement of claim a similar claim shall have been set up, shall comply therewith on or before the date specified in paragraph (b) or within such extended period of time that the court may, on the application of any such party, fix for the purpose.

(d) After the action is registered as a lis pendens affecting the larger land and the estimated costs of the survey of the larger land have been deposited in court, the court shall-

> *(i) add as parties to the action all persons disclosed in the statement of claim - of the party at whose instance the larger land is being made the subject-matter of the action as being persons who ought to be included as parties to an action in respect of such larger land under section 5; and*
>
> *(ii) proceed with the action as though it had been instituted in respect of such larger land; and for that purpose, fix a date on or before which the party specified under paragraph (b) of this subsection shall, or any other interested party may, comply with the requirements of section 12 in relation to the larger land as hereinafter modified.*

(e) Where the larger land is made the subject-matter of the action, the provisions of sections 12, 13, 14 and 15 shall,

mutatis mutandis, apply as if the statement of claim of the party seeking a partition or sale of the larger land were the plaint in the action; and-

> *(i) such party shall with his declaration under section 12, in lieu of an amended statement of claim, file an amended caption including therein as parties to the action all persons not mentioned in his statement of claim, but who should be made parties to an action for the larger land under section 5, and such amended caption shall be deemed for all purposes to be the caption to his statement of claim in the action;*
>
> *(ii) summons shall be issued on all persons added as parties under paragraph (d) of this subsection and all persons included as necessary parties under sub-paragraph (i) hereof;*
>
> *(iii) notice of the action in respect of the larger land shall be issued on all parties to the action in the original plaint together with a copy of the statement of claim referred to above;*
>
> *(iv) the provisions of section 20 shall apply to new claimants or parties disclosed thereafter.*

(f) If the party specified by the court under paragraph (b) of this subsection or any other interested party fails or neglects to comply with the provisions of section 12, as hereinbefore modified on or before the date specified in that

paragraph, the court may make order dismissing the action in respect of the larger land.

(g) Where the requirements of section 12 as hereinbefore modified are complied with, the court shall order summonses and notices of action as provided in paragraph (e) of this subsection to issue and shall also order the issue of a commission for the survey of the larger land, and the provisions of sections 16, 17 and 18 shall accordingly apply in relation to such survey.

The 3rd Defendant did not take any steps required by law to have a larger land than that sought to be partitioned by the Plaintiff made the subject matter of the action. If the 3rd Defendant wanted to enlarge the corpus, he ought to have taken steps to file an amended plaint *inter alia* naming new parties as Defendants, because according to the Preliminary Plan there are several claimants to the adjoining lands on all four boundaries. All those alleged owners are third parties.

At the trial, the 3rd Defendant raised the unspecific issue whether the land described in the schedule to the plaint is not depicted in the Preliminary Plan. He did so in an attempt to dismiss the action, as he is in possession of the entire land.

Soon after raising issues, the Plaintiff gave evidence. In his evidence, he marked the Preliminary Plan and the Report stating that the former depicts the land to be partitioned. Even at that point, the 3rd Defendant did not make an application to mark them subject to proof. Section 18(2) enacts *inter alia* that the Preliminary Plan and Report can be used as evidence without

further proof. However under the proviso to section 18(2), the 3rd Defendant could have called the Surveyor to give evidence. This was not done.

Section 18(2) of the Partition Law reads as follows:

> *The documents referred to in paragraphs (a), (b) and (c) of subsection (1) of this section may, without further proof, be used as evidence of the facts stated or appearing therein at any stage of the partition action:*
>
> *Provided that the court shall, on the application of any party to the action and on such terms as may be determined by the court, order that the surveyor shall be summoned and examined orally on any point or matter arising on, or in connection with, any such document or any statement of fact therein or any relevant fact which is alleged by any party to have been omitted therefrom.*

The 3rd Defendant states in his evidence that he has been in possession of the land depicted in the Preliminary Plan from the time he was born in 1942 and that his parents lived on the land before him. He further adds that he became entitled to the land by paternal inheritance and Deeds. The Deeds he refers to are 3V1 and 3V2. This means, although 3V1 and 3V2 describe a land in extent of about 3 acres (the same land which is described in the schedule to the plaint), in point of fact, the land on the ground has continuously been as depicted in the Preliminary Plan.

The Surveyor went to the land to prepare the Preliminary Plan in the year 1998, i.e. 68 years after the execution of the 3rd Defendant's Deed 3V1 of 1930. In 3V1, there is mention of another Deed executed in 1922. This means the Surveyor went to the land 76 years after the execution of the earliest known Deed. One cannot expect the boundaries of land in Gampaha to remain unchanged for 76 years.

The Nittambuwa-Urapola high road shown in the Preliminary Plan running along the northern boundary and the canal running along the southern boundary are of recent origin and did not exist in the 1920s.

It is relevant to note that in the old Deeds tendered by both parties, the boundaries are described by the names of the owners of the adjoining lands at that time. In the Preliminary Plan, the Surveyor records the existing boundaries. In doing so, he gives the names of the present owners. The Plaintiff in his evidence has also stated so.

Without analysing the evidence from the proper perspective, the learned District Judge made a superficial comparison of the boundaries and extent of the land described in the schedule to the plaint which is based on old Deeds with the existing boundaries and extent of the land as depicted in the Preliminary Plan to conveniently conclude that the land has not been properly identified. On this basis, without examining the evidence on the pedigrees of the parties and without answering the issues raised at the trial, the action was summarily dismissed. This is erroneous.

The land to be partitioned has been properly identified. I answer the questions of law on the identification of the corpus against the 3rd Defendant.

Let me now turn to the questions of law whereby the 3rd Defendant states that the Plaintiff failed to prove his title according to law, and that the Court failed to properly consider the 3rd Defendant's paper title and prescriptive title.

According to the evidence of the 3rd Defendant, he claims title to the land on paternal inheritance, Deeds, and prescription.

To prove paternal inheritance, the 3rd Defendant produces Deed No. 10216 marked 3V1. This Deed is referred to in paragraph 3 of the plaint. By virtue of this Deed, the 3rd Defendant's father Thiththalapitige Luwis Perera got an undivided 1/24 share of the land and upon his death, the 3rd Defendant, who is one of his three children (the other two being the 1st and 2nd Defendants), inherited an undivided 1/72 share.

The only other Deed the 3rd Defendant relies on to prove title is Deed No. 56 marked 3V2. This Deed is referred to in paragraph 8 of the plaint. By this Deed, a person by the name of Sibel Nona transferred an undivided (1/2 x 1/3) 12/72 share of the land to the 3rd Defendant.

The Plaintiff does not dispute Deeds 3V1 and 3V2. The 3rd Defendant is entitled to those undivided rights which amount in total to a 13/72 share of the land. The High Court has allotted this share to the 3rd Defendant.

There can be no dispute that the 3rd Defendant is a co-owner of the land. There is no evidence to say the 3rd Defendant acquired prescriptive title to the entire land against all the co-owners. There shall be cogent evidence to successfully claim prescriptive title against co-owners. Mere continuous long possession of the entire common property by one co-owner does not constitute prescriptive possession against all the co-owners. It is clear that the plea of prescriptive title by the 3rd Defendant was only an afterthought. Such a plea was not vigorously pursued at the trial or before this Court.

At the argument before this Court, learned Counsel for the 3rd Defendant submitted that although the Plaintiff states in paragraph 2 of the plaint that by Deed Nos. 1403 and 1433 marked P2 and P3 respectively, Luwis Perera transferred an undivided 3/24 share to the Plaintiff, the transferor is not Luwis Perera, but some others. These others are not strangers. The transferors of P2 and P3 are the 1st to 3rd Defendants who are the children of Luwis Perera. They transferred the said share by right of paternal inheritance. This is stated in the Deeds.

P2 and P3 as well as other Deeds marked by the Plaintiff were not marked subject to proof. A partition case is not a criminal case to secure a dismissal by creating doubts of the Plaintiff's pedigree in the mind of the District Judge. The Plaintiff need not prove his pedigree beyond reasonable doubt but on a balance of probabilities. P2 and P3 are not fraudulent Deeds.

In paragraph 4 of the plaint, the Plaintiff states that he became entitled to an undivided 8/24 share by Deed No. 10376 marked

P4 and Deed No. 9196 marked P5 from Tiththalapitige Singho Perera. These Deeds were executed in 1960 and 1959 respectively. The 3rd Defendant submits that there is no proof of how Singho Perera got his title. In P4 there is no mention of how Singho Perera got title but in P5 he refers to Deed No. 5554 of 1954 as the root of his title.

The same submission is made in respect of the Deeds mentioned in paragraphs 6 and 7 of the plaint.

In paragraph 6 of the plaint, the Plaintiff states that by Deed No. 11182 of 1962 marked P6 and Deed No. 75 of 1976 marked P7, Saranelis Perera transferred 12/24 share and 2/24 share respectively to the Plaintiff.

Deeds P6 and P7 provide Deed Nos. 9196 of 1959 and 10376 of 1960 as the source of title for Saranelis Perera.

In paragraph 7 of the plaint, the Plaintiff states that by Deed No. 863 of 1984 marked P8, Tiththalapitige Sanchi Nona transferred 2/24 share to Wilbert Perera and Wilbert Perera by Deed No. 6808 of 1984 marked P9 transferred the same to the Plaintiff.

Deed P8 refers to Deed No. 717 of 1928 and Deed P9 refers to Deed No. 863 of 1984 as the source of title for the transferors.

What about the 3rd Defendant's pedigree? Does he tender title Deeds from time immemorial?

By Deed No. 10216 of 1930 marked 3V1, although the 3rd Defendant claims 1/72 share by paternal inheritance (i.e. Thiththalapitige Luwis Perera's rights), there is no clear proof of

how the transferor of this Deed, i.e. Kakulawalage Lui Nona got title except to rely on what is recited in the Deed which states she got title from her mother Thiththalapitige Nikohamy. There is no further proof that Nikohamy was Lui Nona's mother.

By Deed No. 56 of 1976 marked 3V2 whereby the 3rd Defendant claims an undivided 12/72 share to the land, there is no clear proof of how the transferor, Thiththalapitige Sibel Nona, got title to such share except to rely on what is recited in the Deed whereby she states she got title by Deed No. 13300 of 1926 and Deed No. 718 of 1928.

It is true that in a partition action the Plaintiff shall unfold the full pedigree. However this does not mean that he shall unfold a perfect pedigree starting from the very first Deed ever executed on the land. It is not possible to trace the very first Deed or the very first original owner of the land. We must stop tracing back at a convenient point. What constitutes this convenient point shall be decided on a case by case basis and not by way of a rigid formula. This point was lucidly explained in the Court of Appeal case of *Magilin Perera v. Abraham Perera [1986] 2 Sri LR 208 at 210-211* by Gunawardene, J. with the agreement of G.P.S. De Silva, J. (later C.J.) in the following manner:

> *When a partition action is instituted the Plaintiff must perforce indicate an original owner or owners of the land. A Plaintiff having to commence at some point, such owner or owners need not necessarily be the very first owner or owners and even if it be so claimed such claim need not necessarily and in every instance be correct because when*

such an original owner is shown it could theoretically and actually be possible to go back to still an earlier owner. Such questions being rooted in antiquity it would be correct to say as a general statement that it could be well nigh impossible to trace back the very first owner of the land. The fact that there was or may have been an original owner or owners in the same chain of title, prior to the one shown by the Plaintiff if it be so established need not necessarily result in the case of the Plaintiff failing. In like manner if it be seen that the original owner is in point of fact someone lower down in the chain of title than the one shown by the Plaintiff that again by itself need not ordinarily defeat the plaintiff's action. Therefore, in actual practice it is the usual, and in my view sensible, attitude of the Courts that it would not be reasonable to expect proof within very high degrees of probability on questions such as those relating to the original ownership of land. Courts by and large countenance infirmities in this regard, if infirmities they be, in an approach which is realistic rather than legalistic, as to do otherwise would be to put the relief given by partition decrees outside the reach of very many persons seeking to end their co-ownership.

The Plaintiff has proved his title on the balance of probabilities. The 3rd Defendant's claim on inheritance and Deeds has been accepted while his claim on prescription has been rightly rejected. The questions of law raised on these points are answered against the 3rd Defendant.

I accept that the High Court did not give adequate reasons in overturning the Judgment of the District Court. There is no analysis of evidence or law in relation to the questions of identification of the corpus or devolution of title. However I agree with the conclusion arrived at by the High Court, subject to the variation that issue No. 3 raised by the Plaintiff in the District Court on prescription shall be answered in the negative.

Subject to the said variation, the Judgment of the High Court is affirmed and the appeal of the 3rd Defendant is dismissed with costs.

Judge of the Supreme Court

Sisira J. De Abrew, J.
I agree.

Judge of the Supreme Court

S. Thurairaja, 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 154(P) of the Constitution read with Section 31DD of the Industrial Disputes Act (as amended) and Section 9 of the High Court of the Provinces (Special Provisions) Act No.19 of 1990.

SC.Appeal No.61/2015

SC.SPL.LA NO.251/2014

HCALT/33/2012

LT 32/RM/71/2008

Padmika Mahanama Tilakarathne

No.198, High Level Road,

Homagama.

Applicant-Appellant-Petitioner

Vs.

Maga Neguma Road Construction Equipment Company (Pvt) Ltd.,

No.50, Station Road,

Angulana,

Ratmalana.

Respondent-Respondent-Respondent

BEFORE : **SISIRA J.DE ABREW, J.**

VIJITH K. MALALGODA, PC, J. &

A.L.S. GOONERATNE, J.

COUNSEL : Uditha Egalahewa PC with Ranga Dayananda, N.K. Ashokbharan and Miyuru Egalahewa instructed by Ms. Lilanthi de Silva for the Applicant-Appellant-Appellant.

J.B. Shantha Perera PC with Epa Premachandra and L.Walasmulla for the Respondent-Respondent.

ARGUED &

DECIDED ON : 27.01.2021.

SISIRA J.DE ABREW, J.

Heard both Counsel in support of their respective cases. The Applicant-Appellant-Appellant (hereinafter referred to as the Applicant-Appellant) filed an application dated 08.09.2008 in the Labour Tribunal alleging that his termination of services was wrong. In the same application he sought re-employment and back wages. Learned President of the Labour Tribunal by his order dated 16.03.2012 dismissed the application of the Applicant-Appellant on the basis that he had vacated his employment. Being aggrieved by the said order of the learned President of the Labour Tribunal the Applicant-Appellant filed an appeal in the High Court of Colombo. The learned High Court Judge by his judgment dated 17.11.2014 dismissed the Appeal and affirm the order of the learned President of the Labour Tribunal. Being aggrieved by the said judgment of the learned High Court Judge the Applicant-Appellant has filed an appeal in this Court. This Court by its order dated 23.07.2015 granted Leave to Appeal on questions of law set out in paragraph 10(a), (b), (c) and (e) of the Petition of Appeal dated 15.12.2014 which are set out below;

1. Did the Hon. Judge of the High Court err in law by affirming the award made by the learned President of the Labour Tribunal without properly evaluating the evidence led in the Labour Tribunal?.

2. Was the said Order of the Hon. Judge of the High Court just and equitable?

3. Was the said Order of the Hon. Judge of the High Court against the weight of the evidence led and therefore contrary to the law?

4. Did the Hon. Judge of the High Court misdirect herself on whom the burden of proof lies to establish the two aspects involving the concept of vacation of post i.e. the physical absence from the work place and intention of desert and abandon the employment?

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

The Applicant –Appellant was sent on vacation of post on two grounds;

1. Not reporting for duty

2. Not submitting the medical certificates.

According to the evidence led at the trial, the Applicant-Appellant could not report for duty due to various harassment that he had to encounter in the office. By letter dated 21.05.2008 marked "A25", the Employer-Respondent-Respondent (hereinafter referred to as the Employer-Respondent) gave time to the Applicant-Appellant to submit the relevant medical certificate till 30.05.2008. This letter dated 21.05.2008 has been signed by the General Manager of the Employer-Respondent. Although, the Employer-Respondent by letter dated 21.05.2008 marked "A25" (in the Labour Tribunal) gave permission to the Applicant-Appellant to submit his Medical Certificate till 30.05.2008, the Board of Directors of the Employer-Respondent on 21.05.2008 took a decision to send the Applicant-Appellant on vacation of post. This evidence is revealed at page 368 of the brief. The decision of the Board of Directors had been

submitted to the Labour Tribunal as "X1". It is noted that by letter dated 21.05.2008 the Employer-Respondent gave permission to the Applicant-Appellant to submit their medical certificate till 30.05.2008. But strangely on 21.05.2008 the Board of Directors has taken a decision to send him on vacation of post. Therefore, the decision of the Employer-Respondent to send him on vacation of post on 21.05.2008 itself is questionable.

The Applicant-Appellant has stated in his evidence that he could not report for duty due to various harassments caused to him by the Chairman of the Employer-Respondent. He has stated, in his evidence, that after the new Chairman assumed duties in the Employer-Respondent company, the new Chairman has taken a decision to demolish the office of the Applicant-Appellant. It is interesting to note the incident that had taken place on 17.03.2008. The Chairman of the Employer-Respondent, on 17.03.2008, had walked into the office of the Applicant-Appellant and threatened to kill him like a dog by putting a pistol into his mouth. The Applicant-Appellant complained this incident to the Police. The Applicant-Appellant was examined by a Doctor and the Medico Legal Report has been produced as "A36a" in the Labour Tribunal. The history given by the patient is as follows;

> Alleged to have been assaulted by …… on 17.03.2008 at 12.30 p.m;
> Slapped either side of the face;
> Threatened by putting a pistol into mouth;
> Attempted manual strangulation;

The Doctor, in the Medico Legal Report, has made the following observation;

> " History given by the victim is consistent with Medico Legal Examination findings"

On the complaint made by the Applicant-Appellant on the above incident, the Police filed a case against the Chairman of the Employer-Respondent. We note that he was charged under Section 314 and Section 486 of the Penal Code. In the Magistrate's Court a settlement was reached and in the settlement, the Chairman of the Employer-Respondent in Open Court apologized to the Applicant-Appellant. Therefore, it is clear that the Chairman of the Employer-Respondent has apologized to the Applicant-Appellant about what happened on 17.03.2008. When we consider the above evidence, the most important matter that must be considered is whether the Applicant could have continued to report for duty. When we consider the above material, we hold that there was no opportunity for the Applicant-Appellant to report for duty at the office of the Employer-Respondent.

After considering all the above matters, we hold the view that the Applicant-Appellant did not have an intention not to report for duty and he was prevented from reporting for duty by the Employer-Respondent. If the Applicant-Appellant did not have an intention not to report for duty and was prevented from reporting for duty due to the harassment caused to him by the Employer, his employment cannot be terminated on the basis that he had vacated the employment. This view is supported by the judicial decision in the case of Nelson de Silva *Vs. Sri Lanka State Engineering Corporation(1996) 2 SLR 342* wherein His Lordship Justice Jayasuriya made the following observation.

> "A temporary absence from a place does not mean that the place is abandoned; there must be shown also an intention not to return"

We have earlier pointed out that the Appellant did not have an intention not to report for duty. According to the evidence led at the trial he could not report for duty due to the harassment caused to him by the Employer-Respondent at the work place. If he did not have an intention not to report for duty, we hold that his services cannot be terminated on the basis that he had vacated the employment. We have earlier said, that the decision

of the Employer-Respondent to send him on vacation of post is questionable. For the purpose of clarity, we would like to state that Applicant-Appellant was given time to submit medical certificates till 30.05.2008, but the Board of Directors of the Employer-Respondent took a decision on 21.05.2008 to send him on vacation of post.

Considering all these matters, we hold that the decision of the Employer-Respondent to send the Applicant-Appellant on vacation of post cannot be permitted to stand in law.

Considering all the above material, we held that the learned President of the Labour Tribunal was wrong when he came to the above decision. In view of the conclusion reached above, we answer the 1st question of law in the affirmative. With regard to the 2nd question of law, we answer as follows;

> " The order of the Hon. Judge of the High Court is not just and equitable".
>
> We answer the 3rd question of law in the affirmative.
>
> With regard to the 4th question of law, we answer as follows;
>
> The Applicant-Appellant did not have any intention of abandoning the employment.

Considering all these matters we set aside the judgment of the learned High Court Judge dated 07.11.2014 and the order of the Labour Tribunal dated 16.03.2012. We direct the Employer-Respondent to re-employ the Applicant-Appellant in the same post that he held at the time of the time of termination of services at the Employer-Respondent company and to grant him all back wages and emoluments.

We direct the Respondent to implement this judgment within three months from the date of this judgment.

The Registrar of this Court is directed to send a certified copy of this judgment to the Respondent.

JUDGE OF THE SUPREME COURT

VIJITH K. MALALGODA, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

A.L.S. GOONERATNE, J.

I agree.

JUDGE OF THE SUPREME COURT

Mks

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

In the matter of an Appeal from the judgement of the High Court of the Western Province holden in the Colombo.

Sri Lanka Telecom Ltd,
Lotus Road,
Colombo 01.

Plaintiff

Vs.

Global Electroteks Limited,
Unit C 17, Poplar Business Park,
10, Preston Road London E14 9 RL,
United Kingdom.

Defendant

SC (CHC) Appeal No.05/2011

HC (Civil) No. 207/2003 (1)

AND NOW

Sri Lanka Telecom Ltd,
Lotus Road,
Colombo 01.

Plaintiff - Appellant

Vs.

Global Electroteks Limited,
Unit C 17, Poplar Business Park,
10 Preston Road London E14 9 RL,
United Kingdom.

Defendant – Respondent

Before: **Sisira J. de Abrew J.,**
Murdu N.B.Fernando, PC J. and
S. Thurairaja PC J.

Counsel: Dr. K. Kanag-Isvaran PC with Lakshman Jayekumar instructed by Julius and Creasy for the Plaintiff – Appellant.

Manoj Bandara with Hasitha Gamage instructed by Sudath Perera Associates for the Defendant- Respondent.

Argued on: 08.02.2021

Decided on: 31.05.2021

Murdu N.B. Fernando, PC. J.

This appeal arises from the judgement of the High Court of the Western Province holden in Colombo ("the High Court") dated 03-09-2010.

By the said High Court judgement, the learned judge of the High Court dismissed the action filed therein subject to taxed costs.

Being aggrieved by the said judgement, the Plaintiff-Appellant ("the Plaintiff") came before this Court by Petition of Appeal dated 14-10-2010 and moved inter-alia to set aside the judgement of the High Court and to grant relief as prayed for in the plaint.

The factual matrix of this application *albeit* brief is as follows;

01. The Plaintiff-Appellant, Sri Lanka Telecom entered into a Telecommunication Services Agreement ("the agreement") with the Defendant-Respondent ("the Defendant"), a company based in the United Kingdom dated 29-06-2001. This agreement was executed by the Chief Executive Officer of Sri Lanka Telecom and the Directors of the Defendant company B.A.C Abeywardena and R.S. Jayatilleka and was for providing inter connection services;

02. By the said agreement **"P1"**, the Defendant being the 'customer' of the 'operator' Sri Lanka Telecom the Plaintiff, originates a voice call or data transmission ("traffic /calls") on the licensed system of Sri Lanka Telecom, which culminates or terminates with a customer of another operator, operating another licensed system in another country and *vice versa.* This process of 'interconnection' is achieved by installing a communication link between the systems of the respective operators.

03. In terms of said agreement, the Plaintiff agreed and under took to provide the Defendant traffic/calls and the Defendant agreed and under took to obtain the interconnection services at the below mention rates.

    - <u>For traffic/ calls originating from Sri Lanka.</u>

        - for the 1st 100,000 minutes per month at the rate of US $ 0.30 cents per minute;

        - for the next 100,000 to 500,000 minutes per month at the rate of US $ 0.25cents per minute; and

        - for the next 500,000 to 1,500,000 minutes per month at the rate of US $ 0.20 cents per minute.

        - The above rates were subject to the Defendant bringing a minimum volume of 1,500,000 minutes traffic/calls per month. (If the Defendant fails to bring such traffic, the defendant is liable to pay for the full committed fee for the traffic/calls.)

    - <u>For traffic/calls originating from the United Kingdom.</u>

        - US $ 0.20 cents per minute for any volume of traffic/calls and there was no committed volume of traffic.

04. The agreement was valid for a period of one year. The industry norm was each party invoice the other and the party that owes the greater amount set-off the sum owed to itself and make good the balance owed to the other party.

05. In the instant case, there was an imbalance of two-way traffic between Sri Lanka and the United Kingdom. Traffic originating from United Kingdom was greater and the Defendant had to make payment to the Plaintiff, Sri Lanka Telecom. The payments were based on the monthly invoices, monthly incoming telephone statements, monthly outgoing telephone statements and monthly net settlement statements issued by the Plaintiff.

06. Although the agreement was for a period of one year, even after the validity of the agreement ended on 29-06-2002, the parties continued with the aforesaid process and business relationship. The Plaintiff billed the Defendant as per the rates given in the agreement and the Defendant made the payments, intermittently, without any protest or objection to the invoices tendered. The outstanding sum was always reflected in the net settlement statements issued by the Plaintiff.

07. This process continued until December 2002, at which point the Defendant requested for a variation of the rates by a letter dated 24-12-2002.

08. Thereafter, on 07-01-2003, the Plaintiff suspended the inter-connection services and on 14-02-2003 terminated the said services.

09. On 06-08-2003, the Plaintiff, Sri Lanka Telecom filed action in the High Court for recovery of the sum of US $ 4,623,168.88 or its equivalent in Sri Lankan Rupees for the services provided by the Plaintiff to the Defendant.

10. The Defendant in its answer denied the said charges but took up the position that fresh rates were negotiated between the parties and payments were made by the Defendant to the Plaintiff at the rate of US $ 0 .10 cents per minute.

11. At the trial, the Plaintiff led the evidence of three witnesses. The 3rd witness was the Chief Executive Officer of Sri Lankan Telecom, a Japanese national whose cross-examination could not be concluded as he was no longer available in Sri Lanka.

12. The Plaintiff closed its case at that point, marking in evidence a number of documents. The Defendant did not lead any evidence but in cross examination of

the Plaintiff's witnesses, marked three documents. Both parties tendered written submissions.

13. Thereafter judgement was entered dismissing the plaint filed by the Plaintiff. The judgement was delivered not by the judge who heard the evidence but by the learned judge who succeeded the said judge.

Having referred to the background of this case, I would now move on to examine the judgement delivered by the learned High Court Judge.

Firstly,

The case presented by the Plaintiff before the High Court was that although the agreement entered into between the two parties was for a period of one year with provision to extend, it was not extended as stipulated therein and that impliedly the terms and conditions of the said agreement were abided by and complied with by the parties, until the agreement was suspended and thereafter terminated.

The case presented by the defendant was that consequent to the ending of the validity period of the agreement on 30.06.2002, fresh rates were negotiated and the parties transacted without a written contract but on an oral contract and the said contract survived, until it was suspended by the Plaintiff in January 2003.

Secondly,

With regard to the jurisdiction of the High Court to hear and determine this application, the case of the Plaintiff was that the Court had jurisdiction to hear and determine this matter since the parties continued with the business relationship based upon the agreement **P1**, which expressly provided for such jurisdiction.

The case for the Defendant, on the other hand was that the Court had no jurisdiction to entertain this action, as the agreement had no force after the due date and also that the Defendant being a company based in the United Kingdom cannot be sued in Colombo.

The learned High Court Judge, after referring to the key aspects of the instant case and the admissions recorded, indicated (vide page 14 of the judgement), that the issue of jurisdiction depends on the validity of the terms and conditions of the agreement **P1** and therefore the pivotal issue is the agreement **P1** and proceeded to examine the terms and

conditions of **P1** agreement. The learned judge thereafter came to the finding that the agreement **P1** was not extended in accordance with the terms and conditions of the agreement **P1**.

Thereafter, the learned judge, went on to examine whether there was *Consensus ad Idem* between the parties to continue with the terms and conditions of the agreement and having referred to the answer of the Defendant and the evidence led pertaining to the continuation of business relationship even after 30-06-2002, held (vide page 22 of the judgement) that it can be reasonably presumed that there was an agreement between the parties, even after 30-06-2002.

Then, the learned judge examined a number of invoices issued and dispatched by the Plaintiff to the Defendant using the same rates agreed and stipulated in the agreement **P1.**The learned judge also examined the monthly incoming and outgoing telephone statements, the relevant documents of proof of dispatch of invoices and statements and also a number of telegraphic transfers made by the Defendant to Plaintiffs' NRFC account at Bank of Ceylon, Colombo being payments made subsequent to 30-06-2002 i.e. after the one year validity period of the agreement **P1** ended. He also refers to the fact that there was no evidence whatsoever to establish and show that the Defendant objected to, in any manner, to any of the invoices or statements sent after 30-06-2002 and at page 24 of the judgement holds as follows: -

> *"If there is no other evidence and as there was no objection to the rates used in invoicing, this Court could have come to the conclusion that, by conduct parties agreed to continue with and abide by the rates agreed in P1 and the payments made were part payments."*

If I may pause at this moment and re-coup the learned judge's analysis, he refers to the fact that agreement **P1** was not extended as per the stipulated format, nevertheless by consent the business relationship continued and that there was *Consensus ad Idem* to continue with the rates referred to in the agreement **P1**.

Having said that, the learned judge in my view approbates and reprobates. He goes from one factor to another.

He refers to a piece of evidence elicited in the cross-examination of the Plaintiff's witness and comes to the final conclusion that the rate of payment was US $ 0.10 cents per minute and that is the rate at which the Defendant made the payment and there is no acceptable

evidence to show that the Plaintiff objected to the payments made by the Defendant based upon the said rate of US $ 0.10 cents per minute, at any given point of time.

The learned judge does not analyze how the US $ 0.10 cents per minute came into effect or from which date it came into being or who initiated it or as to whether it was a negotiated and accepted rate between the parties. He goes on the basis it is the new rate agreed by the parties. The Defendant not leading evidence or not presenting its case under oath appears not to be a material factor or a significant factor. In my view, these are factors that a judge ought to consider, scrutinize, weigh and thereafter on a balance of probability come to a finding. The judgement should clearly show the thought process and analysis of the judge.

The learned judge thereafter, reproduces portions from the plaint and answer and relies upon the evidence of Mr. Anan the CEO of Sri Lanka Telecom, whose evidence, the learned judge disregarded in toto at the beginning of the judgement and also refers to bits and pieces of evidence and finally comes to the conclusion, that by conduct of the parties it can be presumed that there was consensus between the parties and thus agreement to provide inter-connection services continued even after the agreement **P1** ended.

Nevertheless, the learned judge, thereafter adverts to the fact that the Plaintiff has failed to prove that the rates payable were the same as in the agreement **P1**. He goes onto state that the Plaintiff has founded his cause of action on the agreement **P1** and that the Plaintiff's Chief Executive Officer has failed to establish by his letter **P12**, that there was *Consensus ad Idem,* at the 'beginning of the dispute' and therefore the Plaintiff is 'disentitled' to the claims in the plaint. (vide pages 24 to 29 of the judgement)

The learned Judge thereafter proceeds to answer the issues in favour of the Defendant and specifically answers issues 34 and 35 (raised by the defendant) as follows: -

34. As pleaded in the paragraph 10 of the answer after the expiration of the agreement marked P1,

(a) Did the Plaintiff agree for the rate of US $ .10 cents per minute, if the traffic for a consecutive three months exceed 5,000,000 minutes per month?

Answer – not proved

(b) Did the Defendant achieve the target of 5,000,000 minutes for the months of August, September, and October 2002?

Answer - does not arise

(c) Had the Defendant made payments to the Plaintiff on the basis of US $ .10 cents per minute?

Answer – Yes, after 30-06-2002

35. As pleaded in paragraph 11 of the answer did the Defendant request the Plaintiff to prepare a new written agreement incorporating the understanding reached after 30th June 2002 as there was no written agreement?

Answer – Yes, according to P10

Before proceeding further, I wish to emphasize that this appeal is a direct appeal and that there are no specific questions of law on which leave was granted. Therefore, I intend to examine the judgement in its entirety to ascertain whether the evidence supports the findings made by the learned judge.

The Plaintiff, Sri Lanka Telecom is an exclusive international gateway through which international connection services can be brought to Sri Lanka. The Defendant Company is duly licensed in the United Kingdom to provide telecommunication services, including international connection services, through authorized carriers and can bring calls originated in the United Kingdom to Sri Lanka through Sri Lanka Telecom, the Plaintiff in the instant case. There is no dispute between the parties, that for such purpose and process the Telecommunication Service Agreement **P1** was executed between the parties, whereby the Defendant committed to bring a minimum volume of 1,500,000 minutes traffic per month at the rate of US $ 0 .30 cents for the first 100,000 minutes, US $ 0 .25 cents for the next 100,000 to 500,000 minutes and US $ 0 .20 cents for the balance 500, 00 to 1,500,000 minutes to Sri Lanka from the United Kingdom.

Similarly, Sri Lanka Telecom agreed to pay the Defendant at the rate of US $ 0.20 cents per minute for any volume of traffic, without a committed volume originating from Sri Lanka to the United Kingdom.

This process continued from 29-06-2001 to 30-06-2002 in accordance with the terms of the agreement **P1**. Clause 2.3 for the agreement referred to the period of agreement to be one year and Clause 2.4 referred to the mode and manner in which the agreement could be extended by the parties, specifically with mutual consent and in writing, provided a notice is received 60 days prior to the expiry of the agreement.

There is consensus between the parties that the agreement **P1** was not extended as contemplated under Clause 2.4 referred to above. However, the business relationship continued and the process of incoming and outgoing international calls from Sri Lanka to the United Kingdom continued. Thus, impliedly the agreement continued and the parties were bound to each other to make payments for the incoming and outgoing traffic.

Was it at the same rate or was there a variation in the rate? Or more precisely, what is the rate at which the calls were placed and made subsequent to June 2002?

That is the only question that begs an answer from this Court.

The Plaintiff's position is, it is at the same stipulated rate referred to in the agreement **P1**. In order to buttress its position, the Plaintiff marked in evidence the monthly invoices **[P15(a) to P15(r)]** monthly incoming and outgoing telephone statements [**P17(a) to P17(r)** and **P18(a) to P18(r)]** and monthly net settlement statements **[P16(a) to P16 (q)]** together with supplementary statements **[P18(r) and P18(q)],** courier receipts **[PF(1) to PF(13)],** telegraphic transfers **[P19(a) to P19 (s)]** and Bank Statements pertaining to Plaintiffs NRFC account to establish payments made by the Defendant [**P21(a) to P21(l)].**

The said documents were not objected to by the Defendant at any stage. i.e., at the time of issue or at the time of marking in evidence. These invoices and statements clearly indicated the accounting procedure and the outstanding balance sum that the Defendant had to pay the Plaintiff, reason being the traffic from the United Kingdom to Sri Lanka was far greater than the traffic originating from Sri Lanka together with the fact that the Defendants' payments were always intermittent and never on time.

In fact, the learned judge accepts and acknowledges, that the said documents marked and produced by the Plaintiff, were neither challenged nor objected to by the Defendant. Hence, it is not necessary to examine the accuracy of each and every invoice and statement. Suffice it to state that the Plaintiff's case was the business relationship and the process continued, subject to the stipulated rates in the **P1** agreement. i.e .at US $ 0.30 cents per minute for the first 100,000 minutes, US $ 0.25 cents per minute for the next 100,000 to 500,000 minutes and US $ 0.20 cents per minute for 500,000 to 1,500,000 minutes.

The Defendant on the other hand, in his answer takes up the position that consequent to the expiry of **P1** agreement, parties negotiated and arrived at the rate of US $ 0 .10 cents per minute to be the new rate and that the Defendant therefore, made the payments at US $ 0 .10 cents per minute from July 2002 onwards.

However, the Defendant failed to give evidence before the High Court to substantiate this material factor. In my view, the said failure on the part of the Defendant to give evidence firstly, with regard to the date and manner of negotiations and secondly, the date on which such negotiated rate would come into effect is a crucial factor to be reckoned when, determining this case.

Nevertheless, the learned judge accepted the position of the Defendant and emphatically stated that the Defendant made the payment at US $ 0 .10 cents per minute from July 2002. (vide page 24 of the judgement) and thus disregarded the position taken up by the Plaintiff, that the applicable rate was the rates stipulated in the agreement **P1**.

However, it should be borne in mind that the learned judge, when answering issue No. 34 (a) specifically accepted that the Plaintiff did not agree to the rate of US $ 0 .10 cents and answered the said issue as *has not been proved* and when answering issue 34(b) pertaining to the Defendant achieving the target stated *does not arise*.

Thus, in my view, the learned judge approbates and reprobates. On one hand, the learned judge denies that the Plaintiff accepted the new rate and that achieving the target does not arise and on the other hand, answering issue No.35 states that the new agreement should be based on the letter **P10** which speaks of the Defendant achieving the target in response to the alleged letter **P11** said to be issued under the hand of the Chief Executive Officer of the Sri Lanka Telecom.

Therefore, it would be in the best interest of justice, if the variation of rate of payment is considered in greater detail. These rates are reflected in certain documents and the said documents will now be examined.

Firstly, the agreement **P1**. There isn't an iota of doubt that the agreement **P**1 was not extended. Similarly, it is not in dispute that the parties continued with the business relationship and the process of interconnection of telephone services between the two countries continued until the agreement was suspended by the Plaintiff in January 2003.

According to the documents led before the High Court such suspension took place, by letter dated 07-01-2003 issued under the hand of Mr. Shuhei Anan, Chief Executive Officer of Sri Lanka Telecom. This letter of suspension was marked in evidence as **P12**.

By the aforesaid letter, the writer, Chief Executive Officer of Sri Lanka Telecom refers to another letter written by the Defendant dated 24-12-2002 and categorically denies the contents of the said letter. That letter too, was marked in evidence as **P10**.

It is observed that the dispute between the two parties triggered upon receipt of the said letter **P10** and it is intended to consider the said letter now.

By the said letter, **P10**, B.A.C. Abeywardena, the Managing Director of Global Electroteks Ltd., the Defendant company, requests a new agreement incorporating a certain rate and a period. An excerpt of the letter is as follows: -

> *"We are pleased to inform you that we have achieved the target of sending over five million minutes in three consecutive months…"*
>
> *"Therefore, we shall thank you to prepare a new agreement according to the rates and period mentioned in your letter dated 30-06-2002 and to revise the invoices accordingly" (emphasis added)*

This letter was received by the Plaintiff through one of its officers. The evidence of Mr. Herath, the Plaintiff's 1st witness before the High Court (vide proceedings dated 30-06-2005) was that the aforesaid Defendant's letter **P10** was handed over to him by the Defendant, B.A.C. Abeywardena himself on 24-12-2002 together with *another unsigned letter purported to be of Sri Lanka Telecom, dated 30-06-2002*, marked and produced at the trial, as **P11**.

The witness, even under cross-examination maintained that the said unsigned letter **P11** is a forgery and a fabrication and the Chief Executive Officer of Sri Lanka Telecom did not offer the Defendant any concessions as stated in the said letter **P11**. The learned Presidents Counsel for the Appellant brought to the attention of Court that even the name of the Chief Executive Officer is erroneously typed in the said letter **P11** as well as in the letter **P10**, written by B.A.C. Abeywardena, Managing Director of the Defendant company and thus, adverted strongly, the contents of **P10** were designed to enrich the Defendant and the Defendant alone.

On the other hand, the letter **P11** is the bedrock of the Defendant's case. **P11** is the document, the Defendant relies upon to establish the rate of US $ 0.10 cents per minute to be the new negotiated rate offered by the Plaintiff and **P10** is the Defendant's communique indicating the achievement of the target by him. Thus, the Defendant's contention is that in view of achieving the target referred to in the letter **P11**, payments were made accordingly.

However, upon a careful reading of the afore quoted paragraph in **P10**, the letter the Defendant wrote to the Chief Executive Officer of Sri Lanka Telecom, it is apparent that the ***Defendant sought a revision of invoices and preparation of a new agreement incorporating a new rate and period only on 24-12-2002***. i.e., six months after the duration of the agreement **P1** ended in June 2002.

Thus, it is *sine qua non* that until then, the rates stipulated in the agreement **P1 s**hould apply.

In the said circumstances, in my view, the learned judge misdirected himself in accepting the Defendants version and coming to the conclusion *that the Defendant made the payments at US $ 0 .10 cents per minute from July 2002.* (vide page 24 of the judgement)

Secondly, the documents **P10, P11, P12** referred to above and marked in evidence by the Plaintiff, are in my view the most crucial and material documents with regard to the Defendants version of this case. Hence, this Court would decipher and examine the said documents in depth to understand the case presented by the Defendant which the learned judge accepted to the detriment of the case of the Plaintiff.

The Plaintiff's contention was that issuance of **P12** the letter of suspension was necessitated in view of receipt of **P10** and **P11** on 24-12-2002. The Plaintiff emphasize that **P11** is a forgery and a fabrication and that the new rate and period referred to therein, which the Defendant is relying upon in **P10** to revise and prepare a new agreement was never offered by the Plaintiff to the Defendant.

Hence, let us look at **P11** now. The letter **P11** is on a Plaintiff's letterhead. However, it is unsigned. It carries the name of Shuhei Anan, the Chief Executive Officer. The name is erroneously spelt. The letter is ***offering an extension of the agreement P1 for a period of three-years* a**t ***the rate of US $ 0 .10 cents per minute,*** if the Defendant would bring traffic to the tune of 5,000,000 minutes per month consecutively for three months before December 2002. If not, the letter states Sri Lanka Telecom may be compelled not to extend the contract with B.A.C. Abeywardena, Managing Director of Global Electroteks Ltd. beyond December 2002.

Even if the letter **P11** is not a genuine document as alleged by the Plaintiffs' witnesses, it is the corner stone of the Defendant's case. However, in my view the letter **P11** will not assist the Defendant. It is to the detriment of the Defendant and it is fatal for the defendant's case. It emphatically accepts that the agreement **P1** is still in existence. In such a background, the learned judge's assumption that the Defendant paid for the traffic at US $ 0 .10 cents per minute from July 2002 is beyond comprehension. It is not based on any legal principles, industry norms or commercial practices. It is neither a reasonable assertion or a logical conclusion. In my view, the learned judge has based his findings on unsubstantiated material.

In any event, according to the Defendant himself, the target was achieved by bringing the required traffic only at the end of October 2002, the three consecutive months being August, September and October 2002. Then, how could the Defendant make payment from

July 2002, at US $ 0.10 cents per minute prior to the ending of the said three-month period? what is the rational or justification for the Defendant to start making payments on a fresh rate? Hence, I am of the view that the learned judge's assumption with regard to the new rate is erroneous and without merit. Therefore, on the said fact alone, the impugned judgement cannot stand and should be reviewed by this Court.

As observed earlier in this judgement, the learned High Court Judge correctly held that the agreement **P1** was not extended, that the Plaintiff periodically invoiced and informed the Defendant the outstanding sum, the Defendant did not object or challenge such sum and hence, accepted the veracity of the sum stated. However, thereafter the learned judge completely changed his stand and accepted the Defendants version that fresh rates were negotiated and that the Defendant paid the Plaintiff according to the new rates negotiated between the parties.

Similarly, it is observed that the learned judge relied on the evidence of Mr. Shuhei Anan, the Chief Executive Officer, to dismiss the case of the Plaintiff. It is a matter of concern that the evidence of the said witness was rejected by the learned judge upon the basis it was incomplete and not subject to a full cross-examination. The learned judge, in my opinion did not analyse the case of the Plaintiff in its entirety. At one point of time, he says court cannot give weightage to **P11** and thereafter places much reliance on certain pieces of evidence of the Plaintiff's witnesses with regard to the documents **P10** and **P11**, whereas, the said witnesses emphatically re-iterate that **P11** is a forgery and a fabrication and there was no consensus whatsoever by the Plaintiff to grant a new reduced rate to the Defendant, for providing inter connection facility.

In such a background, I hold that the finding of the learned judge does not stand to reason and hence the judgement of the High Court is unsustainable in facts and in law. Moreover, the learned judge has misdirected himself in rejecting the plaint after acknowledging that the documents led by the Plaintiff to substantiate its case was neither challenged nor controverted by the Defendant. Hence, on the grounds discussed herein, I see merit in the submissions of the learned President's Counsel for the Plaintiff, that the appeal should be allowed.

Having referred to the findings of the learned Judge, I wish to look at the agreement **P1** once again. The Plaintiff rests its case on this agreement. The jurisdiction of the Court was invoked on the agreement. The course of action is also based on this agreement.

There is no ambiguity whatsoever that the agreement was for a period of one year and it was not extended, in writing, at the end of the one-year period on 30-06-2002, as stipulated by Clause 2.4 of the agreement.

In such a circumstance, **can the Plaintiff invoke the jurisdiction of the High Court** based on the agreement? The learned Judge answered issues 1 and 2 raised by the Plaintiff and issues 30, 31 and 32 raised by the Defendant pertaining to jurisdiction in favour of the Defendant and upheld that the High Court has no jurisdiction to hear and determine this action upon the ground that there was no valid agreement.

Hence, the crucial issue that this Court has to determine is, even if there wasn't an existing agreement in writing, was there C*onsensus ad Idem* between the parties? Was there an implied contract to proceed with the business relationship and provide inter connection services? Were the parties by their conduct bound to each other to honour the terms and conditions of the agreement **P1**? If so, did the High Court have jurisdiction to hear and determine this application?

In the instant matter for determination before this Court, the question pertaining to jurisdiction is inter connected with implied contracts. What are implied contracts? This is best explained in the book, **Chitty on Contracts.**

In Volume I titled, **General Principles [31st Ed] in Chapter I - 096** it is stated as follows:

Express and implied contracts

> *"Contracts maybe either express or implied. The difference is not one of legal effect but simply of the way in which the consent of the parties is manifested. Contracts are express when their terms are stated in words by the parties. They are often said to be implied when their terms are not so stated…* ***There may also be an implied contract when the parties make an express contract to last for a fixed term, and continue to act as though the contact still bound them after the term has expired. In such a case the Court may infer that the parties have agreed to renew the express contract for another term.*** *Express and implied contracts are both contracts in the sense of the term, for they both arise from the agreement of the parties, though in one case the agreement is manifested in words and in the other case by conduct.'' (emphasis added)*

As evident from the above quoted passage, an implied contract can be inferred when an express contract to last for a fixed term ends, but the parties continue to act as though the contract still binds them.

In the instance case too, a similar situation arose. Consequent to the validity of the agreement **P1** ended the two parties, the Plaintiff and the Defendant, continued to act as though the agreement impliedly bound them. The process of providing international telephone connections continued. Two-way traffic moved between the United Kingdom and Sri Lanka. Impliedly both parties acted in terms of the said agreement **P1** which lapsed after one year.

It is not necessary at this juncture to get involved in an academic analysis of the rights and obligations of parties in an implied contract or to delve into the relationship of parties of an implied contract and specifically dissect the the relationship of the two parties of the instance case, since the Defendant categorically accepts such relationship by its bald statement in the answer, *"after 30th June 2002, the parties thus acted without any written contract only on oral contract"* (vide paragraph 9(c) of the answer).

Thus, the Defendant categorically admitted that there was an oral agreement or an implied contract between the parties based or arising out of the initial agreement **P1** to provide inter connection services. Therefore, I am of the view that the High Court had jurisdiction to hear and determine this application based upon such implied contract.

Hence, I hold that the finding of the learned judge that the High Court did not have jurisdiction to hear and determine this application is erroneous. There was a valid agreement implied in nature between the parties and based upon the said implied contract, the High Court had jurisdiction to hear and determine this application.

At this juncture, I pause for a moment to examine the contention of the learned Counsel for the Defendant with regard to jurisdiction.

In a nutshell, his argument was that the agreement **P1** has no force or effect in law as it has expired. Hence, no cause of action can arise therein to invoke the jurisdiction of the High Court. If action is to be instituted on the oral contract referred to by the Defendant, it ought to be in terms of Section 9 of the Civil Procedure Code. i.e., either at the registered office of the Defendant in the United Kingdom or where the cause of action arose, once again in the United Kingdom, based on the Roman Dutch Law doctrine, 'creditor must seek the debtor'. Hence, he argued that the learned Judge correctly analyzed the legal position in determining the question of territorial and competent jurisdiction.

Upon a careful perusal of the impugned judgement, I cannot see, an analysis of the jurisdiction upon the contention put forward by the learned Counsel for the Defendant. In answering issue one, the learned judge makes a very bald statement. I reproduce the learned judges' words in *verbatim*. "jurisdiction - *not proved. (as the plaintiff failed in proving the*

validity of P1 after 30th June 2002 and a cause of action that arose within the jurisdiction of this Court)

Thus, in my view, the contention of the Defendant that the High Court did not have jurisdiction is without merit and the said submission should be rejected in *limine*.

I would also wish to advert to another significant factor pertaining to **proof of documents.**

As was discussed earlier, the Plaintiff based its case on the agreement **P1** and implied continuation of the business relationship, upon the same terms and conditions as in **P1** even after the validity period ended on 30-06-2002. The Plaintiff marked in evidence, a number of invoices, traffic statements and net settlement statements to establish the said business relationship and continuation of process of interconnection of international telephone facilities. These documents were neither challenged nor controverted by the Defendant nor its Managing Director, B.A.C. Abeywardena at any point of time. Moreover, it is observed that the Defendant opted not to give evidence before the High Court and be subjected to cross examination on its stand or on the above referred documentation.

This Court on numerous occasions have categorically held that such a course of action in not challenging or controverting important pieces of evidence is an additional factor that a court should take into consideration in favour of a person who leads such evidence.

In **Edrick de Silva V. Chandradasa de Silva, reported in 70 NLR 169,** HNG Fernando, C.J. at page 174, went onto observe as follows: -

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

Hence, based upon the aforesaid *ratio decidendai*, I am of the view, that the Defendant's **failure to controvert or challenge the documents** especially the monthly invoices, incoming and outgoing telephone statements, net settlement statements issued by the Plaintiff, **is an admission by the Defendant of its content being true and accurate.**

In fact, the learned Judge at page 24 of the impugned judgement (supra) acknowledges that the Defendant did not challenge or controvert the documents. Nevertheless, thereafter the learned Judge goes on a voyage of its own to come to the final conclusion, which is factually erroneous in my view, that the negotiated rate was US $ 0 .10 cents per minute, after 30-06-2002.

The Counsel for the Defendant also brought to the attention of Court two judgements. **Fradd v. Brown and Company 20 NLR 282,** a judgement of the Privy Council and **Alwis v. Piyasena Fernando 1993(1) SLR 119** a judgement of this Court, wherein it was held that it is rare that a decision of a trial judge on a primary point of fact is overruled in appeal and it is well established that primary facts by a trial judge who hears and sees witnesses are not to be lightly disturbed in appeal.

However, as I have already observed the impugned judgement was not delivered by the trial judge who heard and saw the demeanour of the witnesses but by another learned judge who succeeded the trial judge thereafter.

In any event, in a series of judgements the Appellate Courts have held that failure to comply with the mandatory requirements in Section 187 of the Civil Procedure Code vitiates a judgement.

In **Warnakula v. Jayawardena [1990] 1 SLR 206**, the Court of Appeal observed as follows: -

> *"The learned Counsel for the plaintiff-appellant submitted to Court that the learned District Judge had failed to consider and analyse the evidence. He further submitted that the learned District Judge had failed to give reasons for the findings and had totally failed to consider the complaints and the documentary evidence produced in this case.*
>
> *There is force in the submission of Counsel. The learned District Judge had failed to evaluate and consider the totality of evidence. His judgement was not in compliance of Section 187 of the Civil Procedure Code. He has given a very short summary of the evidence of the parties and witnesses and without giving reasons he had stated that he prefers to accept the evidence of the*

defendant-respondent as it was satisfactory and thereafter proceeded to answer the issues."

In a more recent judgement of this Court, **Suntel Limited V. Electroteks Network Services (Pvt) Ltd. S.C. (CHC) App 53/2012 S.C minutes dated 12-12-2018**, it was observed:

"This overall paucity of reasons and loose ends apparent on the face of it, renders that the judgement to be violative of Section 187 of the Civil Procedure Code."

"The learned High Court Judge has only given bare answers to the issues raised. We may assume the learned Trial Judge was satisfied that the claim of the defendant-respondent observed to be decreed. But the judgement of the learned Trial Judge was not final; it was subject to appeal and unless there was a reasoned judgement recorded by the Trial Judge an appeal against the judgement may turnout be an empty formality"

Hence, while appreciating the submission of the learned Counsel for the Defendant that the findings of a Trial Judge should not be lightly disturbed in appeal, it is apparent in the instant case, that the thought process of the judge is not transparent for this Court to uphold the impugned judgement.

The Plaintiff filed the instant case before the High Court to recover a sum of US $ 4,623,168.88 on its equivalent in Sri Lankan Rupees, on a commercial transaction within the scope of ambit of the High Court of Provinces (Special Provision) Act No. 10 of 1996.

The Plaintiff's cause of action was to recover the balance monies due and owing to the Plaintiff from the Defendant as set out in the invoices and statements of account led in evidence before court through the Plaintiff's witnesses.

The said documents were neither challenged nor controverted by the Defendant. In fact, the Defendant's main ground of defence was that payment for services provided should be done not on the rates stipulated in the plaint and established through the invoices and documents led in evidence but on a new negotiated rate. As already observed by this Court the said defence is unsubstantiated and baseless and has no force or effect in law.

The Plaintiff has established beyond doubt that business relationships continued between the Plaintiff and Defendant post June 2002, until the Plaintiff first suspended and thereafter terminated the Telecommunication Services Agreement, initially executed on 29-06-2001.

The Plaintiff has also specifically pleaded the total outstanding sum, giving credit to all the payments made by the Defendant, during the period in issue of the business relationship, beginning from July 2001 to January 2003.

The evidence led before the High Court as already adverted, established that the aforesaid sum is due and owing to the Plaintiff from the Defendant. Moreover, the Defendant has failed to challenge or contradict any of the documents led in evidence pertaining to the total outstanding sum.

In the aforesaid circumstances, I allow the appeal and set aside the judgement given by the learned High Court Judge dated 03-09-2010. Accordingly, judgement is entered in favour of the Plaintiff-Appellant, in a sum of US $ 4,623,168.88 together with legal interest thereon from the date of action till date of decree and thereafter on the aggregate sum decreed until payment is made in full to the Plaintiff- Appellant.

For the above reasons I allow the appeal and (a) set aside the judgement of the High Court (b) enter judgement in favour of the Plaintiff-Appellant as prayed for in the Petition.

Appeal is allowed. Parties will bear their own costs of this appeal.

Judge of the Supreme Court

Sisira J. de Abrew, 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

Viacom International Inc.,
1515, Broadway,
New York,
United States of America.
Plaintiff

SC APPEAL NO: SC/CHC/APPEAL/3/2006
CHC CASE NO: HC/Civil/21/98(3)

Vs.

1. The Maharaja Organisation Limited,
   No.146,
   Dawson Street,
   Colombo 02.
2. The Director General of Intellectual Property,
   3rd Floor,
   "Samagam Medura",
   D.R. Wijewardena Mawatha,
   Colombo 10.

Defendants

AND NOW BETWEEN

The Maharaja Organisation Limited,
No.146, Dawson Street,
Colombo 02.
1st Defendant-Appellant

Vs.

1. Viacom International Inc.,
   1515, Broadway,
   New York,
   United States of America.
   Plaintiff-1st Respondent
2. The Director General of Intellectual Property,
   3rd Floor,
   "Samagam Medura",
   D.R. Wijewardena Mawatha,
   Colombo 10.
   2nd Defendant-Respondent

Before: P. Padman Surasena, J.
E.A.G.R. Amarasekara, J.
Mahinda Samayawardhena, J.

Counsel: Romesh De Silva, P.C., with Rudrani Balasubramaniam, Sugath Caldera and Shanaka Cooray for the 1st Defendant-Appellant.

Dr. K. Kanag-Isvaran, P.C., with Dr. Harsha Cabral, P.C., and Kushan Illangatillake for the Plaintiff-1st Respondent.

Suren Gnanaraj, S.S.C., for the 2nd Defendant-Respondent.

Argued on: 19.02.2021

Written submissions:

The 1st Defendant-Appellant and the Plaintiff-1st Respondent on 16.03.2021.

Decided on: 30.06.2021

Mahinda Samayawardhena, J.

The Plaintiff-1st Respondent, Viacom International Inc. (Plaintiff), filed an appeal by way of a plaint dated 11.08.1998 before the Commercial High Court in terms of section 182 of the Code of Intellectual Property Act, No. 52 of 1979, against the order of the Director of Intellectual Property dated 30.06.1998, made after an inquiry held under section 107(13) of the Code. By this order, the Director of Intellectual Property decided to register Mark No. 61332 of the 1st Defendant-Appellant, The Maharaja Organisation Limited (1st Defendant), despite opposition by the Plaintiff.

The Commercial High Court issued summons on the 1st Defendant but the 1st Defendant did not respond compelling the Court to take up the appeal *ex parte*. After the *ex parte* inquiry into the merits of the appeal, the Commercial High Court dismissed the Plaintiff's appeal by Judgment dated 13.09.1999. The Plaintiff appealed against that Judgment to the Supreme Court (SC/APPEAL/40/1999). Before the Supreme Court, the Plaintiff objected to the 1st Defendant participating in the appeal

as the proceedings had been taken up *ex parte* against the 1st Defendant in the lower Court. However the parties later agreed before the Supreme Court, as reflected in that Judgment, that the objection to the participation of the 1st Defendant in the appeal be considered "*with the main appeal and that the parties would tender written submissions and further the Court could make its order on the written submissions of the parties*."

Both parties filed written submissions before the Supreme Court and by Judgment dated 28.04.2005, which is now reported as *Viacom International Inc. v. Maharaja Organisation Ltd [2006] 1 Sri LR 140*, the Supreme Court "*set aside the Judgment of the Commercial High Court dated 13th September 1999 and also set aside the order of the 2nd Defendant dated 30th June 1998 allowing the 1st Defendant to register Trade Mark No. 61332*."

Thereafter the 1st Defendant by motion dated 10.06.2005 made an unusual application to the Commercial High Court stating that "*it has now become necessary to proceed with this case in view of the pronouncement of the Supreme Court Judgment in that the Defendant could file papers to set aside the ex parte decree as the Defendant is in law entitled to do*."

The Commercial High Court by order dated 10.11.2005 rejected the said application of the 1st Defendant. It is against this order of the Commercial High Court dated 10.11.2005 that the 1st Defendant has filed this final appeal.

At the argument before this Court, learned President's Counsel for both parties invited the Court to decide the matter on written submissions.

Learned President's Counsel for the Plaintiff, drawing attention to the Full Bench decision of this Court in *Chettiar v. Chettiar [2011] BLR 25, [2011] 2 Sri LR 70,* submits that this appeal of the 1st Defendant from the order of the Commercial High Court dated 10.11.2005 shall be dismissed *in limine* as it is misconceived in law in that the 1st Defendant should have come before this Court against the order of the Commercial High Court not by way of a final appeal under section 754(1) read with section 754(5) of the Civil Procedure Code and sections 5 and 6 of the High Court of the Provinces (Special Provisions) Act, No. 10 of 1996, but with the leave of this Court first had and obtained, i.e. by way of a leave to appeal application made under section 754(2) read with section 754(5) of the Civil Procedure Code and sections 5 and 6 of the High Court of the Provinces (Special Provisions) Act, No. 10 of 1996.

Although learned President's Counsel for the Plaintiff has stressed this point in his written submissions filed both before and after the argument, learned President's Counsel for the 1st Defendant has refrained from addressing this matter in his written submissions.

Let me first reproduce sections 754(1), (2) and (5) of the Civil Procedure Code and sections 5 and 6 of the High Court of the Provinces (Special Provisions) Act, No. 10 of 1996:

> *754 (1) Any person who shall be dissatisfied with any judgment, pronounced by any original court in any civil action, proceeding or matter to which he is a party may prefer an appeal to the Court of Appeal against such judgment for any error in fact or in law.*

(2) Any person who shall be dissatisfied with any order made by any original court in the course of any civil action, proceeding or matter to which he is, or seeks to be a party, may prefer an appeal to the Court of Appeal against such order for the correction of any error in fact or in law, with the leave of the Court of Appeal first had and obtained.

(5) Notwithstanding anything to the contrary in this Ordinance, for the purposes of this chapter—

Judgment means any judgment or order having the effect of a final judgment made by any civil court; and

Order means the final expression of any decision in any civil action, proceeding or matter, which is not a judgment.

Sections 5 and 6 of Act No. 10 of 1996 whereby the Commercial High Court was established read as follows:

(5) (1) Any person who is dissatisfied with any judgement pronounced by a High Court established by Article 154P of the Constitution, in the exercise of its jurisdiction under section 2, in any action, proceeding or matter to which such person is a party may prefer an appeal to the Supreme Court against such judgement, for any error in fact or in law.

(2) Any person who is dissatisfied with any order made by a High Court established by Article 154P of the Constitution, in the exercise of its jurisdiction under section 2, in the course of any action, proceeding or matter to which such person is, or seeks to be, a party, may prefer an appeal to the Supreme Court against such order for the

correction of any error in fact or in law, with the leave of the Supreme Court first had and obtained.

(3) In this section, the expressions "judgement" and "order" shall have the same meanings respectively, as in section 754(5) of the Civil Procedure Code (Chapter 101).

(6) Every appeal to the Supreme Court, and every application for leave to appeal under section 5 shall be made as nearly as may be in accordance with the procedure prescribed by Chapter LVIII of the Civil Procedure Code (Chapter 101).

The question whether an appeal or a leave to appeal lies against an order of the District Court or Commercial High Court was a subject of much controversy for a long period of time. There were two approaches: "the order approach" and "the application approach".

In the Supreme Court case of *Siriwardena v. Air Ceylon Ltd [1984] 1 Sri LR 286*, Sharvananda J. (later C.J.) followed the order approach adopted by Lord Alverstone C.J. in *Bozson v. Altrincham Urban District Council [1903] 1 KB 547*.

Conversely, in the Supreme Court case of *Ranjit v. Kusumawathie [1998] 3 Sri LR 232*, Dheeraratne J. followed the application approach adopted by Lord Esher M.R. in *Salaman v. Warner [1891] 1 QB 734* and Lord Denning M.R. in *Salter Rex & Co. v. Ghosh [1971] 2 QB 597*.

The order approach contemplates only the nature of the order. When taken in isolation, if the order finally disposes of the matter and the parties' rights in litigation without leaving the

suit alive, the order is final and a direct/final appeal is the proper remedy against such order.

The application approach contemplates only the nature of the application made to Court, not the order delivered *per se*. In accordance with this approach, if the order given in one way will finally dispose of the matter in litigation, but if given in the other way will allow the action to continue, the order is not final but interlocutory, in which event, leave to appeal is the proper remedy. In other words, according to the application approach, if the order, whichever way it is given, will, if it stands, finally determine the matter in litigation, the order is final.

The Full Bench of the Supreme Court (comprising five Justices) was called upon to decide on this vexed question in *Chettiar v. Chettiar [2011] 2 Sri LR 70* and *[2011] BLR 25*. The Court, having discussed both approaches stemming from English decisions, unanimously decided that the application approach (as opposed to the order approach) shall be the criterion in deciding whether appeal or leave to appeal is the proper remedy against an order of the District Court or Commercial High Court.

This Full Bench decision of the Supreme Court was consistently followed in later Supreme Court decisions. *(Yogendra v. Tharmaratnam (SC/Appeal/87/2009, Supreme Court Minutes of 06.07.2011), Ranasinghe v. Madilin Nona (SC/Appeal/03/2009, Supreme Court Minutes of 16.03.2012), Prof. I.K. Perera v. Prof. Dayananda Somasundara (SC/Appeal/152/2010, Supreme Court Minutes of 17.03.2011)*

However, notwithstanding this was a Full Bench decision of the Supreme Court, there were lingering doubts about the

correctness of the decision. Therefore, in *Priyanthi Senanayake v. Chamika Jayantha [2017] BLR 74*, a Fuller Bench of the Supreme Court (comprising seven Justices) revisited the decision in *Chettiar*'s case. Eventually, the Fuller Bench also reached the same conclusion, i.e. the test to be applied is the application approach and not the order approach.

Chief Justice Dep (with the concurrence of the other six Justices of the Supreme Court) held:

> *In order to decide whether an order is a final judgment or not, it is my considered view that the proper approach is the approach adopted by Lord Esher in Salamam v. Warner [1891] 1 QB 734, which was cited with approval by Lord Denning in Salter Rex & Co. v. Ghosh [1971] 2 QB 597. It stated: "If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for that purpose of these Rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory."*

It is abundantly clear that an appeal does not lie against the impugned order of the Commercial High Court whereby the Commercial High Court only rejected the application of the 1st Defendant made by way of a motion to allow the 1st Defendant to file papers to set aside the *ex parte* decree. There is no necessity to apply the decision in *Chettiar's* case to this case. The order of the Commercial High Court is *prima facie* interlocutory and not final.

At the time of the impugned order, the Supreme Court had already delivered the final Judgment on the merits of the case. But let us assume that the rights of the parties had not been decided by the Supreme Court at that time. Then, if the Commercial High Court allowed the application of the 1st Defendant to file papers to set aside the *ex parte* decree, the case would not have ended there but would have continued. When applying the application approach, it is crystal clear that there is no right of appeal against the impugned order and hence the final appeal filed by the Petitioner is misconceived in law.

The Petitioner should have come before this Court against the order of the Commercial High Court not by way of a final appeal made under section 754(1) read with section 754(5) of the Civil Procedure Code and sections 5 and 6 of the High Court of the Provinces (Special Provisions) Act, No. 10 of 1996, but by way of a leave to appeal application made under section 754(2) of the Civil Procedure Code read with section 754(5) of the Civil Procedure Code and sections 5 and 6 of the High Court of the Provinces (Special Provisions) Act, No. 10 of 1996.

Although no submission was made on behalf of the 1st Defendant on the applicability of *Chettiar's* Judgment to the facts of this case, perhaps for obvious reasons, let me add the following to clear any doubt.

Chettiar's case was decided on 10.06.2010. There was a doubt about the applicability of this Judgment to final appeals filed against orders of the District Court and Commercial High Court pronounced prior to 10.06.2010. This matter, i.e. whether *Chettiar's* Judgment had retrospective effect, was specifically raised as a question of law when the decision in *Chettiar's* case

was revisited by the Seven Judge Bench of this Court in *Priyanthi Senanayake v. Chamika Jayantha [2017] BLR 74*. However, the Seven Judge Bench of the Supreme Court did not even think it fit to grant leave on this question. The Court only granted leave to appeal to revisit the Five Judge Bench decision in *Chettiar's* case. Two appeals were amalgamated before the Seven Judge Bench. In both appeals, the Plaintiffs' cases had been dismissed by the Trial Courts (one by the District Court and the other by the Commercial High Court) on preliminary objections taken up by the Defendants. In both appeals, the impugned orders had been made and final appeals filed long before *Chettiar's* case was decided. Despite submissions on this point before the Seven Judge Bench of the Supreme Court, the Court dismissed the appeals on the basis that the Plaintiffs should have filed leave to appeal applications and not final appeals against the impugned orders.

I must state that this is not an application of *Chettiar's* Judgment retrospectively. By *Chettiar's* Judgment, the Supreme Court did not make new law. It only declared what has always been the law. The task of the Court is *jus dicere* (to say what the law is) and not *jus dare* (to make the law). The doctrine of separation of powers is in harmony with this view. This is sometimes known as the declaratory theory of law: that judges do not make the law but only declare what it has always been. Because the law pre-exists the decision, the question of retrospective or retroactive application does not arise.

Let me add one more point in connection with *Chettiar's* Judgment. It was held by a Fuller Bench of the Supreme Court (comprising seven Justices) in *Iranganie De Silva v. Indralatha*

[2017] BLR 68 that when the language of a statute is clear and the right of appeal is given in express terms, such as in section 88(2) of the Civil Procedure Code, which enacts "*The order setting aside or refusing to set aside the judgment entered upon default shall be accompanied by a judgment adjudicating upon the facts and specifying the grounds upon which it is made, and shall be liable to an appeal to the Court of Appeal*", the decision in *Chettiar's* case has no application.

The preliminary objection raised by the Plaintiff in the instant appeal cannot be disregarded as a mere technicality. It goes to the root of the 1st Defendant's appeal. I uphold the preliminary objection and dismiss the appeal with costs.

Judge of the Supreme Court

P. 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

The Maharaja Organisation Limited,
No.146, Dawson Street,
Colombo 02.
Petitioner

SC APPEAL NO: SC/CHC/APPEAL/4/2002
CHC NO: HC/CIVIL/33/2000(3)

Vs.

1. Viacom International Inc.,
   1515, Broadway, New York,
   United States of America.
2. The Director General of
   Intellectual Property,
   "Samagam Medura",
   D.R. Wijewardena Mawatha,
   Colombo 10.
   Respondents

AND NOW BETWEEN

The Maharaja Organisation Limited,
No.146, Dawson Street,
Colombo 02.
Petitioner-Appellant

Vs.

1. Viacom International Inc.,
   1515, Broadway, New York,
   United States of America.
2. The Director General of
   Intellectual Property,
   "Samagam Medura",
   D.R. Wijewardena Mawatha,
   Colombo 10.

Respondent-Respondents

Before: P. Padman Surasena, J.
E.A.G.R. Amarasekara, J.
Mahinda Samayawardhena, J.

Counsel: Romesh De Silva, P.C., with R. Balasubramaniam, Sugath Caldera and Shanaka Cooray for the Petitioner-Appellant.

Dr. K. Kanag-Isvaran, P.C., with Dr. Harsha Cabral, P.C., and Kushan Illangatillake for the 1st Respondent-Respondent.

Argued on: 19.02.2021

Written submissions:

by the Petitioner-Appellant and the 1st Respondent-Respondent on 16.03.2021.

Decided on: 30.06.2021

Mahinda Samayawardhena, J.

The Petitioner-Appellant, The Maharaja Organisation Limited (Petitioner), filed an appeal by way of a Petition of Appeal dated 15.09.2000 before the Commercial High Court in terms of section 182 of the Code of Intellectual Property Act, No. 52 of 1979, against the order of the Director of Intellectual Property dated 28.05.1998, made after an inquiry held under section 107(13) of the Code. By this order, the Director of Intellectual Property decided to register Mark No. 61297 of the 1st Respondent-Respondent, Viacom International Inc. (1st Respondent) despite opposition by the Petitioner.

The 1st Respondent in the answer *inter alia* took up a preliminary objection seeking dismissal of the appeal of the Petitioner *in limine* on the basis that the Petitioner should have come before the Commercial High Court against the order of the Director of Intellectual Property not by way of a Petition of Appeal but by way of a plaint. The Commercial High Court by order dated 14.12.2001 upheld this preliminary objection without going into the merits of the appeal and rejected the Petition of Appeal allowing the Petitioner to come before the same Court by way of a plaint, if so advised. The Petitioner did not file a plaint in the Commercial High Court but instead filed a final appeal against the said order under section 754(1) of the Civil Procedure Code read with section 754(5) of the Civil Procedure Code and sections 5 and 6 of the High Court of the Provinces (Special Provisions) Act, No. 10 of 1996.

At the argument before this Court, in addition to the merits of the appeal, learned President's Counsel for the 1st Respondent, drawing attention to the Full Bench decision of this Court in

Chettiar v. Chettiar [2011] BLR 25, [2011] 2 Sri LR 70, submitted that this appeal of the Petitioner from the order of the Commercial High Court shall be dismissed *in limine* as it is misconceived in law in that the Petitioner should have come before this Court against the order of the Commercial High Court not by way of a final appeal made under section 754(1) read with section 754(5) of the Civil Procedure Code and sections 5 and 6 of the High Court of the Provinces (Special Provisions) Act, No. 10 of 1996, but with the leave of this Court first had and obtained, i.e. by way of a leave to appeal application made under section 754(2) read with section 754(5) of the Civil Procedure Code and sections 5 and 6 of the High Court of the Provinces (Special Provisions) Act, No. 10 of 1996.

Although learned President's Counsel for 1st Respondent has stressed this point in his further written submissions filed after the argument, learned President's Counsel for the Petitioner has refrained from addressing this matter in his further written submissions.

Let me first reproduce sections 754(1), (2) and (5) of the Civil Procedure Code and sections 5 and 6 of the High Court of the Provinces (Special Provisions) Act, No. 10 of 1996:

> *754 (1) Any person who shall be dissatisfied with any judgment, pronounced by any original court in any civil action, proceeding or matter to which he is a party may prefer an appeal to the Court of Appeal against such judgment for any error in fact or in law.*
>
> *(2) Any person who shall be dissatisfied with any order made by any original court in the course of any civil action,*

proceeding or matter to which he is, or seeks to be a party, may prefer an appeal to the Court of Appeal against such order for the correction of any error in fact or in law, with the leave of the Court of Appeal first had and obtained.

(5) Notwithstanding anything to the contrary in this Ordinance, for the purposes of this chapter—

Judgment means any judgment or order having the effect of a final judgment made by any civil court; and

Order means the final expression of any decision in any civil action, proceeding or matter, which is not a judgment.

Sections 5 and 6 of Act No. 10 of 1996 whereby the Commercial High Court was established read as follows:

(5) (1) Any person who is dissatisfied with any judgement pronounced by a High Court established by Article 154P of the Constitution, in the exercise of its jurisdiction under section 2, in any action, proceeding or matter to which such person is a party may prefer an appeal to the Supreme Court against such judgement, for any error in fact or in law.

(2) Any person who is dissatisfied with any order made by a High Court established by Article 154P of the Constitution, in the exercise of its jurisdiction under section 2, in the course of any action, proceeding or matter to which such person is, or seeks to be, a party, may prefer an appeal to the Supreme Court against such order for the correction of any error in fact or in law, with the leave of the Supreme Court first had and obtained.

(3) In this section, the expressions "judgement" and "order" shall have the same meanings respectively, as in section 754(5) of the Civil Procedure Code (Chapter 101).

(6) Every appeal to the Supreme Court, and every application for leave to appeal under section 5 shall be made as nearly as may be in accordance with the procedure prescribed by Chapter LVIII of the Civil Procedure Code (Chapter 101).

The question whether an appeal or leave to appeal lies against an order of the District Court or Commercial High Court was a subject of much controversy for a long period of time. There were two approaches: "the order approach" and "the application approach".

In the Supreme Court case of *Siriwardena v. Air Ceylon Ltd [1984] 1 Sri LR 286*, Sharvananda J. (later C.J.) followed the order approach adopted by Lord Alverstone C.J. in *Bozson v. Altrincham Urban District Council [1903] 1 KB 547*.

Conversely, in the Supreme Court case of *Ranjit v. Kusumawathie [1998] 3 Sri LR 232*, Dheeraratne J. followed the application approach adopted by Lord Esher M.R. in *Salaman v. Warner [1891] 1 QB 734* and Lord Denning M.R. in *Salter Rex & Co. v. Ghosh [1971] 2 QB 597*.

The order approach contemplates only the nature of the order. When taken in isolation, if the order finally disposes of the matter and the parties' rights in litigation without leaving the suit alive, the order is final and a direct/final appeal is the proper remedy against such order.

The application approach contemplates only the nature of the application made to Court, not the order delivered *per se*. In accordance with this approach, if the order given in one way will finally dispose of the matter in litigation, but if given in the other way will allow the action to continue, the order is not final but interlocutory, in which event, leave to appeal is the proper remedy. In other words, according to the application approach, if the order, whichever way it is given, will, if it stands, finally determine the matter in litigation, the order is final.

The Full Bench of the Supreme Court (comprising five Justices) was called upon to decide on this vexed question in *Chettiar v. Chettiar [2011] 2 Sri LR 70* and *[2011] BLR 25*. The Court, having discussed both approaches stemming from English decisions, unanimously decided that the application approach (as opposed to the order approach) shall be the criterion in deciding whether appeal or leave to appeal is the proper remedy against an order of the District Court or Commercial High Court.

This Full Bench decision of the Supreme Court was consistently followed in later Supreme Court decisions. *(Yogendra v. Tharmaratnam (SC/Appeal/87/2009, Supreme Court Minutes of 06.07.2011), Ranasinghe v. Madilin Nona (SC/Appeal/03/2009, Supreme Court Minutes of 16.03.2012), Prof. I.K. Perera v. Prof. Dayananda Somasundara (SC/Appeal/152/2010, Supreme Court Minutes of 17.03.2011)*

However, notwithstanding this was a Full Bench decision of the Supreme Court, there were lingering doubts about the correctness of the decision. Therefore, in *Priyanthi Senanayake v. Chamika Jayantha [2017] BLR 74*, a Fuller Bench of the Supreme Court (comprising seven Justices) revisited the

decision in *Chettiar*'s case. Eventually, the Fuller Bench also reached the same conclusion, i.e. the test to be applied is the application approach and not the order approach.

Chief Justice Dep (with the concurrence of the other six Justices of the Supreme Court) held:

> *In order to decide whether an order is a final judgment or not, it is my considered view that the proper approach is the approach adopted by Lord Esher in Salamam v. Warner [1891] 1 QB 734, which was cited with approval by Lord Denning in Salter Rex & Co. v. Ghosh [1971] 2 QB 597. It stated: "If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for that purpose of these Rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory."*

It is abundantly clear that an appeal does not lie against the impugned order of the Commercial High Court whereby the Court only rejected the petition of the Petitioner allowing the Petitioner to present a plaint. This is the relevant part of the High Court order:

> *In the circumstances I uphold the preliminary objection raised by the 1st Respondent and accordingly I reject the petition of the Petitioner but the rejection of the petition shall not preclude the Petitioner from presenting a plaint according to law.*

There is no necessity to apply the decision in *Chettiar's* case to this case. The order of the Commercial High Court is *prima facie* interlocutory and not final.

What happens if the application approach is adopted? If the Commercial High Court had overruled the preliminary objection of the 1st Respondent, the case would not have ended there but the trial/inquiry would have proceeded and a Judgment on the merits of the case would have been delivered. Hence the impugned order is not final.

It is crystal clear that there is no right of appeal against the impugned order and the final appeal filed by the Petitioner is misconceived in law. The Petitioner should have come before this Court against the order of the Commercial High Court not by way of a final appeal made under section 754(1) read with section 754(5) of the Civil Procedure Code and sections 5 and 6 of the High Court of the Provinces (Special Provisions) Act, No. 10 of 1996, but by way of a leave to appeal application made under section 754(2) read with section 754(5) of the Civil Procedure Code and sections 5 and 6 of the High Court of the Provinces (Special Provisions) Act, No. 10 of 1996.

Although no submission was made on behalf of the 1st Respondent on the applicability of *Chettiar's* Judgment to the facts of this case, perhaps for obvious reasons, let me add the following to clear any doubt.

Chettiar's case was decided on 10.06.2010. There was a doubt about the applicability of this Judgment to final appeals filed against the orders of the District Court and Commercial High Court pronounced prior to 10.06.2010. This matter, i.e.

whether *Chettiar's* Judgment had retrospective effect, was specifically raised as a question of law when the decision in *Chettiar's* case was revisited by the Seven Judge Bench of this Court in *Priyanthi Senanayake v. Chamika Jayantha [2017] BLR 74*. However, the Seven Judge Bench of the Supreme Court did not even think it fit to grant leave on this question. The Court only granted leave to appeal to revisit the Five Judge Bench decision in *Chettiar's* case. Two appeals were amalgamated before the Seven Judge Bench. In both appeals, the Plaintiffs' cases had been dismissed by the Trial Courts (one by the District Court and the other by the Commercial High Court) on preliminary objections taken up by the Defendants. In both appeals, the impugned orders had been made and final appeals filed long before *Chettiar's* case was decided. Despite submissions on this point before the Seven Judge Bench of the Supreme Court, the Court dismissed the appeals on the basis that the Plaintiffs should have filed leave to appeal applications and not final appeals against the impugned orders.

I must state that this is not an application of *Chettiar's* Judgment retrospectively. By *Chettiar's* Judgment, the Supreme Court did not make new law. It only declared what has always been the law. The task of the Court is *jus dicere* (to say what the law is) and not *jus dare* (to make the law). The doctrine of separation of powers is in harmony with this view. This is sometimes known as the declaratory theory of law: that judges do not make the law but only declare what it has always been. Because the law pre-exists the decision, the question of retrospective or retroactive application does not arise.

Let me add one more point in connection with *Chettiar's* Judgment. It was held by a Fuller Bench of the Supreme Court (comprising seven Justices) in *Iranganie De Silva v. Indralatha [2017] BLR 68* that when the language of a statute is clear and the right of appeal is given in express terms, such as in section 88(2) of the Civil Procedure Code, which enacts "*The order setting aside or refusing to set aside the judgment entered upon default shall be accompanied by a judgment adjudicating upon the facts and specifying the grounds upon which it is made, and shall be liable to an appeal to the Court of Appeal*", the decision in *Chettiar's* case has no application.

The preliminary objection raised by the 1st Respondent in the instant appeal cannot be disregarded as a mere technicality. It goes to the root of the Petitioner's appeal. I uphold the preliminary objection and dismiss the appeal of the Petitioner with costs.

Judge of the Supreme Court

P. 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 DEMOCRATIC SOCIALIST REPUBLIC

OF SRI LANKA.

In the matter of an Application under Section 113 of the Companies Act No.17 of 1982.

SC(CHC)Appeal case No. 11/2014

CHC Case No. HC/CIVIL/02/2011/CO

1. K.K.D.T.Dharmaratne,
2. Mrs.D.P.M. Dharmaratne,

Via Santa Maria Dell,
Angelo No.32,48018,
Faensa (RA), Italy,
Presently,
"Sridhara",
Dambugahawatta,
Hokandara Road,
Pannipitiya

Petitioners.

-Vs-

1. Palm Paradise Cabanas Limited,
No.66, Norris Canal Road,
Colombo 10.

2. Gonaduwage Upali Perera Gunasekara, (Now deceased),
No. 19/2, Sunandarama Road,
Kalubowila,
Dehiwala.

2A. Sunethra Gunasekara,
No. 19/2, Sunandarama Road,
Kalubowila,
Dehiwala.
Presently,
No.16, Centre Road,
Borupana,
Ratmalana.

3. Registrar of Companies,
Department of Company Registrar,
"Samagam Medura"
D.R.Wijewardena Mawatha,
Colombo 10.

Respondents.

AND NOW

In the matter of an Appeal against the judgment dated 28th November 2012 of the High Court of the Western Province Holden Civil and Commercial Jurisdiction.

1. K.K.D.T.Dharmaratne,

2. Mrs.D.P.M.Dharmaratne,
"SriDhara",Dambugahawatta,
Hokandara Road,
Pannipitiya.

Petitioner – Appellants

1. Palm Paradise Cabanas Limited,
   No.66, Norris Canal Road,
   Colombo 10.
2. Gonaduwage Upali Perera Gunasekara, (Now deceased),
   No. 19/2, Sunandarama Road,
   Kalubowila,
   Dehiwala.

2A. Sunethra Gunasekara,
No. 19/2, Sunandarama Road,
Kalubowila,
Dehiwala.
Presently,
No.16, Centre Road,
Borupana,
Ratmalana.

3. Registrar of Companies,
   Department of Company Registrar,
   "Samagam Medura"
   D.R.Wijewardena Mawatha,
   Colombo 10.

Respondents - Respondents

Before: Hon. Sisira J De Abrew J

Hon. Murdu N. B. Fernando J

Hon. E.A.G.R. Amarasekara J.

SC(CHC)Appeal Case No. 11/2014.

Counsels: Romesh de Silva PC with Manjuka Fernandopulle for Petitioner Appellants, Uditha Egalahewa PC with Amarnath Fernando for the 1st Respondent Respondent, Chandaka Jayasundara PC with Rehan Almeida for 2nd Respondent Respondent.

Argued On: 10.02.2020

Decided On: 20.05.2021

E.A.G.R.Amarasekara J.

This action was originally instituted by the Petitioner – Appellants (hereinafter sometimes referred to as the Appellants) against the 1st, 2nd and 3rd Respondents – Respondents (hereinafter sometimes referred to as the 1st, 2nd, and 3rd Respondents respectively) in the District Court of Colombo by petition dated 20th July 1999, in terms of the Section 113 of the Companies Act No. 17 of 1982, *inter alia* on the basis that;

- The initial paid up capital of the 1st Respondent Company was 43,100 shares and the 1st Appellant was allotted 13,400 shares, the 2nd Appellant was allotted 8600 shares and the two Foreign Collaborators were allotted 10,550 shares each- (vide paragraph 9 of the petition).
- Due to the circumstances more fully described in their Petition to the District Court, in 1988 the Appellants decided to resign from the Board of Directors of the 1st Respondent Company and the said Foreign Collaborators paid a sum of Rs. 75,000 to the Appellants as compensation and soon after that the Appellants left Sri Lanka for employment in Italy. (vide paragraphs 25,26 and 27 of the petition)
- However, the 1st and 2nd Appellants decided to keep their shares in the 1st Respondent Company. (Vide paragraph 28 of the petition)
- From March, 1989, 1st Appellant visited Sri Lanka only for short breaks and in such instances 1st Appellant visited the 1st Respondent Company and was also informed that the 1st Respondent Company was running at a loss. (vide paragraph 31 of the petition)

- In 1999, when the Appellants, through their Attorneys – at – Law, searched the entries of the Register of Companies to effect a transfer of land allotted to him by a decree in a Partition Case bearing No. 2218/P of DC, Tangalle, which is the a land occupied by the 1st Respondent Company as a part of the Hotel, the 1st Appellant was informed that according to the annual returns filed in the Register of Companies on 20th March 1989, the Appellants were no longer shareholders of the Company and the 2nd Respondent (now deceased) was holding shares aggregating to 22,000. (Vide paragraphs 37 and 38 of the petition).
- The Appellants have not sold their shares to the 2nd Respondent or anyone and the Appellants had no intention whatsoever to sell them to the 2nd Respondent or to any other person and the Appellants have not signed any transfer form transferring their shares to anyone.
- The Appellants have not been paid any consideration for the said purported transfer of the said shares. (vide paragraph 40 of the petition).

Having alleged that no such transfer of shares had taken place, the Appellants sought the intervention of court to declare that the Appellants continued to be the owners of said shares and, as such, continued to be the members of the 1st Respondent Company and further that the register be rectified accordingly.

The 2nd Respondent filed its statement of objections dated 25th February 2000 to this application in the District Court and sought for dismissal of the Appellants' action. The 2nd Respondent in his aforesaid statement of objections took up certain preliminary objections and without prejudice to the preliminary objection, inter alia pleaded that;

- Appellants and the Foreign Collaborators are acting in collusion with the objective of depriving the 2nd Respondent of the shares. (vide paragraph 5 of the statement of objections).
- Appellants have wrongfully and unlawfully not made the said Foreign Collaborators as parties to these proceedings with a view of suppressing and misrepresenting facts and documents to court. (vide paragraph 5 of the statement of objections).

- 1st Appellant had 13,400 shares and the 2nd Appellant had 8,600 shares and the entirety of the said shares was transferred to the 2nd Respondent for valuable consideration (vide paragraph 6 of the statement of objections).
- Appellants having mismanaged the company, when the Foreign Collaborators and the Foreign Investment Advisory Committee (FIAC) pressurized them, decided to sever relationship with the company and to have nothing to do with the company- (vide paragraph 12 of the statement of objections.).
- Thus, the 2nd Respondent was approached to purchase the shares of the Appellants and to run the business of the company and, accordingly an agreement was reached to transfer shares- (vide paragraph 12 of the statement of objections).
- Pursuant to such agreement a meeting of the Board of Directors was held on 5th January 1988 at which the 2nd Respondent was also present, and at the said meeting the transfer of shares by the Appellants was notified to the Board of Directors, and the Board of Directors approved the transfer of the Appellants' shares to the 2nd Respondent - (vide paragraph 13 of the statement of objections).
- The share certificates issued in favor of the 2nd Respondent was in the office of the 1st Respondent premises and all books and documents are now in the control and custody of the Foreign Collaborators and their Nominee Directors - (vide paragraph 13 of the statement of objections).
- From 5th January 1988, the 2nd Respondent has exercised all rights, powers and entitlements in the 1st Respondent Company as its major shareholder- (vide paragraph 13 of the statement of objections).

Although the application of the Appellants was dismissed by the District Court on preliminary objections taken on the basis that the Petitioners were not entitled to recourse to 'summary procedure' to make this application, the Supreme Court by judgment dated 18th August 2008 set aside the order of the Court of Appeal which confirmed the said order of the District Court and referred this matter back for inquiry on the pleadings already completed. However, with the enactment of the new Companies Act No. 07 of 2007, this case was transferred from the District Court to the Commercial High Court as jurisdiction over company matters are presently vested with the Commercial High Court - (Vide Paragraphs 5 to 8 of the

petition to the Supreme Court). During the said process, the 2nd Respondent died and the 2A Respondent was substituted in the place of the 2nd Respondent.

Accordingly, the matter was taken before the Commercial High Court. At the trial into the said application, parties recorded 8 admissions and 31 issues out of which, issues Nos. 1-6 were framed by the Appellants, issues Nos. 7-8 were raised by the 1st Respondent and issues Nos. 9-31 were raised by the 2nd Respondent. The 1st Appellant tendered his evidence by way of an affidavit dated 7th February 2011 and marked documents "P1" to "P19" in evidence and also gave oral evidence in open court. Appellants also called Mr. Sudath Wickramaratne, AAL to give evidence. At the conclusion of the said evidence, Appellants closed their case reading in evidence the documents marked P1 to P19. Only the objection to P9 was re-iterated. The 1st Respondent has tendered the affidavit dated 30th May 2012 of Mr. W.F.E.S. Fernando and the Appellants have informed the Court that they would not cross-examine on the said affidavit. Thereafter, 2A Respondent has closed her case reading in evidence documents marked "2R1" to "2R3" – vide Journal Entry dated 26.09.2012.

At the conclusion of the trial, the parties filed written submissions. The Learned High Court Judge of Colombo exercising commercial jurisdiction delivered his judgment on 28th November 2012 and, by the said judgment, dismissed the Appellants' action with costs.

Being aggrieved by the said decision of the learned High Court Judge, the Appellants have filed this direct appeal before this Court.

As for the case placed before the learned High Court Judge, the main matter to be decided was whether the Appellants transferred their shares to the 2nd Respondent or not. This being a matter that had to be decided on facts, this court has to be careful before taking any decision to interfere with the decision of the learned judge who heard the evidence of the witnesses since it was held in **Alwis Vs Piyasena Fernando (1993) 1 S L R 119** that it was a well-established principal that finding of primary facts by a trial judge who hears and sees witnesses are not to be lightly disturbed on appeal. It was also held in **Fradd Vs Brown& Company Ltd. 20 N L R 282** that it is rare that a decision of a judge of a first instance upon a point of fact purely is overruled by the Court of Appeal. Where the controversy is about veracity of witnesses, immense importance is attached not only to the

demeanour of witnesses but also the course of trial, and the general impression left on the mind of the judge of the first instance, who saw and noted everything that took place in regard to what was said by one or other witness. Therefore, in this regard this court has to see whether the decision of the learned High Court Judge is perverse or one that could not have been reached as per the evidence led at the trial or whether the learned High Court Judge did not consider the relevant facts and or consider the irrelevant facts in coming to his conclusions[1] or whether he applied wrong principles of law in evaluating evidence in coming to his conclusions. This court is also mindful of the fact that an appellate court is entitled to interfere with the findings on facts of the trial judge if they are based not so much on credibility of the witness as on wrong inferences from documents- vide **Peiris Vs Fernando 62 N L R 534.**

Now, I would attend to the reasons and findings of the learned High Court Judge to see whether he has erred and whether this Court shall interfere with his findings.

As said before, the Learned High Court Judge has identified that the matter to be decided in the action was whether the Appellants transferred their shares to the 2nd Respondent or not. Further he has observed;

- That as per the evidence given by the 1st Appellant himself, that in the formation of the 1st Respondent Company, the 2nd Appellant had not contributed in any manner and the money invested by the 1st Appellant had been recouped within one year by the Foreign Collaborators who invested 5.6 million in the venture – (as per the evidence at pages 10- 13 of the proceedings dated 22.02.2011 and page 4 of the High Court judgment. Further the contribution contemplated here seems to be the contribution towards the capital).
- That as per the document marked P5(a), there had been a court case between the Appellants and the Foreign Collaborators in which the Foreign Collaborators sought to cancel the shares issued to the Appellants without paying for them and also to remove the Appellants from their positions as the Directors of the said company. (The said removal was so prayed in case

[1] Naturupana Tea and Rubber Estates Ltd. Vs Perera 66 N L R 135 and Fonseka Vs Kandappa (1988) 2 S L R 11

the Appellants do not contribute to the Capital as per the conditions laid down by the FIAC).

- That after the issuance of an interim order preventing the Appellants from doing anything regarding the Company without prior approval of the Foreign Collaborators, in 1988, out of court settlement had been arrived at between the Appellants and the Foreign Collaborators, whereby the Foreign Collaborators made a payment of Rs.75000/= as "compensation" to the 1st Appellant and the Foreign Collaborators had withdrawn the case with liberty to file a fresh action if necessary.- (as per the evidence at pages 14 & 15 of the proceedings dated 22.02.2011 and proceedings dated 08.03.1988). (This court observes that here the word compensation has been used by the learned High Court Judge within inverted comas indicating that it was not used there by the learned High Court judge in its pure dictionary meaning but may be to indicate that the Appellants had used it to connote what they received as a compensation.).
- That the 1st Appellant admitted in evidence that, in a meeting held on 05.01.1988, which he says not a board meeting, he resigned from the Board of Directors and from his positions as Chairman and Managing Director and after that he stopped having day to day control of the Company and that the aforesaid Rs.75000/= was paid at the said meeting – (as per the evidence at pages 18,19 of the proceedings dated 22.02.2011 and page 13 of the proceedings dated 21.06.2011.)
- That Minutes of a Board Meeting dated 05.01.1988 had been marked by the 1st Appellant as P18 stating that it is a fraudulent document and, as borne out by the said Minutes, the Appellants have transferred their shares for a consideration of Rs.75000/=.
- That the 1st Appellant had said in evidence that he resigned at the time of the meeting and, with regard to the surrendering of the share certificate, he had said that he might have said that he surrendered them during the meeting but, with regard to the transfer of shares he had stated that he never transferred them. – as per the evidence at page 13 and 14 of the proceedings dated 21.06.2011.
- That the 1st Appellant had stated that he lost the original share certificate when they were kept in office of the Tangalle hotel soon after the interim

order was issued against him in the said Homagama District Court case. – (as per the evidence at page 39 of the proceedings dated 22.02.2011.)

- That as per the evidence of the 1st Appellant, he has stated that he and his wife the 2nd Appellant left Sri Lanka after the meeting held on 05.01.1988 and came back to Sri Lanka in 1999, and had nothing to do with the Company during that 10 years, however, during that time, he came to Sri Lanka annually for two months on holiday from Italy and visited the hotel and spent several days there in the hotel – (as per the evidence at pages 16 and 39 of the proceedings dated 22.02.2011).
- That the 1st Appellant admits that he did not receive any notices in relation to affairs of the company and was never informed of the changes that have taken place with regard to the change of company secretaries as well as new appointments of directors etc. – (as per evidence at pages 22 and 34 of the proceedings dated 22.02.2011).

This court cannot find fault with the above observations made by the learned High Court Judge as they are supported by the evidence led and the documents marked during the trial. On the other hand, trial judge had the opportunity to observe the 1st Appellant when the 1st Appellant gave evidence with regard to P18, while admitting and denying different parts that it contained while alleging it a fraudulent document.

The above observations indicate that the Foreign Collaborators withdrew their case against the Appellants after the "out of court settlement" whether the said settlement happened in a board meeting or some other meeting. It is more probable that it was due to the fact that they received substantial relief from that settlement similar to what they have prayed from the court. As observed by the learned High Court Judge, the Foreign Collaborators sought to cancel the shares issued to the Appellants without paying for them and also to remove the Appellants from their positions as the Directors of the said company through that action. P18 reflects both these reliefs, however with a payment of Rs. 75000/= to the Appellants. Further, if the 1st Appellant had lost his share certificate just after the interim order, his statement in evidence which gives the impression that he might have said that he handed over the share certificates in a meeting held on 05.01.1988, which also took place just after the interim order, creates a contradictory situation. It appears that such facts and circumstances led the

learned High Court Judge to disbelieve the position of the Appellants that P18 is a fraudulent document. It is true that the then Chairman has not signed P18. What section 141(1) of the Companies Act No.17 of 1982 required was to keep the minutes of the directors' meetings to be entered in a book kept for that purpose. As per sub sections 141 (2) & (3) such minutes purported to be signed by the chairman of the meeting or the next succeeding meeting became evidence of such proceedings until the contrary is proved. It appears if the chairman's signature was placed it became *prima facie* evidence. Similar Provision is found in section 147 of the present Act No.7 of 2007. Thus, it does not seem that the placing of the signature of the Chairman was a must but it gave better evidential value making the minute prima facie evidence until the contrary was proved. Thus, in my view, mere fact that it does not contain the signature of the Chairman does not make it a fraudulent document. There was no evidence to show that this minute was not entered in the books kept for that purpose. In fact, other evidence led at the trial indicate that the decisions of this meeting were carried out by the 1st Respondent Company since the 2nd Respondent seems to have become a Director from that time onwards and the registers with the Company Registrar was accordingly changed – vide P13. As per section 75 of the said Act, without a proper instrument of transfer, a company could not register a transfer. As per P18, it is evidenced that Foreign Collaborators were represented in the said purported Board Meeting. From 1988, said Foreign Collaborators or their representatives in the board seems to have considered the 2nd Respondent as a Director and shareholder since his position in the Company has not been challenged by them as per the evidence led. Even though, the Appellants averred in paragraph 43 of the Petition filed in the District Court as well as in the paragraph 23 of the affidavit filed in lieu of evidence in chief, that the Foreign Collaborators informed their son that they do not know how the shares were registered in the name of the 2nd Respondent, no evidence has been led to established that fact. On the other hand, Foreign Collaborators were there from the beginning of the business and, as per the Article of Association marked P1(a), no share transfer is valid or effectual unless the Board of Directors approve or give consent to it- vide article7. As such, this impression given in the petition that even the Foreign Collaborators do not know how the 2nd Respondent became a shareholder cannot be relied upon. P14 and P15 only reveal that the Appellants had inquired from the Company Secretary appointed in 1996 whether relevant

documents in respect of the share transfer are with them and the consideration passed for the said transaction, and they received a reply to the effect that the said Company Secretary was not involved in preparation of the documents and registering any transfer referred to in the letter sent by the Appellants. It appears no attempt has been taken by the Appellant to inquire from the Company Secretary of the relevant time or lead evidence of that secretary.

Further in the Petition filed and in paragraph 27 of his affidavit filed as evidence in chief, the 1st Appellant avers that P18 is a fraudulent act of the 2nd Respondent in collusion with the Foreign Collaborators. Even for the sake of argument one assumes that there would have been a fraud with regard to P18, it had to be fraud by the then directors as it appears to be a minute of the board meeting and, as said before, without the sanction of the Board of Directors no share transfer could have been effected. The application of the Appellant was to rectify the register and not to claim consideration for the shares. It appears that all the people who are responsible for the decision were not made parties since, no Foreign Collaborator or their representative Director is made a party to the action. In other words, fraud and change in the entries in relevant books have been alleged without making the other necessary persons, who are responsible for the relevant changes in the entries in the books as well as for the alleged fraud, parties to the action. It must be noted that the 2nd Defendant who was dead and gone by the time the trial was taken became a Director only from the date of P18 and the others who took part in the purported decision in P18 were not made parties to reveal their side of the story or defend their action. Further as per the Appellants' version settlement after the interim order in the District Court case was with the Foreign Collaborators and not with the 2nd Respondent. If there was any misdeed in the guise of that settlement as alleged, main perpetrators should be the Foreign Collaborators. It is apparent that at a time when the 2nd Respondent and the Foreign Collaborators were involved in litigation, the Appellants have filed this action in the District Court - vide P17.

The learned High Court Judge, due to his observation, as per the evidence given by the 1st Appellant, on the lack of interest shown by the 1st Appellant during the period from 1988 to 1989 with regard to the affairs of the Company, has come to the conclusion that, if the 1st Appellant was the majority shareholder as he claims, his such behavior was beyond comprehension. This is not an improbable

conclusion. Especially, the 1st Appellant once being the Chairman and the Managing Director, should have known that there shall be general meetings annual or otherwise of which shareholders shall be given notices. If he was the majority shareholder, he would have shown some interest with regard to his rights throughout these ten years. He naturally would have taken interest in the change in the managements etc. especially when he takes up the position that the Company was run by directors who were appointed illegally – vide page 22 of the proceedings dated 22.02.2011. The 1st Appellant's explanation seems to be that he had no further interest in the Company after his resignation- vide page 35 of the proceedings dated 22.02.2011. The 1st Appellant further has stated, that when he visited the hotel during his holidays, he came to know that the Company was running at a loss – vide paragraph 17 of his affidavit and page 34 of the proceedings dated 22.02.2011. It is the human nature to take interest when his rights and investment are at risk. Further the evidence indicates that the 1st Appellant successfully involved in a partition case during the time he was employed in Italy. Most probably he would have acted through an agent. If he had shares and was the major shareholder, it is more probable to expect that such a person would take necessary precautions or interest to protect and enjoy his rights as a shareholder but he has not done so. The Counsel for the Appellants in his submissions argues that learned High Court judge failed to take into consideration that the absence from Sri Lanka was a perfect explanation for lack of participation in the Company's affairs. It is true that the management of a company is basically with the Board of Directors. However, evidence is that the 1st Appellant came to Sri Lanka for 2 months every year and, as mentioned above if they are the major shareholders, they would have taken interest to see how the company was running by purported illegally appointed directors without giving even a notice of general meetings. Thus, this court cannot find fault with the learned High Court judge for disbelieving the 1st Appellant in that aspect.

As per the impugned Judgment, the learned High Court Judge has not accepted the assertion of the appellants that they did not transfer their shares and also disbelieve the 1st Appellant's evidence that their share certificates were lost when they were kept in the office of the Tangalle hotel soon after the interim order in the Homagama District Court case, which was issued in 1987. If it was lost, stolen or destroyed, a vigilant person would have naturally taken steps to get a duplicate

certificate and if necessary, to make a complaint to the proper authorities as opined by the learned High Court Judge. Not taking such steps by the Appellants, especially when the 1st Appellant agreed through an 'out of court settlement' to withdraw from the management of the Company, creates a serious doubt with regard to the reliability of their story. On the other hand, if it was lost, how can the 1st Appellant say that, when he was question about what is mentioned in P18 with regard to the surrendering of the share certificate, he might have said that- vide page 14 of the Proceedings dated 21.06.2011. To say so during the meeting, he should have the share certificate when the said out of court settlement reached and, there should have been an agreement to transfer shares.

In the said backdrop, the learned High Court Judge has considered that the Appellants' inability, without acceptable reasons to produce the share certificates, which is prima facie evidence of their entitlements to the shares if they are the shareholders, against them, stating that initial burden is on the Appellants to prove what they say. In this regard the learned Counsel for the Appellants in his submissions argues that the production of share certificate has no relevancy to the issue whether the Appellants transferred their rights or not. It is true that it is common ground that the Appellants held the impugned shares prior to 05.01.1988 but the issue No. 7 has been raised to query whether the Appellants are entitled to file and maintain an action in terms of the Section 113 of the Companies Act No.17 of 1982. Said Section 113 enable a person aggrieved or a member of the Company or the Company to make an application to court to rectify the register. To show the Appellants have status to file and maintain the action, they must show that either they are members or aggrieved persons as at the date of application. In that regard the share certificates become prima facie evidence to show their status to file the action, namely their entitlement to shares as at the date of filing the action.

For the reasons given above, this Court cannot come to the conclusion that the Learned High Court judge's findings with regard to the story of lost share certificates by the Appellants are not supported by the evidence led or, in other words those findings are perverse. Further this court cannot hold that the learned High Court judge erred when he considered the non-production of the share certificates in evidence against the Appellants.

This Court observes that, if P18 is a forged document made to transfer the shares of the Appellants, it is difficult to think that the purported fraudsters would have mentioned things such as the absence of the 2nd Appellant and proxy given by her and the inappropriateness of such conduct in P18. Such inclusions in P18 tend to show that it reflects what really happened on the relevant occasion.

The Appellants have called Mr.Sudath Wickramarathne AAL to say that he did not participate in any of the Board Meetings of the 1st Respondent Company. This may be due to the name Sudath Wickramasinghe AAL appears in P18. This will not make anything clear since the name appears in P18 is Sudath Wickramasinghe and not Wickramarathne, since not being a party to that meeting Mr. Wickramarathna cannot tell that said name is wrong or one Wickramasinghe did not attend the meeting.

The learned High Court Judge has not accepted the position of the Appellants that Rs.75000/= was paid as compensation for resigning from the Board of Directors and, has considered it as payment for the transfer of shares. Even though, the 1st Appellant take up the position that there was an out of court settlement, there was no document containing the terms of settlements other than P18. It is only the word of the 1st Appellant against what is mentioned in P18. No officer from the 1st Respondent Company was summoned to show that it is not a board minute as per their books. Other Party to the out of court settlement, namely the Foreign Collaborators or their representatives were not summoned or made parties to the action as party to P18. As observed by the learned High Court judge, subsequent conduct of the Appellants does not support the view that they remained as major shareholders after they resigned from their director posts in the Company.

It is argued that no evidence was led and, share certificate or transfer forms were not submitted on behalf of the 2nd Respondent. To place evidence on behalf of the Respondent, first the Appellants, being the petitioners, should have proved their case. It is pertinent to note that the 2nd Respondent's position in the objection was that those documents are not with him but in the office the 1st Respondent premises. However, he was not among the living at the time the trial was taken up. 2A Substituted Respondent was not a party to P18 or the purported out of court settlement referred to by the Appellant to give evidence in that

regard. The 2nd Respondent's position in the objection was that this is an action filed in collusion with the Foreign Collaborators and as such, the 2A substituted Respondent may not have been in a position to call Foreign Collaborators in support of the case of the 2nd Respondent. In such a situation no adverse inference shall be made against the 2nd Respondent for not calling additional witnesses but for only relying on the documents and the facts revealed in cross examination. In fact, on behalf of the 1st Respondent an affidavit of an officer of the Company Secretary to the 1st respondent Company has been filed as per the journal entry dated 30.07.2012 and the Appellants counsel appeared to have said that no cross examination would be done on that affidavit evidence- vide journal entry dated 26.09.2012. Said affidavit confirms the content in P15 which has been written in reply to P14 sent on behalf of the Appellants. The said letter P15 confirms that even by 16th May 1996, the Appellants' names did not appear as shareholders in the books of the company. It is pertinent to note after getting this information through P15, the Appellants have not taken any steps to inquire from the secretaries who were at the time the said alleged transfer took place or to summon the said secretary or any board member of that time to show that P18 is a forgery or a document containing false information. Even though, the Appellants allege that P18 is fraudulent act done in collusion with the Foreign Collaborators, Appellants have averred that Foreign Collaborators have informed the Appellants that they do not know how the Appellants' names were removed from the register- vide paragraphs 53, 42 and 43 of the original petition to District Court. In such a situation, if it is true, the Appellants could have called the Foreign Collaborators to prove their version which they did not do. On the other hand, as mentioned before, for the Respondent to place evidence, the Appellants must have proved their case.

This court also observes that the 2nd Appellant has not given evidence to say that she did not sell or transfer her shares.

For the foregoing reasons, this court is of the view that the Appellants failed to prove their case before the High Court. Hence the learned high court judge's decision not to accept Appellants' version that P18 is a fraudulent document and, not to accept the Appellants as shareholders of the 1st Respondent Company while refusing to grant reliefs as prayed by the Appellants as indicated by the reasons given in the impugned judgment cannot be termed as perverse or not

supported by evidence. Further, this court cannot find that the learned High Court Judge did take into account irrelevant considerations or did not take into account relevant considerations or failed to apply correct principals of law in dismissing the Appellants' action.

Hence this 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, P C J.

I agree.

Judge of the Supreme Court

IN THE SUPREME COURT OF THE

DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

SC CHC Appeal No. 14/2014

High Court of Colombo

Case No: HC/ARB/409/2011

People's Merchant PLC,
(formerly People's Merchant Bank PLC),
No. 21,
Navam Mawatha,
Colombo 03.

PETITIONER

-Vs-

Udaya Saman Subhasinghe,
No. 125/5/1,
Monarathenna Watta,
Palliya Road,
Bogamuwa,
Yakkala.

RESPONDENT

AND NOW BETWEEN

Udaya Saman Subhasinghe,
No. 125/5/1,
Monarathenna Watta,
Palliya Road,

Bogamuwa,

Yakkala.

RESPONDENT-APPELLANT

-Vs-

People's Merchant PLC,

(formerly People's Merchant Bank PLC),

No. 21, Navam Mawatha,

Colombo 03.

PETITIONER-RESPONDENT

Before: **MURDU N. B. FERNANDO PC J**

P. PADMAN SURASENA J

A. H. M. D. NAWAZ J

Counsel: S. N. Vijithsing for the Respondent-Appellant

Lasantha Mudalige for the Petitioner-Respondent.

Argued on: 18-02-2021

Decided on: 23-06-2021

P. Padman Surasena J

The Petitioner - Respondent filed the Petition dated 13-12-2011 and an Affidavit in the High Court of Colombo praying for a decree, in accordance with the award dated 22-02-2011, made in the arbitration, held in accordance with the agreement between the Petitioner - Respondent and the Respondent Appellant. The purpose of the decree so prayed by the Petitioner – Respondent, was to enforce the said arbitral award in terms of Section 31 of the Arbitration Act No. 11 of 1995 (hereinafter sometimes referred to as 'the Arbitration Act' or 'the Act').

Opposing the above claim, the Respondent - Appellant filed his Statement of Objections dated 07-08-2012 praying *inter alia* for an order to set aside the said arbitral award and for the dismissal of the Petition of the Petitioner-Respondent.

After the inquiry, the learned Judge of the High Court by his order dated 10-12-2012, directed to enforce the said arbitral award and enter a decree as per the said arbitral award.

The Respondent - Appellant thereafter filed the Notice of Appeal dated 24-12-2012, and subsequently also filed a Petition of Appeal addressed to this Court dated 31-01-2013 which includes a prayer to set aside the aforesaid order of the High Court.
It is noteworthy that the said Petition of Appeal does not disclose any legal provision by virtue of which the Respondent - Appellant could have become entitled to file such an appeal to this Court.

When the said appeal was taken up before this Court for argument, the learned Counsel who appeared for the Petitioner - Respondent raised a preliminary objection to the maintainability of this appeal stating that there is no legal provision which enables the Respondent-Appellant to file such an appeal to this Court against the impugned order of the High Court. In other words, it was the submission of the learned Counsel for the Petitioner - Respondent that the law has not provided a right of appeal for the Respondent - Appellant in the instant case.
The Respondent - Appellant has lodged the instant appeal against an order made by the High Court under section 31 (1) of the Arbitration Act which states as follows.
"A party to an arbitration agreement pursuant to which an arbitral award is made may, within one year after the expiry of fourteen days of the making of the award, apply to the High Court for the enforcement of the award."

Section 31 (6) of the said Act has set out, as to what the High Court must do when such an application is made.
It reads as follows.

"Where an application is made under subsection (1) of this section and there is no application for the setting aside of such award under section 32 or the court sees no cause to refuse the recognition and enforcement of such award under the provisions contained in sections 33 and 34 of this Act, it shall on a day of which notice shall be given to the parties, proceed to file the award and give judgment according to the award. Upon the judgment so given a decree shall be entered".

To ascertain whether any appeal lies against an order made by the High Court under section 31 of the Act, one has to consider the provisions in section 37 of the Arbitration Act.

Section 37(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".

The High Court has pronounced the judgment impugned in the instant appeal under section 31 of the Arbitration Act No. 11 of 1995. The said section (s. 31) is in Part VII of the said Act which according to its heading, deals with the applications to courts relating to awards (including recognition and enforcement of foreign awards). As section 37 is also in part VII of the Act, the phrase *"this Part of this Act"* in section 37(1) is a reference to part VII of the Arbitration Act. Therefore, it is only under section 37 (2) of the Act that an appeal could, if at all, lie to this Court in the instant case.

However, an appeal would be possible under section 37(2) only if the Supreme Court grants leave to appeal on a question of law.

The said provision is as follows.

Section 37(2).

"An appeal shall lie from an order, judgment or decree of the High Court referred to in subsection (1) to the Supreme Court only on a question of law and with the leave of the Supreme Court first obtained".

This means that the Respondent - Appellant in the instant case should necessarily have first obtained the leave of the Supreme Court in respect of the instant appeal.

Moreover, the Respondent - Appellant should also have submitted a question of law for the consideration of the Supreme Court for granting of leave. Admittedly, the Respondent - Appellant has not done any of the above. In the above circumstances this Court is unable to consider the instant appeal as an appeal filed under section 37 of the Arbitration Act No. 11 of 1995.

It would be appropriate to refer to the case of Board of Investment of Sri Lanka Vs. Million Garment (Pvt) Ltd,[1] at this stage. In the said case, the Supreme Court was called upon to decide on the time limit for filing applications for leave to appeal under Section 37(2) of the Arbitration Act. The learned counsel who appeared for the respondent in that case, raised a preliminary objection stating that the application for leave to appeal was time-barred as the judgment of the High Court was pronounced on 14th May 2012, and the application for leave to appeal was lodged in the registry of this Court on 26th June 2012 (on the forty-third day after the pronouncement of the impugned judgment). He therefore argued that the petitioner in that case had filed the said application for leave to appeal outside the time limit prescribed by law, for filing of such applications. His Lordship Saleem Marsoof PC J having considered the provisions relevant to the issue at hand, stated as follows.

"…. *I am fortified in my decision that an application for leave to appeal challenging a decision of the High Court to file of record an arbitral award and pronounce judgement and enter decree accordingly has to be lodged within six weeks of the said judgment and decree, since the language of Section 37 (1) of the Arbitration Act manifests a clear legislative intent to curtail appeals from orders and awards of arbitral tribunals with a view to giving full effect to the concept of party autonomy and maintaining the efficacy of the arbitral process. More so, because Section 37 (2) of the said Act seeks to confine appeals to any order, judgement or decree of the High Court made under Part VII of the Act relating to the enforcement and setting aside of arbitral awards by limiting them to those involving a question of law and imposing the further*

[1] SC (HC) LA 58/2012; Decided on 24.10.2014.

requirement of obtaining the leave of the Supreme Court for proceeding with the same, with the same objectives in mind. ….."

The learned counsel for the Respondent - Appellant, Mr. Vijith Sing conceded that the Respondent - Appellant has not first obtained the leave of the Supreme Court on a question of law in the instant appeal. However, he thereafter submitted that this Court nevertheless has jurisdiction to entertain this appeal both under Article 127 of the Constitution and in the exercise of revisionary powers of this Court. It is to the said arguments I would now turn.

Article 127 of the Constitution of the Democratic Socialist Republic of Sri Lanka is as follows.

"*127. (1) The Supreme Court shall, subject to the Constitution, be the final Court of civil and criminal appellate jurisdiction for and within the Republic of Sri Lanka for the correction of all errors in fact or in law which shall be committed by the Court of Appeal or any Court of First Instance, tribunal or other institution and the judgements and orders of the Supreme Court shall in all cases be final and conclusive in all such matters.*

(2) The Supreme Court shall, in the exercise of its jurisdiction, have sole and exclusive cognizance by way of appeal from any order, judgement, decree, or sentence made by the Court of Appeal, where any appeal lies in law to the Supreme Court and it may affirm, reverse or vary any such order, judgement, decree or sentence of the Court of Appeal and may issue such directions to any Court of First Instance or order a new trial or further hearing in any proceedings as the justice of the case may require, and may also call for and admit fresh or additional evidence if the interests of justice so demands and may in such event, direct that such evidence be recorded by the Court of Appeal or any Court of First Instance."

Article 127 (2) sets out what this Court can do in the exercise of its appellate jurisdiction and therefore the said Article comes into operation only when it considers an appeal lawfully filed before it.

Article 127 (1) has specifically subjected itself to the other provisions of the Constitution. This is clear from the wording *"The Supreme Court shall, subject to the Constitution,.."*, found in that Article.

Thus, Article 127 (1) must be read with Article 128 of the Constitution. This is because Article 128 is another provision in the Constitution which has specified several channels through which any appeal can reach this Court.

It is as follows.

Article 128

"(1) An appeal shall lie to the Supreme Court from any final order, judgement, decree or sentence of the Court of Appeal in any matter or proceedings, whether civil or criminal, which involves a substantial question of law, if the Court of Appeal grants leave to appeal to the Supreme Court ex mero motu or at the instance of any aggrieved party to such matter or proceedings;

(2) The Supreme Court may, in its discretion, grant special leave to appeal to the Supreme Court from any final or interlocutory order, judgement, decree, or sentence made by the Court of Appeal in any matter or proceedings, whether civil or criminal, where the Court of Appeal has refused to grant leave to appeal to the Supreme Court, or where in the opinion of the Supreme Court, the case or matter is fit for review by the Supreme Court:

Provided that the Supreme Court shall grant leave to appeal in every matter or proceedings in which it is satisfied that the question to be decided is of public or general importance.

(3) Any appeal from an order or judgement of the Court of Appeal, made or given in the exercise of its jurisdiction under Article 139, 140, 141, 142 or 143 to which the President, a Minister, a Deputy Minister or a public officer in his official capacity is a party, shall be heard and determined within two months of the date of filing thereof.

(4) An appeal shall lie directly to the Supreme Court on any matter and in the manner specifically provided for by any other law passed by Parliament."

As Article 128 (1), (2), (3) refers only to orders or judgements of the Court of Appeal they have no relevance to the instant case as it is an appeal against an order made by the High Court. Thus, the provision applicable to the instant case is clearly Article 128 (4) of the Constitution and the 'law passed by parliament' relevant to the instant case is section 37 in part VII of the Arbitration Act.

I have already dealt with that section and held that the Respondent - Appellant in the instant case, has not first obtained, the leave of the Supreme Court on a question of law, as required by that section and therefore the instant appeal is not an appeal filed under section 37 of the Arbitration Act.

For the above reasons, I have no hesitation to reject the above argument that this Court nevertheless has jurisdiction to entertain this appeal under Article 127 of the Constitution.

Although the learned counsel for the Respondent - Appellant, Mr. Vijitha Sing, submitted that this Court has jurisdiction to consider this appeal in the exercise of its revisionary powers, this Court has not been vested with such power by any law. Mr. Vijith Sing, also did not refer to any provision of law under which this Court could have exercised such revisionary power. In my view there is no merit in this argument and it should suffice to say that 'the Supreme Court is a creature of statute and its powers are statutory' as stated by His Lordship Amerasinghe J in the case of Jeyaraj Fernandopulle vs. Premachandra De Silva and Others.[2]

In the case of Mahesh Agri Exim (Pvt) Ltd Vs. Gaurav Imports (Pvt) Ltd and Others,[3] this Court had to consider the question whether this Court has revisionary jurisdiction against orders made by the Commercial High Court. I had the privilege of agreeing with His Lordship Justice Priyantha Jayawardena who stated in that case, the following.

[2] 1996 (1) SLR 70.
[3] SC Revision No. 02/2013 Decided on 30-07-2019.

"*The Counsel for the Petitioner submitted that a grave prejudice has been caused to his client and therefore, the Supreme Court should intervene in this matter. He further submitted that this is a fit and proper case to exercise revisionary jurisdiction and/or inherent powers of this Court.*

We are of the opinion that this Court has no jurisdiction to entertain Revision applications arising from the orders made by the Commercial High Court. Further, the inherent powers of this Court cannot be entertained in this application."

Thus, I am of the view that this Court does not have revisionary powers to intervene and consider the instant appeal. For the foregoing reasons, I uphold the Preliminary Objection raised by the Respondent - Appellant. I proceed to dismiss this Appeal.

JUDGE OF THE SUPREME COURT

MURDU N. B. FERNANDO PC J

I agree,

JUDGE OF THE SUPREME COURT

A.H. M. D. NAWAZ J

I agree,

JUDGE OF THE SUPREME COURT

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

Viacom International Inc.,
1515, Broadway,
New York,
United States of America.
Plaintiff

SC APPEAL NO: SC/CHC/APPEAL/28/2003
CHC CASE NO: HC/Civil/20/98(3)

Vs.

1. The Maharaja Organisation Limited,
   No.146,
   Dawson Street,
   Colombo 02.
2. The Director General of Intellectual Property,
   3rd Floor,
   "Samagam Medura",
   D.R. Wijewardena Mawatha,
   Colombo 10.

Defendants

AND NOW BETWEEN

Viacom International Inc.,
1515, Broadway,
New York,
United States of America.
Plaintiff-Appellant

Vs.

1. The Maharaja Organisation Limited,
   No.146,
   Dawson Street,
   Colombo 02.
2. The Director General of Intellectual Property,
   3rd Floor,
   "Samagam Medura",
   D.R. Wijewardena Mawatha,
   Colombo 10.

Defendant-Respondents

Before: P. Padman Surasena, J.
E.A.G.R. Amarasekara, J.
Mahinda Samayawardhena, J.

Counsel: Dr. K. Kanag-Isvaran, P.C., with Dr. Harsha Cabral, P.C., and Kushan Illangatillake for the Plaintiff-Appellant.

Romesh De Silva, P.C., with Rudrani Balasubramaniam, Sugath Caldera and

Shanaka Cooray for the 1st Defendant-Respondent.

Suren Gnanaraj, S.S.C., for the 2nd Defendant-Respondent.

Argued on: 19.02.2021 and 10.03.2021

Written submissions:

The Plaintiff-Appellant and the 1st Defendant-Respondent on 07.04.2021.

Decided on: 30.06.2021

Mahinda Samayawardhena, J.

Introduction

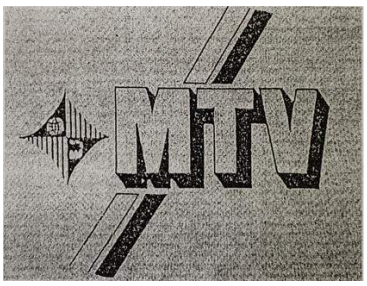
The Appellant, Viacom International Inc., a company incorporated in the United States of America, is the owner of the "MTV Music Television" mark, which has been registered in the USA and in the majority of trademark jurisdictions in the world since 1984 for the transmission of television music programmes and related products and services. The use of the mark commenced in the USA in 1981, the first music programme having been launched on 01.08.1981, and had thereafter expanded into approximately 72 countries on six continents when the Appellant lodged the application No. 61297 with the 2nd Respondent, the Director of Intellectual Property, on 15.05.1991 to have the said mark registered in Sri Lanka in Class 38 of the international classification in respect of communication services including the transmission of television programmes. The 2nd Respondent accepted the mark with the disclaimer that the registration of the mark

shall give no right to the exclusive use of the words "Music Television" and the letters "MTV", and published it in the gazette dated 05.02.1993.

Eight days after the Appellant had applied for the registration of the MTV Music Television mark, on 25.05.1991, the 1st Respondent, The Maharaja Organisation Ltd., lodged application Nos. 61331 and 61332 for the registration of the mark MTV in the same Class and in respect of the same services, i.e. in Class 38 in respect of communication services essentially consisting of the diffusion of television programmes. The 2nd Respondent accepted the two marks of the 1st Respondent with the disclaimer that the registration of the marks shall give no right to the exclusive use of the letters MTV and published them in the gazette dated 29.07.1994.

The two marks are reproduced below.

Appellant's Mark 61297



Respondent's Mark 61331

The Appellant objected to the 1st Respondent's marks and *vice versa*. After an inquiry, by order dated 28.05.1998, the 2nd Respondent decided to register the Appellant's mark No. 61297. Thereafter, by orders dated 30.06.1998, the 2nd Respondent decided to register the 1st Respondent's two marks, Nos. 61331 and 61332. Both parties appealed from

the decisions of the 2nd Respondent to the Commercial High Court and thereafter to this Court.

The appeal in respect of mark No. 61332 was allowed by this Court in SC/APPEAL/40/1999, which is now reported in *Viacom International Inc. v. Maharaja Organisation Ltd. [2006] 1 Sri LR 140*. The appeal in respect of mark No. 61297 was dismissed by this Court today in SC/APPEAL/4/2002.

On appeal, the Commercial High Court affirmed the decision of the 2nd Respondent in respect of mark No. 61331. The instant appeal is against that Judgment.

It may be noted that when the 2nd Respondent made the order and the High Court affirmed it, the law in force was the Code of Intellectual Property Act, No. 52 of 1979 (Code), not the Intellectual Property Act, No. 36 of 2003 (Act). Hence the legal position discussed in this Judgment is under the Code.

Question at Issue

Learned President's Counsel for the 1st Respondent in his written submissions dated 07.04.2021 filed after the argument identifies the specific question to be decided in this appeal in this manner:

> *The question at issue in the Appeal before [this] Court is as to whether there can be any confusion/misleading of the public in respect of the Petitioner's "MTV Music Television" mark by the Respondent's use of its "MTV" mark.*

Without embarking upon an in-depth analysis of the facts and law in this regard, as I will elaborate on below, this

question can conveniently be answered in the affirmative and the appeal can safely be allowed taking into consideration the express admissions made by the 1st Respondent itself.

The First User

Although the 1st Respondent lodged the application for registration of the trade mark eight days after the application lodged by the Appellant, the 1st Respondent claims to be the first user of the MTV mark in Sri Lanka from May 1992.

However it is significant to note that this was by no means a smooth process. It happened under protest. Prior to the use of the mark by the 1st Respondent, a letter of demand dated 03.02.1992 was sent by the Attorney-at-Law of the Appellant to the 1st Respondent asserting that the proposed use of the MTV mark was an attempt to pass off the Appellant's services and activities as those of the 1st Respondent, and on this basis the Appellant demanded an undertaking from the 1st Respondent that it would not use the term MTV. The 1st Respondent appears to have remained silent and continued with its own course of action.

Therefore the 1st Respondent's repeated emphasis in these proceedings that it is the first user of the MTV mark in Sri Lanka well before the Appellant, is ill-conceived. The 1st respondent jumping the gun, in my view, tends to show *mala fides*, and cuts across his argument advanced in passing that he is an honest concurrent user of the mark.

The Appellant used this mark for the first time in Sri Lanka on 01.12.1995. Nevertheless, by then the Appellant had been in use of the MTV Music Television mark in several countries

and trade circles in abundance, as seen from the copious documentary evidence marked A to F produced at the inquiry before the 2nd Respondent, and thereby arguably had some presence in Sri Lanka due to cross-border reputation. The documents A1 to A9 are US registrations of the MTV Music Television mark; B is a list containing the countries in which the Appellant's mark is registered; C1 to C11 are representative articles relating to the recognition of the Appellant's mark; D1 to D5 are news reports reflecting the acclaim accorded to the Appellant's television programming; and E is an article that appeared in the USA Weekly Variety on 02.12.1991 regarding the ensuing dispute between the two parties.

Notably, the 1st Respondent did not file even a scrap of paper to substantiate its position before the 2nd Respondent or the Commercial High Court.

District Court Case No. 4500/SPL

After the Appellant had filed the application for registration of the mark but just before the use of the mark by the Appellant in Sri Lanka, the 1st Respondent with MTV Channel (Private) Ltd filed case No. 4500/SPL in the District Court of Colombo on 20.11.1995 against the Appellant and Teleshan Network (Private) Ltd asserting that the proposed use of the MTV mark by the Appellant would be in breach of the 1st Respondent's legal rights and contrary to the provisions of the Code of Intellectual Property Act, particularly on unfair competition in terms of section 142 of the Code, in that the acts of the Appellant and the other were:

wrongful and/or unlawful and/or illegal and/or in violation of the plaintiffs' rights;

likely or bound to mislead the public in respect of the source;

likely or bound to mislead the public in respect of the goods or services in connection with the use of the mark;

of such a nature as to create confusion with the establishment, the services and/or commercial activities of the plaintiffs, who are competitors;

indications of the source or origin of the services which in the course of trade are liable to mislead the public as to the source of the services;

a direct and/or indirect use of a false and/or deceptive indication of the source of goods and/or services and/or the identity of the suppliers.

This complaint was reiterated by the 1st Respondent over and again throughout the proceedings before the 2nd Respondent because the 1st Respondent was objecting to the Appellant's registration of the MTV mark No. 61297 in Sri Lanka predominantly on the basis that the 1st Respondent is the prior user of the MTV mark in Sri Lanka.

The 1st Respondent in its affidavit in reply dated 27.05.1996 filed before the 2nd Respondent against the Appellant's registration of the MTV mark No. 61297 *inter alia* states that the Appellant was trying to "take a free ride" on the mark MTV which the public in Sri Lanka associate with the 1st Respondent, and "*the use of the mark MTV in any manner*

similar to the use of the mark MTV by the Applicant in Sri Lanka which could confuse the trade and the public is an act contrary to honest trade practice in contravention of section 142 of the Code. Any income derived in Sri Lanka in the circumstances referred to above is illegal."

Let me also quote the 2nd paragraph of the order of the 2nd Respondent dated 28.05.1998 made in respect of mark No. 61297:

> *The opponent (the 1st Respondent in the instant appeal) opposed the registration of the propounded mark under section 99(1)(d)(f), 100(1)(a)(b) and section 142 of the Code. The opponent contends that the propounded mark of the applicant (the Appellant in the instant appeal) is incapable of distinguishing the goods or services of one enterprise from those of other enterprises. The use of the propounded mark by the applicant in Sri Lanka is likely to mislead trade circles or the public as to the source of the goods or services concerned. The opponent further contends that the propounded mark infringes third party rights contrary to the provisions of Chapter 29 relating to unfair competition.*

The argument of learned President's Counsel for the 1st Respondent that "*Although bundles of documents have been filed by the petitioner before Court, not a single document has been filed evidencing any confusion whatsoever caused to even a single member of the public in Sri Lanka, in respect of the petitioner's MTV Music Television mark as a result of the Respondent using its MTV mark*", is clearly misplaced in light of the previous position taken up by the 1st Respondent as stated above.

As I will explain below, there is no necessity on the part of the Appellant to prove that the misleading of the public did take place or will definitely take place but only that it is likely to take place.

Admitted facts need not be proved in terms of section 58 of the Evidence Ordinance.

The doctrine of estoppel and the doctrine of approbate and reprobate (which is a species of estoppel) forbid a litigant to approbate and reprobate, affirm and disaffirm, blow hot and cold, to suit the occasion. A party cannot say at one time that a transaction is valid and thereby gain some advantage from it, and then turn round and say it is invalid for the purpose of securing some other advantage.

E.R.S.R. Coomaraswamy, in *The Law of Evidence*, Vol I, page 163 states:

> *Estoppel arises where a party has by his previous conduct disqualified himself from making particular assertions in giving evidence. The law has the right to require consistency in its litigants. An estoppel may be defined shortly as a rule of law whereby a party is precluded from denying the existence of some state of facts, which he has formerly asserted.*

In *Ranasinghe v. Premadharma [1985] 1 Sri LR 63 at 70*, Sharvananda C.J. observed:

> *In cases where the doctrine of approbation and reprobation applies, the person concerned has a choice of two rights, either of which he is at liberty to adopt, but not both. Where the doctrine does apply, if the person to*

whom the choice belongs irrevocably and with full knowledge accepts one, he cannot afterwards assert the other; he cannot affirm and disaffirm.

The Issue before the 2nd Respondent

The actual question to be resolved at the inquiry into the registrability of the 1st Respondent's MTV mark No. 61331 was not whether the two marks resembled each other in such a way as to be likely to mislead the public, as this was admittedly so, but who – whether the Appellant or the 1st Respondent – was trying to piggyback on the reputation of the other, which is contrary to honest practices in industrial or commercial matters constituting the act of unfair competition as contemplated in section 142 of the Code.

However in the two page order of the 2nd Respondent delivered more than 1 ½ years after the conclusion of the inquiry, the only two main points, as I understand, stressed by the 2nd Respondent were that: (a) the registration of the 1st Respondent's propounded mark does not give the 1st Respondent the right to the exclusive use of the letters M, T and V; and (b) the device of the 1st Respondent's logo on the mark makes the 1st Respondent's mark distinctive (when compared with the Appellant's mark, thereby eliminating any likelihood of misleading the public as to the source of service, identity of the supplier etc).

In the given facts and circumstances of this case, this approach of the 2nd Respondent is in my view a misdirection in fact and law, which vitiates the order.

In short, when the 1st Respondent complained against the Appellant's use of the mark as creating confusion and

misleading the public, the 1st Respondent was already fully aware of the said two points highlighted by the 2nd Respondent in his order, as, by that time, the marks of both parties had been gazetted.

It is unfortunate that on appeal the Commercial High Court affirmed the order of the 2nd Respondent.

Although this is sufficient to set aside the order of the 2nd Respondent and the Judgment of the Commercial High Court which affirmed it, I will further deliberate on the matter, as if there was no such admission, in view of the extensive submissions made by eminent learned President's Counsel for both parties.

Section 100(1)(a) of the Code

In terms of section 100(1)(a) of the Code, no mark which resembles, in a manner likely to mislead the public, a mark already (a) validly filed or (b) registered by a third party, shall be registered.

> *A mark shall not be registered which resembles, in such a way as to be likely to mislead the public, a mark already validly filed or registered by a third party, or subsequently filed by a person validly claiming priority in respect of the same goods or services or of other goods or services in connexion with which use of such mark may be likely to mislead the public.*

Firstly, by the time the 1st Respondent made the application for registration of its MTV mark, the Appellant had already filed a valid application to register its MTV Music Television mark, which, according to the own admissions of the 1st

Respondent quoted above, resembles the 1st Respondent's mark in such a way as to be likely to mislead the public. Then obviously the 1st Respondent's mark could not have been registered.

Secondly, when the 2nd Respondent made the order dated 30.06.1998 registering the 1st Respondent's mark, the Appellant's mark (which, according to the 1st Respondent resembles its mark causing confusion) had already been registered.

According to section 114(2) of the Code "*A mark when registered shall be registered as of the date of receipt by the Registrar of the application for registration, and such date shall be deemed for the purposes of this Part to be the date of registration.*" Hence the registration of the Appellant's mark takes effect from 15.05.1991, the date the application for registration was received by the 2nd Respondent. Then the 1st Respondent's mark could not have been registered on 30.06.1998 as a mark shall not be registered which resembles, in such a way as to be likely to mislead the public, a mark registered by a third party.

It is significant to note that section 100(1)(a) requires a likelihood of misleading the public. There is no necessity to prove that the misleading of the public has actually taken place or will definitely take place but only that it is likely to take place. The word "likely" denotes establishing a probability that the public will be misled.

Can the Logo make the Difference?

What is this logo the 2nd Respondent and the learned High Court Judge have placed such heavy reliance on in deciding

the matter in favour of the 1st Respondent? This purported company logo of the 1st Respondent was already part of the propounded mark of the 1st Respondent when the 1st Respondent complained against the Appellant's MTV mark No. 61297 as being misleading, confusing, deceptive etc. in terms of *inter alia* the source, service and identity of the supplier. The logo was not something new, which the 2nd Respondent found for the first time at the inquiry. Hence there was no reason to give undue weightage to the logo of the 1st Respondent company in the propounded mark.

In the first place, do the public know that what is found in the 1st Respondent's mark in addition to MTV is the logo of the 1st Respondent? Have a look at the logo in the mark reproduced earlier. Does the logo play a dominant part in the mark so as to distinguish the two marks? Where is the evidence produced before the High Court for the High Court to state:

> *The 1st defendant's logo is well known to the public of Sri Lanka and has been associated with the 1st defendant for a long period of time. Any person looking at the 1st defendant mark will immediately identify the mark with the 1st defendant because of the 1st defendant's logo in the mark. The logo of the 1st defendant has acquired reputation among the public in connection with its business and when the logo is formed a part of its trade mark the general public would know that it identifies with the services provided by the 1st defendant. The logo of the 1st defendant displayed conspicuously in its trade mark which forms part of the mark would clearly show the goods and services of the 1st defendant are*

> *peculiar to him by reason of adopting the 1st defendant company logo.*

In fairness to the 1st Respondent and with respect to the learned High Court Judge, I must state that this kind of detailed factual description is not found even in any of the self-serving affidavits of the 1st Respondent or written submissions filed on behalf of the 1st Respondent before the Director of Intellectual Property or the High Court. I repeat, not a single document was tendered by the 1st Respondent with the affidavits to substantiate anything including this logo saga.

A mark which resembles another cannot be made distinctive by adding a device unless it makes a tangible difference between the two. No such impact is made by the addition of the device which the 1st Respondent claims is its logo.

Finding Equilibrium between the two Parties

The learned High Court Judge commences the impugned Judgment dated 16.09.2003 in this manner:

> *The plaintiff is the owner of the mark MTV Music Television which has been registered in the United States. The plaintiff registered its mark MTV Music Television in Sri Lanka by application No. 61297 in respect of class 38 on 15th May 1991. This application was opposed by the 1st defendant and after an inquiry held by the 2nd defendant, by his order dated 28th May 1998 rejected the opposition of the 1st defendant and accordingly dismissed the 1st defendant's opposition.*

Learned President's Counsel for the 1st Respondent quoted the above paragraph in his written submission to convince this Court that the 2nd Respondent was mindful of the fact that he had rejected the opposition of the 1st Respondent to the Appellant's mark when he rejected the opposition of the Appellant to the 1st Respondent's mark.

It appears that the learned High Court Judge assumed that because the 2nd Respondent had previously rejected the opposition of the 1st Respondent to the Appellant's mark, the 2nd Respondent was also correct to have reciprocally rejected the opposition of the Appellant to the 1st Respondent's mark, little realising that the two situations are incomparable.

In my view, in the facts and circumstances of this case, the 2nd Respondent had no choice but to allow the application of the Appellant, and thereafter to reject the application of the 1st Respondent. There was no question of balancing the rights of both parties.

Identical or Resembling

At the outset I must make it clear that the Appellant presented its case on the basis that the 1st Respondent's mark resembles the Appellant's mark and not that the marks are identical. Nevertheless, in the course of writing this Judgment, this matter – whether the two marks are identical or resemble each other – caused me some anxiety. Hence I thought I must advert to it although I am not inclined to make a conclusive view on that matter.

For a mark to be considered identical to another mark, it need not necessarily be the exact copy of the other. If the dominant element or the most prominent part or the eye-

catching distinctive component of the mark is identical to that of the other, arguably, the mark is identical notwithstanding differences are identifiable upon a side by side comparison.

In *De Cordova v. Vick Chemical Co. (1951) 68 RPC 103 at 105-106*, the Privy Council declared:

> *[A] mark is infringed by another trader if, even without using the whole of it upon or in connection with his goods he uses one or more of its essential features. The identification of an essential feature depends partly on the court's own judgment and partly on the burden of the evidence that is placed before it. A trade mark is undoubtedly a visual device; but it is well-established law that the ascertainment of an essential feature is not to be by ocular test alone. Since words can form part, or indeed the whole, of a mark, it is impossible to exclude consideration of the sound or significance of those words. Thus it has long been accepted that, if a word forming part of a mark has come in trade to be used to identify the goods of the owner of the mark, it is an infringement of the mark itself to use that word as the mark or part of the mark of another trader, for confusion is likely to result.*

In *Associated Rediffusion v. Scottish Television [1957] RPC 409*, the Plaintiffs were the registered owners of the trade mark "TV Times" in respect of printed periodicals and publications relating to matters connected with television broadcasts. The Defendants proposed to publish a magazine listing Scottish programmes under the title "Scottish TV Times" or "Scottish Television Times". The Plaintiffs were

operating substantially in the English market and the Defendants proposed to operate substantially in the Scottish market. In an action for infringement, an interim injunction was granted against the Defendants.

Salmon J. observed at page 414:

> *It seems to me that the essential feature of the Plaintiffs' Trade Mark is the juxtaposition of the words "TV Times". No one I think could pretend – and I am sure the Plaintiffs do not – that they have any right in the name "Television" or "TV" by itself, still less could they have any right in the name "Times" by itself. The essential element, or the essential feature, of this Trade Mark, as it seems to me, particularly as it is in respect of printed periodical publications relating to matters connected with television broadcasts, is the use of the two names together, "TV Times".*
>
> *There is a good deal of evidence before me that the use of the words "Scottish TV Times" would be likely to cause confusion in the minds of many people and would be likely to lead many people to suppose that the "Scottish TV Times" was the Scottish edition of the Plaintiffs' publication…I think that the question I have to pose myself is not "If two people saw these papers side by side would they confuse them?", but, "Is the use of the name 'Scottish Television Times' likely to lead to confusion, likely to cause people to think that that publication is or may be the Scottish edition of the Plaintiffs' journal?". I do not believe (that it makes any difference that the word "Television" is written in the name rather than "TV". Whatever the Defendants call it I*

> *think it is plain – and I think it must be very plain to the Defendants – that the vast bulk of the public will refer to that paper as the "TV Times".*

If a mark is identical to a registered mark phonetically and visually and is also used in the course of trade for identical goods and services, a double identity is established.

Kerly's Law of Trade Marks and Trade Names, 14th Edition, paragraph 14-051 at page 375, states:

> *Once the defendant's sign has been identified it must be compared with the registered mark to determine if it is identical. Again, this is a matter to be considered from the perspective of the average consumer. A sign will be identical with the registered mark where it reproduces, without any modification or addition, all the elements constituting the mark or where, viewed as a whole, it contains differences so insignificant they may go unnoticed by the average consumer.*

Article 5(1) of Council Directive No. 89/104/EEC to approximate the laws of the Member States of the European Union relating to trade marks (Trade Mark Harmonisation Directive) provides:

> *The registered trade mark shall confer on the proprietor exclusive rights therein. The proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade:*
>
> *(a) any sign which is identical with the trade mark in relation to goods or services which are identical with those for which the trade mark is registered;*

> *(b) any sign where, because of its identity with, or similarity to, the trade mark and the identity or similarity of the goods or services covered by the trade mark and the sign, there exists a likelihood of confusion on the part of the public, which includes the likelihood of association between the sign and the trade mark.*

In interpreting the said Article 5(1)(a), a Nine Judge Bench of the European Court of Justice in the case of *LTJ Diffusion SA v. Sadas Vertbaudet SA [2003] ETMR 83* held:

> *Article 5(1)(a) of the directive must be interpreted as meaning that a sign is identical with the trade mark where it reproduces, without any modification or addition, all the elements constituting the trade mark or where, viewed as a whole, it contains differences so insignificant that they may go unnoticed by an average consumer.*

Is there an arguable case that the 1st Respondent's mark is identical to that of the Appellant because the main element in both marks is MTV? The get-up and the words Musical Television in small letters by the Appellant and the small sized logo of the 1st Respondent are subordinate to the said dominant element.

Perhaps with this in mind – probably not – learned President's Counsel for the 1st Respondent, in his ingenuity, making a comparison between section 10(1) of the English Trade Marks Act of 1994 and section 117(2)(a) of the Code of Intellectual Property Act of 1979 in Sri Lanka submits that although in English Law section 10(1) mandates that a trademark which is identical to a registered trademark and

used for identical goods would result in automatic infringement without proof of anything further, "*In our law however even if an identical trademark to the registered trademark is used (any use of the mark) in order to prove infringement, the owner of the mark has to also prove that such use is likely to mislead the public*."

Section 10(1) of the English Trade Marks Act of 1994 enacts:

> *A person infringes a registered trade mark if he uses in the course of trade a sign which is identical with the trade mark in relation to goods or services which are identical with those for which it is registered.*

Section 117(2)(a) of the Code of Intellectual Property Act enacts:

> *Without the consent of the registered owner of the mark third parties are precluded from the following acts:*
>
> > *any use of the mark, or of a sign resembling it, in such a way as to be likely to mislead the public for goods or services in respect of which the mark is registered, or for other goods or services in connexion with which the use of the mark or sign is likely to mislead the public.*

I accept that there is a difference between our Code and the English Act. Our Code focuses on the resemblance of marks and not identical marks. If a mark is identical to (not resembling) a registered trade mark and relates to identical goods or services, misleading the public is, for all practical purposes, inevitable. I must add that there may be situations where the use of well-known marks can be denied even in

respect of completely dissimilar goods and services, as it might confuse the public that the goods and services originate from the same trade source. The registration of an identical mark in relation to identical goods and services can conveniently be challenged under unfair competition. The Court in such circumstances can, under section 114 of the Evidence Ordinance, draw a presumption in favour of the owner of the registered mark allowing the propounder of the subsequent mark to rebut such a presumption.

Although this was not expressly stated in the Code, it is expressly stated in section 121(4) of the existing Intellectual Property Act, No. 36 of 2003:

> *The court shall presume the likelihood of misleading the public in instances where a person uses a mark identical to the registered mark for identical goods or services in respect of which the mark is registered.*

This does not mean that the Court could not have drawn such a presumption under the Code.

Resemblance of the Marks

When a mark resembles another mark, confusion or the misleading of the public, particularly as to the source of the goods or services, is anticipated.

There is no standard formula in assessing the resemblance of marks. It is not correct to compare a part of the mark with a part of the other mark. The marks shall be considered as a whole. In doing so, the Court will not examine the marks in too much detail. A side by side comparison with microscopic scrutiny would be out of place. A critical comparison of the

marks such as word by word, letter by letter and syllable by syllable might disclose numerous points of difference. Nonetheless, in the field of trade, the ordinary customer does not take decisions after such close scrutiny. What is important is the overall impression created whilst bearing in mind that ordinary members of the public have an ordinary memory and not an extraordinary memory, acuteness or sharpness. How the two marks appear in the course of trade literally, visually, phonetically and conceptually are all relevant factors. Also relevant are the nature of the goods or services the marks are used for, the nature of the end users of such goods or services, their modes of purchase, their methods of use etc. This is not an exhaustive list but only a guide to be adopted in considering the resemblance of marks. Factors may vary from case to case. So does the weight to be attached to them. That is why in *Wagamama Ltd v. City Centre Restaurants PLC [1995] FSR 713* at 732, Laddie J. remarked "*Whether there has been trade mark infringement is more a matter of feel than science.*"

In the *Pianotist Co. Ltd. case (1906) 23 RPC 774 at 777*, Parker J. opined:

> *You must take the two words. You must judge of them both by their look and by their sound. You must consider the goods to which they are to be applied. You must consider the nature and kind of customer who would be likely to buy these goods. In fact you must consider all the surrounding circumstances; and you must further consider what is likely to happen if each of those trade marks is used in a normal way as a trade mark for the goods by the respective owners of the*

> *marks. If, considering all those circumstances, you come to the conclusion that there will be confusion - that is to say, not necessarily that one man will be injured and the other will gain illicit benefit, but that there will be a confusion in the minds of the public which will lead to confusion in the goods - then you may refuse the registration, or rather you must refuse registration in that case.*

The degree of resemblance necessary to uphold an objection for registration cannot be tabulated. It is a question of fact.

In *Seixo v. Provezende (1865-66) LR 1 Ch App 192 at 196*, Lord Cranworth declared:

> *What degree of resemblance is necessary from the nature of things, is a matter incapable of definition à priori. All that courts of justice can do is to say that no trader can adopt a trade mark so resembling that of a rival, as that ordinary purchaser, purchasing with ordinary caution, are likely to be misled. It would be a mistake, however, to suppose that the resemblance must be such as would deceive persons who should see the two marks placed side by side. The rule so restricted would be of no practical use.*

There is no necessity to copy the registered mark. If the goods or services bear the same name when used in trade circles, confusion cannot be ruled out.

Lord Cranworth continued at 196-197:

> *If a purchaser looking at the article offered to him would naturally be led, from the mark impressed on it, to*

> *suppose it to be the production of the rival manufacturer, and would purchase it in that belief, the Court considers the use of such a mark to be fraudulent. But I go further. I do not consider the actual physical resemblance of the two marks to be the sole question for consideration. If the goods of a manufacturer have, from the mark or device he has used, become known in the market by a particular name, I think that the adoption by a rival trader of any mark which will cause his goods to bear the same name in the market, may be as much a violation of the rights of that rival as the actual copy of his device.*
>
> *Ever since the year 1848, the Plaintiff, Baron Seixo, had caused his casks to be stamped with his coronet and the word "Seixo," and the evidence shews that his wines had thus acquired in the market the name of "Crown Seixo Wine". When, therefore, the Defendants, in the year 1862, adopted as their device a coronet, with the words "Seixo de Cima," meaning "Upper Seixo," below it, the consequence was almost inevitable that persons with only the ordinary knowledge of the usages of the wine trade from Oporto would suppose that, in purchasing a cast of wine so marked, they were purchasing what was generally known in the market as "Crown Seixo Wine".*

Although the marks are compared as a whole, emphasis is placed on the dominant elements of the marks.

In *Athinaiki Oikogeniaki Artopoiia Avee v. OHIM [2006] ECR II-785*, the figurative mark "FERRO" (the word FERRO on a banner) was held to be similar to the well-known mark "FERRERO" in respect of same class of goods – the dominant

verbal element was phonetically and visually similar. Here the verbal element FERRO was dominant, prevailing over the figurative banner which was of purely secondary importance and without distinctive character. The marks shared the same letters in the same order, and the differing number of syllables did not detract from this visual similarity.

A word of caution is required: the Director of Intellectual Property and the Commercial High Court need not rely too heavily on decided cases as those cases have been decided on their own unique facts and circumstances. Those authorities can only be used as guides.

The 2nd Respondent in his order refers to some decided authorities in support of his conclusion that the 1st Respondent's mark is not similar to the mark of the Appellant. He says:

> *Parker J. [in Pianotist Application (1906) 23 RPC 774] held that the mark "NEOLA" was not similar to "PIANOLA"; the numerals "99" and words "Double nine" held not similar to "999" in Ardoth Tobacco v. Sandorides 42 RPC 30; "POL-RAMA" was held not similar to "POLAROID" in Pol-Rama TM (1977) RPC 581; and ACEC TM (1965) RPC 369 where the well-known word "ACE" was held not similar to the letters "ACEC".*

However the facts and circumstances of these cases are different from those of the instant case. Let me explain this in further detail because it may be useful in the future decision-making process. The 2nd Respondent in the above paragraph refers to four cases. I will consider them one by one.

In the *Pianotist Co. Ltd. case (1906) 23 RPC 774*, the Appellant had registered its trademark "Pianola" in Class 9 for all goods in that class. Thereafter, the Respondent applied to register "Neola" for a piano player being a musical instrument included in Class 9. The objection by the former to the latter's mark was overruled. Dismissing the appeal filed against that order, Parker J. observed at pages 777-778:

> *[T]he argument before me has taken two lines. In the first place, it is suggested that the importance of the Trade Mark "Pianola" lies in its termination, and that anybody who takes a word with a similar termination may cause confusion in the mind of the public. The second way it is put to me is, that the sounds of the words, although the look of the words may be different, are likely to be so similar that a person asking for a "Pianola" might have a "Neola" passed off on him, or vice versa.*
>
> *Of course, one knows that the persons who buy these articles are generally persons of some education, (it is not quite the same as somebody going and asking for washing soap in a grocer's shop) and some consideration is likely to attend the purchase of any instrument of the cost of either of these instruments, whether it be a "Pianola" or a "Neola". Now, in my opinion is that having regard to the nature of the customer, the article in question, and the price at which it is likely to be sold, and all the surrounding circumstances, no man of ordinary intelligence is likely to be deceived. If he wants a "Pianola" he will ask for a "Pianola", and I cannot imagine that anybody hearing*

> *the word "Pianola" if pronounced in the ordinary way in the shop, and knowing the instruments as all shopmen do would be likely to be led to pass off upon that customer a "Neola" instead of "Pianola".*

This part of the Judgment is important:

> *There is another point in the matter – though I do not know that it is very material – that is, that according to the evidence the "Pianola" is, practically speaking, an outside attachment, to be attached to the piano. The "Neola", on the other hand, is a thing where there is no outside attachment at all, but the mechanical part of the machine is inside the case of the piano, so that anybody who really wanted a "Pianola" and knew what the "Pianola" was would not be likely to mistake the actual article, even if the "Neola" was tendered to him, for that which he desired to buy.*

If I may repeat for emphasis: "*the "Pianola" is, practically speaking, an outside attachment, to be attached to the piano. The "Neola", on the other hand, is a thing where there is no outside attachment at all, but the mechanical part of the machine is inside the case of the piano.*"

In the instant application, the 1st Respondent's mark predominantly consists of the word MTV, which is literally and phonetically identical, not similar, to the dominant part of the Appellant's registered mark, which both parties use for the same service, i.e. the transmission or diffusion of television programmes.

In *Ardath Tobacco Co. Ltd. v. W. Sandorides Ld. (1924) 42 RPC 50*, the question was the use of the numbers "999" by

the Plaintiff and "99" by the Defendant in their respective marks, after the names "State Express" and "Lucana" respectively, on the cigarette boxes of the two companies. It was held not to be similar.

This case can be distinguished from the instant case as one of the main reasons given to dismiss the Plaintiff's claim in *Ardath Tobacco Co. Ltd.* was that the Plaintiff's customers commonly asked for "State Express" cigarettes and not "999" cigarettes. Thus there was no risk of deception or confusion. However, this is not the situation with regard to MTV. Both parties transmit television programmes with the MTV mark.

In the *POL-RAMA Trade Mark case [1977] RPC 581*, the application to register "POL-RAMA" as a trade mark for sunglasses with polarising lenses was opposed by the proprietors of the mark "POLAROID". The reasons given to conclude that there was no danger of confusion from the phonetic aspect were:

> *Whatever way the prefix POL- of the applicant's mark is pronounced the mark as a whole, even when spoken quickly or casually, will, I think, have three syllables, POL-RA-MA, whereas POLAROID spoken similarly will have two, POLE-ROID. I think that there is a more definite break between the first and second syllables of POL-RAMA than with POLAROID and greater emphasis placed on the RA-second syllable….from the phonetic point of view, the -ROID ending of POLAROID is a component of the mark which makes an impression on the hearer….I think that less stress is likely to be placed on the prefix of POL-RAMA and more weight given to the suffix -RAMA.*

With regard to the instant action, the dominant part of the mark MTV is identical in both marks and there is no necessity to break it down into syllables.

In the *ACEC Trade Mark case [1965] RPC 369*, the applicants applied to register the word "ACEC". The opponents were the proprietors of the mark "ACE".

In concluding that there was no risk of deception or confusion in the marks themselves, the reasons given were:

> *The opponents' mark is a well-known English word; the applicants' mark is not a word which has any meaning, and does not, in fact, give the appearance of being a word at all. It is possible to give it a pronunciation, such for example as EH-SEK. It is not, however, an easy word to pronounce and in my opinion many people would simply use the letters A C E C.*

With regard to the instant case, the dominant feature MTV of the two marks is identical and people simply recite the letters M T V separately, whether in reference to the Appellant or the 1st Respondent. Hence confusion is likely when recommendations of programmes are made by one viewer to another and also during business activities among trade circles.

P. Narayanan in *Law of Trade Marks and Passing Off*, 5th Edition, paragraph 17.28 at page 235 states:

> *When the words in question are both invented and, to most people, meaningless, phonetic and visual similarity may be conclusive. Where the words have no intrinsic*

meaning for differentiation, it is a matter of memory to decide the purpose or association of the words.

Learned President's Counsel for the 1st Respondent submits that the 1st Respondent is the owner of an actual television channel, namely MTV, but the Appellant uses his MTV mark to present television programmes on some other television channel, and therefore there cannot be any confusion. The confusion is not in connection with the ownership of television channels but the ownership of television programmes, and therefore the confusion stands. Both marks appear on English programmes catering to a particular segment of the Sri Lankan public.

In the instant case it would be a matter of pressing a button on the remote controller of the television to switch between the 1st Respondent's MTV programme and the Appellant's MTV programme/channel, with MTV appearing on the television screen in both instances.

The primary function of a trade mark is to indicate the origin of goods or services.

When the programmes of both parties are presented with the dominant element of the mark MTV, the viewer is bound to get misled or confused as to the origin of the service. The viewer may believe that the owners of the two trademarks are related or affiliated or connected in the sense that one is an extension of the other or that the goods or services originate from the same source.

Phonetic Similarity

The learned High Court Judge correctly states at the outset of his order that consideration shall be given to the degree of similarity of the two marks phonetically and visually. However the learned Judge later changes his mind to say that phonetic similarity may be ignored if the two marks appear different when considered as a whole. Learned President's Counsel for the Appellant stresses that phonetic confusion has far reaching effects and cannot be rectified even by an apparent lack of similarity in appearance.

Aural similarity may be sufficient if it plays the dominant part in the mark.

In *Mystery Drinks GmbH v. OHIM [2004] ETMR 18*, "MYSTERY" and "MIXERY" were held to be similar where the goods might be ordered orally.

As the Privy Council stated in *De Cordova v. Vick Chemical Co. (1951) 68 RPC 103* at 106:

> *A trade mark is undoubtedly a visual device; but it is well-established law that the ascertainment of an essential feature is not to be by ocular test alone. Since words can form part, or indeed the whole, of a mark, it is impossible to exclude consideration of the sound or significance of those words.*

In *Arumugam Pillai v. Syed Abbas, AIR 1964 Mad 204*, a trader dealing in the sale of chewing tobacco registered a trade mark under the name "Thanga Baspam Tobacco". Subsequently, a manufacturer of chewing tobacco sought registration of his trade mark under the name "Thangapavun

Tobacco". The designs of the two trade marks were significantly different and there was no visual similarity between the two. But the trader opposed the registration of the manufacturer's trade mark on the ground that the manufacturer's mark was phonetically similar to and closely resembled his own trade mark.

The Court held that the registration of the manufacturer's trade mark could not be permitted if he used the prefix "Thangapavun", as a part of the manufacturer's mark was likely to mislead the public. An average person with imperfect memory was likely to be misled if the two marks were put up together in the market. Very few people of that class would pause to consider the distinction between the words "Thanga Baspam" and "Thangapavun".

In the local case of *Hebtulabhoy & Company Ltd v. Stassen Exports Ltd [1989] 1 Sri LR 182*, the Appellants were owners of the registered trade mark "Rabea" which they used in Roman letters on labels in the export of tea to foreign buyers. The word "Rabea" in Arabic means the season of spring. The registration prohibited the use of the mark "Rabea" in translation. The Respondent's Company used the words "Chai el Rabea" in Arabic on their labels in the export of tea to Egypt. The Appellant sued the Respondent for a permanent injunction and obtained an interim injunction. The District Judge refused the permanent injunction.

On appeal, the Court of Appeal held:

> *In deciding whether "Rabea" in Roman characters and "Chai el Rabea" in Arabic are deceptively similar, the Court must look at the question from a business and*

commonsense point of view. There was phonetic similarity in the two expressions even if there is no visual resemblance. The resemblance between the two marks has to be considered with reference to the ear as well as to the eye. The selection of the name "Chai el Rabea" by the Respondents lent itself to suspicion of fraudulent motive to trade upon the Appellant's reputation. The Respondent, at the request of his buyer, affixed the labels in Colombo prior to export and committed infringement of the Appellant's rights, as a registered owner of the trade mark.

The Court made the following pertinent observation at page 191:

In the light of the views expressed by Judicial authority in both local and foreign cases considered above, one has to consider the comments in Callmann's treatise on Unfair Competition 4th Edition Vol. 3 on motives for the selection of Trade Marks. "A boundless choice of words, phrases and symbols is available to one who wishes to mark to distinguish his product or service from others. When a defendant selects from this practically unlimited field a trade mark confusingly similar to the mark publicly associated with the plaintiff's product, then it would appear that the defendant made the particular choice in order to trade upon the plaintiff's established reputation. If there is no reasonable explanation for the defendant's choice of such a mark though the field of his selection is so broad the inference is inevitable that it was chosen deliberately to deceive."

Learned President's Counsel for the 1st Respondent has drawn the attention of the Court to *Wagamama Ltd v. City Centre Restaurants PLC [1995] FSR 713* to say that phonetic similarity is not important at all times. I accept this position.

L. Bently and B. Sherman in *Intellectual Property Law*, 3rd Edition, at page 864 opine:

> *The relative importance of each sort of similarity will vary with the circumstances in hand, in particular the goods and the types of mark. In the case of certain kinds of goods, such as clothes or furniture, visual similarity between the marks in issue will be the most important form of similarity. In contrast, it has been said that wine marks will be perceived verbally, with restaurant services (where word-of-mouth recommendation is highly important), it is likely that phonetic similarity will be a key. Each case is therefore to be viewed in its own context.*

Wagamama Ltd v. City Centre Restaurants PLC was an action in respect of a registered trade mark infringement and passing off. The Plaintiff owned and operated a successful restaurant under the name "WAGAMAMA". In late 1993, the Defendant decided to develop a restaurant chain by the name "RAJAMAMA". The Plaintiff objected to the use of that name. The Court held in favour of the Plaintiff.

Laddie J. at 732-733 held:

> *Whether there has been trade mark infringement is more a matter of feel than science. I have borne in mind all of the arguments advanced by the defendant. However in this case, it is significant that the marks are being used*

> *in relation to comparatively inexpensive restaurant services. This is an area where imperfect recollection is likely to play an important role. Furthermore the fact that the plaintiff's mark is quite meaningless means that imperfect recollection is more likely. Although some of the target market may consider the defendant's mark to be made of two parts, each of which has some sort of meaning, I think a significant section will not bother to analyse it in that way. To them it will be just another artificial mark. Although I accept that when seen side by side the plaintiff's and defendant's marks are easily distinguishable, this is not determinative of the issue of infringement.*

Learned President's Counsel for the 1st Respondent contends that phonetic similarity is not relevant in the instant case because the relevant segment of the public will perceive the mark through their eyes on the television screen and not through their ears.

Even if the two marks are perceived by sight, confusion is likely as both depict MTV. Besides, the MTV mark is not only visible on the television screen but also often recited during the transmission of programmes by the 1st Respondent, perhaps to leave an indelible impression in the minds of viewers.

Hence phonetic similarity plays a role in the instant case.

Disclaimer

If the mark otherwise resembles a mark already filed or registered in such a way as to be likely to mislead the public or create confusion with the goods or services of a competitor,

it cannot be registered on the basis that the registered mark contains a disclaimer.

The learned High Court Judge in the impugned order, whilst repeatedly stating that the marks shall be considered as a whole (about which there is no dispute), fell into error when he immediately thereafter stated that the disclaimed parts shall nevertheless be disregarded in that assessment. The learned Judge states:

> *[T]he registration will give exclusive rights only to the mark as a whole. Where there is a disclaimer entered in the register, the owner of the mark, by the strength of the registration alone cannot prevent the use by others of the disclaimed feature by itself. The plaintiff's mark is registered subject to the disclaimer that mark shall give no right to the exclusive use of the words Music Television and the letters MTV.*

In the instant case, the 2nd Respondent permitted the Appellant's mark MTV Music Television to be registered subject to the disclaimer that "*Registration of this Mark shall give no right to the exclusive use of the words Music Television and the letters MTV separately and apart from the mark.*" Learned President's Counsel for the 1st Respondent submits that even if the Appellant's mark is a registered mark, "*the disclaimer would prevent the petitioner from objection to the Respondent's mark as it comprises the letters MTV, which have been expressly disclaimed.*"

A disclaimer is an acknowledgement by the owner of a trade mark that the owner does not have the exclusive right to use part of that trade mark. Disclaimers may be voluntarily

provided as a means of ensuring the registration of a trade mark without delay. Otherwise, a disclaimer might be requested by the authority as a condition for the registration of a mark if the mark contains an element that is not distinctive and the inclusion of which could give rise to doubt as to the scope of protection of the mark.

However when there is a conflict, and if part of the registered mark is subject to a disclaimer as being non-distinctive, the overall impression of the conflicting mark inclusive of the part disclaimed is decisive because the disclaimer does not go out into the market with the goods or services offered in the course of trade. The general public is unaware of such disclaimers. A disclaimer on the Register of the Intellectual Property Office only affects the trade mark owner's rights attached to the registration of the trade mark.

An exception to this, however, may be infringement cases involving hybrid trade marks where it is not the overall impression of the entire mark that is decisive but only the overall impression of the elements that are protectable.

For instance, in the case of *Christian Louboutin v. Van Haren Schoenen (Case C-163/16) [2018] ETMR 31*, at the point of applying for registration, the mark at issue was described as follows: "*The mark consists of the colour red (Pantone 18-1663TP) applied to the sole of a shoe as shown (the contour of the shoe is not part of the trade mark but is intended to show the positioning of the mark)*". The European Court of Justice in the Judgment delivered on 12.06.2018 held that the trade mark must be interpreted as meaning that a sign consisting of a colour applied to the sole of a high-heeled shoe does not include the shape of the shoe.

In the *Ford-Werke AG's case (1955) 72 RPC 191*, the Appellant applied for registration of a mark of which the essential features were the letters "F" and "K" in interlaced ovals. The Appellant offered to include in the application a disclaimer on the right to the exclusive use of the letters "F" and "K" and claimed registration on the appearance of the mark as a whole. The application was refused. Affirming the order on appeal, Lloyd-Jacob J. stated at 195:

> *Nor would the position be any different were the applicants' offer to enter a disclaimer to the exclusive right to the use of these letters to be accepted. Such a disclaimer, while affecting the scope of the monopoly conferred by the registration, could not affect the significance which the mark conveyed to others when used in the course of trade. If it be right to conclude that it is the letters F and K which constitute the feature of the mark which would strike the eye and fix in the recollection, this cannot be affected by what is or is not entered upon the Register housed at the Patent Office. Attention must, therefore, be focused upon the content of the mark, and not upon the content of the protection sought for the mark.*

In the *TeleCheck Trade Mark case [1986] RPC 77 at 81*, it was held:

> *A disclaimer on the Register does not alter the trade mark as it only deals with the rights of the proprietor when registered. In the circumstances of this case, where the most prominent part of the trade mark is the word "TeleCheck", the significance of the trade mark*

> *to the public and its capacity to distinguish remain the same whether a disclaimer is on the Register or not.*

In the *Granada case [1979] RPC 303 at 308,* it was held:

> *I do not think, therefore, that a disclaimer per se affects the question of whether or not confusion of the public is likely when the question is for determination under section 12(1), a context other than one that is concerned solely with the exclusive rights of a proprietor. As Lloyd Jacob J. put it in Ford Werke's Application (1955) 72 RPC 191 at 195 lines 30 to 38, a disclaimer does not affect the significance which a mark conveys to others when used in the course of trade.*
>
> *Disclaimers do not go into the market place, and the public generally has no notice of them. In my opinion matter which is disclaimed is not necessarily disregarded when questions of possible confusion or deception of the public, as distinct from the extent of a proprietor's exclusive rights, are to be determined.*

P. Narayanan in *Law of Trade Marks and Passing Off*, 5th Edition, paragraph 9.53A at page 163 states:

> *The fact that the opponent has disclaimed any feature of the mark is not a factor to be considered in comparing the marks.*

L. Bently and B. Sherman in *Intellectual Property Law* by, 3rd Edition, at page 793 take a similar view:

> *The courts have recognized that disclaimers are of limited value because they only appear on the Register*

> *and do not follow goods into the market. Consequently, because consumers and competitors would normally be unaware that aspects of a mark had been disclaimed, often a disclaimer will not save a mark from objection.*

Therefore the conclusion of the 2nd Respondent and the learned High Court Judge that the objection of the Appellant is not entitled to succeed because the Appellant's mark was registered subject to the disclaimer that the Appellant has no right *inter alia* to the exclusive use of the letters MTV is erroneous.

Infringement

In his notice of opposition, the Appellant submitted to the 2nd Respondent that the mark of the 1st Respondent shall not be admitted for registration as "*The registration of the propounded mark therefore will contravene the provisions of Unfair Competition under section 142, 100(1)(a) and 99(2) of the Code.*"

At this point I must state that although learned President's Counsel for the Appellant relies on section 99(2) of the Code to convince the Court that the application of the 1st Respondent shall be rejected as the mark has been in use by the Appellant in other countries for a long period of time, this section in my view is not meant for that purpose but for an applicant like the Appellant to convince the 2nd Respondent that his mark shall not be refused under section 99(1).

Section 99(1) of the Code sets out the objective grounds from (a) to (l) upon which a mark can be refused, and then section 99(2) enacts:

> *The Registrar shall in applying the provisions of paragraphs (b), (c), (d), (f), (g) and (h) of subsection (1), have regard to all the factual circumstances and, in particular, the length of time the mark has been in use in Sri Lanka or in other countries and the fact that the mark is held to be distinctive in other countries or in trade circles.*

I have already dealt with the applicability of section 100(1)(a) of the Code, which states that a mark that resembles a mark already filed or registered in such a way as to be likely to mislead the public shall not be registered. In the facts and circumstances of this case, the 2nd Respondent has violated this section.

I accept the submission of learned President's Counsel for the 1st Respondent that healthy competition is necessary and shall not be impeded.

A market economy allows for and encourages competition between industrial and commercial organisations. Fair or healthy competition between enterprises is necessary particularly to ensure consumer welfare. Without such competition, one business will monopolise an industry leading to inferior products and exorbitant prices. Healthy competition between businesses encourages good customer service, quality products, and fair pricing.

"Unfair competition" encompasses a wide ambit. It protects not only the honest businessman but also the innocent consumer.

Section 142(1) of the Code stated that "*Any act of competition contrary to honest practices in industrial or commercial matters shall constitute an act of unfair competition.*"

Section 142(2), which did not encompass an exhaustive list, provided certain instances which would constitute unfair competition.

> *142(2) Acts of unfair competition shall include the following:*
>
> *(a) all ads of such a nature as to create confusion by any means whatsoever with the establishment, the goods, services or the industrial or commercial activities of a competitor;*
>
> *(b) a false allegation in the course of trade of such a nature as to discredit the establishment, the goods, services or the industrial or commercial activities of a competition;*
>
> *(c) any indication of source or appellation of origin the use of which in the course of trade is liable to mislead the public as to the nature, manufacturing process, characteristics, suitability for their purpose or the quantity of goods;*
>
> *(d) making direct or indirect use of a false or deceptive indication of the source of goods or services or of the identity of their producer, manufacturer or supplier;*
>
> *(e) making direct or indirect use of a false or deceptive appellation of origin or imitating an appellation of origin even if the true origin of the product is indicated, or*

> *using the appellation in translated form or accompanied by terms such as "kind", "type", "mark", "imitation" or the like.*

It is worth noting that section 100(1)(e) of the Code referred to section 142.

> *100(1)(e) A mark shall not be registered which infringes other third party rights or is contrary to the provisions of Chapter XXIX relating to the prevention of unfair competition.*

Although unfair competition is encapsulated in section 100, which sets out the grounds for the refusal of registration of marks by reason of third party rights, unfair competition is sometimes used to refer to the broad genus of all marketplace wrongs, of which trademark infringement is one species.

In *Sumeet Research and Holdings Ltd. v. Elite Radio and Engineering Co. Ltd. [1997] 2 Sri LR 393*, Mark Fernando J. referring to section 142(1) of the Code which provides that "*Any act of competition contrary to honest practices in industrial or commercial matters shall constitute an act of unfair competition*", observed at pages 401-402:

> *Apart from that, what is meant by "contrary to honest practices in industrial or commercial matters"? If this includes only conduct contrary to obligations imposed by statute law (criminal or civil) or common law (especially the law of delict), section 142 would seem to be superfluous – because anyway such conduct is prohibited by law. It seems arguable, therefore, that section 142 mandates higher standards of conduct – some norms of business ethics – and does not merely*

> *restate existing legal obligations. If so, what those standards of conduct are would be a matter for determination by the trial Judge. It is also arguable that the prohibition against unfair competition in section 142(2) must be interpreted not only in the context of protecting intellectual property rights, but also of safeguarding the rights and interests of consumers – by enabling consumers to know what exactly they are getting, without, for instance, being deceived, confused or misled as to the manufacturer, the source, the origin, and the quality of goods or services.*

Section 142(2)(a) and 142(2)(c) speak of "creating confusion" and "misleading the public" respectively. In the facts and circumstances of this case, the acts of the 1st Respondent fall within those two sections. The conduct of the 1st Respondent has contravened honest practices in industrial or commercial matters so as to constitute an act of unfair competition.

Conclusion

When the 2nd Respondent decided to register the MTV mark No. 61331 in the name of the 1st Respondent on 30.06.1998, the Appellant had been the rightful owner of the MTV Music Television mark No. 61297 from 15.05.1991 by order of the 2nd Respondent dated 28.05.1998.

It is relevant to note that the 1st Respondent filed an appeal in the Commercial High Court against the order dated 28.05.1998, 2 years 3 months and 18 days after that order, i.e. on 15.09.2000.

The dominant element of the two marks – MTV – is literally, phonetically and visually similar such as to cause confusion

in the mind of the public and trade circles *inter alia* as to the source of the services offered under each mark in that it could create the erroneous impression that the 1st Respondent's services are the services of the Appellant or *vice versa* or that there is a connection between the 1st Respondent and the Appellant in terms of services whereas they are in fact competitors.

It was erroneous on the part of the 2nd Respondent to have registered the 1st Respondent's MTV mark No. 61331. The Judgment of the High Court which affirmed it is also wrong.

In the prayer to the petition of appeal, the Appellant prays that the Judgment of the High Court dated 16.09.2003 be set aside and the reliefs prayed for in the plaint dated 30.07.1998 filed in the Commercial High Court be granted.

In the plaint, the main relief sought from the High Court is to set aside the order of the 2nd Respondent dated 30.06.1998 allowing the registration of the 1st Respondent's mark.

I grant all the said reliefs and allow the appeal.

The Appellant is entitled to costs in this Court and the Court below.

Judge of the Supreme Court

P. 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 Application made under Article 105 (3) of the Constitution of the Democratic Socialist Republic of Sri Lanka For Contempt of Court.

1) Hee Jung Kim Alias Kim Hee Jung
No. 51A-24/2-23rd Floor
Empire Tower
Baybrooke Place,
Colombo 2
And also

Supreme Court No;
SC Contempt No. 03/16

No 47, Alexandra Place,
Colombo 07

And
Hoiryong Poonglin Iwant Apt 203-701
Howon-dong 308 139
Uijeongbusi Kyeongkido
South Korea

2) Some Rupali Jayasinghe
No 8/5, Pansalahena Road
Kolonnawa

Petitioners

Vs

Don Bandumali Jayasinghe [nee Welikala]
No. 40/19 Longden Place,
Colombo 7

Respondent

BEFORE: Buwaneka Aluwihare PC, J.
Murdu N.B. Fernando PC, J.
P. Padman Surasena J.

Counsel: Kuvera de Zoysa PC with Piume Kulatilake and Ameer Maharoof on the instructions by Sanjay Fonseka for the Petitioner.

Razik Zarook PC, Seevali Amithirigala PC with Sazana Karunathilake, Dharani Sirisena for the Respondent.

Argued on: 10.07.2020

Decided on: 15.07.2021

Judgement of the Court

Aluwihare PC.J.,

A Rule issued by this Court on 26th July 2016, called upon the Respondent, Don Bandumali Jayasinghe (hereinafter sometimes referred to as "Bandumali Jayasinghe") to show cause as to why she should not be dealt with for an offence of contempt of the Supreme Court, punishable under Article 105 (3) of the Constitution, committed, intentionally and/or willfully, by making false statements to this Court.

The Rule

In the exercise of the Jurisdiction vested in the Supreme Court in terms of Article 105 (3) of the Constitution the Rule issued against Bandumali Jayasinghe was to show cause as to why she should not be punished for having committed the following offences of contempt of the Supreme Court;

That the respondent-;

. (a) Submitted a written complaint to this Court against Ms. Amarathunga Arachchige Niduk Wasana Perera, Attorney-at-Law (hereinafter sometimes referred to as Niduk Perera) relating to her professional conduct in the District Court of Colombo case bearing No: DDV/0054/2008 and in the complaint did willfully make the following false statements:

(i) That she never received any notice, summons and/or any decree in the said divorce action.

(ii) That she never instructed Niduk Perera to file proxy on her behalf and/or to appear and tenders an answer and/or to take any notice of the said divorce action.

(iii) That Niduk Perera AAL had tendered a forged proxy on her behalf in the said divorce action and had filed an answer without her instructions.

2. In the Affidavit [dated 27th June 2014] submitted to this Court in SC Petition No:P/19/2014 relating to the said complaint against Niduk Perera, the Respondent did willfully make the following false statements;

(i)That she had had no knowledge of the District Court of Colombo Case No.DDV/00054/2008 until she became aware of the Testamentary Proceedings bearing number DTS/00151/2012 in the District Court of Colombo and had never instructed Ms. Niduk Perera to appear in that divorce action on her behalf.

(ii) That she never received any summons in the said divorce action No:DDV/00054/2008 and that the signature claiming to be hers at page 43 of the document marked as "X1" is not her signature.

(iii) That she had never met Niduk Perera and did not even know her by name.

(3) On or about 28th May 2014, when questioned by the Supreme Court in SC Petition No: P/19/2014 relating to the same complaint, she did willfully and falsely state that the she had never seen Niduk Perera before and that it was the first time that she was seeing her.

Facts

On 21st January 2014, Bandumali Jayasinghe by way of a letter addressed to His Lordship the Chief Justice made a complaint against Attorney-at-Law Ms. Niduk Perera (hereinafter sometimes referred to as "Niduk Perera"). In the said complaint Bandumali Jayasinghe claimed that after having perused the case record of the Testamentary Action bearing No. DTS/00151/2012 which had been instituted by the 1st Petitioner to these proceedings, Hee Jung Kim *alias* Kim Hee Jung (hereinafter sometimes referred to as "Kim Hee Jung") in respect of the estate of one Dharman Sathanath Jayasinghe (hereinafter sometimes referred to as "Dharman Jayasinghe"), she was shocked to discover that a decree of divorce had been obtained against her by Dharman Jayasinghe in the case bearing No. DDV.00054/2008 in the District Court of Colombo.

She further claimed in her letter that having examined a certified copy of the case record of the said divorce action, she found that;

a) Dharman Jayasinghe, her ex-husband had filed action on 1st February 2008 seeking a divorce from her.
b) On 15th May 2008 Niduk Perera had tendered a proxy for and on behalf of her and had also filed answer claiming that instructions had been given by her to do so.
c) The case was fixed for trial for 3rd July 2008 and had been taken up *ex-parte* since there had been no appearance and/or representation on her behalf .
d) The Court had entered a Decree *nisi* and ordered it to be served through registered post and the Fiscal.
e) On 10th October 2008 the Fiscal had reported to the Court that the Decree *nisi* had not been served on her.
f) On the same day, an Attorney-at-Law called Ms. Nilu Perera (hereinafter sometimes referred to as "Nilu Perera") had appeared as her Attorney and had informed the Court that she was accepting the notice of the Decree *nisi* on behalf of the Respondent.
g) On 30th January 2009, the District Court had made the Decree *nisi* absolute on the basis that the said Attorney-at-Law had accepted the Decree *nisi* on behalf of her.

Bandumali Jayasinghe had further asserted in the complaint that;

a) She had no knowledge of the divorce action No. DDV/00054/2008 until she became aware of the testamentary proceedings bearing No. DTS/00151/2012.
b) She had never received any summons, notice and/or any decree in the divorce action.
c) She had never met Niduk Perera nor had she ever retained the services of Niduk Perera in a divorce action.

d) She had never instructed Niduk Perera to file a proxy on her behalf and/or to appear and tender an answer and/or to take any notice in the divorce action.
e) Niduk Perera had tendered a forged proxy on her behalf and had filed answer without her instructions. She had also permitted Dharman Jayasinghe to obtain an *ex-parte* decree in his favour.
f) One Attorney-at-Law named Nilu Perera had accepted the notice of the Decree nisi without any instructions having been given by her.
g) She had been severely prejudiced by the illegal conduct of the said Niduk Perera and/or Nilu Perera and therefore prays that the Supreme Court takes necessary steps to grant her relief in respect of the injustice caused to her due to the aforesaid illegal conduct.

In pursuance of this complaint, proceedings commenced in the Supreme Court under reference No. P/19/2014.

The Court then referred the said matter to the Bar Association [BASL] to hold an inquiry. The Professional Purposes Committee of the Bar Association of Sri Lanka (hereinafter sometimes referred to as "The Committee") had held an extensive inquiry into the complaint and reported to the Supreme Court of their findings by their report dated 27th January 2015. ("P27")

The Committee observed that it was unable to come to a finding of any professional misconduct or breach of professional etiquette on the part of Attorney -at- Law Niduk Perera and that it could neither accept Bandumali Jayasinghe as a truthful witness nor believe in her assertions. The Committee recommended to this Court that no further action should be taken against Niduk Perera and that action should be taken to issue a Rule on Bandumali Jayasinghe to show cause as to why she should not be dealt with for contempt of court by intentionally making false statements to the Supreme Court in the said Inquiry [SC/P19/2014].

However, on 15th November 2014, Bandumali Jayasinghe on the advice of her legal representatives, withdrew the aforementioned complaint she made to the Supreme Court against Niduk Perera.

Thereafter, by way of a Petition dated 2nd June 2016, the Petitioners in the instant case invoked the Contempt of Court jurisdiction of the Supreme Court praying that the Court be pleased to in the first instance issue a Rule on Bandumali Jayasinghe to show cause as to why she should not be punished or dealt with for contempt of court by intentionally and/or willfully making false statements to the Supreme Court.

Accordingly, a Rule was issued by this Court against Bandumali Jayasinghe on 26th July 2016 and the inquiry commenced.

Evidence led at the Contempt Proceedings No.03/16 at the Supreme Court

Niduk Perera was called as a witness on behalf of the Petitioners and was questioned before the Supreme Court on 22nd June 2018 and 24th July 2018.

On 22nd June 2018 she identified Bandumali Jayasinghe in court. (at page 11 of the Contempt proceedings dated 22nd June 2018).

She claimed that up to the 28th of May 2014, which was the day on which Bandumali Jayasinghe had claimed to have seen her for the very first time, she had in fact met Bandumali Jayasinghe on more than 10 occasions. She further argued that Bandumali Jayasinghe was lying in stating that she had never met her and had never instructed her to file a proxy in the divorce action.

On being questioned, Niduk Perera related the following facts;

She had first come to know Bandumali Jayasinghe in 2008 after having been recommended to Bandumali Jayasinghe by Varners Law Firm.

She received a telephone call from Bandumali Jayasinghe asking to be represented by her in the divorce action No.DDV/54/2008.

She had a consultation with Bandumali Jayasinghe at her office prior to summons being served and she had asked her to meet her again after the summons had been served.

On being informed by Bandumali Jayasinghe that she had received summons, she had told her to come and meet her with the summons and the other documents she had received with it.

She had gone through the summons and prepared a printed proxy which she got Bandumali Jayasinghe to sign and write her NIC Number.

She had compared the number written by Bandumali Jayasinghe with her National Identity Card and had made a correction as an extra digit [of the ID number] had been written by Bandumali.

She had told the trial court that Bandumali Jayasinghe was not contesting the divorce

She was told by Bandumali Jayasinghe that there was a written agreement between her and Dharman Jayasinghe prior to the divorce action under which they had agreed to divide their assets.

She stated that Bandumali Jayasinghe had in fact communicated with her through her mobile phone no 0773186901 and produced detailed call records reflecting large number of calls between the parties, from 14th March 2008 to October 2008. (Statements marked as P25, P26 and P27)

She stated that even after the conclusion of the divorce action Bandumali Jayasinghe had maintained a professional relationship with her.

This was evidenced by;

1.The Power of Attorney No.147, dated 13th December 2009, attested by Niduk Perera and executed by Bandumali Jayasinghe's son Ashan Jayasinghe of which Bandumali Jayasinghe was the first witness. The protocol copy of the Power of Attorney dated 13th December 2009 No.147 was produced before the Court as evidence.

(at page 15 of the proceedings of 22nd June 2018 and proceedings dated 24th July 2018)

2.Niduk Perera's services had been retained to draft a Trust Agreement in respect of a Trust that Bandumali Jayasinghe and her former husband Dharman Jayasinghe wanted to establish in the name of their deceased sons, Hiran and Ashan Jayasinghe.

(evidenced by a Letter dated 08th June 2014 from Mr. Nihal Jayewardene, PC whose advice was sought during the drafting of the Trust Agreement) marked as P34.

3.Emails had been sent by Bandumali Jayasinghe to Niduk Perera regarding the Trust matter (P36)

4. A 'friend request' sent to Niduk Perera by Bandumali Jayasinghe on the social media platform 'Facebook' to add her as a Friend. (The email notification of the friend request is marked as P35).

These instances clearly establish the fact that Bandumali Jayasinghe knew who Niduk Perera was and had a professional relationship with her even after the divorce had been finalized.

Evidence given in SC Proceedings No. P/19/2014 with respect to Bandumali Jayasinghe's complaint against Niduk Perera.

After the complaint was filed by Bandumali Jayasinghe against Niduk Perera, the latter gave a detailed account of her professional relationship with Bandumali Jayasinghe by way of two affidavits, i.e. Observations to the Supreme Court dated 10th June 2014 (marked as "P20") and an affidavit tendered to the Inquiry Committee of the Bar Association of Sri Lanka dated 31st October 2014 (marked as "P23")

Although this material pertains to the issue of determining whether Niduk Perera was guilty of professional misconduct, it is pivotal in the present action for this court to determine whether Bandumali Jayasinghe's allegations are in fact true.

As was stated in Niduk Perera's two Affidavits;

She had first come to know Bandumali Jayasinghe in 2008 when Bandumali Jayasinghe had contacted her via phone and had asked her to represent her (Bandumali Jayasinghe) in the divorce action No. DDV/0054/08.

Then on or about 2nd April 2008, Bandumali Jayasinghe had come to meet her at her office and had instructed her on the said divorce action.

She had been informed by Bandumali Jayasinghe that she and Dharman Jayasinghe had agreed to dissolve their marriage and had already negotiated and executed a divorce settlement, as to how the assets were to be divided between them. Bandumali Jayasinghe had also related that she received monies from Dharman Jayasinghe and that she had already executed certain deeds, acting in terms of the post-nuptial agreement. (*vide* Paragraph 5a of P20)

Regarding the divorce action, Bandumali Jayasinghe had instructed her that she would not be contesting the action and had asked for a speedy conclusion of the action without her having to participate in the legal proceedings. This was, according to her, the first professional duty, she had performed on behalf of Bandumali Jayasinghe in respect of this case. (*vide* page 10 of the proceedings dated 22nd June 2018)

Thereafter, Bandumali Jayasinghe had met her again at her office and had handed over the said summons and the Plaint which had been delivered along with the summons. (at paragraph 5c of P20).

She had then prepared a printed proxy and had obtained Bandumali Jayasinghe's signature and had got her to write down her National Identity Card number in her own handwriting. She had then checked the number by comparing it with the National Identity Card and having seen that Bandumali Jayasinghe had written an extra digit got her to delete the same. (Proxy is marked as 'P17'). The place where Bandumali Jayasinghe's signature appears is marked as P17 (a) and where the NIC number of Bandumali Jayasinghe appears is marked as P17 (b))

Niduk Perera maintained that she then drafted the Answer on Bandumali Jayasinghe's instructions denying the allegations contained in the Plaint and had made a plea of counter divorce as Bandumali Jayasinghe wanted to end the marriage as well. (*vide* paragraph 5(d) of P20)

When the case was called in the District Court of Colombo, she had appeared on behalf of Bandumali Jayasinghe and had filed her proxy as well as the Answer. (paragraph 5e P20)

Thereafter, she had sought further instructions from Bandumali Jayasinghe as to whether she wished to pursue a divorce in her favour or refrain from contesting her husband's action. (*vide* Paragraph 24 of P23). She claims that Bandumali Jayasinghe had instructed her that she did not wish to contest the case and wanted her to take the necessary steps to expedite the divorce.

On 28th May 2008 she had appeared on behalf of Bandumali Jayasinghe and had informed the court that she would not be contesting the action, after which the court fixed the case for trial on 3rd July 2008. (journal entry no. 3 at page 3 of annexure x1) (paragraph 25 of P23)

On 3rd July 2008, she had appeared in the District Court of Colombo on behalf of Bandumali Jayasinghe and the case was refixed for 29th August 2008 (Journal Entry No.4) (paragraph 27 of P23). However, after she had left, the case had been taken up again and an *ex parte* decree *nisi* had been entered in favour of Dharman Jayasinghe.

She had then informed Bandumali Jayasinghe about the *ex parte* proceedings. Bandumali Jayasinghe not having been too concerned, had insisted on having the action concluded as soon as possible as there was a sum of money that she was to receive once the case was over, in terms of a post-nuptial agreement between her and Dharman Jayasinghe. (Para 30 P23)

Sometime later Bandumali Jayasinghe had informed her that an officer of the court had visited her house in Dompe but had not been able to serve the Decree *Nisi* as she was then residing at Longden Place, Colombo 07. However, she had gone on to say that the Decree *Nisi* that had been sent to her under registered cover, had reached her.

Bandumali Jayasinghe had then specifically instructed her to appear in Court on the next date and to consent to conclude the divorce action which would assure her receiving the balance payment promised under the divorce agreements. (Para 31 P23)

Accordingly, she had appeared in court on 10th October 2008 and took notice of the decree *nisi* and thereafter the case had been re-fixed for 30th January 2009 to make the decree *nisi* absolute. (paragraph 32 of P23)

She had called Bandumali Jayasinghe the day before the decree *nisi* was to be made absolute to make sure she had not changed her mind (Paragraph32 p23) (detailed bill of outgoing calls from Niduk Perera to Bandumali Jayasinghe from 15th September 2008 to 14th October 2008 R47 (a) (b))

On 30th January 2009 she had appeared once again in court and the decree *nisi* had been made absolute. Certified copies of the decree *nisi* and decree absolute had been handed over to Bandumali Jayasinghe. (para 33 p23)

(Statements marked as P25, P26 and P27)

This evidence clearly and unequivocally demonstrates the client-lawyer relationship between these two individuals, and that Niduk Perera's services had been obtained by Bandumali Jayasinghe to appear on her behalf in the divorce action No. DDV/00054/08 and had appointed her as her attorney on record by duly signing the proxy.

<u>Bandumali Jayasinghe's evidence</u>

The evidence given by Bandumali Jayasinghe in order to support the allegations she had made against Niduk Perera warrant an extensive examination in order to ascertain whether she did in fact attempt to mislead the Supreme Court and thereby interfere with the administration of justice, thereby committing the offence of Contempt of court.

Despite Bandumali Jayasinghe's contention in the written submission dated 21st August 2020 tendered on her behalf, regarding the powers of the Committee to conduct an inquiry, the Supreme Court will not delve into the matter of whether or not the Committee had the mandate to carry out an inquiry and make recommendations. The fact of the matter is that Bandumali Jayasinghe did attend the said inquiry and give evidence before it. Therefore, we see no reason why the Supreme Court, independent of the findings of the Committee, could not take into

account the aforesaid evidence in order to ascertain whether she came before the Supreme Court and made false representations.

The Court will therefore inquire into the contents of her complaint to the Supreme Court dated 21st January 2014, her Affidavit to the Supreme Court dated 27th June 2014 (marked as P21), as well as her Affidavit to the Inquiry Committee of the Bar Association of Sri Lanka dated 25th August 2014 (P22) and the proceedings of the BASL inquiry (marked as P24(a), P24 (b), P24(c), P24(d), P24(e), P24(f)). All of this evidence pertains to the proceedings relating to the complaint she had made against Niduk Perera, but nevertheless warrants examination in the present case, given the fact that the key issue is whether she made false representations to the Supreme Court and is therefore guilty of contempt of court.

Evidence given by Bandumali Jayasinghe in support of her allegations.

(i) That she had never met Niduk Perera and did not even know her by name.

One claim made by Bandumali Jayasinghe against Niduk Perera was that she had never met her and had never retained her services in the divorce action. (*vide* Paragraph 8 of the Complaint).

She reiterated this in her Affidavit to the Supreme Court ("P21") (para 4 and para 13) as well as in her Affidavit to the Professional Purposes Committee of the Bar Association of Sri Lanka (hereinafter sometimes referred to as "The Committee") (P21 at paragraph 43). Furthermore, when the Supreme Court confronted Bandumali Jayasinghe in open Court as to whether she had met Niduk Perera previously, she replied by saying that she had never seen her and that it was the first time that she was seeing her. (SC Proceedings of 28th May 2014). Even at the inquiry conducted by the Committee, on 30th August 2014 she claimed that it was at the Supreme Court that she had seen Niduk Perera for the first time. (Pages 4, 25-26)

However, on 6th September 2012 Bandumali Jayasinghe admitted to the Committee, under cross-examination, that she had met Niduk Perera or someone resembling her before on several occasions. (page 40)

(ii) That Niduk Perera had tendered a forged proxy on her behalf in the said divorce action and had filed answer without her instructions.

The crux of Bandumali Jayasinghe's complaint is that, unbeknown to her, Niduk Perera had acted and appeared on her behalf in the divorce action bearing No. DDV/00054/2008. She claimed that Niduk Perera had tendered a forged proxy and an answer without having received any instructions from her to do so.

She has reaffirmed this allegation in her Affidavit to the Supreme Court (P21) (*vide* Paragraph 19) and in her Affidavit to the Committee (P22) (*vide* paragraph 40).

However, during the inquiry, she not only admitted to signing the proxy (proceedings dated 31.08.2014 at page 31), but it was also discovered that the photocopies of a certified copy of the proxy that had been tendered by her as evidence to the Supreme Court had been tampered with (proceedings dated 6th September 2014). Bandumali Jayasinghe could not vouch for the genuineness of the document she produced as the proxy and did not answer when asked whether she could swear that it hadn't been tampered with. (proceedings of 30th August 2014 page 28)

(iii) That she never received any notice, summons and/or any decree in the said divorce action.

In Bandumali Jayasinghe's affidavit to the Supreme Court (P21), she affirmed that she did not receive summons and that although the signature placed on the "precept to fiscal to serve" appears to be hers it was in fact not hers. (vide paragraph 7)

She has reiterated this assertion in her Affidavit to the Committee (P22). (Paragraph 41-42)

However, under cross-examinationon13th September 2014, she has admitted that she did receive the summons, had signed it and did not take it seriously. (at page 27). This is further established by Journal Entry No.2 of the Case record of DDV-00054-08 which states that summons had been personally served on Bandumali

Jayasinghe by the Fiscal on 2nd May 2008, as well as by the Fiscal's affidavit dated 2nd May 2008.

in June 2012, Bandumali Jayasinghe instituted a testamentary case No. DTS-00134-12 in respect of the estate of the deceased Ashan Jayasinghe in the District Court of Colombo. During the course of the testamentary proceedings, Bandumali Jayasinghe's lawyers had submitted the decree absolute of her divorce from Dharman Jayasinghe by way of a motion on 27th June 2012. She has denied all knowledge of that motion. (page 20 of the proceedings dated 13th September 2014)

The contradictory position taken by Bandumali Jayasinghe on material points, is a clear indication of the fact that she had not been truthful, that her version lacks credibility and that she has wantonly misrepresented facts to the Supreme Court

(iv) That she had no knowledge of the Divorce case

All of her allegations against Niduk Perera are fundamentally based not only on her assertion that she did not grant a proxy to her, but also on her claim that she knew nothing about the divorce action instituted by her husband Dharman Jayasinghe.

Her assertion that she had no knowledge of the fact that the divorce action No. DDV/00054/2008 was filed by Dharman Jayasinghe and that she only found out about it when the testamentary action bearing No. DTA 15/2012 was filed by Kim Hee Jung with regard to his estate, has been restated in her Affidavit to the Supreme Court (at paragraph 4 of P21) as well as in her Affidavit to the Committee (at paragraphs 29 read with 31 -33 of P22).

Despite her claim that she was unaware of the divorce proceedings against her, there is ample circumstantial evidence which points to the fact that she was aware of the divorce action;

On 26th November 2007, Dharman Jayasinghe and Bandumali Jayasinghe had entered into a Non-Notarial Agreement (marked as "P4"). It had been described as a mutually created settlement to divorce/ collaborative divorce agreement.

For the same purpose of dissolving their marriage amicably they had entered into a second agreement in the style of a post-nuptial agreement, dated 28th December 2007 (marked as "**P6"**).

In pursuance of the aforesaid agreements Bandumali Jayasinghe had;

- Gifted the premises No. 40/19, Longden Place premises to Dharman Jayasinghe by Deed No. 3924 dated 28th December 2007. **(P7)**
- Gifted a land called "Alubogahakumbura" by Deed No. 3932 dated 2nd January 2008 to Ashan Jayasinghe. **(P8)**
- Gifted a land along with Dharman Jaysinghe, called "Mahabim Mukalana" by Deed No. 3925 dated 28th December 2007 to Ashan Jayasinghe. (P9)
- Accepted Rs. 12.5 million as the first instalment of the Rs. 25 million agreed upon by the parties with a specific condition that the remaining balance of Rs. 12.5 million shall only be paid when the decree *nisi* is made absolute. (Clause 4 of P6)
- Resigned as a Director of Dinu Construction (Pvt) Ltd (Letter of Resignation dated 4th December 2007 marked as 'P5 (a)'), a company which was incorporated in 1987 by Dharman Jayasinghe with co-ownership and co-directorship with Bandumali Jayasinghe and another

The only explanation she could give to the Committee for signing the aforementioned agreements was that she was not aware of the nature and significance of those documents and that she signed whatever documents Dharman Jayasinghe wanted her to, in order to obtain money for the education of her son, Ashan Jayasinghe.

From the foregoing, the irresistible conclusion one can draw is that Bandumali Jayasinghe had 'lied' to the Supreme Court with the objective of persuading the court to take action against Niduk Perera, based on those lies.

Following the death of her younger son Ashan Jayasinghe, Bandumali Jayasinghe in her statement to the Cinnamon Gardens Police Station on 29th January 2011 had specifically stated that, according to her late son, he had not been pleased with the food prepared by the 'Korean Lady' who was the wife of his father (Dharman Jayasinghe) and that his father had once warned Ahsan Jayasinghe that the Korean Lady was not a servant but his lawful wife. However, in her Affidavit to the Supreme Court dated 27th June 2014, while admitting that she did make a statement to the Cinnamon Gardens Police Station on 29th January 2011 with regard to the death of her son, she has claimed that she was unaware that her husband had divorced her, which certainly was not the truth.

Later, in June 2012, Bandumali Jayasinghe instituted a testamentary case No. DTS-00134-12 in respect of the estate of the deceased Ashan Jayasinghe in the District Court of Colombo. In the caption in the said testamentary action she was named as "Don Bandumali Welikala" and not as "Don Bandumali Jayasinghe", "Welikala" being her maiden name. She had also claimed ½ of Ashan Jayasinghe's estate, when she could have claimed ¾ of it if her marriage to Dharman Jayasinghe still subsisted. She did not, however, provide a reasonable explanation for her abovementioned course of conduct.

Furthermore, as mentioned earlier, on 27th June 2012 her lawyers had by way of motion submitted the decree absolute of her divorce from Dharman Jayasinghe, of which she denied all knowledge. (page 20 of the proceedings dated 13th September 2014)

Four months after the death of Dharman Jayasinghe, the Condominium Unit belonging to the late Ashan Jayasinghe was leased out to Colombo International Container Terminals Limited by Bandumali Jayasinghe and Kim Hee Jung who acted as joint-lessors and owners of the said property. In the lease agreements Bandumali Jayasinghe's status was described as 'divorced' and Kim's was described as the wife of Dharman Jayasinghe. (Lease Agreement No. 3284 dated 4th July 2012 and Lease Agreement No. 3541 dated 18th June 2013 both dates anterior to the complaint made against Niduk Perera by Bandumali Jayasinghe)

At the inquiry conducted by the Committee, Bandumali Jayasinghe admitted to signing the said lease agreements (at page 18 of the proceedings dated 3rd August 2014 and at page 13 of the proceedings dated 6th September 2014) however she insisted that in addition to her it was the mother of Dharman Jayasinghe, Soma Rupali Jayasinghe (the 2nd Petitioner in the instant case), who had signed and that Kim Hee Jung had not been present. On the perusal of the agreements, it is clear that Soma Rupali Jayasinghe had signed only as a witness and that the power of attorney holder of Kim Hee Jung had signed on her behalf as a joint lessor.

Kim Hee Jung could not have been a joint lessor if she did not inherit Ashan Jayasinghe's property through Dharman Jayasinghe. And she could only inherit from Dharman Jayasinghe if she was his wife.

In addition to all of this evidence, Bandumali Jayasinghe failed to give an adequate explanation for the telephone calls and email messages between her and Niduk Perera. When examining the supplementary evidence pertaining to her knowledge of the said divorce action it is evident that Bandumali Jayasinghe has not been honest in her representations.

The inference that can be drawn from the above is that Bandumali Jayasinghe having full knowledge of her dealings with Niduk Perera has made false representations to the Supreme Court by way of an affidavit, the contents of which for all intents and purposes ought to be treated as evidence.

The Attorneys-at-Law appearing on behalf of Bandumali Jayasinghe in the present action have stated that they do not wish to challenge the fact that the allegations made against Niduk Perera are untrue. Their only contention is that the statements made do not amount to contempt of court. (written Submissions on behalf of the Respondent in Contempt No.03/16 dated 21st August 2020)

Thus, at this point this court needs to consider whether the Respondent Bandumali Jayasinghe's conduct, namely placing 'false evidence' before the Supreme Court, amounts to contempt of court.

Contempt of Court

Contempt of court is a multifaceted offence, for which it is difficult to lay down a precise definition. In English Common Law, contempt of court is an act or omission calculated to interfere with the due administration of justice.

Lord Radcliffe in the case of **Reginald Perera v. The King** stated;

"There must be involved some act done or writing published calculated to bring a Court or a Judge of the Court into contempt or to lower his authority or something calculated to obstruct or interfere- with the due course of justice or the lawful-process of the Courts."

According to Lord Cross of Chelsea, "*Contempt of court means an interference with the administration of justice…."* **Attorney-General v. Times Newspapers** (1973) 2 All ER 54,]

In **Attorney-General v. Leveller Magazine Ltd.,** [1979] AC 440 at page 449, Lord Diplock defined the offence as follows,

> "*Although criminal contempt of court may take a variety of forms, they all share a common characteristic: they involve an interference with the due administration of justice, either in a particular case or more generally as a continuing process. It is justice itself that is flouted by contempt of court, not the individual court or judge who is attempting to administer it."*

In **Attorney-General v. Newspaper Publishing PLC** [1988] Ch.333, 368; it was held that, *"The law of contempt is based on the broadest principles, namely that the courts cannot and will not permit interference with the due administration of justice. Its application is universal."* [per Sir john Donaldson MR]

If the people are to be governed by the rule of law, the judicature administering it should not only be credible, but should also command the confidence of the public; without which it loses its ability to perform its functions. The court is required to adjudicate on the rights of litigants based on the material placed before it in the form of evidence. Since the court necessarily has to rely on such evidence, the

reception of accurate and credible evidence has a significant bearing on the court arriving at correct decisions.

One of the main reasons, in my view, for almost all jurisdictions world over to visit instances of giving false evidence with penal sanctions is to ensure the due administration of justice; for failure on the part of the court to do so would impact on the credibility of the court and thereby lower the reputation of the court as an impartial adjudicator of disputes.

Commenting on the principles of the offence of 'Giving false evidence' under Section 191 of the Indian Penal Code, Dr. Sri Hari Singh Gour says *"The giving of false evidence is thus the practicing of fraud upon the court by making it believe as true that which the deponent does not believe to be true.. As such the offence belongs the genus of offences concerned with due discharge of their duties by public servants.* ***The offence is thus a contempt of court…"*** [Gour's Penal Law of India 11th Edition Vol 2-page 1724]

Giving false evidence has received statutory recognition as 'contempt of court' in the form of Section 449 of the Code of Criminal Procedure Act No.15 of 1979. hereinafter the CPC] Section 449 of the CPC reads thus;

> *449 (1); "If any person giving evidence on an subject in open court in any judicial proceeding under this Code gives, in the opinion of the court before which the judicial proceeding is held, false evidence within the meaning of section 188 of the Penal Code, it shall be lawful for the court, if such court be* ***the Supreme Court*** *or Court of Appeal or High Court,* ***summarily to sentence such witness as for a contempt of the court*** *to imprisonment either simple or rigorous for any period not exceeding two years or to fine such witness in any sum not exceeding one thousand rupees; or……"*

Although Section 449 of the CPC has no application to the instant situation the point, I wish to make is that, giving or presenting false evidence could be treated as an instance of 'contempt of court'.

In the instant case the Respondent had clearly, by misrepresenting facts which were false or she knew to be false had made use of such facts in her attempt to obtain from the court the order, she desired.

Powers of the Supreme Court to deal with instances of contempt.

The Constitution vests the Superior Courts *inter alia,* with the power to punish for contempt of court. The power of the Supreme Court to do so is contained in Article 105 (3) of the Constitution which reads as follows:

Article 105 (3)

> *"The Supreme Court of the Republic of Sri Lanka and the Court of Appeal of the Republic of Sri Lanka shall each be a superior court of record and shall have all the powers of such court, including the power to punish for contempt of itself, whether committed in the court itself or elsewhere, with imprisonment or fine or both as the court may deem fit. The power of the Court of Appeal shall include the power to punish for contempt of any other court, tribunal or institution referred to in paragraph 1 (c) of this Article, whether committed in the presence of such court or elsewhere."*

In the Matter of D.M.S.B. Dissanayake S.C. Rule, 1/2004, S.C. Minutes of 7th December 2004 (unreported) S. N. Silva C.J. emphasized that

"…. this Court, as the highest and final superior court of the Republic, forms part of the administration of justice and necessarily attracts the power to take cognizance of and punish offences of contempt."

Hence the jurisdiction to punish as contempt, any act of interference with the administration of justice is vested with the Supreme Court as a Superior Court of Record. It is part of the inherent jurisdiction of the Supreme Court and an essential adjunct for safeguarding the rule of rule of law.

Making false representations to the Supreme Court

Judges do not have personal knowledge of the cases brought before them and in fact, they are not supposed to have such personal knowledge. Therefore, to mete out justice Judges must depend on documents and the testimonies of individuals that are submitted to the court. As such, if a document or testimony is false, then

there is every likelihood of injustice resulting due to the falsity of the material before the court.

The plea made by the Petitioners in this action is that Bandumali Jayasinghe has made a series of false statements to mislead the Supreme Court and has thereby committed the offence of Contempt of Court punishable under Article 105 (3) of the Constitution.

The three essential elements required to establish that an individual has given false evidence can be identified as,

1.The legal obligation to state the truth. (arising out of the binding nature of an oath, an express provision of law to state the truth, or a formal declaration required to be made by law.)

2. The making of a false statement.

3. The belief in its falsity.

In the instant case, there are numerous instances that establish without doubt, that Bandumali Jayasinghe has suppressed facts and has given statements which she knew or had reason to believe to be untrue. For instance, she vehemently denied retaining or having ever seen Niduk Perera, but evidence suggests otherwise; she affirmed to this Court that she never received summons, but on being cross-examined she admitted that she did; she complained that Niduk Perera had tendered a forged proxy, but she later admitted that she did in fact sign the proxy; she claimed to know nothing about Dharman Jayasinghe divorcing her and going on to marry Kim Hee Jung, but all evidence supports the assumption that she did know.

The irresistible inference that can be drawn is that Bandumali Jayasinghe has deliberately presented an account which is demonstrably false, with a view to mislead and deceive the court to achieve her personal objectives.

When a person misleads the Supreme Court or for that matter any court, it amounts to interference with the due course of justice by attempting to obstruct

the Court from reaching a correct conclusion. (**The Secretary, Hailakandi Bar Association v. State of Assam**, A.I.R. 1996 S.C. 1925 at pp. 1930,1931).

Therefore, making false representations to the Supreme Court knowing them to be false, giving evidence knowing it to be false- and thereby attempting to mislead the Court amounts to Contempt of Court as it is a direct interference with the administration of justice.

Despite the fact that Bandumali Jayasinghe was given the opportunity to establish the veracity of her account, she has failed to do so. The submissions made by her in support of her allegations against Niduk Perera are laden with contradictions, inaccuracies and falsehood.

Her assertion that the allegations made by her were not made with the intention of influencing the court as to the final outcome of the case, but were made in order to establish the charge against Niduk Perera is not an acceptable justification for her actions. (A *video* written submissions of Bandumali Jayasinghe to the Supreme Court dated 21st August 2020). It is clear that her conduct created a real risk to the due administration of justice and was therefore a "calculated conduct". (Attorney General v. Times Newspapers (1974) AC 273)

Furthermore, the allegations levelled against Niduk Perera which included the filing of a forged proxy, appearing and filing answer for a party without receiving instructions, and allowing the action to proceed *ex parte*, all done without any instructions from the party purported to be represented, are extremely grave. In pursuance of these allegations Bandumali Jayasinghe had thought it fit to make a complaint to the Chief Justice and thereafter tender a false affidavit and supplementary evidence to support her false allegations. As was reiterated earlier, In the matter of **D.M.S.B. Dissanayake** (*supra*) S.N. Silva C.J. emphasized that the Supreme Court as the most superior court of the country forms part of the administration of justice and attracts the power to recognize and punish offences for contempt.

Therefore, the Supreme Court possesses the power in proceedings relating to contempt of court, a power which, if properly exercised can be a salutary influence on the administration of justice. The Constitution itself has vested the Supreme

court with the power to hold an individual, who as in this instance, had blatantly lied to it, guilty of contempt.

Bandumali Jayasinghe has by way of her false representations interfered with the due administration of justice, by attempting to obstruct the Supreme Court from reaching a correct conclusion. Her intention has clearly been to deceive and mislead the Court and her conduct can be described as an attempt to make a mockery of the law as well as of this Court in her attempt to achieve her personal objectives. Therefore, it can be held that she calculated conduct to interfere with and obstruct the due course of justice constitutes contempt of court which is punishable under Article 105 (3) of the Constitution.

We have considered the submissions made on behalf of the Respondent in this matter.

Accordingly, we affirm the Rule served on the Respondent; convict the Respondent of the offence of contempt of Court, punishable under Article 105 (3) of the Constitution.

In the course of the hearing the Learned President's Counsel Razik Zarook PC maintaining the highest traditions of the Bar did submit that "the allegations made against Niduk Perera had certainly not been well thought of and indeed not correct and in view of it, the Respondent unreservedly apologise to this Court".

Upon consideration of all relevant facts the Respondent is sentenced to a term of two years rigorous imprisonment, however, taking into account the mitigatory factors pleaded on her behalf, the operation of the sentence is suspended for a period of five years. In addition, a fine of Rs. 300,000/ [Three hundred thousand] is also imposed on the Respondent, with a default sentence of two years rigorous imprisonment. The fine is to be paid on a date to be determined by this court.

The Respondent is further directed to tender a written apology to Attorney -at-Law Ms. Niduk Perera with regard to the false and /or baseless allegations made against her.

Although it may not have a direct bearing on the issue before us, I would be failing in my duty if this court does not make an observation with regard to the discharge

of her professional duties by Attorney- at- Law Ms. Niduk Perera. Having gone through the material placed before us in the course of the inquiry, it was evident that the Attorney-at Law Ms. Niduk Perera had discharged her professional duties diligently and in the best interest of the Respondent, Bandumali Jayasinghe and the allegations made against Ms. Niduk Perera is bereft of any merit whatsoever. It is indeed unfortunate that the Attorney-at-Law concerned had to face the ignominy of going through the inquiry held before the Professional Purposes Committee of the Bar Association as a result of the complaint made by the Respondent Bandumali Jayasinghe, to the Supreme Court.

JUDGE OF THE SUPREME COURT

JUSTICE MURDU FERNANDO PC

I agree

JUDGE OF THE SUPREME COURT

P Padman Surasena J

I have had the benefit of reading in draft form, the judgment of His Lordship Justice Buwaneka Aluwihare PC. I agree with the Judgement of His Lordship which affirms the rule served on the Respondent and convicts the Respondent of the offence of contempt of court punishable under Article 105 (3) of the Constitution.

The Respondent now stands convicted of willfully making the false statements set out in the Rule which His Lordship Justice Aluwihare PC has dealt with, in detail, in the judgment.

The Respondent, when the rule was read out to her in Court, had pleaded not guilty. That was the reason why this Court had to engage in a protracted inquiry in which the complainant Ms. Niduk Perera Attorney-at-Law also had to give evidence on several dates. As has been mentioned by His Lordship Justice Aluwihare PC in his draft judgment, that was in addition to the burden on the complainant Ms. Niduk Perera having to participate in an inquiry held before the Professional Purposes Committee of the Bar Association of Sri Lanka.

His Lordship Justice Aluwihare PC has held in the Judgment that the Respondent has deliberately lied to the Supreme Court with a view of moving Court, to take action, on the basis of her falsehood, against Ms. Niduk Perera Attorney-at-Law.[1] The Judgment has further held that the Respondent has failed to give an acceptable reason for the afore-stated deliberate lie.

It is my view, that the act of the Respondent misrepresenting facts which she knew were false, and placing such falsehood deliberately before this Court with a view of attempting to obtain from this Court, an order she had desired, [2] is a very serious issue. Such acts have serious adverse effects on the due process of administration of justice by the Court. The Respondent has had no regard whatsoever when she placed this falsehood before the Apex Court of the land.

In the light of the above circumstances, I impose a sentence of 03 years rigorous imprisonment on the Respondent. I agree with His Lordship Justice Aluwihare PC that in addition to the aforesaid sentence of 03 years rigorous imprisonment, a fine of Rs. 300,000 (Three Hundred Thousand) with a default sentence of two years rigorous imprisonment be imposed on the Respondent. I also agree with His Lordship Justice Aluwihare PC that the Respondent must tender a written apology to Attorney-at-law Ms. Niduk Perera with regard to the false and/or baseless allegations made against her.

[1] Page 16 of the draft judgment.
[2] As stated by Hon. Justice Aluwihare PC at page 20 of the draft judgment.

I also agree with the last paragraph of His Lordship Justice Aluwihare PC that Ms. Niduk Perera Attorney-at-Law had discharged her professional duties diligently and in the best interest of the Respondent.

JUDGE OF THE SUPREME COURT

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

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

SC/FR APPLICATION 46/2018

Gurusinghe Senevirathnage
Tharindu Priyan Akalanka.
No.18, Missaka Mawatha,
Mihinthale.

PETITIONER

Vs

1. Wijesinghe,
   Police Sergeant 26852
   Circuit Crime Investigation
   Division.
   Anuradhapura.

2. Dharmasiri,
   Police Sergeant 16876,
   Circuit Crime Investigation
   Division.
   Anuradhapura.

3. Wanninayake,

Police Constable 6998,
Circuit Crime Investigation
Division,
Anuradhapura.

4. Asanka,
   Police Constable 39938,
   Circuit Crime Investigation
   Division,
   Anuradhapura.

5. Udayantha,
   Police Constable 38491,
   Circuit Crime Investigation
   Division,
   Anuradhapura.

6. Amila,
   Police Constable 48059,
   Circuit Crime Investigation
   Division,
   Anuradhapura.

7. Sirimal,
   Police Constable 62953,
   Circuit Crime Investigation
   Division,
   Anuradhapura.

8. Uddhika,
   Police Constable Driver 33601,
   Circuit Crime Investigation
   Division,
   Anuradhapura.

9. Nawarathne,
   Chief Inspector,
   Circuit Crime Investigation
   Division,
   Anuradhapura.

10. Thilina Hewapathirana,
    Superintendent of Police,
    Circuit Crime Investigation
    Division,
    Anuradhapura.

11. Sandun Gahawatte,
    Deputy Inspector General of
    Police,
    Office of Deputy Inspector
    General North Central Province,
    Anuradhapura.

12. Pujith Jayasundara,
    Inspector General of Police,
    Police Headquarters,
    Colombo 01.

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

RESPONDENTS

BEFORE : **VIJITH K. MALALGODA, PC, J.,**
S. THURAIRAJA, PC, J. and
MAHINDA SAMAYAWARDHENA, J.

COUNSEL : Ruwanthi Doralagoda for the Petitioner.
Manohara de Silva, PC with Keerthi Gunawardane and Boopathy Kahathuduwa for the 1st 3rd and 4th Respondents.
Ganga Wakishta Arachchi, SSC with W.J.R. Fernando, SC for the Hon. Attorney General.

WRITTEN SUBMISSIONS : Petitioner on 25th January 2019 and 16th July 2021.
1st and 3rd Respondents on 08th January 2021 and 16th July 2021.
13th Respondents on 23rd March 2021 and 14th July 2021.

ARGUED ON : 09th July 2021.

DECIDED ON : 21st October 2021.

S. THURAIRAJA, PC, J.

The Petitioner namely, Gurusinghe Senevirathnage Tharindu Priyan Akalanka (hereinafter referred to as ''the Petitioner") has made the instant application seeking relief in respect of the infringement of his fundamental rights guaranteed under and in terms of the Constitution, in the manner hereinafter more fully set out, against the 1st to 13th Respondents.

The 1st and 2nd Respondents are Sergeants of Police attached to the Circuit Crime Investigation Division, Anuradhapura. The 3rd, 4th, 5th, 6th, 7th and 8th Respondents are Police Constables attached to the same unit. The 9th Respondent is the Chief Inspector attached to the Circuit Crime Investigation Division of Anuradhapura. The 10th Respondent is the Superintendent of Police of the Circuit Crime Investigation Division, Anuradhapura. The 11th Respondent is the Deputy Inspector General of North Central Province, Anuradhapura. The 12th Respondent is the Inspector General of Police. The 13th Respondent is the Attorney General who has been made a Respondent in compliance with the Constitution of the Democratic Socialist Republic of Sri Lanka.

This matter was supported before this court on 26th July 2018 and leave was granted under Article 11, 13(1) and 13(2) of the Constitution. On 26th July 2018, when this matter was supported for granting of leave, the Petitioner had submitted that he will be restricting this application to the reliefs prayed for against the 1st, 3rd, 4th and 5th Respondents to this case. On 31st October 2019 the learned Counsel for the Petitioner submitted that he will not be pursuing the matter against the 4th and 5th Respondents. Further, as the Petitioner had no objections to release the 4th and 5th Respondents from the proceedings, they were released from the proceedings accordingly. Presently, the case is against the 1st and 3rd Respondents.

I find it pertinent to refer to the factual matrix of this application as provided by the parties in order to ascertain whether the Petitioner's Fundamental Rights guaranteed under Article 11, 13(1) and 13(2) of the Constitution have been violated by

the 1st and 3rd Respondents. However, as there are substantial disparities between the narration of facts provided by the parties, I find it necessary to briefly narrate both positions.

Facts of the case as per the Petitioner

The Petitioner states that on 20th September 2017 a group of men entered the Petitioner's residence in a disruptive and disorderly manner while the Petitioner was asleep. The Petitioner alleges that he was apprehended and manacled without production of a reason for the arrest. He states that he was subsequently removed from his residence and taken to the Circuit Crime Investigation Unit of Anuradhapura. The Petitioner acknowledged that the group of abovementioned people were assigned to the Circuit Crime Investigation Unit of Anuradhapura.

The Petitioner states that he was mercilessly assaulted while being transported from the Petitioner's residence to the Circuit Crime Investigation Unit of Anuradhapura and interrogated by any one or more or all the 1st - 8th Respondents on whether the Petitioner had been involved in the theft of a motor bicycle. The Petitioner states that the Petitioner provided them with the details of one Chanaka Sanoj Akalanka in Mihinthale as the Petitioner believed that the 1st- 8th Respondents were laboring under the misapprehension as to the Petitioner's complicity in the theft of a motor bicycle. The Petitioner further states that the Petitioner was coerced into conducting himself in such a fashion due to relentless physical assault on the Petitioner by any one or more or all the 1st-8th Respondents.

The Petitioner states that the above said Chanaka Sanoj Akalanka was taken into custody upon the Petitioner's statement on the same date and assaulted by any one or more or all the 1st- 8th Respondents. The Petitioner asserted that said Chanaka Sanoj Akalanka had not been complicit in the purported theft of the motor bicycle and consequently any one or all 1st-8th Respondents proceeded to assault the Petitioner ruthlessly until the Petitioner almost collapsed in agony. Thereafter the Petitioner states that his hands were handcuffed behind his back, and he was taken to Thisa

Wewa along with aforesaid Chanaka Sanoj Akalanka and two others, viz. Silva and Suranga.

The Petitioner further states that the Petitioner and aforesaid Chanaka Sanoj Akalanka, Silva and Suranga were carried into a teak woodland over the Thisa Wewa embankment where the Petitioner was hung on a teak tree and continuously assaulted by the 1st, 3rd, 4th, and 5th Respondent and other officers of the Circuit Crime Investigation Unit of Anuradhapura for a period of two hours. The Petitioner states that he was then brought back to the Circuit Crime Investigation Unit of Anuradhapura and was held for three days thereby depriving the Petitioner of medical care and treatment. The Petitioner alleges that he was indisposed physically and psychologically due to persistent assault and arbitrary detention.

The Petitioner states that he was set free by the officers of the Circuit Crime Investigation Unit of Anuradhapura at around 7.30 pm on the 23rd September 2017 and was handed over to the Petitioner's mother and father. The Petitioner was thereafter referred and admitted to the Teaching Hospital of Anuradhapura by the Petitioner's mother and father on the same day under the registration number (bed head ticket) of 17-115355. The Petitioner was attended to and treated at the Anuradhapura Teaching Hospital from 23rd September 2017 to 05th October 2017 at Ward No. 20 where the Petitioner was pronounced to have sustained six grievous injuries.

The Petitioner's mother and the Petitioner lodged complaints with the Anuradhapura branch of the Human Rights Commission of Sri Lanka concerning the arbitrary arrest, unlawful detention and the persistent assault, inhuman and degrading treatment of the Petitioner inflicted by any one or more or all the 1st-8th Respondents of the Circuit Crime Investigation Unit of Anuradhapura in terms of the reference numbers HRC/AP/430/2017(I) and HRC/AP/480/2017(W) on 26th September 2017 and 19th October 2017 respectively.

Facts of the case as per the 1st and 3rd Respondents

1st and 3rd Respondents stated that a person named N.N. Vithanage had made a complaint to the DIG of North Central Province (11th Respondent) on 19th July 2017 regarding the theft of his motorcycle bearing the number NCWL 1657. The said N.N. Vithanage had also previously lodged a complaint to the Anuradhapura Crimes Division and had made the second complaint as suspects had not been apprehended notwithstanding the CCTV footage.

Consequently, the 11th Respondent had referred the matter to the Senior Superintendent of Police of Anuradhapura Division by way of a letter dated 19th July 2017 bearing reference No. DIG/ANP/Public/896/2017. Consequent to the above direction by the 11th Respondent, the OIC- District Intelligence Unit of the DIG office of Anuradhapura had written a letter to the 11th Respondent that he has perused the CCTV footage and has identified the suspect as one Jayamuni Dushan De Silva through private informant. He stated that he was submitting the report awaiting further instructions from the 11th Respondent to proceed. By way of a letter dated 20th July 2017, the Senior Superintendent of Police of Anuradhapura Division had referred this matter to the attention of the 9th Respondent and directed him to take necessary steps before the 12th August 2017.

Consequent to the above order, the 9th Respondent had referred the matter to the 2nd Respondent and had directed him to take necessary steps before 11th August 2017. The 2nd Respondent had thereafter informed the 9th Respondent that he was able to uncover details about several persons who were involved in the said incident of theft and had requested for an extension of time to further investigate and to arrest the suspects. Consequently, on 22nd September 2017 the 1st-7th Respondents left the Circuit Crime Investigation Division to arrest Jayamuni Dushan Chathuranga Silva, who was a suspect identified using the aforementioned CCTV footage. The Respondents stated that the said Jayamuni Dushan Chathuranga Silva alias Doctor alias Jabba, was arrested at 676, Sangamitta Mawatha, Anuradhapura. When inspecting the house, they

had found two side mirrors of a motor bike and one Pathirana Dasanayakalage Damith Niroshan Wijewardana alias Suranga who was also in the same house and was arrested. When questioning said Suranga, he had informed the Respondents that the stolen bike was given to one "Podi Akalanka".

The aforementioned suspects were taken into custody and the Respondents had identified the said "Podi Akalanka" as the Petitioner in the present action. The Respondents stated that when they attempted to question the Petitioner, he acted aggressively and created a commotion by attempting to flee. The Respondents state that in the said attempt to flee, the Petitioner fell down after hitting a nearby fence. The Respondents state that they held the Petitioner's hands behind his back and handcuffed him in order to control him. The Respondents state that even after the Petitioner was handcuffed, he struggled and attempted to remove and/or break the handcuffs. The Respondents state that the Petitioner's fear and his conduct also contributed to their suspicion.

Further, the Respondents were aware of that the Petitioner is a person who is addicted to "Kerala Ganja" (Cannabis) and was trying to flee for that reason. However, when questioning the Petitioner, it became apparent that the Petitioner was not involved in the offence under the investigation and since the Respondents did not find any Cannabis with the Petitioner at his residence, the Respondents did not arrest him. The Respondents state that the police officers had not assaulted the Petitioner but merely questioned him and denies the allegation of arbitrary arrest, unlawful detention and persistent assault, inhuman and degrading treatment of the Petitioner.

Alleged violations and steps taken by the Respondents

As clearly enumerated above, the narration of events by the parties are vastly different and contradictory, as such I find it pertinent to identify the more important elements of the two narrations of the events prior to concluding on which narration has been admitted as fact.

According to the Petitioner, he was arrested on 20th September 2017 by a team of police officers which included the 1st and 3rd Respondents, all of whom were attached to the Circuit Crime Investigation Division, Anuradhapura and he was detained in the police custody for four days. During that period, the Petitioner states that he was subjected to torture, inhuman treatment which includes the being handcuffed, being hung with a rope in a teak tree, being assaulted etc. The Petitioner in his evidence states that, he was hung for about 2 hours and assaulted. The Petitioner submits that the Respondents then applied some oil and kept him at the police station. Subsequently, on the 23rd September 2017, the Petitioner was released from police custody. As per the submitted facts, the Circuit Crime Investigation Unit of Anuradhapura arrested aforesaid Silva and Suranga on the same date the Petitioner was arrested and though the aforesaid Silva and Suranga were produced before the Magistrate Court of Anuradhapura, the Petitioner was not produced.

Upon the Petitioner being released by the Circuit Crime Investigation Unit of Anuradhapura, the Petitioner was admitted to the Anuradhapura Teaching Hospital for medical treatments. The Petitioner was treated and discharged after 12 days. The Petitioner was examined by the Judicial Medical Officer (hereinafter referred to as "the JMO") of the Anuradhapura Teaching Hospital and was issued with the Medico-Legal Report (MLR) which is filed as "P5(a)". The MLR identified six grievous injuries which rendered the Petitioner unable to follow ordinary pursuits for more than 20 days. It identified a damage of brachial plexus at neck, which is a rupture caused by a forceful stretch causing the nerve to tear completely or partially. Further the diagnosis ticket of the Petitioner, marked and filed as "P5", referred the Petitioner for Neurophysiology. The ticket and the attached Reports further elaborate on the extent of injuries suffered by the Petitioner.

Contrary to the above position, the Respondents submit that the Petitioner was injured during the arrest when the Petitioner had struggled and tried to flee whereupon he injured himself by running into a fence. Further, the Respondents state

that they had handcuffed him with his hands behind his back as he continued to struggle. Taking the Respondents' narration of events into consideration, the Respondents had not harmed the Petitioner at any instance or taken him to police custody.

I am of the view that the MLR report and reports issued by the Neurophysiology Unit submitted to this Court establishes and supports the position taken by the Petitioner and not that of the 1st and 3rd Respondents in this matter. The Petitioner's recounting of the incidents is corroborated by the affidavits of his parents and the aforementioned medical reports. The Respondents have failed to provide adequate explanation as to how the Petitioner received such injuries on his neck, hands and the upper limbs of the body. The MLR strongly corroborates the fact that the Petitioner was hung for a considerable period of time as there were injuries on the upper part of the body including the neck. Further, the Respondents have not submitted any material before this Court to show that the Petitioner was a suspect in any case and to prove that he was ever produced before a Magistrate Court. Finally, I find that it is extremely unlikely for injuries of such severity to have been caused due to the Petitioner merely having run into a fence as explained by the Respondents.

Keeping the above discrepancies in mind, I now wish to examine the alleged Fundamental Rights violations. The Petitioner applies to this Court under Article 11 of the Constitution which reads as follows:

> *"No person shall be subjected to torture or to cruel inhuman or degrading treatment or punishment"*.

In regard to the violation of the Constitutional Rights of the Petitioner as guaranteed by Article 11 of the Constitution, particularly by the 1st and 3rd Respondents, we may refer to the case of **Mrs. W. M. K De Silva v Chairman, Ceylon Fertilizer Corporation (1989) 2 Sri LR 393** at **405** in which Amerasinghe, J stated that,

"In my view Article 11 of the Constitution prohibits any act by which severe pain or suffering, whether physical or mental is, without lawful sanction in accordance with a procedure established by law, intentionally inflicted on a person by a public official acting in the discharge of his executive or administrative duties or under the colour of office"

In the instant case it is apparent that the Petitioner was subject to severe physical pain inflicted by the Respondents acting in their official capacity. As enumerated above, I am disinclined to believe that the Petitioner running into a fence resulted in such grievous injuries disrupting ordinary life for a period of 20 days as evidenced by the JMO report. In light of the reports, it is apparent that the Petitioner was subject to grievous injury as well as substantial mental pain caused by the situation.

Taking the above discussed opinions and Article 11 of the Constitution into account, it is my view that the treatment meted out to the Petitioner by the 1st and 3rd Respondent is a violation of his rights under Article 11 of the Constitution.

The Petitioner states that the arrest and detention of the Petitioner was in contravention of the provisions of the Code of Criminal Procedure Act No.15 of 1979 (as amended) and the Respondents transgressed the provisions of the same code. Considering the arrest, we find that the police officers have completely misidentified the suspect. This court has on numerous occasions emphasized the importance of police officers or investigating officers conducting their arrest and searches in accordance with the procedure established by law with a proper fact finding and investigation process.

The Petitioner further states that his arrest is contrary to Article 13 of the Constitution which guarantees freedom from arbitrary arrest, detention and punishment.

In the case of **Sanjeewa, Attorney-At-Law (on behalf of Gerald Mervin Perera) V Suraweera, Officer-In-Charge, Police Station, Wattala and Others (2003) 1 SLR 317** in which a suspect was mistakenly identified, arrested without due reason and severely assaulted, Fernando J expressed the following views:

> *"Further, had the Respondents been acting bona fide when they arrested the Petitioner, they would have promptly recorded his statement, and would then have either produced him before a Magistrate or released him. The fact that they failed to record a statement (or if the IB extracts are accurate, waited ten hours to do so) strongly suggests that they did not, even subjectively, believe that he had committed an offence, but were merely hoping that something would turn up. It is also probable that the Petitioner was not given a reason for arrest."*

In the instant case the Petitioner was arrested without being given due reason as to his arrest. Additionally, the fact that there are no arrest notes made with regard to the arrest of the Petitioner arouses reasonable suspicion. It must be noted that the Information Book kept in the police station does not have any entry regarding the same.

The learned President's Counsel for the Respondents argued that the arrest was conducted in pursuing the statements of an actual suspect who had disclosed that he had sold the stolen bike to one "Podi Akalanka" whom he insisted was the Petitioner and that for this reason there was reasonable suspicion in order to arrest the Petitioner. This Court observes that if there had been a reasonable suspicion that the Petitioner was in some manner involved in the alleged theft due to a name divulged by an arrested suspect, the officers should have followed the correct procedure and made an 'official arrest' of the Petitioner as prescribed by law. The blatant disregard of the relevant procedure by the Respondents leads to the finding that the Petitioner was illegally arrested and detained contrary to Article 13 of the Constitution.

State responsibility

Article 11 of the Constitution endows every person with absolute protection from torture, or cruel, inhuman or degrading treatment or punishment. Article 13 (1) stipulates that no person shall be arrested except according to procedure established by law and Article 13 (2) states 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. It needs no reiteration that the primary responsibility of upholding these fundamental protections lies with the State.

This Court has repeatedly upheld that police officers, being state officers tasked with law enforcement and the maintenance of law and order, have an utmost responsibility in respecting, safeguarding and advancing these rights. Police officers are expected to extend common courtesies at all times when dealing with the public. The identity or the status of the person whom the police is dealing with should have no bearing whatsoever on the fair and courteous treatment that a person is entitled to receive, as of right. Police officers are bound to treat every person with dignity and respect. As such, in the instant case, necessary prevention measures should have been taken by the State and the Police Department.

However, it must be noted that upon the alleged violation occurring to the Petitioner, the 1st and 3rd Respondent were indicted before the High Court of Anuradhapura under the case bearing no. HC 257/2019 for violation of Section 2(4) of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act No. 22 Of 1994. Therefore, I find that the State has fulfilled their obligations and I do not hold the State responsible for the alleged violations of Fundamental Rights of the Petitioner.

Decision

Accordingly, I find that the 1st Respondent, namely Sirisenage Wijesinghe and 3rd Respondent, namely W. M Nilantha Priyadarshana Wanninayake, have violated the Fundamental Rights of the Petitioner guaranteed under Article 11, 13(1) and 13(2) of the Constitution and I direct the 1st and 3rd Respondents to pay Rs.500,000/- each from their personal resources to the Petitioner. I order the 1st and 3rd Respondents to pay a further amount of Rs.25,000/- each as cost of litigation to the Petitioner.

Application allowed.

JUDGE OF THE SUPREME COURT

VIJITH K. MALALGODA, PC, J.,

I agree

JUDGE OF THE SUPREME COURT

MAHINDA SAMAYAWARDHENA, J.

I agree

JUDGE OF THE SUPREME COURT

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

In the matter of an application under and in terms of Articles 17 and 126 of the Constitution of the Republic.

SC FR Application 52/2021

1. Welikadage Nadeeka Priyadarshani Perera
2. Ranmuthu Chamodya Hansani (Minor)

1st and 2nd Petitioners above, both of No. 43/6B, R.E. De Silva Road, Heppumulla, Ambalangoda.

Petitioners

Vs

1. Prof. G. L. Peiris

   Hon. Minister of Education

2. Prof. K. Kapila C. K. Perera

   Secretary, Ministry of Education

1st and 2nd Respondents above, both of Isurupaya, Battaramulla.

3. Hasitha Kesara Veththimuni,

   Principal,

   Dharmashoka Vidyalaya,

   Galle Road, Ambalangoda.

4. B. Anthony

5. T. M. Dayarathne

6. L. N. Madhavee Dedunu

7. N. Channa Jayampathy

   4th to 7th Respondents above, all of Members of Interview Board (Admission to Year 1)
   C/O Dharmashoka Vidyalaya, Galle Road, Ambalangoda.

8. Gamini Jayawardhane

9. Rekha Mallwarachchi

10. J. P. R. Malkanthi

11. S. A. B. L. S. Arachchi

12. Rasika Prabodha Hendahewa

    8th to 12th Respondents above, all of Members of Board of Appeal (Admission to Year 1)
    C/O Dharmashoka Vidyalaya, Galle Road, Ambalangoda.

13. Kithsiri Liyanagamage

Director- National Schools,

Isurupaya, Battaramulla.

14. J. D. N. Thilakasiri,

Provincial Director of Education

Upper Dickson Road, Galle.

15. Hon. Attorney General

Attorney General's Department,

Hulftsdorp, Colombo 12.

Respondents

Before: Buwaneka Aluwihare, PC. J.
A. H. M. D. Nawaz J.
Kumudini K. Wickramasinghe J.

Counsel: Chrishmal Warnasuryia with Kumudu Hapuarachchi and Madhuwanthi Konara instructed by Indunil Wijesinghe for the Petitioners.

Ms. Kanishka de Silva Balapatabendi SSC for the 1st-3rd and 13th-15th Respondents.

Argued on: 16. 06. 2021

Decided on: 27.10. 2021

Judgement

Aluwihare PC. J.,

The Petitioners in the present application were granted leave to proceed for the alleged infringement, of their fundamental rights guaranteed under Article 12(1) and 12(2) of the Constitution.

The 1st Petitioner is the mother of the 2nd Petitioner who is a minor. The Petitioners allege that the 2nd Petitioner was denied admission to Grade 1 of the Dharmasoka Vidyalaya, Ambalangoda, for the Academic year 2021 citing the failure to meet the requirements under Clause 7.2. ('Children of residents in proximity to school' category) of Circular No. 29/2019 issued by the Ministry of Education ('P3').

The Circular 'P3' sets out the scheme of Grade 1 admissions to Government Schools. Clause 7.0. lists the categories under which applicants may seek admission and the percentages of students to be admitted under the respective categories. The Petitioners had applied under the category of 'Children of residents in proximity to school' referred to in Clause 7.0.

Clause 7.2. Of 'P3' requires that, to be eligible under the said category, mandatorily, applicants should be resident at the address they are applying from and should be able to prove their residency at the said address through documentary evidence.

In order to apply for a particular school, the applicant should be resident within the 'feeder area' of the school. As per Clause 4.7. the 'feeder area' is the administrative district area that the school is situated in. When a school is situated on the border of an administrative district area, the nearest divisional secretariat division of the other administrative district near the border should be considered as the feeder area.

Clause 7.1.5. sets out the procedure in which the proximity of the place of residence to the school is to be determined. It requires that a ***circle*** be drawn taking the distance from the main door of the applicant's residence to the front door of the Main office of the school of which admission is sought (where the Primary Section is situated in a

different premises, the distance to that Office), as the radius. ("ඉල්ලුම් කරන පාසලේ ප්‍රධාන කාර්යාලයට (ප්‍රාථමික අංශය ප්‍රධාන පාසලින් බැහැර වෙනත් පරිශ්‍රයක පවතින්නේ නම් එම කාර්යාලයට) ඇති දුර") .

Marks are to be deducted for each other Government School with a Primary Section to which the applicant can be admitted, situate within the ***circle***. The marks to be deducted per each such school is 5, as per Clause 7.4.5. of 'P3'. According to the Circular, the allocation of marks for the 'Children of residents in proximity to school' category are as follows;

Place of residence	20 marks
Other documents	05 marks
Electoral records	25 marks
Proximity to School	50 marks
Total	**100 marks**

The Petitioners had been called for an interview on 8th September 2020. At the interview, the 1st Petitioner had submitted a true copy of the property deed of the residence of the 1st Petitioner, Certificate of Character and Residence issued by the Grama Niladhari, electricity bills, water bills, documents relating to assessment rates, the Pregnancy record book of the 1st Petitioner and electoral records along with the school admission application form and the birth certificate of the 2nd Petitioner, as documentary proof of residence. The 2nd Petitioner had been allocated 92.4% marks which were over and above the cutoff mark, which was 90%. 5 Marks had been deducted, as per clause 7.4.5. for Devananda Vidyalaya situated within the circle, and the 1st Petitioner states that she did not oppose it as they had obtained marks above the cutoff mark. In confirmation of the acceptance of the marks, the Petitioner had signed at the foot of the mark sheet ('P10'). The Petitioners state that at the conclusion of the interview, the 2nd Petitioner was declared eligible for admission.

The Petitioners assert that they fulfilled the admission criteria in the manner referred to above and the awarding of sufficient marks [92.4%], afforded them a legitimate expectation of gaining admission to the school.

On 15th November 2020, the 3rd to 7th Respondents as members of the Board of Interview had visited the residence of the Petitioners for a site inspection, while the Petitioners were not at home. They had inspected and photographed the premises. The Principal had informed the Petitioners via a phone call that the representatives were at their house for the site inspection. The Petitioners state that they were not at home at that time, and were on their way home.

On 3rd December 2020, a staff officer of the school had informed the1st Petitioner, via telephone, to be present on 4th December 2020 for a discussion regarding the admission of the 2nd Petitioner to the school. At the discussion on that day, the 1st Petitioner alleges that she was asked to place her signature on the cover of a file without explaining the content, that was in English. The Respondents, however, deny this allegation and state that the notes explaining the unsatisfactory proof regarding residence at the given address were made in Sinhala and not in English, as evinced by 'R8'.

On a subsequent occasion, the 1st Petitioner along with the Chief Incumbent priest of the Shri Niketharamaya temple, had gone to meet the Principal to inquire whether the 2nd Petitioner could secure admission to the school. However, the 1st Petitioner had been informed that the 2nd Petitioner could not be admitted to the school as there was another school (in addition to Devananda Maha Vidyalaya) situated within the ***circle***, namely Kandegoda Maha Vidyalaya. The Petitioner had been informed that as required by Clause 4.7. of 'P3' a further 5 marks had to be deducted from the marks originally awarded, in addition to the earlier deduction of marks for Devananda Maha Vidyalaya.

The Petitioners contend that, whereas both Dharmasoka Vidyalaya and Devananda Vidyalaya are situated within the Ambalangoda educational division, the said Kandegoda Maha Vidyalaya is situated within the educational division of Balapitiya,

although all three schools are situated within the same administrative district. The crux of their argument is that, Kandegoda Maha Vidyalaya therefore should not be considered as a school that fall within the ***circle*** and that marks should not be deducted due to the location of the said Kandegoda Maha Vidyalaya as that is not the objective of Clause 4.7. of 'P3'. The Respondents, however, contend that, as the Balapitiya Divisional Secretariat is situated within the Galle District, as is Dharmasoka Vidyalaya, marks must be deducted for the said school as well.

The 'temporary list' ('P11') displayed in or around 23rd December 2020 announcing the names of the candidates who were provisionally selected, had not contained the name of the 2nd Petitioner, although the names of at least 2 candidates with marks lower than that of the Petitioner were included (No. 89 and 90).

The Petitioners state that after the lapse of about a week since the release of the temporary list, the 3rd Respondent and a few others had visited the residence of the Petitioners, at which time the father, sister's son and brother-in-law of the 1st Petitioner were present in the premises.

On 31st December 2020, the 1st Petitioner had preferred an appeal to the Board of Appeal ('P12') in terms of Clause 11 of 'P3' impugning the exclusion of the 2nd Petitioner from the temporary list.

The hearing of the appeal had been held on17th January 2021, with the participation of the1st Petitioner and the 8th to 12th Respondents. According to the 1st Petitioner, she had been informed that the 2nd Petitioner cannot be admitted to the school as it was difficult to accept the proof of residence due to the unkempt condition the premises were in at the time of the inspection, indicating that the house was, in fact, not occupied. The 1st Petitioner alleges that she was informed of this decision without a re-examination of the requisite documents or conducting a proper hearing according to the procedure specified in 'P3'. The 2nd Petitioner was awarded 77.4% marks by the Appeal Board, and the Petitioner alleged that no justifiable reasons were given for the reduction of marks from the original 92.4% marks awarded by the Interview Board.

The Petitioners contend that this is non-compliant with Clause 11 and 18 of 'P3' which pertain to ensuring a just and fair process of appeal.

The Respondents maintain that no marks were deducted on the basis of the state of the residence of the Petitioners. The 1st Petitioner had refused to sign the document ('R9') on which the Respondents had reduced the marks previously awarded. The notation the 1st Petitioner had made on 'R9' stating that she is unwilling to sign the document was not denied at the hearing, by the Petitioner.

The final list of students selected for Dharmasoka Vidyalaya was displayed on 3rd February 2021 and the 2nd Petitioner's name was not included in the list, nor in the waiting list displayed on the website of the school. The 3rd Respondent, by his communication on 5th February 2021, had informed that the 2nd Petitioner cannot be admitted to the school as she has not secured the required 90% marks under the 'proximity' category.

Consequently, in or around 31st December 2020, the 1st Petitioner tendered appeals to the President of the Republic, the Secretary of Education (Southern Province) and the Director of Divisional Education Office, Ambalangoda, and were called to the Divisional Education Office on 18th January 2021 for the appeal to be considered. The 1st Petitioner states that Ms. D. P. Damayanthi, the Director of Divisional Education had stated that the 2nd Petitioner had been treated unfairly and that although she had repeatedly tried to contact the 3rd Respondent she had failed to do so. The Petitioners state that they have tendered an appeal to the 2nd Respondent, Secretary, Ministry of Education but that they do not foresee a satisfactory administrative resolution of the matter.

The Petitioners have filed a complaint to the Human Rights Commission [HRC] dated 5th January 2021 ('P9') as well but have subsequently withdrawn it citing personal difficulties. The 3rd Respondent in his affidavit has taken up the position that the complaint [to the HRC] has been withdrawn after he submitted his observations to the Commission.

Awarding of provisional marks based on proximity

It appears that the provisional marks were awarded taking into consideration, *inter alia*, the map marked 'R4'. The Respondents state that it is the usual practice to have the applicants point out their residence on a Google map that is made available to them, at the interview. Taking the location of the residence as one point and the location of the school office as the other, a circle is drawn using the distance between the said two points as the radius. The map 'R4' has been marked in the above manner, and in that map, other than Dharmasoka Vidyalaya, only Devananda College had fallen within the radius of the ***circle***. The map 'R6' on the other hand, had been drawn by an official of the Surveyor General's Department who made the necessary measurements during the site inspection. 'R6' which depicts the applicable circle, indicates that Devananda Vidyalaya is completely within the circle while a small part of the Kandegoda Maha Vidyalaya also falls within the circle. In the case of the Dharmasoka Vidyalaya, more than 50 per cent of the school buildings fall within the circle. For the purposes of this case, reliance can be placed on the map ['R6'], the same being drawn by an official of the Survey General's Department using GPS measurements.

The initial grounds for reduction of marks as stated in 'R8' are that; the Petitioners were resident in 3 locations during the material time period; that from the site inspection, it was clear that the house in question was an unoccupied partially built structure [Photographs 'R5' & 'R5a'] and there was not even a door fixed to the lavatory; that upon calculation of the distance by the surveyor it was evident that marks should be deducted for Kandegoda Maha Vidyalaya as well.

The Petitioners in their written submissions had contended that the requirements of Clause 9 regarding site visits have not been followed by the Respondents. Per Clause 9.3.3. records of the site visit should be maintained with the date, time, and the names and signatures of the persons who conducted the site inspection. The Respondents have submitted records of the first site inspection signed by the persons who carried out the inspection marked 'R7'. In the said records, a second site visit has been

suggested in order to ascertain whether the Petitioners were in fact resident there, as the structure in question has been found to be a house that was being built anew and yet to be fully completed.

The Petitioners state that the names of the persons who accompanied the 3rd Respondents on the second site visit are not recorded. Furthermore, if deductions are made from the awarded marks, the reason for such changes must be disclosed to the applicant, according to Clause 9.3.3. of 'P3'. The Respondents, however, had considered the Petitioners' application for the admission to the school concerned on the premise that the Petitioners were residing at the house in question. Thus, even if it is assumed that the Respondents had not been in total compliance with Clause 9.3.3. of 'P3' in its application, no prejudice has been caused to the Petitioners.

There, however, is another factor that needs consideration as far as allocation of marks is concerned. As confirmed by the 'Certificate of residence and character' issued by the Grama Niladhari ('P7') the 1st Petitioner has resided at 453/3A, Beach Road, Heppumulla, Ambalangoda from her date of birth to 22nd May 2016; at 63/4, R. E. De Silva Mawatha, Heppumulla, Ambalangoda from 23rd May 2016 to 31st December 2016; and at 43/6B, R. E. De Silva Mawatha, Heppumulla, Ambalangoda (the address from which the application has been made). It is evident that the Petitioners had resided at three different locations within the time period material to the application i.e. the 5-year period immediately before the year, the application for admission was submitted.

Clause 7.2.2.3. states that when the applicant has been resident in another address within the feeder area and is submitting electoral records from both addresses in order to confirm their residence of at least 5 years within the feeder area, both electoral records can be considered as electoral registers of the present place of residence. Such consideration, however, can be given only if the schools which are more proximate than the school to which the child is applying to are the same for both places of residence. It can be seen that the 1st Petitioner has been a resident within the same area of Heppumulla for the period from 2015-2019 that was material for the

admission process. However, the Petitioners have not submitted material to show that the 'schools' for both addresses are the same thereby starving the court of material to ascertain whether the benefit of Clause 7.2.2.3. should be given to the Petitioners.

In the written submissions tendered on behalf of the Respondents, the deduction of marks of the 2nd Petitioner is explained. As the 1st Petitioner has resided at the current address only for 3 years, marks have been awarded only for those 3 years for both parents of the applicant, amounting to 15 marks (2.5 x 3 x 2). It should also be noted that although marks were awarded for the 1st Petitioner's husband as well, the electoral records 'P9' only pertain to the 1st Petitioner. No evidence of the husband's residence in the 5 years material to the application has been submitted. 5 marks were deducted from the 45 marks that had been originally awarded under the proximity criteria, for the Kandegoda Maha Vidyalaya as well.

Originally, as indicated by 'R8', based on the site visit the Respondents had concluded that the Petitioners were not resident at the given address. They had, however, awarded full marks for the documentary evidence submitted without making any deductions in spite of the fact that the Respondents entertained doubts as to the Petitioner's residency at the given address. For the purposes of awarding marks for residence as confirmed by the electoral records the Respondents have awarded marks for the 3 years in which the Petitioners have stated that they have been resident at the given address.

The Respondents further submit that as indicated on the mark sheet 'R9' the marks awarded at the first interview are subject to change if the information provided by the applicant is revealed to be inaccurate/false, or if it is found by the site inspection that the applicant is not residing at the given address. The Respondents therefore argue that no legitimate expectations can be founded on the marks awarded therein.

In addition, the Respondents further state that the Petitioners themselves, in Item No. 5 of their application, have accepted that Devananda Vidyalaya is closer in proximity than Dharmasoka Vidyalaya. The Respondents further dispute the 1st Petitioner's submission that she was residing at the given address with her husband and daughter

since 2015 as in the notice of assessment 'P8c' submitted by her the property is described as a 'land'. The water and electricity bills adduced as additional documents to establish as proof of residence 'P8a' and 'P8b' bear dates after the 30th of June 2020, the closing date for applications.

The Respondents further state that the 2nd Petitioner has been admitted to Devananda Vidyalaya which was not disclosed to court by the Petitioners.

Upon a perusal of the additional documents submitted as proof of residence by the Petitioners, it is clear that they do not meet the requirements of the Circular. The water and electricity bills submitted ('P8a' and 'P8b') are only of the year 2020 and that too are not bills dated prior to the application deadline as required. Neither do the bills indicate at least 5 years of ownership. The single assessment sheet submitted 'P8c' is only regarding the year 2016. The pregnancy record book of the 1st Petitioner ('P8d') indicates the address 'No. 453/3A, Patabendimulla, Ambalangoda' an address other than that of the current residence, which therefore, cannot qualify as proof of residence at the current address. The electoral records from 2015-2019 ('P9') indicate that the 1st Petitioner was registered in the same electoral district. No electoral records of the father of the 2nd Petitioner were submitted

The certificate of the Grama Niladari ('P7') indicates that the 1st Petitioner was resident within the same area, though at 3 different addresses during the minimum 5 years material to the application. It should be noted that the Circular does not recognize the certificate of the Grama Niladari as additional documentary proof of residence.

Although the Petitioners contend that they are eligible for 100% marks in the category of proximate residence, it is not so. The documents mentioned above do not satisfy the requirements of the Circular 'P3' to the extent required to gain admission to Dharmasoka Vidyalaya, despite the fact that the 2nd Petitioner has been a resident within the Heppumulla, Ambalangoda area for the entirety of her life (*vide* addresses in the documents submitted by the 1st Petitioner).

The Petitioners have failed to submit documentary proof to sufficiently establish their residence at the address material to gaining admission to Dharmasoka Vidyalaya. The Respondent Interview Board and the Board of Appeal have in fact awarded the applicant the maximum marks that she was entitled to. It is imperative that the Petitioners fulfil the eligibility criteria before they hasten to impugn the decision of the Interview Board and the Appeals Board.

It is common knowledge that each year, a considerable number of school admission applications are submitted for consideration by school authorities and the school staff is required to go through the tedious process of evaluating such applications. In the said context, it would be impractical to hold to account each and every minor oversight or administrative lapse, on the part of the Interview Board, which is not of any gravity as to cause prejudice and thereby discriminate the applicant. As is clear from the analysis of the evidence, the maximum marks possible had been awarded to the Petitioners. Wanasundera J. in **Wijesinghe v. Attorney-General** [1978-79-80] 1 SLR 102 held "*Every wrong decision or breach of the law does not attract the constitutional remedies relating to fundamental rights.*" Under Article 126, the Supreme Court would intervene in instances where a fundamental right was breached. In the present case, no such intervention is called for.

When the number of applicants seeking admission to a school exceeds the capacity of the intake, some criteria has to be adopted to select the number of applicants that the school can accommodate. The State cannot be held at fault for adopting such a process. Although the Petitioners' choice of school may have been Dharmasoka Vidyalaya, it has been shown that they do not possess the requirements to make it through the vetting process successfully. In the circumstances the State has provided the 2nd Petitioner with a school, by admitting her to Devananda Vidyalaya, a school which is in the vicinity of Dharmasoka Vidyalaya. In this context, it cannot be concluded that any prejudice or an injustice has been caused to the Petitioners, much less a breach of the Directive Principles of State policy, the duty to assure "*to all persons of the right to universal and equal access to education at all levels.*"

There is no evidence to conclude that the Petitioners have been denied equality before the law or the equal protection of the law. Nor is there any occasion to accept that the Petitioners were subjected to discrimination on any ground.

Therefore, we do not deem it fit to hold that the Petitioners' rights under Article 12(1) and 12(2) have been infringed.

I make no order as to costs.

Application dismissed.

Judge of the Supreme Court

A. H. M. D. Nawaz J.
I agree.

Judge of the Supreme Court

Kumudini. K. Wickramasinghe J.
I agree.

Judge of the Supreme Court

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

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

SC/FR APPLICATION 79/2016

N.K. Sooriyabandara
D 30, Old Galaha road,
Peradeniya.
PETITIONER

Vs

1. University of Peradeniya,
   Peradeniya.

2. Prof. Upul B. Dissanayake
   Vice Chancellor.

3. (b) Prof. S.H.P. Parakrama
   Karunaratne,
   Deputy Vice Chancellor.

4. (a) Dr. M. Alfred.

5. (a) Prof. O.G. Dayaratne Bandara

6. Prof. W.M. Tilakaratne.

7. Prof. Leelananda Rajapaksha.

8. Prof. V.S. Weerasinghe.

9. (a) Prof. D.K.N.P. Pushpakumara.

10. Prof H.B.S Ariyaratne

11. Prof. D.B.M. Wickramaratne.

12. (a) Prof. N.A.A.S.P. Nissanka.

13. (a) Prof. Anoma Abeyratne.

14. Prof. S.R. Kodituwakku.

15. Mrs. K.D. Gayathri M. Abeygunasekera.

16. Dr. Ranil Abeysinghe.

17. (a) Prof. C.M. Maddumabandara.

18. Mr. U.W. Attanayake.

19. (a) Prof. I.M.K. Liyanage.

20. Mr. G.S.J. Dissanayake.

21. Mr. E.H.M. Palitha Elkaduwa.

22. Mr. Upul Kumarapperuma.

23. Prof. P.B. Meegaskumbura.

24. Dr. Mohamed Thaha Ziyard Mohamed.

25. Prof. K.N.O. Dharmadasa.

26. Dr. Selvy Tiruchandran.

27. (c) Maneesha Seneviratne.

27. (i) Mr. Rawana Wijeratne.

28. Mr. Lal Wijenayake.

29. (a) Dr. M.A.J.C. Marasinghe.

Dean, Faculty of Allied Health Sciences.

30. (a) Dr. J.A.V.P. Jayasinghe.
    Dean, Faculty of Dental Science.

31. (a) Prof. G.B. Herath.
    Dean, Faculty of Engineering.

32. (a) Dr. D.M.S. Munasinghe.
    Dean, Faculty of Veterinary Science.

33. (a) Prof. A.S. Abegunawardana.
    Dean, Faculty of Medicine.

34. (a) Most Ven. Niyangoda Vijithasiri
    Council Member.

35. (a) Mr. Samantha Rathwaththe
    Council Member

36. (a) Nihal Rupasinghe
    Council Member

37. (a) Dr. D.M.R.B. Dissanayaka
    Council Member

38. (a) Mr. Udayana Kirigoda
    Council Member

39. (a) Mr. Prasanna Gunathilaka
    Council Member

40. (a) Eng. Mahendra Wijepala
    Council Member

41. (a) Dr. Gamini Buthpitiya
    Council Member

42. (a) Dr. Syril Wijesurendra
    Council Member

43. (a) Prof. N.D. Samarawicrama
    Council Member

44. (a) Mr. Janaka Chaminda Warnakula
    Council Member

45. (a) Mr. Gamini Dissanayaka
    Council Member

46. (a) Prof Geri Pieris
    Council Member

2nd to 46(a) Respondents all of University of Peradeniya but 6th ,7th ,8th ,10th,11th ,15th ,16th ,17(a) ,18th, 19(a), 20th, 21st, 22nd, 23rd, 24th, 25th ,26th, 27(c) and 27 are no more present

29. Prof. Lakshman Wijeyaweera
    Faculty of Dental Sciences,
    University of Peradeniya,
    Peradeniya

30. Dr. S.B. Ekanayake.
    University of Peradeniya,
    Peradeniya.

31. University Grants Commission,
    No. 20, Ward Place,
    Colombo 07.

32. Hon. Attorney – General,
    Attorney – General's Department,
    Hulftsdorp Street,
    Colombo 12.

RESPONDENTS

BEFORE : **S. THURAIRAJA, PC, J.**
E.A.G.R. AMARASEKARA, J and
JANAK DE SILVA, J.

COUNSEL : Nihal Jayawardena, PC with Buddhi Kaluthanthri instructed by Nelum Senanayake for the Petitioners.
Suren Gnanaraj SSC for the Respondents.

ARGUED ON : 25th February 2021.

WRITTEN SUBMISSIONS : Respondents on 21st October 2020.

DECIDED ON : 12th November 2021.

S. THURAIRAJA, PC, J.

The 1st Petitioner, N.K. Sooriyabandara (Hereinafter referred to as "the Petitioner") has made the instant application seeking relief in respect of the infringement of his Fundamental Rights guaranteed under and in terms of the Constitution, in the manner hereinafter more fully set out, against the Respondents.

The 1st Respondent is the University of Peradeniya (hereinafter referred to as "the University), the 2nd Respondent is Prof. Upul B. Dissanayake; the Vice Chancellor of the University and the 3rd Respondent is the Deputy Vice Chancellor of the University. The 4th-30th Respondents are parties affiliated with the University, 31st Respondent is the University Grants Commission and the 32nd Respondent is the Hon. Attorney General.

The Petitioners instituted an action at the Supreme Court under Article 126 of the Constitution, through Petition dated 3rd March 2016 against the Respondents claiming that the Fundamental Rights of the Petitioner as guaranteed by Article 12(1) and Article 14(1)(g) of the Constitution have been infringed by the Respondents and further requesting for interim relief suspending the letter of termination of services of the Petitioner as contained in the document marked 'P12' and interim relief restraining the Respondents from evicting the Petitioner from staff quarters until the final determination of the instant case.

The Court was inclined to grant Leave to Proceed for the alleged violation of Article 12(1) of the Constitution. Additionally, the University was agreeable to give an undertaking that they would maintain the status quo to the extent of permitting the Petitioner to remain in the quarters until the final determination of the instant case, which was further extended on the grounds that the Petitioner would pay rent for the same.

The Facts

The Petitioner had joined the University as a Marshal Grade II in September of 2007. Thereafter, the University had published an advertisement internally for the post of Chief Security Officer (CSO) Grade II on the 26th of November 2012 in accordance with the scheme of recruitment. The University received authorization to advertise this post by the University Grants Commission (UGC) by the Commission Circular No.160 dated 26th February 1982, which authorized each University to advertise, hold interviews and to make recommendations to the Commission for the appointments to all posts coming within the purview of Section 71(2)(ii) of the Universities Act No.16 of 1978 (hereinafter referred to as "the Universities Act") , excluding those posts referred to in paragraph (1) of the circular.

Pursuant to the said advertisement, the Petitioner and another applicant were called for an interview on the 26th of April 2013 before a selection committee appointed by the

University Council of the 1st Respondent. However, since neither candidate had performed satisfactorily at the interview, the University had decided to give the Petitioner an acting appointment for a period of 3 months with effect from 15th May 2013.

The selection committee was reconvened in October 2013 to reconsider the qualifications and the experience of the two short listed candidates in order to recommend one of them for a permanent post. At the said meeting, the selection committee had decided to recommend the Petitioner to the Council for the post of Chief Security Officer, initially on an acting basis for a period of 3 months, and on satisfactory completion of the same to appoint him on a permanent basis subject to probationary period of 1 year. This recommendation had thereafter been approved by the Council.

The Petitioner's acting appointment was thereafter extended for a further 3 months, subsequent to which the Petitioner was appointed by the UGC to the post of Chief Security Officer by letter dated 24th August 2014, subject to a probationary period of one year in terms of Section 71(2)(ii) of the Universities Act No.16 of 1978.

The Petitioner functioned in the post of CSO at the University from 15th September 2014 to 3rd March 2015. However, the University had received the following complaints relating to the conduct of the Petitioner as the CSO whilst on probation:

a) Complaint by the Students Union, University of Peradeniya dated 23rd January 2015
b) Complaint by the Proctor of the University of Peradeniya dated 26th January 2015
c) Complaint by Director, Physical Education dated 5th February 2015
d) Complaint by Federation of Peradeniya University Teachers Associations (FPUTA) dated 12th February 2015
e) Complaint by residents Mawalawatta dated 23rd October 2014 regarding the indiscipline of the security officers under the control of the Petitioner.

The Respondents submit that the complaint made by the FPUTA, which is the parent association comprising of all the academics attached to the University of Peradeniya, was tabled before the Council of the University on the 28th of February 2015, where it was decided to send the Petitioner on compulsory leave with full pay pending a preliminary investigation.

As per the Respondents, the Council had thereafter appointed a 3-member committee on 9th May 2015 in order to conduct a preliminary inquiry in connection with the complaints received against the Petitioner. However, the committee could not convene due to prior commitments of two members. As one member, namely Dr. Sugath Gunasekara was reluctant to continue as a member of the panel due to his belief that the investigation should only be conducted by a single member from the staff of the University and not a panel, Professor R.L. Wijeyaweera (hereinafter referred to as the "29th Respondent") was appointed in his place to avoid further delay.

The Committee had thereafter convened for the first time on 6th of August 2015 and had recorded several statements including one from the Petitioner in connection with the complaint lodged by FPUTA on the 12th of February 2015. As per the Respondent all the documents made available to the committee during the investigation including statements made by the witnesses were made available to the Petitioner and the Petitioner was given the opportunity to place his response to the same including the complaints that had been made against him, both orally and in writing.

Further, The Petitioner's probation was also extended to facilitate the preliminary inquiry. Upon completion of the inquiry, the Committee had submitted its report dated 19th November 2015 to the Council of the University along with all the statements recorded and other evidence, including those submitted by the Petitioner.

As per the Respondent, the Committee had made the following findings with regard to the complaints made by FPUTA:

(A) The Petitioner allowed outsiders to use the University pool without approval, during hours when the pool was closed.

i. The Petitioner had not obtained prior approval from the Director, Department of Physical Education to have the pool opened and used by some school children on the 2nd, 3rd, and 4th of February 2015;

ii. The Petitioner had without any authorization used a key at the Chief Security Office and had opened the pool premises and allowed outsiders to use the pool despite objections from the security in charge of the pool;

iii. The Petitioner had allowed outsiders to use the pool on the 2nd of February 2015 from 6.50 pm to 8.45 pm, when the pool was closed as the pool did not possess sufficient lighting to permit night-time swimming;

iv. The Petitioner had transferred the security officer on duty at the Pool on the 3rd of February 2015 to the Department of Management Studies;

v. The Petitioner had thereafter opened the pool on 3rd and 4th of February 2015, which were two public holidays without any approval and had allowed school children to use the pool, without the presence of pool attendants and lifeguards;

vi. The Petitioner had also caused a loss of Rs. 26,000 by permitting outsiders to use the Pool without proper payment to the University.

(B) The Petitioner had inspected Room No.26 at the Arunachalam Hall in the night of the 5th of November 2014 without following the establishment procedure

i. The Petitioner had admitted that he was aware that the procedure to be followed prior to entering a student room was that the Warden and/or the Proctor should be informed, and in their absence the Sub Warden should be informed, and the search party should comprise a Marshal and/or the Proctor or Deputy Proctor and the resident sub-Warden;

ii. The Petitioner admitted that he had failed to inform any of the said persons and instead had entered Room No.26 on the 5th of November 2014 along with 6 other security officers at 2am, with prior notice to the Deputy Vice Chancellor;

iii. The Deputy Vice Chancellor thereafter confirmed that he had not authorized the Petitioner to inspect Room No.26 in the Arunachalam Hall in the contravention of the established procedure.

(C) The Petitioner had brought disrepute to Prof. K. Samarasinghe, Chairman of the Staff Residence Committee at the 118th meeting held on the 14th of November 2014.

(D) The Petitioner had been cautioned on several occasions with regard to his unsatisfactory conduct Chief Security Officer.

(E) The Petitioner had failed to maintain discipline among the security officers under his charge as evidenced by the complaints received from residents of Mawalawatta.

(F) The Petitioner had taken 30 university cloaks on the false pretext of being required for a function at the Dental Faculty.

Accordingly, the Report of the Committee revealed that the complaints made by the FPUTA against the Petitioner were true and were of a very serious nature and the

Committee recommended that the Petitioner should not be confirmed in the post of CSO. This report had thereafter been tabled before the Council on 28th November 2015, which had unanimously decided not to confirm the Petitioner in the post of CSO and accordingly to terminate his services with effect from 28th November 2015 under Section 21:3:1 of Chapter III and Section 6:1 of chapter V of the Establishments Code of the University Grants Commission and higher Educational Institutions.

The decision of the Council had been forwarded to the UGC by letter dated 14th December 2016 for its approval to terminate the services of the Petitioner who was still on probation at the time. In response to the said letter the UGC had informed the University by a letter dated 20th January 2016 that the concurrence of the UGC was not required and that the Council of the University was vested with the authority to terminate the services of the Petitioner.

The Petitioner had finally been informed of the termination of his services by letter dated 10th of February 2016 titled "Termination of service" informing him that the Governing Council has decided in its 448th meeting held on 28th November 2015 that subsequent to the findings of the Fact Finding Committee it was unanimously decided to not confirm him in the position of CSO and to terminate his services with effect from 28th November 2015 under Section 21:3:1 of Chapter III and Section 6:1 of Chapter V of the University Establishment Code of UGC and HEIs.

At this juncture, I find it pertinent to establish the facts as submitted by the Petitioner by the Petition dated 3rd March 2016.

The Petitioner states that during the time period the Petitioner functioned in the post of CSO from 15th September 2015 to 3rd March 2016, he had not received any complaints regarding his performance. The Petitioner states that he later came to know that the Governing Council had decided to hold a preliminary investigation in February 2015 in

respect of the alleged abuse of power by the Petitioner consequent to the complaint made by the FPUTA and that a committee comprising of the 28th, 29th and 30th Respondents were thereafter appointed by the Council for the purpose of this investigation.

The Petitioner states that he had been informed by letter dated 3rd March 2015 that he had been sent on compulsory leave with immediate effect and that a preliminary inquiry would be held in respect of the allegations. The Petitioner further submits that the Respondents failed to hold an inquiry for two months after placing the Petitioner on compulsory leave. The Petitioner states that he complained to the 2nd Respondent by a letter dated 4th May 2015 regarding the failure to record a statement from the Petitioner for a period of two months and had requested for the inquiry to take place at the earliest possible date. The letter also expresses his concern that should the inquiry be further delayed it would exhaust his leave entitlement and compel him to go on no pay leave.

Subsequently, the Petitioner had been given notice by letter dated 17th September 2015 that the probation period was extended until 14th September 2016 under Section 21:1:5 of Chapter III of University Establishment Code, pending the decision of the preliminary inquiry. The Petitioner states that he had neither been warned nor informed of any shortcomings in respect of discharging the duties of the post of CSO.

The Petitioner states that he was asked to appear before the aforementioned Preliminary Investigation Committee in person on 30th September 2015 after lapse of over 6 months from the date of sending the Petitioner on compulsory leave. The Petitioner states that he objected to the 29th Respondent, however, the 28th Respondent had rejected the said objection and proceeded with the inquiry. The Petitioner further submits that the 29th Respondent conducted himself in a very aggressive manner and even threatened the Petitioner during the proceedings of the said Committee. The Petitioner states that he had written to the 2nd Respondent informing him of the unsatisfactory

manner in which the Preliminary Investigation had been conducted and requested the tape recordings of the proceedings to be preserved.

The Petitioner states that after examining the documents that established the alleged charges against the Petitioner, which were in the possession of the said Committee, he had requested another opportunity to make oral representation before the aforesaid Committee. This request had been rejected and he was directed to tender written submissions by letter dated 13th October 2015 which states that the Petitioner may examine all relevant document on prearranged date and time prior to the 20th October 2015 and that he may further submit any facts or evidence before the 27th of October, which will be taken into account by the Committee. In response to the Petitioner's request to make further submissions before the Committee, he was informed by letter dated 16th October that he may make submissions to the Committee in written form prior to the 27th of October. Accordingly, the Petitioner had filed written submissions on 25th October 2015.

The Petitioner states that he later came to know he was found guilty of all charges which were reproduced above. However, the Petitioner states that the charge F regarding the taking of 30 cloaks stating that it is to be used at a function to be held at the Dental Faculty was not a charge levelled against him and as such, he could not place any material before the Committee to prove his innocence.

The Petitioner states that his salary for the month of December was suspended without any notice and when he had requested for the same, he was informed by Bursar's letter dated 18th January 2016 that the Petitioner's salary was suspended with effect from 28th November 2015 consequent to the letter received from the Non-Academic Establishments, which letter had not been annexed to the same.

The Petitioner had thereafter requested the 2nd Respondent to inform him of the reasons for the suspension of salary whereby the Petitioner was informed by the 2nd Respondent that the Governing Council had decided to terminate the services of the Petitioner based on the findings and recommendations of the Fact-Finding Committee with effect from 28th November 2015 under the relevant provisions of the UGC Establishment Code.

The Petitioner further states that as the preliminary inquiry included the 29th Respondent who was a member of the FPUTA that made the purported allegations, it violates rules of natural justice. The Petitioner also states that as the Petitioner was appointed as CSO by the UGC, the Governing Council lacks the authority to terminate his services. Based on the above submissions, the Petitioner claims that his Fundamental Rights guaranteed under Article 12(1) and Article 14(1)(g) of the Constitution have been violated.

Validity of the decision to terminate services

In deciding upon the merits of this case, I find it pertinent to examine the first matter of contention which is the claim by the Petitioner that the Governing Council does not have the authority to terminate the services of the Petitioner as the Petitioner was promoted to the position of CSO by the UGC. I find that this matter has been addressed by the evidence presented to this Court in the form of the letter dated 20th January 2016 sent by the UGC in response to the decision of the Governing Council to terminate the services by the Petitioner. The relevant portion of the letter has been reproduced below for ease of reference:

> *"This is in reference to your letter dated 14.1.2015 seeking concurrence of the UGC to terminate the services of Mr. N K Sooriyabandara, Chief Security Officer attached to your University.*

In this regard, I would like to draw your kind attention to the direction laid down in the 2nd proviso of Section 75 of the Universities Act No.16 of 1978, the Governing Authority has the power over holder of any post at its employment at any time be suspended, dismissed or compulsory retired. On the other hand, in terms of Section 45(2)(xii), the Council can suspend, dismiss or otherwise punish persons in the employment of a University.

Therefore, concurrence of the UGC is not needed to be acquired in the case of Mr. N K Sooriyabandara Chief Security Officer since the Council, University of Peradeniya is vested with the required authority"

For the purposes of determining the validity of the dismissal of the Petitioner, the relevant sections of the Universities Act must be examined. Section 75 concerns the retirement of persons other than teachers. In terms of suspension or dismissal of such persons, subsection 2 states as follows:

(a) the Commission or ***the governing authority of any Higher Educational Institution to which the holder of such post is attached*** *or in the case where such person is attached to a Higher Educational Institute, the governing authority of the Higher Educational Institution to which such institute is affiliated* ***may based on the recommendations of the Institute suspend the holder of such post pending an inquiry by the*** *Commission or such* ***governing authority or the Institute, as the case may be****, for misconduct, inefficiency or dereliction of duty; or*

(b) ***where such holder of post is found guilty after such inquiry,*** *the Commission,* ***the governing authority of the Higher Educational Institution to which such person is attached*** *or in the case where such person is attached to a Higher Educational Institute, the governing authority*

of the Higher Educational Institution to which such Institute is affiliated, as the case may be, ***may on resolution adopted by*** *the Commission or* ***the governing authority of the relevant Higher Educational Institution, dismiss or compulsorily retire the holder of such post.***

(Emphasis added)

In addition to the above, Section 45 of the Universities Act specifies the powers of a Council of a University and includes in Section 45(2) that a Council may exercise, perform, and discharge the powers, duties and functions pertaining to specific matters, including the following:

(xii) to appoint persons to, and to suspend, dismiss or otherwise punish persons in the employment of, the University:

Based on the above, The Governing Council of the University as the governing authority is indeed authorized to suspend, investigate, and terminate services of the Petitioner. As such, the University has followed an extra step of reaching out to the 30th Respondent for the termination of the services of the Petitioner.

I must also note that it is unreasonable to expect the UGC to intervene in all matters regarding dismissal of all employees of universities. It is impractical given the sheer number of persons employed by universities around the country and it would be an extremely inefficient mechanism that also undermines the authority exercised by each individual university over their respective employees. Considering all, the response of the UGC is correct according to the law applicable.

This was evidenced by Order of the Court of Appeal of case **K.G. Eranda Wijesiri v University of Kelaniya CA/WRIT/App No.756/2007 in minutes dated 15.10.2010**, in which a similar matter concerning a petitioner who was attached to the University of Kelaniya in the position of CSO. The university conducted a preliminary investigation

following which the university decided to interdict the petitioner of said case. The petitioner sought a writ of certiorari quashing the relevant charge sheets and prohibiting the proceedings of the disciplinary inquiry. In addressing the petitioner's challenge that the university was not the disciplinary authority upon whom the power to terminate his services was vested, the Court of Appeal assessed Section 8(1), Section 45(2)(i)(ix), Section 71(2) and Section 75, all of which are relevant to the instant case. The Learned Justice S. Sriskandarajah came to the conclusion that when an officer is attached to a Higher Educational Institution, the governing authority of said Institution has the power to deal with the officer on disciplinary matters.

Upon perusal of the above case, I find that in the instant case I am of the same view as the views expressed by the Court of Appeal in the above case, following careful examination of the same provisions pertaining to the specific circumstances of the instant case.

I am of the view that the above explanation sufficiently addresses the concern in confirming that the Governing Council was vested with the authority to come to the decision of terminating the services of the Petitioner

Violation of Rules of Natural Justice

While the Governing Council of the University is vested with the authority to conduct an inquiry and to terminate the services of the Petitioner, the exact manner in which the inquiry was conducted must be examined due to the concerns raised by the Petitioner. In terms of the inclusion of the 29th Respondent as a member of the Committee, the Petitioner raised the concern that the principles of Natural Justice have been violated. This is given that the 29th Respondent is a member of the FPUTA, which is the party that requested for a disciplinary inquiry in respect of alleged abuse of power by the Petitioner.

In assessing the Report of the Fact-Finding Committee (annexed as "P9" of the record), the Committee seems to have considered witness statements and available records in coming to a unanimous decision. The Report recommends that the petitioner should not be confirmed in the post of CSO. It must be further noted that the Governing Council, in arriving at the decision to terminate the Services of the Petitioner at its 448th Meeting (the minutes of which has been annexed as "1R14" of the record), has referred exclusively to the report of the fact-finding committee and the recommendations available in the same.

As the sole consideration in the decision to terminate the services of the Petitioner was based on the findings of the Fact-Finding Committee, I find it pertinent to examine whether the rules of Natural Justice have been violated by the inclusion of the 29th Respondent as one of the Committee members.

As expounded upon in the case of **R. v. St Edmundsbury BC ex p. Investors in Industry Commercial Properties Ltd. (1985) 1 WLR 1168,** it is an accepted fact that in terms of administrative decision, a standard of bias similar to that of judicial decisions must be followed.

This Court recognizes that personal relationships, business interests, political affiliations may give rise to reasonable suspicion or a real danger of bias. The standard required of bias in situations similar to that of the instant case can be found upon examination of **Allison v. General Council of Medical Education and Registration (1894) 1 QB 750** which referred to the decision given in **Leeson v Council of Medical Education and Registration [1889] 43 Ch D 366.**

In determining bias, the test that is presently applicable is the real likelihood test which is based on the operative principle that justice must not only be done but must be seen to be done. In **R. v. Gough (1993) 2 All ER 724** Lord Goff held as follows

"I think it is possible, and desirable, that the same test should be applicable in all cases of apparent bias, whether concerned with justices or other members of inferior tribunals, or with jurors, or with arbitrators…Furthermore, ***I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man;*** *and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time.* ***Finally, for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias.*** *Accordingly, having ascertained the relevant circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly be regarded (or have unfairly regarded) with favour, or disfavor, the case of a party to the issue under consideration by him."*

(Emphasis added)

In this case Lord Goff also held that,

"it is not necessary that actual bias should be proved…the inquiry is directed to the question whether there was such a degree of possibility of bias on the part of the tribunal that the court will not allow the decision to stand".

In furthering the above, the Court of Appeal case of **Re Medicaments and Related Classes of Goods (No. 2) (2001) 1 WLR 700,** states as follows:

"The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those

circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased."

This reformulation of the test in **R. v. Gough** was approved by the House of Lords in **Porter v. Magill (2002) 2 AC 357**.

In applying the above views to the instant case, It is my view that in terms of assessing bias based on personal interest, it is apparent that the 29th Respondent has no pecuniary interest in this matter. Nevertheless, this Court recognizes that personal relationships, business interests, political affiliations may give rise to reasonable suspicion or a real danger of bias. As was understood in the case of **Allison v General Council of Medical Education and Registration**, not all such affiliations lead to the same conclusion. In this case**,** the Court of Appeal of England considered the fact that the member in question had resigned from the organization 2 months prior to the complaint having been made in deciding that there was no such danger of bias. However, in the present dispute, the 29th Respondent continued as a member of the FPUTA throughout the period of the inquiry.

While this does not amount to actual bias, the circumstances as it stands does not aid the appearance of justice being done as it may indicate a danger of bias on the part of the 29th Respondent. However, I am in no means disregarding the severity of the allegations levelled against the Petitioner and the fact that the Petitioner was acting in the capacity of a probationer.

Decision

While it is not contested that the Respondent is entitled to terminate the services of the Petitioner during the probationary period, based on the consideration above, it is apparent that the decision by the Respondents is based on the inquiry by the Preliminary

investigation committee. As enumerated above I am of the view that the manner in which the inquiry was conducted is in contravention with rules of Natural Justice.

As such, upon careful examination of all relevant facts and circumstances of the instant case, I declare the Fundamental Rights of the Petitioner as guaranteed by Article 12(1) of the Constitution have been infringed. I further declare that the termination of services of the Petitioner as contained in P12 is null and void and has no force or avail in law. However, considering the nature of the gravity of the allegations against the Petitioner, the Respondents are free to take appropriate action. I order no costs.

Application allowed.

JUDGE OF THE SUPREME COURT

E.A.G.R. AMARASEKARA, J

I agree.

JUDGE OF THE SUPREME COURT

JANAK DE SILVA, J.

I 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

Sriyanee Dhammika Kumari Semasinghe,
424/16, Samagi Mawatha, Hokandara.

Petitioner

SC /FR/ Application No. 83/2018

Vs,

1. Mr. Dharmasena Dissanayaka, Chairman,
2. Mr. A. Salam Abdul Waid, Member
2a. Prof. Hussian Ismail, Member
3. Ms. D. Shirantha Wijayatilaka, Member
3a. Ms. Sudarma Karunarathna, Member
4. Dr. Prathap Ramanujam, Member
5. Mrs. V. Jegarasasingam, Member
6. Mr. Santi Nihal Seneviratne, Member
6a. Mr. G. S. A. de. Silva P.C, Member
7. Mr. S. Ranugge, Member
8. Mr. D. L. Mendis, Member
9. Mr. Sarath Jayathilaka, Member
10. Mr. H. M. Gamini Seneviratna, Secretary,
10a. M. A. B. Daya Senarath, Secretary,
11. H. A. D. C. Jayasekera,
Senior Assistant Secretary,

The 1st to 11th Respondents of;
Public Service Commission,
No. 1200/9, Rajamalwatte Road, Battaramulla.

12. Mr. Sarath Dissanayake,
Director General Overseas,
Administration Division.

12a. Mr. M. K. Pathmanathan,
Additional Director General.

13. Mr. Prasad Kariyawasam, The Secretary,
13a. Mr. Ravinatha Aryasinha, The Secretary,
13b. Admiral Prof. Jayanath Colombage,
Secretary, Foreign Ministry

The 12th to 13th Respondents of;
Ministry of Foreign Affairs,
The Public Building, Colombo 01.

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

Respondents

Before: **Justice Vijith K. Malalgoda PC**
Justice Mahinda Samayawardhena
Justice Arjuna Obeyesekere

Counsel: **Uditha Egalahewa PC with Pulasthi Hewamanne for the Petitioner**

Viveka Siriwardena DSG for the Attorney General

Argued on: **16.07.2021**

Judgment on: 15.12.2021

Vijith K. Malalgoda PC J

Petitioner Sriyanee Dhammika Kumari Semasinghe an officer belonging to Grade II of the Sri Lanka Foreign Service (hereinafter referred to as SLFS) had complained before this court, the failure by the Respondents to appoint her to Grade I of the SLFS in violation of her Fundamental Rights guaranteed under Articles 12 (1) and 14 (1)g of the Constitution. On 04.07.2018 this court granted leave to proceed on the above alleged violations.

As submitted by the Petitioner, she was recruited to the SLFS as an Assistant Director Grade III on or around 18/04/1996 after an open competitive examination. The Petitioner was placed 3rd on the merit list.

Thereafter she was posted to several positions in foreign missions as well as in the Foreign Ministry and at the time she filed the instant application before this court she was attached to the Foreign Ministry as Acting Director General of the European Union (Bilateral), Russia and other CIS, and the Caribbean and Counter Terrorism Unit, holding the substantive post of Director Grade II.

Even though the Petitioner was placed No.3 on the merit list, when she was recruited as an Assistant Director Grade III in the year 1996, (she refers to this as 1996 batch) most of the batchmates in the 1996 batch are now promoted to Grade I of the SLFS and some of them are holding positions as Ambassadors in various countries. However, the Petitioner was denied of the promotion to Grade II until 2015 and as revealed before us, in the year 2015 the Petitioner came before the Supreme Court to secure her promotion to Grade II of SLFS. (SC FR 393/2015)

The said matter before the Supreme Court was concluded when the Petitioner was granted the relief by the Respondents and the Journal Entry dated 11.08.2016 reveals the outcome on that day as follows;

> "The learned Senior State Counsel submits to court that the Petitioner had been granted the promotion and promoted to Grade II of the Sri Lanka Foreign Service with effect from 18.04.2006. The learned Senior State Counsel also Submits that the Petitioner's salary had been computed commensurate with the promotion granted to her and also arrears had been paid.
>
> However, learned President's Counsel for the Petitioner submits that some of the payments had not been paid yet. Learned President's Counsel further submits that the Petitioner is willing to withdraw this application if the foreign Ministry is directed to ensure her dues are expeditiously paid.
>
> The 4th Respondent is directed to ensure, through the 3rd Respondent, that all dues and entitlements of the Petitioner are paid expeditiously.
>
> Application to withdrawal is permitted. Application is proforma dismissed."

As revealed before us, the main reason for the delay in granting the promotion to the Petitioner at that stage was the Petitioner's failure to fulfill the Efficiency Bar requirements as stipulated in the service minute of SLFS 2001, and it is relevant at this stage to consider the factual Metrix, for this court to come to a correct finding.

As already discussed, the Petitioner had joined the SLFS as an Assistant Director Grade III in the year 1996, she was placed No. 3 in the merit list. The said recruitment was based on the SLFS service minute published in Gazette extraordinary 842/8 dated 25.10.1994 and the said Service Minute had been revised in 2001 by the Minute published in Gazette extraordinary 1168/17 dated 24.01.2001.

The first promotion to which the Petitioner would be eligible, both under the service minutes published in 1994 and 2001 was the promotion from Grade III to Grade II and the officer should complete 10 years satisfactory service to become entitled to the said promotion. Therefore, the scheme that was relevant for the Petitioner's first promotion was the minute that was published in 2001.

Clause 7 of the said Service Minute refers to the promotions as follows;

7 promotions

Scheme of promotion;

7.2.I. Promotion form Grade III to Grade II - The criteria for promoting a SLFS officer from Grade III to Grade II shall be as follows;

(i) The officer should have completed 10 years satisfactory service in Grade III

(ii) The officer should have completed the second Efficiency Bar Examination before reaching the salary step of Rs. 116,400 and the Third Efficiency Bar, and the other official and link language requirements before reaching the step of Rs. 135,300 on the Grade III scale.

(iii) The officer should have reached the salary step of Rs. 135,300 on the Grade III scale.

Even though the Petitioner had completed the first Efficiency Bar Examination as per Chapter III Clause 4 of the 1994 service minute, she was not been able to fulfill the Efficiency Bar requirement by completing the second Efficiency Bar Examination as per Clause 7:2: I referred to above. Whether the Petitioner had fulfilled the above requirement was unsolved, even at the time she came before this

court in 2015 in SCFR 393/2015, and an appeal submitted by the Petitioner on 30.10.2014 to the 10th Respondent Secretary Public Service Commission (1R6) and the subsequent correspondence between the 10th Respondent, 13th Respondent and the Petitioner confirms this position. (1R7, 1R8, 1R9, 1R10, 1R11)

As recorded before the Supreme Court on 11.08.2016, the decision of the Public Service Commission to promote the Petitioner to Grade II with effect form 18.04.2006 was a result of several decisions, by the said Commission taken in favour of the Petitioner and if I summarize the reliefs granted to the Petitioner by the said commission as evinced from the documents referred to above, reads as follows;

1. Extend the grace period from 18.04.2003 to 02.12.2003 (up to the seventh Efficiency Bar since 02.09.1996)
2. Further extend the grace period from 02.12.2003 to 27.04.2007
3. Since the Petitioner could not sit for the Efficiency Bar Examination conducted on 27.04.2007 due to a reason beyond her control and she passed the said examination on the subsequent examination held on 30.05.2009, to consider that she got through the said examination on 27.04.2007.

Based on the decisions reached above, the Public Service Commission had decided to grant the promotion of the Petitioner from Grade III to Grade II with effect from 18.06.2006 and the said decision was officially communicated to the 13th Respondent on 20.05.2016 and was also communicated to the Supreme Court through the Attorney General on 11.08.2016.

The grievance Petitioner complains before this court in the instant application, refers to the next promotion the Petitioner was entitled, and in this regard our attention was drawn to Clouse 7.2.2. of the service minute published in 2001 by the learned President's Counsel. The said Clause reads thus;

7.2.2 Promotion from Grade II to Grade I –

The criteria for promoting a SLFS officer form Grade II to a vacancy in Grade I will be that the officer should have completed 6 years satisfactory service in Grade II.

As revealed before us, when the Petitioner was granted the promotion from Grade III to Grade II by letter dated 20.05.2016, to be operative from 18.04.2006 the Petitioner was qualified to receive the next promotion under the above Clause, since by that time she had already completed six years

satisfactory service in Grade II. In the said circumstances Petitioner wrote to the 13th Respondent to take steps to grant her the promotion to which she is already entitled.

As further submitted by the Petitioner, by backdating her promotion to Grade II with effect form 18.04.2006, on which day the 1996 batch completed the 10 years satisfactory service, she maintained the same seniority in her batch and therefore was entitled to be promoted to the next grade maintaining the same seniority.

The above position maintained by the Petitioner was conveyed to the Respondents by the Petitioner and the response she received from the Respondents were explained as follows;

a) That by letter dated 11.07.2016, the Ministry of Foreign Affairs notified the Petitioner of adjusting her salary and payments of arrears from 2003 onward (P6a)
b) That in the absence of any positive steps from the Ministry of Foreign Affairs with regard to her promotion which is overdue, wrote to the Secretary, Foreign Affairs on 27.04.2017
c) That the Petitioner had submitted an appeal to the Public Service Commission through Secretary of Ministry of Foreign Affairs on 18.07.2017, requesting the Commission to grant her promotion which is pending before the Commission for nearly one year (P-6d)

   In paragraphs 6-13 of the said appeal, the Petitioner explains her grievance as follows;

   6. Due to administrative lapses, my due promotion from Grade III to Grade II of the SLFS was delayed for nearly 10 years from the date of such promotion, which was 18 April 2006. As a result, I was compelled to file the above captioned SC (FR) application to seek natural justice.

   7. That application was settled on 11th August 2016 on the basis **that my promotion to Grade II SLFS be reinstated retroactively on 18 April 2006 without loss of seniority just as the other officers in the SLFS batch of 1996**. My salary too, was to be computed commensurate with the promotion granted to me with due arrears to be so awarded.

   8 Further, the Seniority List of the Sri Lanka Foreign Service needs to reflect the above retroactive promotion/reinstatement, i.e. I should be **reinstated as number 3 in the seniority list of the SLFS officers recruited in 1996**.

9. As you are aware, my colleagues in the SLFS batch of 1996, have been promoted to Grade I with effect from on or around December 2012 (i.e., on successful completion of six (6) years of satisfactory service *vide* 7.2.2. of the *Sri Lanka Foreign Service Minute (2001) published in Gazette Extraordinary* dated 24.01.2001)

10. SLFS Officers in the 1996 batch are currently serving as Ambassadors/High Commissioners abroad.

11. To the best of my knowledge, a revised seniority list, as at 5 May 2017 given to me by the Overseas Administration Division, reflects my seniority as number 1 under SLFS Grade II and not parallel to my batch of 1996 (ANNEX 'B'). Further, I have been placed at the basic salary of 57,781.00 as at June 2017.

12. I have completed 6 years of the requisite satisfactory service earning increments up until 18 April 2013 as per sub section 7.2.2. in the SLFS Minute 2001 ("*promotion from Grade II to Grade I*")

13. Therefore, **concomitant** with the Supreme Court decision and the retroactive reinstatement of my seniority and promotion to Grade II in the SLFS on 18 April 2006 and given that my promotion to Grade II on 18 April 2006 was delayed due to administrative lapses (*not holding EB exams twice a year as prescribed by SLFS Minute2001 and failing to forward Grade II promotion appeals addressed to the PSC by the Ministry*) on the part of Ministry, the subsequent promotion to Grade I on 3 September 2013 after completion of 6 years of satisfactory service should, therefore, be effected **retroactively** on the date **vacancy became available, i.e. on 3 September 2013.**

d) Even though the Petitioner had not received any response to the appeal, the decision of the Public Service Commission to the effect "එස්. ඩී. කේ. සේමසිංහ මෙනවිය ශ්‍රී ලංකා විදේශ සේවයේ නව සේවා ව්‍යවස්ථාවේ 10.2.1 වගන්තියෙහි (V) හි සඳහන් පශ්චාත් උපාධි සුදුසුකම හැර අනෙකුත් සියලුම සුදුසුකම් සපුරන්නේ නම් 2015.10.13 දින සිට ශ්‍රී ලංකා විදේශ සේවයේ I ශ්‍රේණියට උසස් කළ හැකි බව රාජ්‍ය සේවා කොමිෂන් සභාව විසින් තීරණය කර ඇති බව එහි නියමය පරිදි දන්වා ඇත." was conveyed to the Petitioner by letter dated 23.08.2017 by the head of her division in the Foreign Ministry (P6-e)

e) Petitioner being dissatisfied with the said decision submitted another appeal on 21.09.2017 to the Public Service Commission and in the said Appeal the Petitioner re-iterate the following;

"e" The **basis of the current PSC decision** (*date of promotion as 13th October 2015*) is not clear, as the above date of promotion places **me below <u>two SLFS batches</u> (1996 and 1998, respectively)**. This is especially troubling **when the Ministry itself had placed me as number I under Grade II in its revised Seniority List as at 05.05.2017 (Annex "E")**

"f" As you may be aware, due to administrative lapses, my due promotion from Grade III to Grade II of the SLFS was delayed for nearly 10 years from the date of such promotion, which was 18 April 2006. As a result, I was compelled to file the **<u>SC FR Application No. 393/2015</u>** to seek natural justice.

"g" The **Supreme Court petition was decided on 11 August 2016 my promotion to Grade II in the SLFS was made effective retroactively form 18 April 2006 and without loss of seniority on the basis of relevant provisions of the 2001 SLFS minute**. I was placed number 3 on the merit list at the recruitment to the SLFS on 18 April 1996.

"h" Further according to IA of the 2016 SLFS Minute, the new minute "shall substitute without prejudice to any steps taken or purported to have been taken in terms of the provisions as per the Sri Lanka Foreign Service Minute… Dated 24th January. 2001 of the …" (Annex 'F')

"I" On the same basis as above (g. and h.) **my promotion to Grade I in the SLFS, should also be <u>considered under the 2001 SLFS Minute and retroactively granted in September 2013 between the dates 17.05.2013 and 03.09.2013</u>** (*date of promotion to Grade I of number 2 and number 4 on the merit list SLFS 1996*)

after completion of 6 years of satisfactory service under the 2001 SLFS Minute.

f) That the decision of the Public Service Commission on the said appeal was communicated to the Ministry of Foreign Affairs by letter dated 28.11.2017 (P-8) and the said decision was conveyed to the Petitioner by the head of her division by his letter dated 05.12.2017 (P-7)
In the new decision the Public Service Commission had ruled that;

> "එස්. ඩී. කේ. සේමසිංහ මෙනවිය, පැරණි විදේශ සේවා ව්‍යවස්ථාව අනුව 2013.09.03 දිනට ශ්‍රී ලංකා විදේශ සේවයේ වසර 6ක සතුටුදායක සේවා කාලයක් සම්පූර්ණ කර තිබුණ ද, එදිනට එම සේවයේ I වන ශ්‍රේණියේ පුරප්පාඩු නොමැති වීම හේතුවෙන් සහ එදිනට අදාළව අධිසේවක පදනමින් තනතුරක් ඇතිකිරීම කළමනාකරණ සේවා දෙපාර්තමේන්තුව මගින් ප්‍රතික්ෂේපකර තිබීම හේතුවෙන්, එස්. ඩී. කේ. සේමසිංහ මෙනවිය 2015.10.13 දින සිට විදේශ සේවයේ I වන ශ්‍රේණියට උසස් කිරීමට හැකි බව"

g) The Petitioner being dissatisfied with the said decision of the Public Service Commission had first complained to the Human Rights Commission and later filed the instant application before this court

h) That by letter dated 12.03.2018 foreign Secretary (13th Respondent) once again wrote to the Public Service Commission requesting their intervention to find an alternative solution to resolve the issue of promoting the Petitioner without affecting her seniority, but by the time the said appeal was submitted, the instant application was pending before this court.

On behalf of the Petitioner, it was argued that the Respondents cannot simply reject the request by the Petitioner informing that there is no vacancy in Grade I, when in fact there was a vacancy in Grade I of SLFS on 03.09.2013 and the person who was placed below her on the merit list was granted promotion on that day. The Petitioners further submitted that the Public Service Commission too had acknowledged this fact in its letter dated 28.11.2017 (P-8 and 1R4) and therefore the Petitioner was entitled to be promoted to Grade 1 under the service minute that was issued in the year 2001.

The Petitioner has further submitted that,

> "the Public Service Commission has an obligation to promote officers 'on due time' in accordance with the Service Minutes and back date a grade-to-grade promotion where the

delay in promotion was due to unavoidable circumstances and due to no fault of the officer concerned" (PSC Rules 184,188)

and argued that the objection by the Department of Management Service to create a supernumerary post cannot be a reason for the Public Service Commission to neglect its constitutional obligations.

In this regard the Petitioner relied on the decisions by this court in ***Chief Inspector W.A.J.H. Fonseka and Others Vs. Neville Piyadigama and Others, SC (FR) 73/ 2009 SC Minute dated 08.09.2020, Jayawardena Vs. Dharani Wijethilake [2001] 1 Sri LR 132.***

As against the above Position taken up by the Petitioner, the Respondents, whilst raising several preliminary objections to the maintainability of the instant application, had objected to the grant of any relief. It was the position of the Respondents, that the Applicant is not entitled to maintain the instant application for the reason that;

a) The application is filed out time
b) The necessary parties are not before the court

When raising the above objection, the learned Deputy Solicitor General relied on the material submitted on behalf of the Respondents before this court and therefore it is necessary to first consider the material placed on behalf of the Respondents. In the said circumstances, I will first consider the merits of the case and will consider the preliminary objections at appropriate stages.

In his affidavit filed before this court, the 1st Respondent had submitted the following;

a) Recruitment and promotion in the SLFS is governed by the Provisions of the Service Minute of SLFS and according to the said minute issued on 24.01.2001 it was a requirement for the Petitioner to have passed the second Efficiency Bar within 7 years of her recruitment i.e. by 18.04.2003
b) Petitioner could not complete the second Efficiency Bar within the stipulated period but completed it only on 30.05.2009
c) However, the Petitioner was not eligible to be promoted to Grade II when she completed the second Efficiency Bar, under the Provisions of the Service Minute of SLFS

d) The Petitioner made use of a Public Service Commission Circular issued in the year 2014 (Circular 01/2014) to obtain relief in order to complete Efficiency Bar requirement and submitted an appeal to the Public Service Commission on 30.10.2014

e) In the said appeal the Petitioner admits the lapse on her part in paragraph 3 as follows;

> "3. I have completed eighteen years (18) and six (6) months in the SLFS as at October 2014. However, my promotion to SLFS Grade II has been delayed due to non-completion of <u>one subject</u>, <u>Administration and Office Methods, under EB II by April 2003</u>, the stipulated period from April 1996 for completion of the Second EB"

f) The Petitioner had pleaded for a grace period for completion of her Efficiency Bar requirement in paragraph 4 as follows;

> "4. I am appealing for a retroactive grace period for the completion of Administration and Office Methods, the EB II requirement, on the basis of the Public Service Commission Circular No. 01/2014 issued on 31 January 2014"

g) Whilst considering the above appeal, Public Service Commission had granted several concessionary reliefs to the Petitioner including

i. Extend the grace period form 18.04.2003 to 02.12.2003

ii. Further extend the grace period form 02.12.2003 to 27.04.2007

iii. To consider that the Petitioner got through EB II on 27.04.2007 when in fact she sat for the examination on 30.05.2009

and finally granted the promotion to Grade II on 20.05.2016 to be effective form 18.04.2006

h) The other batchmates who completed the Efficiency Bar requirement within the stipulated period were eligible to be promoted to the next Grade and they were granted promotions under Clause 7.2.2 when there were vacancies in Grade I

i) When the Petitioner become eligible after receiving several concessionary reliefs from the Public Service Commission, several of her batchmates including some, who were placed below her in the original merit list were promoted based on the provisions of the service minute that was in operation at that time,

j) However, the Petitioner appealed to grant her the next promotion (promotion to Grade I) from a date between 17.05.2013 and 03.09.2013 in order to maintain her seniority but in the

absence of any cadre vacancy in SLFS Grade I, the Public Service Commission could not grant the said promotion to the Petitioner.

k) The question of creating a supernumerary vacancy retrospectively, was turned down by the Department of Management Services during a meeting between the Foreign Ministry, Department of Management Service and Public Service Commission since that was against Regulation 70 of the Financial Regulations (1R 16)

l) A new service minute was introduced to SLFS on 06.12.2016 and the said Service Minute was operative from 12.10.2015 (Clause 01)

m) Officers in SLFS were absorbed under the new Service Minute and accordingly the Petitioner too was absorbed to Grade II of SLFS with effect from 12.10.2015

n) The Public Service Commission had decided to promote the Petitioner to Grade I of SLFS with effect from 13.10.2015 as per the provisions of the New Service Minute and it is the said decision the Petitioner had challenged in the instant application claiming that she is entitled to be promoted with effect from 03.09.2013 and not with effect from 13.10.2015

When considering the position taken up by the 1st Respondent before this court, it is clear that the Petitioner when submitting an appeal to the Public Service Commission on 30.10.2014 concede that the delay in promoting her to Grade II was due to non-completion of one subject under Efficiency Bar II and appealed for a grace period for the completion. The said request had been made under a Public Service Commission Circular issued in the year 2014. In these circumstances it is clear that, even though the Public Service Commission had finally granted the promotion to Grade II with effect from 18.04.2006, question of granting the next promotion was unsolved and the Petitioner was not considered as a person who has fulfilled the necessary requirements to be promoted to Grade II of SLFS by the end of year 2014. However, some of her batchmates including the 2nd and the 4th persons in the merit list were promoted to Grade I, by the beginning of the year 2014, based on the available vacancies, and by that time the Petitioner's promotion to Grade II was not finalized.

In the said circumstances, it is observed that the submission by the Petitioner to the effect that she maintained her position in the seniority by backdating the promotion to 18.04.2006 cannot be accepted for the reason that some of her batchmates had already promoted to Grade I when the said promotion was granted to her.

As already referred to in this judgment, SC FR 393/2015 was concluded before the Supreme Court when the state informed court that the Petitioner's promotion from Grade III to Grade II had been

granted to her and therefore the petitioner was permitted to withdraw the said case by court. However, when the petitioner appealed to the Public Service Commission seeking the promotion to Grade I, whilst referring to the said case the Petitioner had submitted.

> "The application was settled on 11th August 2016 on the basis that my promotion to Grade II SLFS be reinstated retroactively on 18th April 2006 without loss of seniority just as the other officers in the SLFS batch of 1996." (Appeal dated 18.07.2017 – P6D)

Once again, she referred to the said case in her appeal against the decision of the Public Service Commission which was communicated to her on 23.08.2017 as follows;

> "The Supreme Court petition was decided on 11th August 2016 and my promotion to Grade II in the SLFS was made effective retroactively form 18th April 2006 and without loss of seniority on the basis of relevant provisions of the 2001 SLFS minute." (Appeal dated 21.09.2017 P6-h)

However, the said position taken by the Petitioner cannot be considered as correct, in the absence of any reference to that effect in the Journal Entry dated 11.08.2016 in SC FR 393/2015.

The Petitioner insisted that her promotion to Grade I should be considered under the Service Minute that was introduced in the year 2001. However, Clause 7.2.2 which refers to the promotion form Grade II to Grade I was very specific, that the promotion from Grade II to Grade I can only be effected if there is a vacancy in Grade I. As submitted by the Respondents before this court, when the Petitioner was granted the promotion on 20.05.2016 to operate retrospectively from 18.04.2006, and when six years satisfactory period is calculated since then, she becomes eligible to be promoted to Grade I by 03.09.2013 but, there were no vacancies available in order to grant her premotion under the said Service Minute.

Public Service Commission in its decision dated 28.11.2017 had admitted this position. Even though the Petitioner was silent on all efforts by the Public Service Commission as well as the Foreign Ministry to create a supernumerary vacancy, that too was failed since the Financial Regulation does not permit to do so.

Even though the Petitioner had repeatedly referred to the fact that there were administrative lapses on the part of the Public Service Commission in refusing her due promotion, she had failed to establish a single lapse on the part of the Public Service Commission but as she had admitted in her own appeal dated 30.10.2014 submitted to the Public Service Commission, that her promotion to SLFS Grade II has

been delayed due to the non-completion of one subject, Administration and Office Methods, under Efficiency Bar II by April 2003 and the said lapse on the part of the Petitioner had created a situation where the Public Service Commission could not help the Petitioner to grant the Promotion to Grade I of SLFS for the reasons referred to above.

Petitioner's argument that the Department of Management Service had no power to grant final approval to create new cadre vacancies based on the decision in the case of Chief Inspector ***W.A.J.H. Fonseka and others Vs. Neville Piyadigama and others*** should be looked into in the light of the decision of this court, in the case of ***C. W. Mackie & Company Ltd. Vs. Hugh Molagoda,*** **Commissioner General of Inland Revenue and others** to the effect, "…….. the equal treatment guaranteed by Article 12 is equal treatment in the performance of a lawful act. Via Article 12, one cannot seek the execution of any illegal or invalid act. Fundamental to this postulate of equal treatment is that it should be referable to the exercise of a valid right, founded in law in contradistinction to an illegal right which is invalid in law. I respectfully agree with what the court said in ***Venkata Subbiah Shetty Vs. Bangalore Municipality,***

> "Article 14 (corresponding to our Article 12) cannot be understood as requiring the authorities to act illegality one case, because they have acted illegality in other cases."

As revealed before us a special meeting was convened to discuss the issue of creating a supernumerary vacancy in Grade I of the SLFS in order to grant the promotion to the Petitioner between the Foreign Ministry, Public Service Commission and the Department of Management Service and at the said meeting it was revealed that the financial Regulation 70 does not permit the Department of Management Service to recommend creating such vacancy.

In this regard, I would like to consider the relevant provisions in the Financial Regulation which reads as follows;

Regulation 70 Creation of posts may be done following the procedure laid down in F.R. 71. No posts shall be created with retrospective effect extended back to lapsed financial years.

As observed by me, Regulation 71 provides the procedure that should be followed when creating posts, cadre, scales of salary during a financial year and Regulation 70 does not permit such creation for a lapsed financial year. Any Government Officer is bound to follow the above Regulation and he cannot be compelled to violate such Regulation.

Petitioner's argument that there was a vacancy in Grade I of SLFS as at 03.09.2013 and the vacancy could have been filled by appointing the Petitioner under 2001 Service Minute maintaining the seniority, should be looked in the light of the second preliminary objection raised on behalf of the Respondents.

When raising a preliminary objection, Respondents argued that the Petitioner had failed to add necessary parties and therefore the application of the Petitioner should be dismissed inlimine.

Requirement of having necessary parties before court was considered by this court under several jurisdictions of this court and in the case of ***Don Shelton Hettiarachchi V. Sri Lanka Ports Authority and Others (2007) 2 SLR 307*** question of non-inclusion of all the parties who would be affected in an application filed under Article 126 was considered by Shirani Bandaranayake J (as she then was) and held that, "It was therefore an essential requirement that the parties, who were necessary to this application, should have been brought before this court and the Petitioner had not adhered to this requirement"

As already discussed by me, the Petitioner's promotion to Grade II was delayed due to non-completion of one subject under Efficiency Bar II by April 2003, until several concessions were considered under Public Service Commission Circular issued in 2014. By this time several members of the 1996 batch including the 2nd and 4th persons in the merit list were promoted to Grade I. In these circumstances it is clear that there are members in Grade I of the SLFS, who were promoted to Grade I during this period, when they fulfilled the necessary requirements within the stipulated period under the relevant Service Minute and their appointments would be affected by the appointment of the Petitioner with effect from 03.09.2013 as submitted by the Petitioner. In the said circumstances, those who were promoted to Grade I of SLFS between 03.09.2013 and 13.10.2015 are necessary parties to the instant application. The Petitioner should have been brought them before this court and had failed to adhere to this requirement.

Service minute of the SLFS was once again replaced in the year 2016 and the said Service Minute was to operate from 12.10.2015. All members of the SLFS were to be absorbed under Clause 14 of the new Service Minute to their respective grades with effect from 12.10.2015, the effective date of the Service Minute.

In the said Service Minute, promotion from Grade II to Grade I was identified under Clause 10.2.1 as follows;

10.2.1. Requirement to be completed;

i) should have completed at least seven (07) years active and satisfactory service in Grade II Service category and earned seven (07) salary increments.

ii) Should have passed the second Efficiency Bar examination on the due date.

iii) Should have completed a period of satisfactory service during the preceding five (5) years from the date of gaining eligibility for promotion.

iv) Should have shown a satisfactory or a higher-level performance during the preceding seven (7) years of gaining eligibility for promotion.

v) Should have obtained a postgraduate degree in International Relations or an equivalent qualification form a university recognized by the UGC or an institution, a university recognized by the UGC as an institution of degree awarding or a foreign university recognized by the UGC, as per Appendix D.

However, the Transitional Provisions identified under Clause 15.1.2 provides certain exceptions to the officers belonging to Grade II who were recruited prior to 01.01.2001 (including the Petitioner)

The said exception reads thus;

15.1.2 Promotion from Grade II to Grade I

i) An officer absorbed to Grade II under the provisions of Section 14 of this Minute will be eligible for promotion to Grade I provided he/she has fulfilled the qualifications under 10.2.1. of the Service Minute. However, the requirement for the fulfillment of qualifications under sub section (v) of 10.2.1. will not apply regarding the promotion of officers recruited before 01.01.2001 from Grade II to Grade I during the transition period

As revealed before us, the said Service Minute had taken away the Cadre requirement in the previous Service Minute and the transitional provision had taken away the postgraduate degree requirement imposed by Clouse 10.2.1 (v)of the new Service Minute,

Since the Petitioner had fulfilled all the necessary requirements under the new Service Minute, the moment she is absorbed under Clause 14 of the new Service Minute, she became entitled to be promoted to Grade I under the new Service Minute and as submitted by the Respondents before us, the Public Service Commission had granted the Petitioner the promotion from Grade II to Grade I with effect from 13.10.2015 acting under the above provisions of the new Service Minute.

The next matter that needs to be looked into by this court is the 1st preliminary objection raised by the Respondents. When raising a preliminary objection with regard to the maintainability of the instant application, the Respondents argued that the application was filed out of time.

As I have already observed in this judgment the Petitioner had come before this court alleging violation of her Fundamental Rights guaranteed under Article 12 (1) and 14 (1)g of the Constitution on 27.02.2018. When complaining the said violations, the Petitioner further moved that,

> "Declare that the purposed decisions reflected in the letter dated 28.11.2017 (Marked P-8) as read with letter dated 05.12.2017 (marked as P7) are null and void and no force or avail in law."

In the said circumstances, it is clear that even though the Petitioner made several representations to the 1st to 10th and 13th Respondents with regard to her promotion from Grade II to Grade I, she finally decided to come before this court, when the Public Service Commission informed her that she could be granted the promotion with effect from 13.10.2015, in absence of a vacancy in Grade I, since the Department of Management Services had refused to create a vacancy on supernumerary basis with effect from the said date.

When raising the preliminary objection, the Respondents submitted that the decision conveyed by the Public Service Commission in P-8 was based on the decision by the Department of Management Service made in the year 2016. In his decision dated 07.12.2016, Director General Department of Management Service had informed the 13th Respondent and the Public Service Commission that it is not possible to create a supernumerary vacancy, back dated to the year 2013 since it is contrary to the provisions of the Financial Regulations. (1R15)

The Respondents argue that the Petitioner was well aware of this decision since 2016 but, had never challenged the said decision, but come before this court seeking an order to promote her to Grade 1 with effect from 03.09.2013, in the year 2018 in violation of Article 126 (2) of the Constitution.

However as already referred to by me, the Petitioner's grievance was not the refusal by the Department of Management Service to create a supernumerary vacancy in Grade I with effect from 03.09.2013 but, it was the failure by the Public Service Commission to appoint her to Grade I, to the vacancy that was available on 03.09.2013, and the subsequent decision by the Public Service Commission to appoint her to Grade I with effect from 13.10.2015 which was conveyed to her on 28.11.2017.

The Respondents have not challenged the application on the basis that it was filed out of time since 28.11.2017, but it was challenged on the basis that the application is filed out of time since 2016. This court is not inclined to accept the above argument.

When considering the matters that has been discussed in this judgment, I hold that the petition was unsuccessful in establishing any violation of her Fundamental Rights guaranteed under Article 12 (1) and 14 (1)g of the Constitution.

Application of the petitioner is therefore dismissed but I make no order with regard to the costs.

Judge of the Supreme Court

Justice Mahinda Samayawardhena,

I agree,

Judge of the Supreme Court

Justice Arjuna Obeyesekere,

I agree,

Judge of the Supreme Court

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

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

SC (FR) Application No. 104/2016

Kasthuri Achchilage Chamarie Samaradisa
No. 1, Algamawatta,
Danowita

PETITIONER

VS.

1. Prasantha Welikala
   Chief Inspector of Police
   Officer in Charge
   Police Station
   Nittambuwa

2. P.C. 39009 Priyantha

3. P.C. 67518 Ranil

4. P.C. 77184 Dinuka

5. P.C. 40134 Ruwan

6. Tharindu Kokawala
   Sub Inspector

All of Nittambuwa Police Station

Nittambuwa

7. N.K Ilangakoon

7A. Pujith Jayasundara

Inspector General of Police

Police Headquarters

Colombo 01

8. Hon. Attorney General

Attorney General's Department

Colombo 12

RESPONDENTS

BEFORE : P. PADMAN SURASENA J.

S. THURAIRAJA, PC, J.

MAHINDA SAMAYAWARDHENA, J.

COUNSEL : Mr. W. Dayaratne, PC, with Mr. Hirantha Namal Perera for the Petitioner

Mr. Kamal Perera for the 1st - 6th Respondents

Ms. Induni Punchihewa, SC, for the 8th Respondent

ARGUED ON : 24th February 2021

WRITTEN SUBMISSIONS : 1st - 6th Respondents on 18th September 2020

8th Respondent on 21st September 2021

Petitioner on 19th February 2021 and 3rd March 2021

DECIDED ON : 6th August 2021

S. THURAIRAJA, PC, J.

Kasthuri Achchilage Chamarie Samaradisa; a 30-year-old, 3 months pregnant woman who claims to have a history of an unstable mental condition is the Petitioner to the current case, whose fundamental rights are alleged to have been violated. (Herein after referred to as the **Petitioner**)

The **1st Respondent** is Prasantha Welikala, who is the Chief Inspector of Police, Officer in Charge of the Nittambuwa Police Station; the Police Station that conducted the arrest of the Petitioner. The **2nd-5th Respondents** are Police Constables attached to the Police Station of Nittambuwa and are namely Priyantha Herath, Ranil Bandara, Dinuka Prabath Rathnayake and Ruwan Chamara Amarasinghe respectively, who conducted the arrest together with the **6th Respondent;** Tharindu Kokawala who is a Sub Inspector of Police attached to the Nittambuwa Police Station.

The 1st - 6th Respondents are alleged to have directly violated the Fundamental Rights of the Petitioner while, the **7th Respondent** N.K Illangakoon was the Inspector General of Police at the time of the incident, while **7A the added Respondent** Pujith Jayasundara was the Inspector General as of 19th October 2016, and the **8th Respondent** is the Hon. Attorney General.

The Petitioner filed an application under Articles 17 and 126 of the Constitution alleging infringement of her Fundamental Rights guaranteed under Articles 11,12 (1) and 13 (1) of the Constitution against the 1st – 6th Respondents. This

Court granted Petitioner leave to proceed under Articles 11,12 (1) and 13 (1) of the Constitution as pleaded.

The Facts

Considering the significant variances of the facts laid down by both parties, I will first lay down the facts stipulated by the Petitioner, followed by that of the Respondents.

On the 6th February 2016, while the Petitioner was on her way to pick her daughter from a tuition class in the Godawela town, a group of men have approached her in a red three-wheeler and attempted to arrest her. As she was hesitant to co-operate, the said individuals have called for the assistance of another group. With the assistance of the second group the Petitioner has been handcuffed and forced into a three-wheeler. The Petitioner claims that she was assaulted by two men who abused her using filthy language while she was being transported. The Petitioner was then brought to the Nittambuwa Police Station.

However, till this point the Petitioner claims that she was unaware of the fact that the said individuals who are the 2nd - 6th Respondents to the case, were Police Constables as they were dressed in civil attire, and further claims that the arrest was taken place without the presence of a Woman Police Constable.

In the Nittambuwa Police Station, the Petitioner has been threatened by the 2nd - 6th Respondents to sign a document informing her that the same was for the purpose of obtaining bail. The Petitioner also claims that she is a psychiatric patient and when her prescribed medication was brought to her by her father-in-law, the 1st - 6th Respondents have not permitted it to be given to her.

The Petitioner states that she had then been taken before the 1st Respondent in the night, who had threatened to destroy her house while addressing her in foul language.

In the afternoon of 7th February 2016, the Petitioner was presented to the Magistrate of Attanagalla for the possession of 7500 ml of illicit liquor, an offence

punishable under Section 46 (e)/ 47 of the Excise Ordinance No. 36 of 1957 as Amended read with The Increase of Fines Act No. 12 of 2005.

The Petitioner states that she was presented before the Magistrate of Attanagalla by the 1st Respondent by a B-Report. Upon examination of the report, it appears to bear the signature of the 6th Respondent. The B Report was under the name and address, *'Wijayalath Pedige Damayanthi Darsha'* of '*Ellakade, Puhulegama'*. However, when the Petitioner informed that the above was not her name and address as per her National Identity Card (NIC), the B- Report was amended to also state, *'alias Kasthuri Achchilage Chamarie Samaradisa of No. 20/4, Keenadeniya, Ambepussa'* as stipulated in the NIC of the Petitioner.

The Magistrate enlarged the Petitioner on bail on 7th February and fixed the case for the 16th February 2016, on which date a charge sheet was served on her and she pleaded not guilty for the said charges.

Following being released on bail by the Magistrate, the Petitioner admitted herself to the Warakapola Base Hospital for treatment for the injuries sustained and for the fear of terrible trauma which could affect her pregnancy. Thereafter, the Petitioner was transferred to the District General Hospital of Kegalle to be examined by the Judicial Medical Officer (JMO).

The husband of the Petitioner on 7th February 2016 had lodged a complaint to the Warakapola Police against 1st- 6th Respondents and the Petitioner states that the above complaint was however recorded only on the following day. The husband of the Petitioner had also made a complaint to the Human Rights Commission on 11th February 2016 for inhuman and degrading treatment suffered by the Petitioner.

The Petitioner claims that the brutal assault on her caused her severe physical pain and resulted in bruises and lacerations on her body and further states that the illegal arrest, remand, and false allegation made against her and the prosecution in the Magistrate Court of Attanagalla caused her humiliation in the eyes of the public, mental pain and resulted in cruel, inhuman, and degrading punishment by 1st - 6th Respondents.

Having observed the facts laid down by the Petitioner, the sequence of events as submitted by the Respondents are as follows,

On 6th February 2016, the 2nd - 6th Respondents, along with a Woman Police Constable named Niluka Liyanage (8453) (Hereinafter sometimes referred to as WPC Niluka) had conducted a raid and arrested three suspects including the Petitioner. The other two suspects namely, Hewa Gajamange Milan Chamara was arrested for the possession of Goda (A form of illicit liquor) and Nissanka arachchilage Chandrani was arrested for the possession of Kasippu (illicit liquor). During the raid, while the 2nd – 5th Respondents had been in civil attire, 6th Respondent; the leader of the team had been in Police uniform.

The Respondents state that the arrest of the Petitioner took place as follows. Following intel received from a Private Informer of the 6th Respondent, the Petitioner has been located not at the Godawela town but at Weragoda road near the Kahatagala water tank, which is approximately one Kilometer off the main road, being seated on a blue plastic container (can).

The 6th Respondent had informed the Petitioner of the need to inspect the plastic container and has proceeded to inspect the same. Following the inspection, the 6th Respondent had detected Kasippu (illicit liquor) in the container. He had then informed the Petitioner that she is being arrested for the possession of illicit liquor and had taken steps to arrest her. He had proceeded to measure the container; and has measured 7500 ml of Illicit liquor out of which 750 ml have been separated as a sample. Both the container with the remaining illicit liquor and the sample bottle had been sealed with wax and the official seal had been placed. Additionally, the fingerprint of the Petitioner was also obtained on the wax. The sample had later been sent to The Government Analyst's Department through the Magistrate Court of Attanagalla and the report dated 31st March 2016 finds the contents to be illicit liquor.

After the sealing procedure was completed, the Petitioner was instructed to get into the van, but she refused to do the same and instead laid on the ground

screaming and pulling out her hair in a restless manner, thereafter on the instruction of the 6th Respondent WPC Niluka has taken the Petitioner to the van.

The 2nd - 6th Respondents deny any allegations of assault during the arrest and transportation of the Petitioner and have tendered an affidavit by WPC Niluka stipulating that the due procedure was followed during the arrest and while transporting the Petitioner to the Police Station of Nittambuwa, hence no assault had taken place.

The Respondents state that the Petitioner was brought to the Police Station where WPC Niluka had inspected the Petitioner for injuries, and no injuries were found. Since the Petitioner did not have her NIC, the name and address given by her had been entered in the Police Records. The 5th Respondent had recorded a statement by the Petitioner, read it over to her and had taken her signature.

Further, the 2nd - 6th Respondents and WPC Niluka state that they were unaware of any medical condition of the Petitioner or that she was dependent on regular medicine as neither the Petitioner nor her husband had informed the Respondents of the above. Contrary to the claim of the Petitioner, the Respondents further state that no one had visited the Petitioner with medicine during police custody and no one has requested the permission of the police to give any such medication to the Petitioner.

In regard to the allegation made against the 1st Respondent threatening the Petitioner, according to the 2nd – 6th Respondents, the Information Book (IB) Records of the Police Station stipulate that the 1st Respondent had left to the Katana Police College at 3.40 pm and had returned to the Nittambuwa Police Station at 8.20 pm following which he had reported off from duty and left to his official residence. Accordingly, the Respondents submit that the 1st Respondent was not present on the night of 6th February 2016 and deny the allegation made of the Petitioner being produced before him.

Contrary to the statement of the Petitioner that she was presented before the Magistrate of Attanagalla by the 1st Respondent, the 2nd – 6th Respondents state that

the Petitioner was presented before the Magistrate by Police Sergeant Perera (27532) accompanied by WPC Niluka. This has been confirmed by the Police Information Book (IB) records. The Petitioner was produced before the Magistrate Court of Attanagalla, on a B Report which contained her name as provided by her initially. However, three Attorneys at Law who appeared for the Petitioner informed the court that the real name of the Petitioner was not '*Wijayalath Pedige Damayanthi Darsha'* but *'Kasthuri Arachchilage Chamarie Samaradisa'* of *'No. 1, Algamawatta, Danowita'* and that she's pregnant and under medical treatment. Subsequent to it being indicated that the Petitioner has deliberately lied to the Police about her real name and identity the police had proceeded to file an action under Section 402 of the Penal Code against the Petitioner for cheating by impersonation.

Having discussed the sequence of events as per both parties, I will now consider the alleged infringement of the Fundamental Rights of the Petitioner.

Alleged infringement of Article 11 of the Constitution

Article 11 of the Constitution reads,

> *"No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"*

As stipulated prior, it is the contention of the Petitioner that she was assaulted by two male police officers while she was being transported to the Police Station of Nittambuwa. According to the Petitioner the male police officers have been seated on either side of her and have abused her using filthy language. The Petitioner claims that the assault caused her severe physical pain and resulted in bruises and lacerations while the incident following the arrest caused her mental distress. In order to establish the same, the Petitioner has produced extracts from a book maintained for the treatment given at the Warakapola Base Hospital, where the Petitioner was

admitted following the incident. The record states that the Petitioner was suffering from 'Acute Psychological distress following trauma' following the arrest.

It is well recognized that the term 'Torture' in international Conventions and in the Constitution of Sri lanka, in Article 11 is broadly defined to encompass both injuries in the form of physical and mental nature. However, in establishing torture in terms of Article 11 of the Constitution a higher burden lies on the Petitioner to prove the alleged torture. The standard of proof required in a case of Torture is a balance of probability with a higher level of certainty weighing towards the case of the Petitioner. In the case of **Channa Pieris and Others V. Attorney General and Others (1994) 1 SLR 1** Amarasinghe J commented on the standard of proof as follows,

> *'... having regard to the nature and gravity of the issue, a **high degree of certainity is required** before the balance of probability might be said to tilt in favour of a petitioner endeavouring to discharge his burden of proving that he was subjected to torture or to cruel, inhuman or degrading treatment or punishment; and **unless the petitioner has adduced sufficient evidence** to satisfy the Court that an act in violation of Article 11 took place, it will not make a declaration that Article 11 of the Constitution did take place.'*
>
> *(Emphasis Added)*

This has been confirmed and followed by this court in many instances. In order for the scale of probability to tilt in favour of the Petitioner, it is imperative that the Petitioner corroborate their allegation of torture with credible evidence, in particular, official medical evidence which operate as an unbiased and independent source of evidence.

Reverting to the incident at hand, on 7th February 2016 when the Petitioner was produced to the Magistrate of Attanagalla following the arrest on 6th February 2016, the Petitioner had been represented by a senior counsel and two junior counsels where the counsels have made submissions on the difference in the name of the

Petitioner. However, the counsels have not informed the Magistrate of any assault or injury. Had the magistrate been informed, he would have referred the Petitioner to immediate medical attention including a referral to a Judicial Medical Officer (JMO). Accordingly, if the injuries of the Petitioner were as serious as she claimed them to be, this should have been brought to the attention of the Magistrate. The failure to do so imposes a question on the credibility of the claim of the Petitioner.

However, the Petitioner has later admitted herself to the Warakapola Base Hospital on 7th February 2016. Thereafter she has been transferred to the District General Hospital of Kegalle and had been admitted on the following day for JMO and psychiatric referral. Accordingly, she has been duly examined by the Consultant JMO and the Medico – Legal Report (MLR) of the Petitioner as per an examination conducted on the 10th February 2016 was submitted before this Court. According to the said MLR the Petitioner has had three injuries which were categorized as non – grievous injuries. The non- grievous injuries were;

" 1. *… a healing linear abrasion measured 1 cm over upper front middle region of the right side of the chest, just below the inner end of right collar bone*
2. *… a healing oblique linear abrasion measured 6 cm over left side upper region of the chest*
3. *… a healing linear abrasion measured 10 cm over upper outer region of left fore arm "*

The JMO opined those injuries as follows;

" • *Injury No.1,2, and 3 due to blunt force trauma*
- *Amount of healing of injuries consistent with given history of date of injuries*
- *Injuries are non-specific as such cannot be confirmed or ruled out the possibility of history indicated incident (sic)*
- *Opinion given by the Consultant General Hospital Kegalle revealed her current mental state is normal and she is fit to give evidence in court "*

Accordingly, in contrast to the allegations of the Petitioner where she claims that the assault caused her '*severe physical pain and resulted in bruises and lacerations',* the MLR only recognizes non-grievous injuries. Further the injuries are not categorised as consistent nor inconsistent with the timeline of the incident, and the injuries cannot be specifically attributed nor ruled out from the incident.

Further, it is the contention of the 1st - 6th Respondents that there is a possibility of the Petitioner self-inflicting the injuries during the time from her release on bail and voluntary admission to the hospital as the Petitioner was not directly referred to a JMO or to the hospital from police custody or by the Magistrate. In addition to the above, there is a possibility that the non-grievous injuries of the Petitioner were a result of her conduct while she resisted arrest by the 2nd – 6th Respondents.

When considering the nature of injuries stipulated in the MLR and the narration of the incident by the Petitioner, the apparent inconsistencies create a certain doubt in my mind. Accordingly, I find that the Petitioner has not adduced sufficient evidence to satisfy the required threshold to prove the existence of torture on her body.

In assessing the torture in mental form, the Mental State Report issued following the examination on 13th February 2016 by the Consultant Psychiatrist of the District General Hospital of Kegalle annexed to the above MLR proves the non – existence of any severe psychological trauma following the incident. It reads,

> *"Her current mental state is stable. No Psychological Distress at this movement. She has* ***No*** *feature of* ***Depressive Disorder*** *or* ***Learning Disability or P.T.S.D."*** *(sic)*

Accordingly, while the Petitioner would have had a history of Psychiatric illness, as per the above MLR the Petitioner has not faced any severe psychological distress as a result of the arrest.

Further, the counsel for the 1st – 6th Respondents submit that a patient of this nature if faced by police torture, the MLR, especially the Mental State Report would have been very serious. Therefore, the Respondents submit that there is no evidence of torture present, which in turn creates a serious doubt in the minds of this Court.

Contrary to the statement of the Petitioner, the findings of this Court in particular the psychiatric report of the Petitioner is adverse to the claim made by her. Considering all above factors, I find that there is no credible evidence of torture. Accordingly, I dismiss the claim under Article 11 of the Constitution.

Alleged infringement of Article 13 (1) of the Constitution

Article 13 (1) of the Constitution reads,

> *"No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest "*

It is the contention of the Petitioner that she was forcibly handcuffed by the 2nd - 6th Respondents and taken to the Nittambuwa Police Station in a Three-Wheeler without the presence of a female police officer and without any reasoning being given.

However contrary to the above, according to the Police Information Books (IB) of the Nittambuwa Police Station, the Petitioner was arrested by a police squad which included a Woman Police Constable; WPC Niluka while on a raid to seize illicit liquor. As per the evidence submitted before this court, the 6th Respondent who was attired in uniform has informed the Petitioner of the need to inspect the plastic container (can) beside her. Following the detection of illicit liquor in the plastic container, the 6th Respondent has explained the reason for arrest; being in possession of 7500 ml of illicit liquor and has instructed the Petitioner to enter the van to be transported to the Police station.

However, since the Petitioner resisted arrest, the WPC named Niluka Liyanage (8453) has taken the Petitioner to the van on the instruction of the 6th Respondent. Further, according to the affidavit of WPC Niluka and 2nd – 6th Respondents, WPC Niluka had been seated with the Petitioner alongside the other female suspect who was arrested during the same raid when the Petitioner was transported to the Nittambuwa Police Station. The above conduct of the 2nd – 6th Respondents have been duly recorded in the police records of the Nittambuwa Police Station and was produced before this court.

Accordingly, when assessing the Police records it is evident that the arrest has been conducted in accordance with the due procedure with a WPC on duty.

Further, in response to a complaint lodged by the Petitioner at the Deputy Inspector General (DIG) DIG Office, Peliyagoda Western Province Office, an inquiry had been held by the DIG Western Province (North), under inquiry reference No. DIG/WPN/4G/NIT/7/16 to determine whether the conduct of the 2nd – 6th Respondents was lawful. Accordingly, it has been found that the 2nd – 6th Respondents have acted in accordance with the law and made a lawful arrest in respect of the Petitioner and that there are no grounds for a disciplinary inquiry to be held against the said Respondents.

Considering all available material in this regard there is no evidence to support that the arrest and the transportation of the Petitioner occurred as claimed by the Petitioner. In contrast, the Respondents have submitted sufficient evidence to prove that the Petitioner was arrested in accordance with the law and standard procedure. In light of above I find that there is no violation of Article 13(1) of the Constitution.

Alleged infringement of Article 12 (1) of the Constitution

Article 12(1) of the Constitution reads as follows,

> *" All persons are equal before the law and are entitled to the equal protection of the law"*

Article 12(1) of the Constitution ensures that individuals despite their status in a given circumstance are entitled to equal treatment and equal protection guaranteed by the law. In this context, it is the duty of the executive body; the Police officers to carry out the arrest within the limits of the law, and as stipulated by the law. The executive would also have a duty to ensure that the individual rights of the accused are protected during detention, investigations, searches etc. conducted following the arrest and ensure that the person is dealt with according to the law.

In the instant case, the Petitioner claims that her right to equal protection of the law was violated as she was subject to an illegal arrest. However, as discussed prior, it is established that the arrest of the Petitioner was conducted in accordance with the law.

In considering the events following the arrest, Section 30 of the Code of Criminal Procedure Act No. 15 of 1979 (as Amended) stipulates the right of a woman to be searched by another woman with strict regard to her decency. In the current instance, once the Petitioner was brought to the Nittambuwa Police Station, the Petitioner had been searched by WPC Niluka and had been in the observation of the same WPC and thus had been given the protection guaranteed under the law.

Further the Petitioner, in her Petition claims that her father-in-law who came to visit her at the Police Station with her required medication was denied access to her. The 2nd – 6th Respondents and the WPC deny the claim stating that no such person was present at the Police Station and no person had informed the Respondents of any health condition of the Petitioner.

Further, it is important to note that in the item 10 of the complaint dated 11th February 2016 made by the husband of the Petitioner to the Human Rights Commission, in the slot reserved for persons visited the victim during police custody, there is no reference made to the father-in-Law of the Petitioner having visited the Nittambuwa Police Station. Thus, there are discrepancies between the account of events provided by the Petitioner and the evidence before this court which diminishes the credibility of the Petitioner and her claim.

Finally, the Petitioner had been transported to the Magistrate Court of Attanagalla by a Police Sergeant along with the WPC. It is evident that the Petitioner has been treated according to the law and had been given equal protection as stipulated by the law. Accordingly, all her rights have been appropriately safe guarded and there is no violation of rights and inequal treatment.

Decision

I have carefully considered all material before this Court and find that the police have documented all incidents from the moment of arrest until producing the Petitioner before the Magistrate and I have no reason to create a doubt in those official records.

Therefore, by the said records and evidence submitted before this Court it is evident that the **1st Respondent**; Prasantha Welikala has conducted himself in accordance with the law in his capacity as the Officer in charge of the Nittambuwa Police Station and the **2nd Respondent** Priyantha Herath, **3rd Respondent** Ranil Bandara, **4th Respondent** Dinuka Prabath Rathnayake, **5th Respondent;** Ruwan Chamara Amarasinghe being Police Constables and the **6th Respondent** Tharindu Kokawala being the Sub Inspector who participated in the raid, have carried out the arrest and their duties following the arrest in accordance with the law, securing the rights of the Petitioner.

Therefore, I find that there is no violation of Articles 11, 12(1) and 13 (1) of the Constitution by the 1st – 6th Respondents.

Further, I find that the State has acted promptly in this regard by inquiring into the actions of the 1st – 6th Respondents under inquiry reference No. DIG/WPN/4G/NIT/7/16 following the complaint received by the DIG Western Province.

Considering all, I find that there is no merit in this application, hence I dismiss the application and award no costs.

Application dismissed.

JUDGE OF THE SUPREME COURT

P. PADMAN SURASENA J.

I agree

JUDGE OF THE SUPREME COURT

MAHINDA SAMAYAWARDHENA J.

I 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.

S.C.(F.R.) Application No: 109/2021

1. Centre for Environmental Justice,
   (Guarantee Limited),
   No. 20/A, Kuruppu Road, Colombo 08.

2. Withanage Don Hemantha Ranjith Sisira Kumara,
   Director and Senior Advisor,
   Centre for Environmental Justice,
   No. 20 A, Kuruppu Road, Colombo 08.

3. Edirisinghe Arachchilage Sanjaya Edirisinghe,
   No. 30/6, Ragama Road,
   Kadawatha.

4. Panchali Madurangi Panapitiya,
   No. 565/44, Mihindu Mawatha,
   Malabe.

5. Weerakkdoy Appuhamilage Manoja Jayaswini Weerakkody,
   No. 256/34C, Ruhunupura,
   Thalawathugoda.

Petitioners

Vs.

1. Hon. Mahinda Rajapaksa,
   Minister of Buddhasasana, Religious and Cultural Affairs, and Urban Development and Housing, and Economic Policies and Implementation,
   No. 135, Srimath Anagarika Dharmapala Mawatha, Colombo 07.

2. Hon. R.M.C.B. Ratnayake,
   Minister of Wildlife and Forest Conservation,
   Ministry of Wildlife and Forest Conservation,
   No. 1090, Sri Jayawardenapura Mw,
   Rajagiriya.

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

Respondents

Before: E.A.G.R. Amarasekara, J.
K.K. Wickremasinghe, J.
Janak De Silva, J.

Counsel:
Ravindranath Dabare with Ms. Suwanthi Ponnamperuma for the Petitioners

Viveka Siriwardena ASG for the 1st, 2nd and 3rd Respondents

Argued On: 25.10.2021

Decided On: 01.12.2021

Janak De Silva, J.

The Petitioners, by petition dated 3rd April 2021, principally sought to impugn the Cabinet Memorandum dated 12th March 2021 [P10] submitted by the 1st and 2nd Respondents titled *"Taking a policy decision in respect of tamed elephants where judicial proceedings and investigations are being conducted and transferring the ownership"*. The Cabinet Memorandum [P10] sought *inter alia* the approval of the Cabinet Ministers to withdraw all cases in which legal action is being taken at present and to hand over these animals to their present owners according to the conditions of transferring these animals. Petitioners sought *inter alia* a declaration that the rule of law of the country will be seriously affected if the members of the executive Cabinet are allowed to interfere with the pending cases in the courts and allowed to arbitrarily take decisions with regard to pending litigation.

When this application was supported on 20th July 2021, the learned Additional Solicitor General appearing for the Attorney General brought to the notice of Court that in fact a Cabinet decision had been taken on 15th March 2021 on the impugned Cabinet Memorandum [P10] which has not been disclosed by the Petitioners. It was submitted that the application must be dismissed *in limine* as the Cabinet of Ministers were not named Respondents. Subsequently, the Petitioners requested that the Court authorize the filing of an amended petition, which was strongly opposed by the learned Additional Solicitor General.

Court allowed the Petitioners to file amended petition subject to any objections of the 1st and 2nd Respondents. Thereafter, an amended petition dated 16th August 2021 was filed to which the 1st and 2nd Respondent filed objections. This order pertains to these objections to the amended petition.

The first objection is that the original petition should be dismissed *in limine* for non-joinder of parties. It was submitted that the Petitioners should have made all the members of the Cabinet Respondents to the application since a Cabinet decision had been taken on the impugned Cabinet Memorandum [P10] by the time the original petition was filed.

The Petitioners have argued that the Cabinet decision was not published on the official website of the Cabinet of Ministers. I am not inclined to support this objection in the absence of a public source through which the Petitioners could have verified whether a Cabinet decision had been made. The Petitioners sought to file an amended petition as soon as the Cabinet decision was brought to their attention. I overrule the first objection.

The second objection is that both the original and amended petitions are time barred.

The impugned Cabinet Memorandum [P10] is dated 12th March 2021 whereas the original petition was filed on 9th April 2021. Thus, the assail of the Cabinet Memorandum [P10] is not time barred.

Admittedly the Cabinet decision was made on 15th March 2021, and the amended petition was filed on 20th August 2021. The Petitioners allege that they became aware of the Cabinet decision only when it was disclosed in open court on 20th July 2021. This court has held that time starts to run from the point of time the Petitioners became aware of the infringement or the imminent infringement [*Siriwardena and Others v. Brigadier J. Rodrigo and Others* (1986) 1 Sri.L.R. 384; *Gamaethige v. Siriwardena and Others* (1988) 1 Sri.L.R. 384].

Nevertheless, in my view, the Cabinet decision itself is not the act which, as has been alleged, would constitute an infringement of the fundamental rights of Petitioners. It is only when the Attorney-General, if he chooses to do so, acts on the impugned Cabinet decision that there may be, as alleged, an infringement of the fundamental rights of the Petitioners.

This court has recognized the notion of a continuing violation of fundamental rights [*Wijesekera and Others v. Attorney-General* (2007) 1 Sri.L.R. 38; *Sugathapala Mendis and Another v. Chandrika Kumaratunga and Others* (Waters Edge case) (2008) 2 Sri.L.R. 339; *Wijesekera and 14 Others v. Gamini Lokuge, Minister of Sports and Public Recreation and 20 Others* (2011) 2 Sri.L.R. 329].

In my view, there are situations where imminent infringements are also continuing. As a matter of fact, by definition, imminent infringements continue until a fundamental right is violated or the decision-maker changes his or her mind. Hence until the Attorney-General acts on the Cabinet decision or there is a change of mind of the Cabinet, the acts impugned by the Petitioners are allegedly continuing imminent infringements of the fundamental rights of the Petitioners. Accordingly, I conclude that the amended petition is not time barred and overrule the second objection.

The third objection is that the amended petition has been filed to cure the defects in the original petition which were brought to the notice of Court on behalf of the Respondents. No doubt the Petitioners have included several new prayers in the amended petition. They have also pleaded the Cabinet decision taken on the Cabinet Memorandum [P10] in addition to making all the members of the Cabinet Respondents to the application.

Nonetheless, this is a fundamental rights application filed in the public interest. The Petitioners allege that the impugned Cabinet Memorandum and decision are an attempt at political interference of national legislation and violation /an imminent threat of violation of the Fauna and Flora Protection Ordinance. It is further submitted that there is a breach/imminent breach of the rule of law.

Whilst the Cabinet Memorandum sought approval of the Cabinet Ministers to withdraw all cases where legal action is being taken at present and to hand over these animals to their present owners according to the conditions of transferring these animals, the Cabinet decision is to direct the Secretary, Ministry of Wildlife & Forest Conservation to bring the special reasons adduced in the Memorandum to the notice of the Attorney General and thereafter take necessary action in association with the Secretary, Ministry of Public Security and in consultation with the Attorney General to reach an amicable settlement with the relevant parties pertaining to the pending court cases, giving due consideration to the proposal (4.2) in paragraph 4.0 of the Cabinet Memorandum.

In *Attorney-General (on the relation of McWhirter) v. Independent Broadcasting Authority* [(1973) 1 All ER 689 at 697] Lord Denning succinctly described the role of the Attorney General of England as follows:

> *"It is settled in our constitutional law that in matters which , concern the public at large the Attorney-General is the guardian of the public interest. Although he is a member of the government of the day, it is his duty to represent the public interest with complete objectivity and detachment. He must act independently of any external pressure from . whatever quarter it may come. As the guardian of the public interest, the Attorney-General has a special duty in regard to the enforcement of the law."* [emphasis added]

Although there may be some differences in the two roles, these observations aptly apply to the role of the Attorney-General of Sri Lanka. In fact, in *Land Reform Commission v. Grand Central Limited* [(1981) 1 Sri.L.R. 250] this Court held that the Attorney-General has a duty to the Court, to the State and to the subject to be wholly detached, wholly independent and to act impartially with the sole object of establishing the truth.

The Attorney-General is vested with extensive statutory powers in relation to criminal investigations and prosecutions. Such powers are held in public trust. They must be exercised for the due administration of justice according to the rule of law which is the basis of our Constitution. Any type of dictation from whatever quarter will compromise the independence of the Attorney-General unless such dictation is permitted by law. Any compromise of the independence of the Attorney-General will have a negative impact on the rule of law. The heart of the Petitioners' complaint is that the 1st and 2nd Respondents and the Cabinet of Ministers are interfering with the statutory powers of the Attorney General.

This is a serious allegation, which if true, has far reaching ramifications. According to Article 4(d) of the Constitution, it is the bounden duty of this Court to secure and advance the fundamental rights guaranteed by the Constitution. These are proceedings brought on behalf of the public at large. I hold that this Court must not allow procedural defects of the nature alleged in this matter to shackle its constitutional duty to examine the allegation of the Petitioners at the leave to proceed stage. Accordingly, I overrule the third objection.

I allow the amended petition dated 16th August 2021.

JUDGE OF THE SUPREME COURT

E.A.G.R. Amarasekara, J.

I agree.

JUDGE OF THE SUPREME COURT

K.K. Wickremasinghe, J.

I 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.

Ravivathani Thuraisingam
18, Mathvady Lane,
Thirunelvely,
Jaffna.

Petitioner

SC (FR) Application No: 180/2014

-VS-

1. University of Jaffna,
   Thirunelvely, Jaffna.
2. Prof. (Miss) V. Arasaratnam,
   Vice Chancellor.
3. Mr. K.K. Arulvel.
4. Prof. S.Sathiaseelan.
5. Prof. V.P. Sivanathan.
6. Dr. (Mrs.) S. Sichandran.
7. Dr. S. Balakumar.
8. Prof. T. Velnampy.
9. Dr. A. Pushpanathan.
10. Mr. S. Kuganesan.

11. Prof. S. Sirsatkunarajah.

12. Dr. A. Atputharajah.

13. Prof. R. Vigneswaran.

14. Dr. S. Sivanandarajah.

15. Rev. Fr. Dr. Justin B. Gnanapragasam.

16. Mr. M. Balasubramanium.

17. Mr. M. Sripathy.

18. Mr. P. Thiyagarajah.

19. Mr. T. Rajaratnam.

20. Prof. P. Balasundarampillai.

21. Eng. M. Ramathasan.

22. Mr. K. Theventhiran.

23. Mr. D. Rengan.

24. Ms. S. Sarangapani.

25. Mr. K.Kesavan.

26. Dr. S. Raviraj.

27. Mr. E. Annalingam.

28. Ms. Sherine Xavier

All members of the Governing Council

29. Mr. V. Kandeepan,
Registrar.

30. Mr. V.A. Subramaniam.

31. Mr. S. Balaputhiran

All of,
The University of Jaffna,
Thirunelvely,
Jaffna.

32. University Grants Commission -Sri Lanka,
UGC Secretariat,
20, Ward, Place,
Colombo 07.

33. Ms. Tharshiga Murugesu,
Thiruppathy, Neervely North,
Neervely, Jaffna.

34. Mrs. Thushyanthi Rajakumaran
Amman Road,
Thirunelvely, Jaffna.

35. Mrs. Sangeetha Mahinthan,
385/20, Mudamavady Junction,
Temple Road, Jaffna.

36. Mrs. Sentheeswary Senuthuran,
214/12, Sir P. Ramanathan Road,
Thirunelvely, Jaffna.

37. Ms. Hanitha Vijeyaratnam,
Dutch Road
Alavaddy West,
Alavaddy.

38. Mr. k. Piratheepan,
241, Periyamathavady,
Udduvil East,
Chunnakam, Jaffna.

39. Mr. N. Sivathaasan,
74/12,
Aththisoody Lane,
Thirunelvely, Jaffna.

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

Respondents

Before: B. P Aluwihare, PC. J.,

Murdu N.B.Fernando, PC. J. and

S.Thurairaja PC. J.

Counsel: Viran Corea with Ms. Sarita de Fonseka for the Petitioner.

S. Barrie SSC for 1st to 32nd and 40th Respondents.

V. Puvitharan PC with Anuya Rasanyakkam for the 33rd Respondent.

Argued on: 06-05-2019 and 30-05-2019

Decided on: 29-03- 2021

Murdu N.B Fernando, PC J.

The Petitioner came before this Court seeking inter-alia a declaration that the Respondents have violated the fundamental rights of the Petitioner guaranteed under Article 12(1) of the Constitution. Leave to Proceed was granted to the Petitioner by this Court on 27.04.2014.

The Petitioners case as referred to in the petition, *albeit* brief is as follows:

1. The 1st Respondent University advertised the **Post of Lecturer** (**Probationary)** in the Faculty of Management Studies and Commerce in November 2013 and called for applications from suitable candidates.

2. The Petitioner a holder of a Bachelor of Business Administration Degree (1st class) specializing in Finance Management applied for the said post. The Petitioner graduated from the 1st Respondent University with a GPA score of 3.63 in the year 2012 and at the time of tendering of the application was a

temporary lecturer attached to the 1st Respondent University and reading for a Master's Degree in Business Administration at the Faculty of Management and Finance of the University of Colombo.

3. In March 2014, interviews for the said post were conducted by a six-member selection committee headed by the 2nd Respondent, the Vice chancellor of the 1st Respondent University. The other members were the 8th, 16th, 19th, 30th and 31st Respondents.

4. In May 2014, the Governing Council of the 1st Respondent University (2nd to 28th Respondents) approved the recommendation of the selection committee and appointed the 33rd Respondent to the said post.

5. The grievance of the Petitioner is that the said appointment is *adhoc*, arbitrary, unfair and completely unlawful and violated the Petitioners fundamental rights for the reasons inter-alia;

    - that the Petitioner had a higher GPA score and possesses more teaching experience than the 33rd Respondent;

    - that the 33rd Respondent has given false and incorrect information pertaining to work experience;

    - that the primary criterion for recruitment is academic excellence and the Petitioner is the most suitable candidate and should have been appointed; and

    - that extraneous factors have been considered by the Governing Council in the appointment of the 33rd Respondent to the post advertised.

6. The Petitioner also alleged that the recommendation of the selection committee submitted to the Government Council was signed by the 2nd Respondent who was not even present throughout the Petitioners interview and that the

Petitioner brought such fact to the attention of the Governing Council with the hope that it would objectively view the recommendation, but to no avail.

7. Thus, the Petitioner seeks a declaration from this Court that the Petitioners fundamental rights have been infringed and also moves for a declaration that the selection and/or appointment of the 33rd Respondent is null and void and for a direction that the Petitioner be appointed to the said post.

The case of the 1st to 32nd Respondents ("the Respondents") is that the 1st Respondent University at all times acted in accordance with the relevant Circulars pertaining to the procedure for appointment of the selection committee and the Scheme of Recruitment of Academic Staff issued by the University Grants Commission (32nd Respondent), the University Establishment Code and the approved marking scheme applicable for the relevant faculty. The Respondents also averred that by unanimous decision the selection committee recommended the 33rd Respondent to the post advertised and the General Council also unanimously approved the said recommendation. Thus, the Respondents aver that the Respondents have not violated the fundamental rights of the Petitioner.

The case presented by the 33rd Respondent is that she too is a graduate of the 1st Respondent University with a 1st class in Financial Management and denies that she misled or misdirected the selection committee as averred to by the Petitioner.

Having referred to the main arguments relied upon by the parties, I would now move on to consider and examine the said positions in detail in order to determine whether the Petitioners fundamental rights secured and guaranteed by Article 12(1) of the Constitution have been infringed by the 1st to 32nd Respondents, by the non-appointment of the Petitioner to the post of Lecturer (Probationary) at the 1st Respondent University.

Article 12(1) of the Constitution reads thus:

> **"all persons are equal before the law and are entitled to the equal protection of the law."**

This Article has been meticulously analyzed, examined and developed by this Court in a plethora of judgements during the last four decades.

In one of the first cases decided by this Court, **Rienzie Perera and another V University Grants Commission and another [1978 – 79- 80] 1 SLR 128**, Sharavananda J., at page 137 observed as follows:

> "Equality of opportunity is only an instance of the application of the general rule of equality laid down in Article 12. Equal protection of the law postulates an equal protection of all alike in the same situations and under like circumstances. There should be no discrimination among equals, either in the privileges conferred or on the liabilities imposed."

In **Perera and Nine Others V Monetary Board of the Central Bank of Sri Lanka and twenty-two others [1994] 1 SLR 152,** Amersinghe J., at page 166 referring to promotions in the public service and the legitimacy and rationality of the marking schemes adopted at interviews, explained as follows:

> "Transparency in recruitment proceedings would go a long way in achieving public expectations of equal treatment. The selection of a person must be viewed as a serious matter requiring a thorough going consideration of the need for the services of an officer, and a clear formulation of both the basic qualities and qualifications necessary to perform the services, and the way in which such qualities and qualifications are to be established."

Thus, it is trite law that in achieving public expectations of equal treatment, **transparency in the recruitment process is a key element.**

The 1st Respondent University together with other State Universities provide tertiary education and comes under the purview of the University Grants Commission ("UGC") established under the provisions of the Universities Act No 16 of 1978 as amended. The appointment of academic staff of Universities is governed by Circulars issued by the UGC.

In the instant case the selection process began by calling for applications for the post of Lecturer (Probationary) – Non medical/ dental category in terms of Circular bearing no 721 dated 21-11-1997 (R1) as amended by Circular bearing no 08/2005 dated 11-08-2005 (R4). The applicability of the said Circulars to the post advertised is not in issue between the parties. The 1st Respondent University empaneled a selection committee in terms of the relevant Circular (R1) to conduct interviews. The selection committee comprised of six members headed by the 2nd Respondent Vice Chancellor. The other members were the 8th Respondent Dean of the Faculty of Management and Commerce, 16th and 19th Respondents being nominees of the Governing Council, the 30th and 31st Respondents head of the Department of Finance and Management and nominee of the Senate. The empaneling of the selection committee is also not in issue between the parties.

The bone of contention of the parties is the recommendation of the selection committee. The selection committee interviewed eight applicants (33rd to 39th Respondents and the Petitioner) and recommended the 33rd Respondent to the post advertised and the Petitioner was named as the reserve (R12).

The Petitioners' contention is that the said recommendation of the selection committee is flawed for the following reasons.

Firstly, the Petitioner has a higher GPA score of 3.63 in comparison to the GPA score of 3.43 of the 33rd Respondent;

Secondly, the Petitioner possess more teaching experience compared to the 33rd Respondent and the Petitioner demonstrated the ability to teach, having been appointed to a post of temporary lecturer at the 1st Respondent University in November 2012. The Petitioner also contended that the 33rd Respondent began her teaching career at the 1st Respondent University only in May 2013, although she adverts to the date as April 2012 in the curriculum vitae tendered to the University. Thus, the Petitioner alleges that the 33rd Respondent has given false information and upon the said ground adverts that the 33rd Respondent misled the selection committee.

In response to the said facts the Respondents aver that the GPA score and teaching experience do not accrue any advantage to a candidate since marks are not given for same at the interview and with regard to the erroneous date of appointment as a temporary lecturer referred to in the curriculum vitae the explanation of the 33rd Respondent that it was an oversight, was accepted by the selection committee.

Thirdly, the Petitioner also challenged the marking scheme as well as the ensuring selection committee recommendation upon the ground that it is based on collateral considerations and thus arbitrary.

With regard to the marking scheme, the Respondents contention is that it is in use at the 1st Respondent University since 2010, on seven of its faculties and has proved to be a suitable basis of assessment of a candidate at an interview.

Having referred to the focal points of the Petitioners case, let me move on to consider the 1st and 2nd points of challenge viz-a-viz the Scheme of Recruitment adopted by the 1st Respondent University.

The Scheme of Recruitment which is UGC Circular no 721 (R2) issued in 1997, required one years' teaching experience as a pre- qualification to apply for the post of Lecturer (Probationary). In 2010, the said provision was relaxed and amended by UGC Circular no 935 (R4). It introduced a new provision **for a candidate to make a presentation before the selection committee in order for the selection committee to assess the 'teaching ability' of**

a candidate and did away with the requirement of one years' teaching experience. The rationale of such decision of the UGC made in the year 2010 that a lecturer should have the ability to teach has not been challenged before any forum.

The Respondents advert that in view of the above said provisions the requirement of one years' teaching experience is not a mandatory factor and at the 1st Respondent University marks are not awarded for teaching experience. The 'ability to teach' is the main criterion to be decided at the interview and the Respondents submit that it is a subjective analysis and is based upon the marking scheme (R5) approved by the 1st Respondent University.

Thus, it is observed under the prevailing Scheme of Recruitment, **'teaching experience' is no longer a threshold requirement** to be considered for recruitment for the post of Lecturer (Probationary). Hence, the Petitioners grievance that she possesses more teaching experience as well as a higher GPA score viz-a-viz the 33rd Respondent and upon the said ground and the said ground alone that the Petitioner should have been appointed to the post of Lecturer (Probationary) and not the 33rd Respondent, in my view, has no basis nor merit in law.

The Petitioners next point of challenge was the **marking scheme**. Initially, the Petitioner did not challenge or refer to a marking scheme in its petition. When the approved marking scheme (R5), the assessment sheet (R11) and the recommendation of the selection committee (R12) were tendered to Court by the 1st Respondent University together with its statement of objections, the Petitioner contended that the marking scheme was not duly authorized by the 1st Respondent University. Thus, the Petitioner challenged the vires of the marking scheme.

However, it is observed that the Petitioner failed to substantiate its argument by placing any material or evidence before Court, to negate the proposition of the Respondents that the marking scheme (R5) was in use at the 1st Respondent University since 2010 i.e. 3 years precedent to the date of the interview and it was formulated consequent to the issuance of UGC Circular no 935 (R4), which introduced the concept of making presentations to assess the teaching ability of a candidate for recruitment as a member of the academic staff. The post

of Lecturer (Probationary) is one such post in the academia. Hence, it is too late in the day for the Petitioner to challenge the veracity or vires of the marking scheme (R5) before this Court and for the said reason I see no merit in the said objection either.

The Petitioner also challenged the recommendation of the selection committee upon the ground of consideration of extraneous and collateral factors by the selection committee. In response, the Respondents denied the said allegation and contended that the candidates were assessed not on extraneous or collateral considerations, but based upon the approved marking scheme (R5) only.

Hence, I would pause at this moment to examine the marking scheme R5. The marking scheme clearly envisage that 50% of the marks are to be awarded **for academic excellence** and out of the balance 50%, 20 marks **for presentation skills and subject knowledge** and the rest of the 30 marks **for vision, creativity, research interest and overall performance of a candidate** at the interview.

The Respondents submitted that the Petitioner and the 33rd Respondents were both awarded the maximum 50 marks for academic excellence since both candidates possess 1st classes. However, for the presentation, the selection committee awarded variant marks under the respective heads for the Petitioner and the 33rd Respondent. The marks awarded and tabulated in the assessment sheet R11 is reflected below.

		Petitioner	33rd Respondent
(1)	For presentation and subject knowledge	12	15
(2)	For creativity, vision, research interest and overall performance	15	25
(3)	For Degree	50	50
	Total	77	90

The above table clearly shows that the 33rd Respondent obtained more marks than the Petitioner. Thus, the Respondents contend that the 33rd Respondent was selected for the post advertised through **a transparent recruitment process devoid of any collateral or extraneous considerations.**

Hence, upon perusal of the documents before Court i.e R2 and R4 Scheme of Recruitment, R5 the marking scheme and R11 the assessment sheet, I see no reason to doubt that the candidates were assessed by the selection committee based on a clear formulation of qualities and qualifications necessary to perform the functions of office stipulated by the UGC and the 1st Respondent University.

Thus, the *transparency in recruitment process* advocated in **Perera v Monetary Board case** (supra) in my view has been adhered to by the Respondents.

However, at the hearing the Learned Counsel for the Petitioner emphasized that all **norms of justice and fairness were completely violated in the selection process** and that the Petitioners outstanding performance throughout her university career, her high GPA score, her unparalleled teaching experience has not been considered by the selection committee. Moreover, the highlight of the Petitioners case was that the 2nd Respondent Vice Chancellor was not even present at the interview when the Petitioner made her presentation. Thus, the learned Counsel strenuously contended that extraneous factors have been the consideration for the selection and relied very much on the fact that the 2nd Respondent, Vice Chancellor who was said to be not present at the interview, had signed the assessment sheet (R11) and forwarded the recommendation of the selection committee (R12) to the General Council. Hence, I would now move on to examine the said proposition of the Petitioner.

Firstly, the assertion pertaining to the absence of the 2nd Respondent, the Vice Chancellor of the 1st Respondent University at the interview.

It is observed that both the assessment sheet (R 11) and the recommendation of the selection committee (R12) have been signed, not only by the 2nd Respondent but by all six members of the selection committee. Furthermore, responding to the aforesaid contention of the Petitioner, the 2nd Respondent has tendered an affidavit to this Court, stating that she was present at the interview, listened to the presentations and asked questions from the candidates based on the presentations, but that during the presentation of the Petitioner, she was urgently called to answer an important telephone call and was not available for a brief moment. The said position is supported by two other affidavits filed of record together with the statement of objections of the Respondents. The said two affidavits were affirmed to by two other members of the selection committee. i.e the 8th and 16th Respondents.

Hence, upon consideration of the said material before this Court, I do not consider the allegation of the Petitioner with regard to the 2nd Respondents brief absence to be a gross violation of the selection process, as the decision of the selection committee should be considered as a composite decision and not merely as an individual decision. The decision of the six-member selection committee was a unanimous decision and all six members have concurred with the said decision and the signatures in the assessment sheet (R11) and the recommendation made to the Governing Council (R12) establishes beyond doubt that it was a composite decision.

Thus, in my view, the brief absence of the 2nd Respondent will not cause any prejudice to the Petitioner. In any event, the Petitioner brought such fact of the absence of the 2nd Respondent Vice Chancellor to the notice of the appointing authority, the Governing Council prior to the Governing Council considering and evaluating the recommendation of the selection committee. Nevertheless, the Governing Council consisting of 27 members, being satisfied with the recommendation of the selection committee unanimously approved the appointment of the 33rd Respondent to the post of Lecturer (Probationary).

At this juncture, I wish to refer to the observations of this Court in the case of,

Abeykoon v National Water Supply and Drainage Board SC FR 127/2014 SC minutes 09.05.2016.

In the said case the Petitioners main grievance was that he was interviewed by a panel of three members whereas the selected candidate was interviewed by a panel of four members and the Court observed,

> *"Whether the Petitioner was interviewed by a panel of three members or a panel of four members, the interview board has followed the marking scheme which has already been adopted [] Therefore, one cannot argue that the Petitioner was placed at a disadvantage… the Petitioner has failed to satisfy this Court as to how any prejudice was caused to him when he was interviewed by a panel of three members…."*

Hence, I see no merit in the assertion of the Petitioner, that the absence of the 2nd Respondent for a fleeting moment had any prejudicial impact on the Petitioner.

Let me now examine, the **Petitioners unparalleled teaching experience and high GPA score,** two other factors repeatedly emphasized by the Petitioner before this Court, to be instances of gross violations of the selection process.

It is not in dispute that according to the Scheme of Recruitment (R2), **Lecturer (Probationary) is the lowest rung in the academic staff of the University structure.** It is the recruitment step in the hierarchical structure and it leads up to Senior Lecturer Grade II, I etc. The Scheme of Recruitment (R2) i.e. Circular no 721, clearly indicates the **post of Lecturer (Probationary) is filled by 'open examination'**.

It is common knowledge that the reference to *tutor, mentor, demonstrator, instructor and temporary lecturer* in universities are ad-hoc appointments given for short durations and are not governed by the said Scheme of Recruitment (R2). Thus, appointments for the said posts especially to the post of 'temporary lecturer' is not by open examination. It could be walk-in interviews or by invitation and necessarily does not follow the recruitment process referred to in UGC Circulars R2 and R4 which essentially introduced the mechanism of

assessing the teaching ability of a candidate by way of a presentation made before a selection committee.

The case of the Petitioner is that in the years 2012 and 2013, the very same University appointed the Petitioner as a 'temporary lecturer' after an interview process and hence the experience gained by the Petitioner during such period should be reckoned with regard to her 'teaching experience'. The Petitioner goes on to assert in 2012 the Petitioner was appointed as a temporary lecturer, whereas the 33rd Respondent who too was interviewed, was neither selected nor recommended. Thus, the Petitioner contends that the Petitioner is better suited for the post advertised since she has already been evaluated by an interview panel and has extra months of teaching experience compared to the 33rd Respondent. Moreover, the Petitioner contends that the 33rd Respondents performance cannot be improved so quickly and dramatically during such a short time and upon the said basis justifies that she should be chosen, and not the 33rd Respondent to the post of Lecturer (Probationary).

It is observed that in 2012 (R6), the Petitioner was recommended and appointed for the post of temporary lecturer at a walk – in interview for a period of 2 months and in 2013 (R7), the Petitioner as well as the 33rd Respondent were both recommended and appointed as temporary lecturers for a period of nine months by the 1st Respondent University. Thus, at the time of the interview, the Petitioner as well as 33rd Respondent were both serving the 1st Respondent University as 'temporary lecturers', Petitioner being employed ahead of the 33rd Respondent.

Hence, employing the Petitioner as a 'temporary lecturer', which is not in the hierarchical structure of the academic staff of the University, in my view does not give the Petitioner an additional benefit, a free ticket or free entry to be recruited to the academic staff of the 1st Respondent University *ipso facto*. The plain reading of the word denotes it is a temporary appointment. **Thus, there is no automatic promotion from the post of temporary lecturer to the post of Lecturer (Probationary).**

The post of Lecturer (Probationary) is a new appointment, for which the procedure laid down should be strictly followed. The qualifications to be appointed as a Lecturer

(Probationary) is distinct, clear and precise in the Scheme of Recruitment (R2 and R4). The threshold requirement is academic qualification. Thereafter, the presentation before a selection committee, to assess the teaching ability. If a candidate could pass the said hurdle then based on the assessment made in line with the marking scheme, a 'recommendation' is made by the selection committee to the Governing Council. **The appointment to the post of Lecturer (Probationary) is finally in the hands of the Governing Council**. It is noteworthy to observe, that the Petitioner does not allege any wrong doing of the Governing Council, excepting the same grounds alleged against the selection committee.

Thus, in my view the contention of the Petitioner, that on the strength of the temporary lectureship that the Petitioner ought to have been appointed to the post advertised has no basis nor merit. Similarly, the contention of the Petitioner that the appointment of the 33rd Respondent was based on extraneous and collateral considerations is also frivolous. As seen from the marks obtained, the 33rd Respondent has fared better than the Petitioner at the presentation and had the highest mark among all the candidates interviewed. Hence in my view the Petitioner has failed to establish before this Court, that she has an *'unparalleled teaching experience'* or that *'collateral and extraneous factors'* have been the consideration in the instant selection process.

The learned Counsel for the Petitioner in order to satisfy this Court that the Petitioner is better suited for the post advertised, finally and vehemently relied upon the Petitioners' GPA score. According to the Petitioner the primary and only criteria of appointment, irrespective of what is in the Scheme of Recruitment, should only be academic excellence. The Petitioner contends that she has a higher GPA score in comparison to the 33rd Respondent and her academic excellence is unquestionably the best among the candidates.

However, the resume of qualifications of candidates annexed to the assessment sheet (R11) shows that out of the twelve candidates short listed for the interview, only seven candidates had GPA scores. Interestingly, all of them have passed out during the years 2010 to 2013. The other five candidates who have passed out prior to 2010 did not have a GPA score. Assessing the graduates on a GPA or the Overall Grade Point Average, is a relatively new phenomenon which is computed and given by only certain Universities. It is not a pre-

condition in the Scheme of Recruitment (R2 and R4) and the marking scheme (R5) and thus, in my view GPA cannot be the only consideration to be reckoned with or relied upon at an interview. It will only be one factor, among many others that the selection committee would consider with regard to assessing the subject knowledge of a candidate at an interview.

It is also observed that there is one candidate who graduated in 2013 with a GPA of 3.66 which is higher than the Petitioners GPA of 3.63. It is further observed that the said candidates' overall performance at the interview has not been that great in comparison to the rest of the candidates.

The aforesaid factors denote, that the GPA score which only some candidates have, cannot be used as a yardstick or a standard measure or a unique factor in assessing a candidate at an interview of this nature where applicants face an open competitive examination.

Thus, in my view, the contention of the Petitioner that she has a 'higher GPA' and possesses 'more teaching experience' in comparison to the 33rd Respondent and is better suited and qualified and thus should have been appointed to the post of Lecturer (Probationary) is devoid of merit.

Similarly, the Petitioners submission that all norms of justice and fairness were completely violated in the selection process and extraneous and collateral factors were the consideration for selection by the selection committee in my view too has no basis nor merit. A level playing field was laid for candidates who were similarly circumstanced and only one winner could emerge.

Furthermore, the decision to appoint the 33rd Respondent to the post advertised was taken unanimously by the General Council of the 1st Respondent University which consists of 27 members (the 2nd to 28th Respondents) who are eminent persons and whose versatility and integrity has not been challenged in this application. Hence, the appointment of the 33rd Respondent to the post of Lecturer (Probationary) by the General Council of the 1st Respondent University, in my view is neither arbitrary nor unlawful as contended by the Petitioner.

Thus, for the reasons adumbrated in this judgement, I hold that the Petitioner has not been successful in establishing that the fundamental rights of the Petitioner guaranteed in terms of Article 12 (1) have been violated by the 1st to 32nd Respondents. This application is accordingly dismissed. I make no order as to costs.

The application is dismissed.

Judge of the Supreme Court

B. P Aluwihare PC, J.

I agree.

Judge of the Supreme Court

S.Thurairaja PC, J.

I agree.

Judge of the Supreme Court

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

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

Herath Mudiyanselage Podi Kumarihami,
No. 237,
Pooja Nagaraya,
Mahiyanganaya.

Petitioner

SC (FR) Application No. 184/2018

Vs.

1. Officer-in-Charge,
   Mahiyanganaya Police Station,
   Mahiyanganaya.

2. Senadheera,
   Police Officer,
   Mahiyanganaya Police Station,
   Mahiyanganaya.

3. Wimalasena,
   Police Officer,
   Mahiyanganaya Police Station,
   Mahiyanganaya.

4. Senior Superintendent of Police,
   Office of the Senior Superintendent of Police,
   Badulla.

5. Pujith Jayasundara,
   Inspector General of Police,
   Police Headquarters,
   Colombo 01.

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

Respondents

Before: **Justice L.T.B. Dehideniya**

Justice A.L. Shiran Gooneratne

Justice Janak De Silva

Counsel: Ms. Ermiza Tegal with Ms. Thiagi Piyadasa **for the Petitioner.**

Ravindranath Dabare with Ms. Savanthi Ponnamperuma and Arundathi Divisekara **for the 1st to 3rd Respondents.**

Dr. Avanti Perera, SSC **for the 4th and 6th Respondents.**

Argued on: 23/03/2021

Decided on: **10/11/2021**

A.L. Shiran Gooneratne J.

The Petitioner, a street vendor aged 52, by Application dated 07/06/2018, invoked the jurisdiction of this Court, *inter alia*, seeking a declaration that the actions and/ or inactions and/ or conduct of the 1st to 4th Respondents and/ or the State resulted in the infringement of the Petitioner's fundamental rights guaranteed under Article 11 and 12

(1) of the Constitution. The Petitioner was granted leave to proceed as prayed for in the Petition.

Provisions of Article 11 of the Constitution entrenches that *"No person shall be subject to torture or to cruel inhuman or degrading treatment or punishment".*

The Petitioner contends that, when she intervened and resisted the arrest of her daughter Chamila Malkanthi, by the 1st to 3rd Respondents, the 1st Respondent slapped, trampled and kicked her chest several times followed by a kick to her abdomen and another kick to her left elbow. The severity and unbearable pain caused by the assault, made her urinate in her clothes. When the Petitioner knelt and pleaded with the 1st Respondent to spare her daughter from arrest, she was kicked in the back by the 2nd Respondent. The 3rd Respondent had grabbed her hair and pushed her causing her head to hit against the wall and threatened that she will be shot.

The Petitioner has attached 3 witness affidavits marked 'P4' to 'P6' in support of her contention. In paragraphs 8 and 13, of the affidavits marked, 'P5' and 'P6' respectively, Sandya Kumari, a neighbor and the estranged husband of the Petitioner, describes the incident that took place on 17/08/2017, as an inhuman assault on the Petitioner. However, in the affidavit marked 'P4', the daughter of the Petitioner Chamila Malkanthi, on whose behalf the Petitioner intervened and resisted arrest, does not speak to an assault at the time of her arrest by the Officer in Charge of the Mahiyangana Police and two other officers. The affidavits filed by the estranged husband and the neighbor of the Petitioner gives a verbatim account of the events which took place as narrated by the Petitioner, which led to the arrest of Chamila Malkanthi.

According to Paragraph 12 of the Petitioner's affidavit, on 17th August 2017 night, having taken instructions from a lawyer in Kandy, the Petitioner admitted herself to the Kandy Teaching Hospital. The Petitioner contends that she was discharged from the hospital on or about 19/08/2017. However, there is no independent evidence before Court to confirm the date of discharge of the Petitioner. The Petitioners diagnosis card is marked 'P1' and the Medico Legal Report (MLR) is also filed of record.

The Petitioner in support of her claim to the violation of Article 11 and 12(1) of the Constitution, has tendered affidavits marked 'P4', 'P5' and 'P6', the diagnosis card marked 'P1', the Medico Legal Report and the document marked 'P3', in proof of the consistency of the contemporaneous complaints made by the Petitioner.

The position taken by the 2nd and 3rd Respondents are that on 17/08/2017, the said Respondents and two other officers attached to the Anti-Corruption Unit of the Mahiyangana Police, approached the Petitioners house to arrest her daughter Chamila Malkanthi, for an offence of aiding and abetting her husband Asanka, in connection with an offence of possession of drugs. The Respondents contend that the Petitioner obstructed the said team of officers from arresting Chamila Malkanthi by violently banging her head against the door, beating her chest with her hands and threatening to kill everyone and herself. The 2nd and 3rd Respondents admit that they visited the home of the Petitioner on 17/08/2017 around 2.30PM and arrested Chamila Malkanthi, according to procedure set down by law. The 1st Respondent denies that he was present at the time of the alleged incident.

Standard of Proof-

The particular circumstances in each case, would be a decisive factor of the violation alleged by a victim. Therefore, the evidential burden falls on the Petitioner to adduce evidence to a fact relied upon. *"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".* (**SC/ FR Application No. 458/2012**, Aluwihare PC, J.)

In a civil case, the standard of proof is that a party has only to prove the case on a balance of probabilities or by a preponderance of evidence.

"Preponderance of evidence is the greater weight of evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient

to free the mind wholly from all reasonable doubt is still sufficient to a fair and impartial mind to one side of the issue rather than the other" **(*Black's Law Dictionary p. 1220)***

Citing ***Velmurugu vs. the Attorney General and another, (1981) 1 SLR 406***, the Petitioner contends that in cases filed under Article 126 of the Constitution for infringement of fundamental rights *"the standard of proof is a preponderance of probabilities as in a civil case, qualified with the requirement for a high degree of certainty to tilt in favor of the Petitioner".*

In ***Kapugeekiyana vs. Hettiarachchi, (1984) 2 SLR 153***, Wimalaratne J. observed thus;

"In deciding whether any particular fundamental right has been infringed I would apply the test laid down in ***Velmurugu*** *that the civil, and not the criminal standard of persuasion applies, with this observation: that the nature and gravity of an issue must necessarily determine the manner of attaining reasonable satisfaction of the truth of that issue".*

In a series of cases decided by this Court it is clear that 'the standard of proof in complains of violation of Article 11, is proof of preponderance of probability and that civil standard of persuasion applies'.

In order to prove an infringement under Article 11, the admissibility of evidence received by Court comes into question before us. The burden of proof falls on the Petitioner to establish his case as a matter of law and pleadings. To discharge the burden of proof, the Petitioner heavily relies on the consistency of the contemporaneous complaints made by her marked 'P3', attributed to physical violence. When applying the test of consistency per se, or the test of consistency inter se, the Petitioner nor the witnesses to this incident have been subjected to any inquiry, where the Petitioner and the witnesses would stick to the same position, both in the examination in chief as well as in cross examination. When considering contemporaneity of statements made by the Petitioner, the promptness of the Petitioner in making the complaint to the relevant authorities, would be a point to be counted in her favor.

The consistency of contemporaneous statements referred to by the Petitioner, which are all dated 19/08/2017, marked 'P3', are not statements made by the Petitioner but are letters written by her Attorney-at-Law, addressed to the relevant authorities requesting their *"good officers to intervene and inquire into this matter and to take appropriate action to protect her rights".* The letters are written for and on behalf of the Petitioner and other family members, *"who were tortured"* and also makes reference to previous incidents of assaults alleged to have taken place.

In ***Edward Sivalingam vs. Sub Inspector Jayasekara & Others (SC/FR/326/2008),*** the Supreme Court held that;

"When considering the allegations made by the Petitioner against officers of the CID it is important to bear in mind that the burden of proving these allegations lies with the Petitioner. This court has held repeatedly that the standard required is not proof beyond reasonable doubt but must be of a higher thresh hold than mere satisfaction. The standard of proof employed is on a balance of probabilities test and as such must have a high degree of probability and where corroborative evidence is not available it would depend on the testimonial creditworthiness of the Petitioner."

It is trite law that in the absence of an explanation, a delay in making a statement to the police would reduce the weight and impact of the evidence of a witness. This is true since the delay can lead to opportunities for tampering with reliable evidence.

It is not in evidence that the Petitioner at any stage made a statement to the Police regarding this incident. The independent evidence marked 'P3', brought in support of the principal testimony of the Petitioner to strengthen the reliability of events which unfolded on the date of the incident, is a narration of events set out by the Petitioner's Attorney-at-Law.

In paragraphs 6,7,8 and 9 and paragraphs 10,11,13 and 14 of the affidavits filed by the neighbor and the estranged husband, respectively, relates to a verbatim account of torture, inhuman and degrading treatment suffered by the Petitioner at the instance of the 1st to 3rd Respondents and are detailed in the following manner;

- The 1st Respondent slapped the Petitioner causing her to fall to the ground and he trampled her, kicked her chest hard several times, kicked her abdomen and her left elbow.
- The 2nd Respondent kicked the Petitioner's spine, whilst she was kneeling on the ground begging that her daughter not be taken away for no reason.
- The 3rd Respondent grabbed the Petitioner by the hair and pushed her against the wall causing her head to hit the wall. He also threatened to shoot her.

The Petitioner contends that the diagnosis card marked 'P1', and the Medico Legal Report (MLR) corroborates the Petitioners narrative of how she was beaten and stamped by the 1st to 3rd Respondents.

The Diagnostic Card issued on admission to the Kandy Teaching Hospital, is marked 'P1', where, apart from the presentation and the operative details, the words, "*soft, tender"* are pointed to a diagram.

The Petitioner's position is that 'softness' and 'tenderness' referred to in 'P1', is in reference to the stomach region of the Petitioner. However, it is observed that the words "*soft, tender"*, pointing to a hand drawn diagram in 'P1', does not clearly refer to the stomach region or any other organ of the body. The diagnosis card has no date of discharge. Since the Medico-legal Report (MLR) was not filed along with the Petition, the Court directed the Court Registrar to call for the said report from the Judicial Medical Officer of the Kandy Teaching Hospital.

The findings in the MLR would be relevant in the nature of this case.

The Petitioner was examined by the Consultant Judicial Medical Officer, Teaching Hospital Kandy on 19/08/17. The Medico-Legal Report issued by the JMO's Office Kandy, is dated 19/08/2017.

Short history given by patient:

On 17/08/17, at around 2 p.m. assaulted by three police officers from Mahiyangana Police with fist, put her on the ground and stamped, knocked the head on the wall. She has reduced hearing in the right ear following it.

Injuries:

There are no injuries seen.

X ray: femur, knee joins, cervical spine, skull- no fractures seen.

Abdomen: no external injuries seen. FAST scan of the abdomen was normal. Seen by ENT Surgeon: reported as no year perforation. PTA test - hearing was normal.

It is noted that, prior to the examination, a short history was recorded by the Judicial Medical Officer of the alleged torture encountered by the Petitioner. However, the MLR does not support the disclosure of the Petitioner.

Has the Petitioner's version qualified the test of probability?

The Petitioner, soon after the alleged violation, left her home in Mahiyangana and proceeded to Kandy to meet her Attorney-at-Law. The Petitioner states that she did not admit herself to the Mahiyangana Hospital due to fear of further harassment by the Police. In the circumstances, one would expect a person similarly circumstanced to seek medical assistance at the nearest hospital rather than proceed to meet an Attorney-at-law based in Kandy. The Petitioner's actions in this instance have spoken louder than her words. Her priority seems to have been to seek legal advice than medical assistance.

In ***Malinda Channa Pieris and others vs. Attorney-General and others, (1994) 1 SLR 1,*** it was pointed out that:

"having regard to the gravity of the matter in issue, a high degree of certainty is required before the balance of probability might be said to tilt in favor of a Petitioner enduring to discharge his burden of proving that he was subjected to torture or to cruel, inhuman or degrading treatment or punishment; and unless the Petitioner has adduced sufficient evidence to satisfy the court that an act in violation of Article 11 did take place, the Petitioner will fail to obtain a declaration that Article 11 that Article 11 was transgressed."

Facts assumed as true or a supposed fact, in conformity with knowledge, observation, and in the natural sequence, is regarded as more likely to be true than less likely.

Accordingly, on consistency of the narration put forward by the Petitioner, there is an element of improbability that the Petitioner having being beaten up in the manner in which she states, would not seek prompt medical attention. The truth of the facts as revealed in the MLR is not in issue and there is no other corroborative evidence of matters related to injuries sustained by the Petitioner. Therefore, giving credence to the supposed facts, there is more likelihood, that the Petitioner's version, to be false.

The Petitioner also contends that the 4th and 5th Respondents have failed to protect the Petitioners rights enshrined under Article 12(1) of the Constitution by not promptly investigating the complains relating to the incident on 17/08/2017. The Petitioner alleges that having ample opportunity to investigate, there has been no investigation carried out by the 4th and 5th Respondents into the incident which took place on 17/08/2017.

However, to the contrary, the investigation notes and the arrest notes pertaining to the alleged incident of 17/08/2017, have been entered in the Information Book maintained by the Divisional Crimes Investigation Unit of the Mahiyangana Police and an investigation report has been filed to that effect in the Magistrates Court, which are produced marked 'R1(b)'. By letter dated 31/10/2018, (R5) the 1st Respondent has made a request to the Senior Superintendent of Police Badulla (4th Respondent) to conduct an inquiry under his supervision with regard to the compliant made by the Petitioner against the Respondents. It is observed that the 4th Respondent has also conducted an inquiry pertaining to the complains made by the Petitioner to the National Authority for the Protection of Victims and Witnesses, an inquiry has been held and the inquiry report is marked 'R4'. A complaint to the Office of the Superintendent of Police, Badulla has also been investigated and the investigation report is tendered marked 'R7'.

On the question of physical harm and/or suffering at the hands of the Respondents, the Petitioner's position is that the 1st, 2nd and 3rd Respondents have failed to present a consistent and true narration of events. However, the related facts pertaining to the

incident on 17/08/2017, and the follow up action taken by the law enforcement authorities would prove otherwise. It is clear that the complaints made by the Petitioner has been referred to higher authorities to investigate and examine the allegations of physical violence against the Petitioner.

Although the Petitioner procured an affidavit from her daughter as an eye witness to the alleged torture, she only speaks to the physical presence of the Petitioner at the time of her arrest. If the Petitioner was assaulted in the manner as described in the Petition, it is more likely than not, the daughter of the Petitioner, who was arrested at the time of the alleged incident, would have testified to the Petitioner's Predicament.

This Court has repeatedly held that it would be necessary for a Petitioner to prove his position by way of medical evidence and/ or by way of affidavits with a high degree of certainty for the purpose of discharging the burden of proof of infringement of Article 11.

In ***Vivienne Goonewardene vs. Hector Perera (1983) 1 SLR 305***, the Supreme Court observed thus;

"The degree of probability required should be commensurate with the gravity of the allegation sought to be proved. This Court when called upon to determine questions of infringement of fundamental rights will insist on a high degree of probability as for instance a Court having to decide a question of fraud in a civil suit would. The conscience of the court must be satisfied that there has been an infringement."

It is trite law that *"the burden of proof lies upon him who affirms, not upon him who denies"*. Therefore, the question before this Court is whether the Petitioner has placed sufficient material before this Court to the degree required to come to a conclusion that the said Respondents have infringed the Petitioners fundamental rights guaranteed under Article 11 and 12(1) of the Constitution.

Considering all the circumstances referred to above, it is apparent that the Respondents have not violated the fundamental rights guaranteed in terms of Articles 11 and 12(1) of the Constitution.

This application is accordingly dismissed. No costs ordered.

Judge of the Supreme Court

L.T.B. Dehideniya J.

I agree

Judge of the Supreme Court

Janak De Silva J.

I 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 of the Democratic Socialist Republic of Sri Lanka.

S.C.F.R Application No: SC FR/185/18

1. Attanayake Mudiyansela Thimeth Senuja Bandara Attanayake
2. Attanayake Mudiyansela Indika Umesh Bandara Attanayake
3. Mapa Herath Mudiyanselage Sudarshani Mapa Herath

All of;

No: 284/A/2, Randipola Watta,
Ambilmeegama,
Pilimathalawa

Petitioners

Vs.

1. R.D.M.P. Weerathunga,
   The Principal and Chairman of the interview board to admit students to Grade 1,
   Kingswood College,
   Kandy.

2. B.M.H.A. Bandara,
   The Vice Principal,
   Kingswood College,
   Kandy.

3. S.A. Wijekoon,
   Secretary of the Interview Board to
   admit students to Grade 1,
   Kingswood College,
   Kandy.

4. P.G.M. Herath,
   Member of the Interview Board to admit
   students to Grade 1,
   Kingswood College,
   Kandy.

5. R.M. Inoka Lasanthi,
   Member of the Interview Board to admit
   students to Grade 1,
   Kingswood College,
   Kandy.

6. M. Abegunasekara,
   President of the Appeals and Objections
   Board to admit students to Grade 1,
   Kingswood College, Kandy
   And Principal,
   Girl's High School, Kandy.

7. S.P. Vidanagamge,
   Secretary of the Appeals and Objections
   Board to admit students to Grade 1,
   Kingswood College,
   Kandy.

8. Subashini Hemalatha,
   Member of the Appeals and Objections
   Board to admit students to Grade 1,
   Kingswood College, Kandy
   And Deputy Principal,
   Pushpadana Girl's College, Kandy.

9. Kodithuwakku,
   Member of the Appeals and Objections
   Board to admit students to Grade 1,
   Kingswood College,
   Kandy.

10. Director of National Schools
    Ministry of Education,
    Isurupaya,
    Baththaramulla.

11. Sunil Hettiarachchi,
    Secretary,
    Ministry of Education,
    Isurupaya,
    Baththaramulla.

12. G.G.S.B. Alahakoon,
    No: 134/1, Heennarandeniya,
    Gampola.

13. G.G.C.B. Alahakoon,
    No: 134/1, Heennarandeniya,
    Gampola.

14. S.D. Kolambage,
No: 71/165,
2nd Lane,
Heerassagala Road,
Kandy.

15. N.N. Kolambage,
No: 71/165,
2nd Lane,
Heerassagala Road,
Kandy.

16. I.K.D.S.B. Siriwardana,
No: 08, Mulgampala Road,
Kandy.

17. I.K.D.M. Siriwardana,
No: 08, Mulgampala Road,
Kandy.

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

Respondents

Before : L. T. B. Dehideniya J

P. Padman Surasena J and

E. A. G. R. Amarasekara J

Counsel : Thishya Weregoda with Iresh Seneviratne, Sanjaya Marambe, Sewwandi Marambe, Prathap Welikumbura, Manusha Gamage and Thamila Perera for the Petitioners.

Rajiv Goonetilleke, SSC, for the 2nd, 10th, 11th and 18th Respondents.

Argued on : 18.05.2020

Decided on : 07.05.2021

E.A.G.R. Amarasekara J

The 1st Respondent who is the Principal of the Kingswood College Kandy had refused to admit the 1st petitioner (a minor aged five) to Grade 1 of the Kingswood College Kandy for the year 2018. The Petitioners by Petition dated 06.06.2018 complained to this Court that the said refusal has violated their fundamental rights guaranteed under Article 12(1) of the Constitution. Thus, the question to be considered is whether the 1st Petitioner child is entitled to be admitted to the Kingswood College as per the relevant criteria under which they applied.

The 2nd Petitioner is the father and the 3rd Petitioner is the mother of the minor. The Petitioners have applied to admit the 1st Petitioner to the Kingswood College under the category of 'Children of Parents who are Past Pupils of the School' (Hereinafter sometimes referred to as "Past pupils' category"). By the letter dated 10.12.2017, the Respondents informed the Petitioners that the 1st Petitioner had failed in obtaining the minimum number of marks required to be admitted to the school under the relevant category. As per the journal entry dated 06.03.2019, leave was granted by this Court to see whether any infringement has taken place in terms of Article 12(1) of the Constitution.

The admissions to the government schools for the year 2018 is regulated by Education Ministry School Admission Circular No. 22/2017 dated 30th May 2017. Though the said circular is marked as **P2(a)** in the Petition, it has not been tendered with the Petition. As per the journal entry dated 11.06.2018, the petitioners have sought permission to tender said **P2a** and **P10** later and the permission was so granted, but as per the journal entries, it appears that those

two documents have not been tendered by the Petitioners. However, the said circular has been tendered with the objections marked as **E**.

The Petitioners in their petition and affidavit refers to certain evidential material relating to or revealed in or given to or given before the inquiry that took place before the Human Rights Commission- vide paragraphs 22, 23, 27c, 28b, 29, 30b, 30c, 30d and 35b of the Petition and corresponding paragraphs of the affidavit. As **P10**, namely the proceedings before the said commission that is referred to in the paragraph 34 of the Petition was not tendered as per the permission given, those averments have become mere statements not supported by the best evidence. It is pertinent to note that aforesaid paragraphs have not been admitted by the 2nd Respondent in his affidavit dated 10.07.2019, but has explained his stance or denied, as the case may be, through several other paragraphs contained in his affidavit in objection.

Aforesaid Kingswood College Kandy is a national school and applications were called in 2017 for admission of students for Grade 1 for the year 2018. The 2nd Petitioner has applied for admission of the 1st Petitioner to Grade 1 of the school under the Past Pupils' category as laid down in clause 6.2 of the 'Instructions related to the admission of children to Grade One in Government Schools for the year 2018' by the Ministry of Education which was marked as **P2b** with the Petition (hereinafter sometimes referred to as guidelines) and clause 7.3 in the above Circular No. 22/2017.

Under the category of 'Children of Parents who are Past Pupils of the School' the child's mother/father/legal guardian may apply as a Past Pupil who studied in the school and the selection will be made under the following marking scheme;

i. Applicant's period of study in the school at the rate of 02 marks for each class studied (one shall not get marks for stay in the same grade for more than one year) – maximum 26 marks
ii. Educational achievements gained by applicant during the schooling period – maximum 25 marks
iii. Achievement gained through co-curricular activities by applicant during schooling period – maximum 25 marks
iv. Membership in Past Pupils Association, educational achievements after the period of schooling and different types of co-operations extended

for the development of the school. – maximum 24 marks (for different types of co-operation extended to the development of the school only a maximum of 06 marks can be given).

The circular also directs that the maximum marks indicated at ii, iii, iv above shall be distributed at the discretion of the Interview Board without being contrary to the instructions given in the said circular.

It is common ground that the number of vacancies available for admission under Past Pupils' category of the Kingswood College for the relevant year was 33 students, which being the 25% of the total vacancies as per the Circular No. 22/2017. The Petitioners were allocated 43.5 marks at the interview and the 1st Petitioner was placed at the 33rd position and was included in the provisional list of those who had been selected. The cut off mark for the same was also 43.5 as at the time of provisional list. However, it is apparent that another child, namely the 16th Respondent, who also obtained 43.5 marks was placed at the 32nd position since his residence was in close proximity to the school. Even though, close proximity to school was not a criterion to give marks under the past pupil category, the placement of the 16th Respondent who received the same marks was not challenged by way of an appeal or objections by the Petitioners under clause 10.1 of the circular. As such, placement of the 16th Respondent shall not be allowed to be challenged in this application since the Petitioners did not use their right to appeal or objection as provided by the circular. It is also observed, that the circular does not provide for how should the placement or selection be done when there are many applicants who have received same marks for the last vacancy or when there are limited number of vacancies. Furthermore, this court observes that as per the clause 12.10, the Secretary to the Ministry has been given power to supervise and settle issues that may arise in relation to the enforcement of the circular. Thus, if the Petitioners have met with a problem which is due to the lack of a provision to meet such situation in the circular, they could have referred it to the Secretary to the Ministry for relief when the 16th Respondent was placed before the 1st Petitioner. No such reference has been made to the Secretary by the Petitioners. Moreover, the averments in the Petition does not allege any infringement caused by placing the 16th Respondent above the 1st Petitioner and no relief is sought against the 16th Respondent- vide paragraph 2(i) of the Petition. Allegations are made against the marks given to the

12th Respondent and the 14th Respondent after the appeals made by them and placing them above the petitioner and the 16th Respondent in the final list respectively in the 33rd and 31st positions. Even though, certain submissions have been made with regard to the placement of the 16th Respondent above the 1st Petitioner in the written submissions tendered by the Petitioners, it is clear, as explained above, such placement was neither challenged through an appeal to the Appeal and Objection Investigation Board (hereinafter sometimes referred as Appeal Board) as per the circular nor challenged in the petition tendered to this court.

Hence, after the appeals made on behalf of the 12th and 14th Respondents, the 1st Petitioner's name as well as the 16th Respondent's name had not been included among the selected students for admission to Kingswood College for 2018 in the final list, and according to the said final list (P7), the cut off mark had been increased to 44. Further the, the Petitioner who originally had the 33rd position as per the temporary list, has obtained the 35th position.

The 14th Respondent, who originally had obtained 42 marks after the interview received additional 3 marks at the Appeal Board. Thus, he obtained a total of 45 marks and thereby became eligible to be admitted to the school.

Also, the 12th Respondent, who originally had obtained 36.5 marks obtained additional 7.5 marks and thereby obtained a total of 44 marks through the Appeal made securing the final and 33rd position in the final list of children eligible to be admitted to the Kingswood College for the year 2018.

Thus, after the appeal process the 16th Respondent who originally obtained the 32nd position was demoted to the 34th position just above the 1st Petitioner who became the 35th in the final list while having the same marks, namely 43.5.

It should be noted that the Petitioners have not challenged the original marks that the Petitioners were given at the interview. The basis of this application is that, as stated above, the additional marks 3 and 7.5 obtained by the 14th Respondent and the 12th Respondent respectively at the Appeal Board, were wrongfully allocated. Hence, if the Petitioners can successfully show that both the 14th and 12th Respondents were wrongfully selected, they can establish that their entitlement to get the 1st Petitioner admitted to the Kingswood College was affected and as such their rights are infringed, but if they fail in establishing that

such allocation of additional marks to both the 14th and 12th Respondents or either of them is wrongful, they cannot establish that their rights to get the 1st Petitioner admitted to the school was infringed since in such a situation the Petitioner's placement in the list would be below the 33rd position. If the additional marks given to one of them is wrong, it will affect only the right of the 16th Respondent to get himself admitted as his position in the temporary list as well as in the final list is above the Petitioner. In such a case, even if there is an irregularity, the Petitioners may fail, since they cannot claim as of a right that as per the circular, the 1st Petitioner could have been selected. Thus, it is necessary for the Petitioners to establish that additional marks given to both the 14th and 12th Respondents are wrongfully given to get relief in this application.

In the aforesaid backdrop, this Court has to see whether any infringement has caused by the additions of marks to the 14th Respondent and 12th Respondent based on the appeals made to the Appeal Board. As per paragraph 11.6 of the Circular 22/2017, the candidates cannot present new documents at the Appeal stage but must rely on the same documents that were presented at the interview. It appears from the petition that the Petitioners attempt to indicate that certain marks added by the Appeal Board are not supported by the originally tendered documents to the Interview Board. - vide paragraphs 7,26, 27b, 27c, 28b, 29, 31, 35b etc. However, subject to what is referred later on this judgment, no acceptable proof is placed before this court to come to a finding that the additions of marks done by the Appeal Board to both 14th and 12 Respondents were done by considering new documents tendered through appeal. The Position of the contesting Respondents is that by an oversight certain marks were not allocated to the 14th and 12th Respondents by the Interview Board and those were added by the Appeal Board (also see paragraph 8, 9, 10, 12, 14, 16 etc. of the affidavit filed in objection by the 2nd Respondent).

The Petitioners seems to rely on the fact that the 14th and 12th Respondents have signed admitting the marks given by the Interview Board as correct. Just at the interview a candidate may not have sufficient time to concentrate on the marking scheme and various criteria used in giving marks. As such, mere acceptance of the correctness of marks shall not defeat their right to appeal if they later on within the appealable period see that the marks given are not correct. In the application at hand 14th and 12th Respondents have appealed within time and, if the Appeal

Board's finding that marks given by the Interview Board were not accurate is correct, they are entitled to relief they obtained from the Appeal Board. The right to appeal to the Appeal Board is given irrespective of the fact whether they admitted the marks given by the Interview Board at the interview or not. The admission of the marks given by the Interview Board at the interview is not an admission which establishes that the documents considered by the Appeal Board are new documents. It only indicates that the 14th and 12th Respondent failed to point out that they are entitled to more marks at the interview using the documents tendered before the Interview Board. In this backdrop, I would prefer to consider the marks given to 14th and 12th Respondents as per the appeal made to the Appeal Board.

In respect of the 14th Respondent:

In this regard, the Petitioners point out that, the additional 3 marks awarded to the 14th Respondent by the Appeal Board were on the basis that the interview panel had not allocated marks for the Diploma Certificate produced by the 15th Respondent, father of the 14th Respondent child. They argue that it was due to the fact that the duration of the course was not indicated in the said Certificate and since the 15th Respondent failed to produce documentary proof to verify the duration at the interview stage, they cannot at the Appeal stage produce new material and get the marks re-evaluated.

In response to the above allegation, the Respondents have argued that since the Interview Board process a large number of applications, it is possible to overlook documents in the process, and specifically, in this scenario, there was no additional material produced in the Appeal stage, and a document to confirm the duration of the said Course was with the application- vide paragraph 14 b.

As per the journal entry dated 11.01.2019, on the request of the petitioners, this Court has directed the 1st Respondent to submit the documents as prayed in the prayer (h) of the petition and, those documents have been submitted marked as A1, A2, B1 to B 26, C1 to C10, D1 and D2 with a motion dated 25th 01. 2019. The said documents have been referred to in the affidavit filed in objection by the 2nd Defendant – vide paragraph 20 of the affidavit filed by the 2nd Respondent. Among those documents C9 is the relevant Diploma Certificate of the 15th Respondent, the father of the 14th Respondent child and C10 is the document that

confirms the duration of the Diploma Course. There is no material to show that this C10 was submitted only to the Appeal Board. C9 is dated 21.03.2015 and C10 is dated 20.11.2015. The application with regard to the admission of 14th Respondent is dated 11.06.2017. Thus, it is clear that C10 was not a document prepared later on to submit to the Appeal Board but a document issued to the 14th Respondent's father (15th Respondent) even prior to making the application for admission. On the other hand, when marks are given to the educational qualification gained after leaving the school by the past pupil, and such marks are distributed as per the discretion of the Interview Board (vide Clause 7.3.4 and 7.3.5 of the circular marked **E** and Clause 6.2 of the guidelines marked **P2(b)**), and when the certificate itself does not reveal the duration, it appears that it is the duty of the Interview Board to get the duration verified before rejecting to give marks on such certificate since there is no description as to the duration of the course that relates to the said educational qualification either in the circular or the guidelines or in the application marked **C2.** As such, I do not think one cannot find fault with the Appeal Board, if the Appeal Board attended to the errors made by the Interview Board with regard to the duration of the Diploma Course when the Diploma Certificate was available. It was also observed that the Petitioners did not strenuously challenge the additional 3 marks given to the 14th Respondent during the hearing.

As elaborated above this Court does not have sufficient material to decide that the addition of 3 marks to the 14th Respondent by the Appeal Board is wrongful. As such with that 3 marks 14th Respondent's total marks increased up to 45 marks giving him a place for admission to the school above the Petitioners as well as the 16th Respondent who was already above the 1st Petitioner in the temporary list. This situation pushed down the placement of the 1st Petitioner below the 33rd Position where only 33 vacancies existed. In that backdrop, non-placement of the 1st Petitioner in the final list among the selected candidates itself cannot give a standing for the Petitioners to challenge the list as of a right, since there was no challenge to the placement of the 16th Respondent above the Petitioner.

In respect of the 12th Respondent:

The particulars pertaining to the admission of the 12th Respondent has been tendered as B1 to B26 by the Respondents. However, this Court observes that the

application of the 12th Respondent is not tendered along with those documents and, therefore this court is not in a position to compare and decide whether the marks given in the mark sheet marked B1 corresponds to the application made by the 12th Respondent. Not submitting the application of the 12th Respondent after the aforesaid direction made on 11.01.2019 has to be weighed against the contesting Respondents. The Petitioners bring to the attention of this Court that B1 mark sheet is replete with corrections and alterations and therefore cast a serious doubt as to the genuineness of the allocation of marks during the Appeal. However, a doubt arisen due to corrections and alterations may not suffice since there shall be grounds to show that such corrections and alterations are not due to various calculations done in considering different material available but only done in view of wrongfully giving marks not entitled to the 12th Respondent. It must be also noted that there is nothing to indicate that documents marked and tendered as B2 to B26 were not available before the Interview Board.

When considering the additional 7.5 marks obtained by the 12th Respondent at the appeal stage, it appears as per the documents marked as B1 and D1 that the said additional marks were allocated as given below;

Category	Interview Marks	Marks after Appeal	Reason
Prize	none	01	prize
Competitions	none	1.5	Drama
Societies	02	04	posts held
Contribution to school	2.5	5.5	contribution

With regard to the above additional marks allocated to the 12th Respondent, it is the position of the contesting Respondents that the marks are justifiable as per the documents marked B1 – B26 of the brief.

As per the documents marked as B8 and B7 the addition of 1.5 marks and 2 marks for co-curricular activities under achievements in Drama Competition and for post held in Societies can be considered reasonable.

It is not clear why the marks for contribution to the school was increased by 3 marks. The maximum that can be given for such contribution seems to be 6 marks- vide **P2(b)** guidelines and the Circular marked **E**. Thus, to give 5.5 marks for

such contributions it must be an outstanding contribution. When the Interview Board gave 2.5 marks for such contribution, the Interview Board must naturally have an idea with regard to the contribution made by other candidates as they are privy to the other applications, but during the Appeal, when the Appeal Board increased the marks by adding 3 more marks, it is not clear whether the members of the Appeal Board had any idea or comparative view with regard to the contributions made by other candidates. If they increased the marks without any idea about the contributions made by other candidates, especially the candidates whose applications were rejected, it cannot be said that such increase of marks for contribution to the school is justifiable. However, this Court does not have sufficient material to state that the Appeal Board acted wrongfully in that regard. However, none of the documents marked as B2 to B26 shows that the 12th Respondent's father won any prize for hand writing for 1 mark to be given by the Appeal Board as per B1. Thus, it appears, out of 7.5 marks added by the Appeal Board to the marks of the 12th Respondent, one mark is given without any supporting document. When that one mark is reduced, the 12 Respondent gets only 43 marks which is less than the marks received by the 16th Respondent and the 1st Petitioner. Hence the placement of the 12th Respondent in the 33rd position in the final list cannot be approved and that should have been given to the 16th Respondent and the 1st petitioner's place should have been the 34th position in the final list. Since there were only 33 vacancies, it was the 16th Respondent who has been affected by this wrongful act and not the Petitioner, since the 1st Petitioner's place which should be the 34th place in the final list, the Petitioners still cannot claim any entitlement for admission to Kingswood College, Kandy. Hence, even if this court observes some irregularity or wrongful act in giving marks to the 12th Respondent, this Court cannot find any infringement of the Petitioners' rights by refusing to admit the 1st Petitioner to the said school, since being in 34th place he is not entitled to admission. Since the Petitioners have not challenged the placement of the 16th Petitioner through an appeal or otherwise, this Court cannot be satisfied that the Petitioners have status to file an application on the basis of refusal to admit the 1st Petitioner to the said college. Even though, the Petitioners did not appeal against the placement of the 16th Respondent above the 1st Petitioner in the temporary list and also had stated in the Petition that the 16th and 17 Respondents were added only to give notice to them and no relief is sought against them, now in the written submissions has

submitted that persons who are similarly circumstanced must be treated equally. However, if the circular is silent and number of vacancies are limited, I do not think this Court can find fault with the relevant authorities if they created a reasonable criteria or reasonable classification among the candidates who gained the same marks to decide who should be given priority to fill the vacancies. On the other hand, there is no proof of service of notices of this application to the 16th and 17 Respondents as per the journal entries and they were absent and not represented during the hearing. As per the brief what has been served on them seems to be a notice of a motion to get the matter re-listed (vide journal entry dated 10.09.2018 and the relevant motion dated 07.09.2018 and attached postal article receipt) and perhaps, the date of hearing -vide journal entry dated 06.03.2019. Under such circumstances, this court cannot consider 16th and 17th Respondents as respondent who are slumber on their rights and not vigilant. Without 16th and 17th Respondent being given a proper chance to present their stance, this Court cannot come to a conclusion that they have slept over their rights. Thus, it is not proper to make any order that may affect the rights of the 16th Respondent.

It is argued by the contesting Respondents that the Appeal Board does not appear to have considered the fact that the 13th Respondent (The father of the 12th Respondent) had represented the school in Cricket, Rugger, Boxing and Athletics and should be entitled for 03 marks for representing the school in sports whereas he was only given 01 mark. Further he has won the 1st place at the Central Province Drama Competition **(B8)** and second place in the same in 1994 **(B9)** and the Appeal Board seems to have missed the document B9 for which they should have given 2 marks and instead given only 1.5 marks for the document marked B8. However, as per the Circular marked **E** as well as the Guidelines marked **P2(b)**, it appears that the distribution of marks under these items was at the discretion of the Interview Board, and it is also mentioned in **B1** that with regard to achievements in Dance, Music, Drama etc., marks are given only for one level in one section. To consider whether this argument is correct or not, sufficient materials are not placed before this Court to indicate how the Interview Board used its discretion with regard to the distribution of marks under the relevant co-curricular activities.

Legitimate Expectation

The Petitioners have stated in the petition that they have a Legitimate Expectation that in the event the ranking of the 1st Petitioner is affected due to any amendments made by the Appeal Board, the petitioners would be given a reasonable opportunity to present their case before the publication of the final list and it has to be so given in the interest of procedural fairness and keeping in line with the rules of natural justice. The Petitioners has brought the attention of the Court to Clause 10(3) of the guidelines P2(b) which provides that persons who forwarded the objections, the persons who are subject to objections and the persons who forwarded the appeals will be separately subjected to investigation by the said Appeal Board during the appeal process. The Petitioners further state that the said circular does not provide any opportunity for persons whose names appear in the provisional list, against whom no objections have been raised, to be heard by the Appeal Board, if they are not included in the final list. It is further alleged that there is a breach of natural justice since they were not given any opportunity to assess the validity of the additional marks given to the 12th and 14th Respondents - vide paragraphs 36 to 40 in the Petition. In reply to these paragraphs the 2nd Respondent in his affidavit in objections state that the procedure as set out in the circular was followed.

In this regard it should be noted that the Circular No.22/2017 marked **E** states in paragraph 12.1.2 that in the event, children who became eligible as per the temporary list become ineligible due to the appeals and objections made to the Appeal Board, the parents of those children must be summoned before the Appeal Board and only after their eligibility is inquired into, the final decision should be made by the Appeal Board. Thus, the Circular provides an opportunity for the children who are listed at the tail end of the provisional list and who may lose their opportunity to get admissions, to get their marks re- evaluated, when there is a risk of losing admissions. As such, there is no need for a legitimate expectation in a purported lacuna of provisions for remedy in the circular for such a situation but there is an express provision giving an opportunity to be heard by the board. In an administrative process for selection, one cannot expect to give an opportunity to a party to cross-examine or challenge others' documents like in a trial before a court house. The position of the contesting Respondents is that they followed the procedure set out in the Circular. This Court cannot find fault with the 3 marks given to the 14th Respondent even after the Petitioners placed

their facts before this Court. There is no direct allegation in the Petition that the Petitioners were denied an opportunity in terms of clause 12.1.12 of the Circular. As such I am not inclined to hold that the Fundamental Rights of the Petitioners were infringed by not giving a proper hearing during the process of selection.

Conclusion

As per the reasons elaborated above, the place obtained by the 14th Respondent by obtaining 45 marks after the appeal made is correct, even if the 12th Respondent loses his 33rd position in the list of eligibility to be admitted to the Kingswood College. In that backdrop, 33rd position should have been given to the 16th Respondent. As there are only 33 vacancies, it is the view of the Court that the Petitioners cannot complain as of a right that the 1st Petitioner was eligible to be admitted to the Kingswood College. As such, the refusal to admit the 1st Petitioner to Kingswood College cannot be considered as an infringement of the Fundamental rights of the Petitioners.

Hence this application is dismissed with 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

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

1. D. H. B. Edirisinghe
   2/57, Melpati watta, Kotawala, Kaduwela.

2. P. M. Ratnapala
   87, Bellantara Road, Dehiwala.

3. M. D. S. A. Perera
   Pahala Kosgama, Kosgama.

4. N. M. A. Amaradewa
   232/6, Imaduwa Road,
   Kurunduwatte, Ahangama.

5. W. P. S. K. Fernando
   Mount Pleasant, Hapugala, Wakwella.

6. L. P. S. Kumara
   62-3, Ginthota Road, Kalegana, Galle.

7. P. Ariyasena
   1st Lane, Kalutara Road, Moranthuduwa.

8. Sri Lanka Accountants' Service Association,
   335-3/1, Olcott Mawatha, Colombo 10.

Petitioners

SC /FR/ Application No. 187/2014

Vs,

1. B. M. S. Batagoda
   Former Deputy Secretary to the Treasury,
   Ministry of Finance and Planning
   the Secretariat, Colombo 01.

2. Dayasiri Fernando
   Former Chairman,
   Public Service Commission,
   No, 177, Nawala Road,
   Narahenpita, Colombo 05.

3. Palitha M. Kumarasinghe
   Former Member of the Public Service Commission, No, 177, Nawala Road, Narahenpita, Colombo 05.

4. Sirimavo A. Wijerathne
   Former Member of the Public Service Commission, No, 177, Nawala Road, Narahenpita, Colombo 05.

5. M. D. W. Ariyawansa
   Former Member of the Public Service Commission,No, 177, Nawala Road, Narahenpita, Colombo 05.

6. Sathya Hettige
   Former Chairman,
   Public Service Commission,
   No, 177, Nawala Road,
   Narahenpita, Colombo 05.

7. S. C. Mannapperuma
   Former Member

8. Ananda Seneviratne
   Former member

9. N. H. Pathirana
   Former Member

10. S. Thillei Nadarajaa
    Former Member

11. S. A. Mohomed Yahiya
    Former Member

12. Kanthi Wijetunga
    Former Member

13. Sunil A. Sirisena
    Former Member

14. I. N. Soyza
Former Member

7th to 14th Respondents
Above; all at
Public Service Commission,
No, 177, Nawala Road,
Narahenpita, Colombo 05.

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

16. Dharmasena Dissanayake
Chairman, Public Service Commission,
No, 177, Nawala Road,
Narahenpita, Colombo 05.

16A. Hon. Justice Jagath Balapatabendi
Chairman, Public Service Commission,
1200/9, Rajamalwatta Road,
Battaramulla.

17. A. Salam Abdul Waid
Former Chairman

17A. Hussain Ismail,
Member

17B. Mrs. Indrani Sugathadasa,
Member, Public Service Commission,
1200/9, Rajamalwatta Road,
Battaramulla.

18. D. Shirantha Wijayatilake,
Former Member

18A. Sudharma Karunaratne,
Member

18B. Mr. V. Shivagnanasothy,
Member, Public Service Commission,
1200/9, Rajamalwatta Road,
Battaramulla.

19. Prathap Ramanujam,
Member

19A. Dr. T. R. C. Ruberu,
Member, Public Service Commission,
1200/9, Rajamalwatta Road,
Battaramulla.

20. V. Jegarasasingam
Member

20A. Mr. Ahamod Lebbe Mohomed Saleem,
Member, Public Service Commission,
1200/9, Rajamalwatta Road,
Battaramulla.

21. Santi Nihal Seneviratne,
Former Member

21A. G. S. A. D. Silva PC
Member

21B. Mr. Leelasena Liyanagama,
Member, Public Service Commission,
1200/9, Rajamalwatta Road,
Battaramulla.

22. S. Ranugge
Member

22A. Mr. Dian Gomes,
Member, Public Service Commission,
1200/9, Rajamalwatta Road,
Battaramulla.

23. D. L. Mendis
Member

23A. Mr. Dilith Jayaweera,
Member, Public Service Commission,
1200/9, Rajamalwatta Road,
Battaramulla.

24. Sarath Jayathilaka
Member

24A. Mr. W.H. Piyadasa,
Member, Public Service Commission,
1200/9, Rajamalwatta Road,
Battaramulla.

25. J. J. Rathnasiri
Former Secretary
Ministry of Public Administration
and Management,
Independent Squire, Colombo 07

25A. S. Hettiarachchi
Secretary, Ministry of Public Administration,
Home Affairs, Provincial Counsel and Local
Government, Independence Squire,
Colombo 07.

25B. Mr. J. J. Rathnasiri,
Secretary, Ministry of Public Services,
Provincial Councils and Local Government,
Independence Square, Colombo 07.

Respondents

Before: **Justice Vijith K. Malalgoda PC**
Justice Janak de. Silva
Justice M. A. Samayawardhena

Counsel: Manohara de. Silva PC with Ms. Nadeeshani Lankatilleka for the Petitioners,
Ms. S. Barrie, SSC, for the Hon. Attorney General

Argued on: 10.02.2021

Judgment on: 09.07.2021

Justice Vijith K. Malalgoda PC

Out of the eight Petitioners before this court, the 1st to the 7th Petitioners were employed in Grade 1 of the Sri Lanka Accountants' Service at the time the Public Administration Circular No. 06 of 2006 was issued but among them the 1st and 2nd Petitioners were retired when they filed the instant application before this court. The 8th Petitioner before this court is the Sri Lanka Accountants' Service Association a duly registered trade union.

As observed by this court, this is yet another application filed by another category of Public Service with regard to the implementation of the Public Administration Circular 06 of 2006 issued by the Ministry of Public Administration and Home Affairs (hereinafter referred to as "the circular") which was introduced to re- structure and to have a common structure in service as well as in salary in the Public Service. As submitted by the Respondents before this court, "the circular" had provided for re-structuring the salaries, service grades and promotional procedure.

This court on several occasion had held that registered trade unions have no *locus standi* to come before the Supreme Court for alleged violation of the fundamental Rights of its membership. In this

regard I am mindful of the decision in ***Ceylon Electricity Board Accountants' Association V. Ranawaka SC FR 18/2015*** SC minute dated 03.05.2016 where *Sripawan CJ* held;

> "In the absence of a provision permitting a Trade Union to institute action on behalf of its members, the Petitioner Union cannot have and maintain this application on behalf of its members in terms of Article 17 read with Article 126 (2) of the Constitution."

However, in the said decision in ***Ceylon Electricity Board Accountants' Association (Supra)*** Sripawan CJ had observed the difference in the decision in the said case with the decision in ***the Public Services United Nurses Union Vs. Jayawickrema and Others (1988) 1 Sri LR 229*** as follows;

> "I do not find myself able to accede to the argument advanced by Mr. …… for two reasons. Firstly, no objection was taken by the Respondents in the said application that the Public Services United Nurses Union had no *locus standi* to institute an application under Article 126 of the Constitution and the Court did not have the benefit of any argument of the learned Counsel on that issue. Secondly, in any event, the second Petitioner was a Nurse and the Secretary of the First Petitioner Union, whose fundamental right of equality guaranteed under Article 12 had been violated. Furthermore, the second Petitioner is a "person" within the meaning of Article 126 (2) of the Constitution. Thus, the case could have proceeded even if the first Petitioner, namely Public Service United Nurses Union was struck down."

The Respondents raised several objections with regard to the *Locus Standi* of some of the Petitioners before this Court including the 8th Petitioner namely the Sri Lanka Accountants' Service Association. However as observed in the case of Ceylon Electricity Board Accountants' Association (Supra) first to the seventh Petitioners being members of the said Association and the Sri Lanka Accountants' Service, who claimed that their fundamental right to equality guaranteed under Article 12 (1) of the

Constitution had been violated, the said Petitioners are entitled to peruse the instant application before this court.

The objection with regard to the *locus standi* of the 1st and the 2nd Petitioners namely, D.H.B. Edirisinghe and P.M. Ratnapala was that they were retired from the service, when the instance application was filed before this court.

However, as observed by this court the said two Petitioners were retired from the service on dates subsequent to 01.01.2006, on which date "the Circular" had come into effect, and the said Petitioners were entitled to claim the benefits of "the circular" for their pension rights.

In the said circumstances, I see no merit in the said objection raised on behalf of the Respondents.

According to the 1st to the 7th Petitioners, they all were belonging to an All- Island Service namely the Sri Lanka Accountants' Service, when "the circular" was issued and except for the 1st and the 2nd Petitioners, all the other Petitioners were in Class I of the said service when the instant application was filed before this court.

The Petitioners have explained their service structure, prior to 01.01.2006 as follows;

Structure of the service-

a) Class I

b) Class II Grade I

c) Class II Grade II (recruitment level)

Promotions within the service-

a) 10 years of satisfactory service in Class II Grade II is required for an officer to be eligible for promotion to Class II Grade I

b) 5 years of satisfactory service in Class II Grade I is required for an officer to be eligible for promotion to Class I

(P2a)

As submitted by the Petitioners, there need to be an amendment to the above structure, with the issue of "the Circular", but due to the delay in implementing "the Circular" 3rd Petitioner along with few other Petitioners belonging to different All-Island Services, instituted proceedings before the Supreme Court to compel the authorities to implement the provisions of "the Circular"

The said application, SC FR 312/2008 was settled between the parties when the Respondents agreed in court for the relief prayed in paragraph 'C' be granted, i.e.

"C. Direct the 1st to the 14th Respondents to amend the service minutes of the Sri Lanka Engineering Service, Sri Lanka Animal Production and Health Service, Sri Lanka Planning Service, Sri Lanka Accountants' Service and the Sri Lanka Agriculture Service as required by the promotional procedure set out in Clause 4 of annexure II of Public Administration Circular 06/2006 with effect from 01.01.2006"

As revealed before us, "the Circular" had provided for a four-tear structure for All- Island Services and the structure proposed by "the Circular" was;

a) Special Grade

b) Grade I

c) Grade II

d) Grade III (recruitment level)

The main grievance of the Petitioners before this court was based on the appointments made to the Special Grade referred to above and the Petitioners rested their entire case to the Service minute, that

was introduced in September 2010, by publishing on 10th September 2010 in the Gazette extraordinary 1670/33. The said service minute replaced the existing service minute which was published in the Gazette (extraordinary) No 1194/26 dated 27th July 2001 and was issued in order to implement the recommendations of "the Circular."

The Petitioners have taken up the position that, an officer belonging to the Grade 1 of the Sri Lanka Accountants' Service as at 01.01.2006 is entitled under Clause 19.1 of the new service minute which is the transitional Provision, read with Clause 10.3 to be appointed to the Special Grade if he fulfills the requirements referred to in those provisions.

For the convenience of reference, I will now re-produce the above clauses in my Judgment.

10.3 Promotion form Grade 1 to Special Grade

10.3.1 Promotion to Special Grade will only be made by a designated officer authorized by the Public Services Commission or by Cabinet of Ministers from the officers in the Grade I of the Service who fulfill following requirements.

Accordingly, an officer-

i. Should have completed satisfactory period of service in the Grade I during the preceding five (5) years of gaining eligibility for promotion and should have earned all salary increments on due dates;

ii. Should not have undergone any punishment as a result of disciplinary inquiry taken place for an offence committed during the preceding five (5) years of gaining eligibility for promotion (excluding warnings);

iii. Should have achieved above satisfactory performance during the five (5) years preceding the date of promotion in terms of the approved performance evaluation scheme;

iv. The promotions to the Special Grade shall be made based on recommendations of the board of interview appointed by the appointing authority to check whether the above qualifications have been fulfilled. Date of promotion will be the due date of gaining eligibility.

10.3.2 Officers who fulfills all requirements stipulated in Section 10.2.1 1(v) and 10.3.1 above will be promoted to the Special Grade from the date of gaining eligibility,

10.2.1.1(v) Referred to above reads as follows;

10.2.1.1(v) Should have completed any one of the qualifications set out in Appendix 5

Appendix 5 Referred to above gives a list of qualifications that are equallent to post graduate degree qualification

19 Transitional provision;

19.1 (a) Officers who are in Service on the effective date will be absorbed into the re-organized Sri Lanka Accountants' Service as follows;

19.1.a (iv) Absorption into Special Grade of the Service. Officers who are in Class I of the Sri Lanka Accountant's Service and have fulfilled qualifications set out in section 10.3.1 and having completed qualification as at the date of implementation.

a) Possession of a Postgraduate Diploma or higher qualification from recognized university or from an institute approved by the University Grants Commission.

b) Having passed Part I or higher level of the final examination of the Institute of Chartered Accountant's or Part III or higher level of Chartered Institute of Management Accountants.

Whilst relying on the above provision of the new service minute read with Clause 6.1, the learned President's Counsel for the Petitioners argued that there was no cadre assigned to the Special Grade by the service minute and according to the service minute the combined cadre of Sri Lanka Accountants' Service should be 1600. In the absence of an identified number of officers in any of the cadres including Grade III to Grade I and Special Grade, it was the position of the Petitioners, that the officers belonging to each Grade is entitled to be promoted to the next Grade when he/she fulfill the requirements identified in the service minute and the same principle will apply even to the promotions to Special Grade.

As further submitted by the learned President's Counsel, the post graduate requirement identified in Clause 10.2.1.1(v) is not applicable to the petitioners since Transitional Provisions in Clause 19 had reduced the said requirement to

a) Possession of a Post Graduate Diploma or higher qualification from recognized University or from an institute approved by University Grants Commission.

b) Having passed Part I or Higher level of the final examination of the Institute of Chartered Accountants' or part III or higher level of Charted Institute of Management Accountants.

and the officers who possessed the said qualification and fulfill the other requirements identified in Clause 10.3.1 including the Petitioners, were entitled to be promoted to the Special Grade without any cadre restriction.

The Petitioners whilst submitting the above position, relied heavily on the Cabinet Memorandum and a decision which was produced marked P6a and P6 respectively. In the said Cabinet decision, it was decided;

i. To implement the new minutes of the Sri Lanka Planning Service and the Sri Lanka Accountants' Service to be effective from 01.01.2006; and

ii. To grant promotions to officers with requisite qualifications in accordance with the provisions of the relevant service minutes, without payment of arrears of salary up to 30.06.2010

By another Cabinet paper dated 23.02.2011 an Interview Panel was proposed to be appointed to check the qualifications of those who are eligible to be promoted to the Special Grade and the said paper was approved by the Cabinet on 31.03.2011 (P10a and P10b)

The grievance or the alleged violation, the Petitioners have complained before this court had emerged since then and the Petitioners have submitted several documents in support of their contention. Some of the documents the Petitioners relied in establishing their grievance is as follows;

P-11 letter by Deputy Secretary Treasury addressed to the Secretary Public Service Commission dated 16.06.2011 seeking approval for the interview board (as per the Cabinet decision) to check the qualifications of 166 applicants for the Special Grade

P-12 letter dated 07.07.2011 addressed to Deputy Secretary Treasury by the Senior Assistant Secretary to the Public Service Commission granting the approval to conduct the interview subject to submitting an explanation with regard to the approved cadre for the Special Grade, prior to conducting the interviews.

P-13 letter dated 12.10.2011 by the Deputy Secretary Treasury to the Secretary Public Service Commission informing that a committee had been appointed to identify the cadre for the Special Grade and Grade I of the Sri Lanka Accountants' Service

P-14 letter dated 4th November 2011 by the Senior Assistant Secretary to the Public Service Commission to the Deputy Secretary Treasury, informing not to conduct any interviews for the promotion of Grade I officers of the Sri Lanka Accusants' Service to the Special Grade until the cadre of the Special Grade is informed to the Public Service Commission

P-15 letter dated 13.12.2011 by the Deputy Secretary Treasury to the Secretary Public Service Commission informing that the New Service minute for the Accountants' Service provides a Non-Cadre base promotion scheme and therefore seeking permission to conduct the interviews

P-16 letter dated 31st January 2012 by Senior Assistant Secretary Public Service Commission to the Deputy Secretary Treasury re-iterating the requirement to finalize the cadre for the Special Grade of the Sri Lanka Accountants' Service prior to conducting the interviews.

Since then, several letters had been exchanged between the General Treasury and the Public Service Commission and the Public Service Commission had finally issued the impugned Gazette 1865/36 dated 6th June 2014 (P-25) making the following changes to the existing service minute.

a. identifying the posts to be held by a Special Grade Officer as,

a) Deputy Chief Secretary (Financial)

b) Chief Financial Officer

c) Director General

d) Additional Director General

b. identifying the Joint Cadre for Grade I to Grade III of the Sri Lanka Accountants' Service as 1600.

c. replacing Clause 10.3.1. of the existing service minute to read as;

10.3.1 Appointment to Special Grade is approved by the Public Service Commission only by promoting officers of the Grade 1 who have fulfilled the following requirements.

i. Should have obtained a Post Graduate Degree in relevant field

ii. Should have completed five (5) years of active and satisfactory service in Grade I of the Executive Service Category and should have earned five increments after promotion to Grade I as to the date of gaining eligibility for promotion.

iii. Should have completed not less than 18 years of active service period in the Executive Service Category of the related service category/posts as at the date of gaining eligibility for promotion

iv. Should have attained a performance at satisfactory level or above within the period of 05 years immediately preceding to the date gaining eligibility for promotion.

v. Should have a satisfactory service period and should not have been subjected to disciplinary punishment within the period of 05 years immediately preceding to the date of gaining eligibility for promotion.

According to the Petitioners the effect of the amendments introduced to the existing service minute was to;

a) Limit the entire cadre of 1600 personnel of the Sri Lanka Accountants' Service only to Grades I, II and III

b) Insist that all promotions to the Special Grade (and/or absorption as the case may be) irrespective of whether they be ordinary promotions and/or transitional period promotions and/or transitional period absorptions be granted only to officer who *inter alia* possess "a Postgraduate Degree in the relevant field" and

c) Determine that promotions to the Special Grade will be made only to fill vacancies in the Special Grade,

Petitioners have further submitted that, based on the amendments made to the service minute, the Public Service Commission had permitted to hold the interview for the promotion and/or adsorption of Grade I officers of the Sri Lanka Accountants' Service to the Special Grade and 82 handpicked officers were called to face the interview but, none of the Petitioners who were eligible to face the interviews based on the earlier Cabinet decision were among the 82 officers summoned to face the interview.

Based on the above submissions placed before this Court, the Petitioners argued that, the amendment made to the Service minute of the Sri Lanka Accounts' Service by the Public Service Commission (P-25) without obtaining the permission of the Cabinet of Ministers and without consulting the Director General Management Services, National Salaries and Cadre Commission and the relevant stake holders including the 8th Petitioner, is arbitrary, illegal and in violation of the Fundamental Rights of the Petitioners guaranteed under Article 12.1 of the Constitution.

Whist raising a preliminary objection on *locus standi* of some of the Petitioners, which I have already considered in this judgment, the Respondents resisted the granting of any relief in the instant application. The in-cumbent Chairmen of the Public Service Commission, the 16th Respondent, filed an affidavit along with several documents to explain the steps taken by the Public Service Commission in

this regard, but before analyzing the same, this court would prefer to consider some of the documents the Petitioners have submitted along with papers already filed before this court.

The Petitioners produced marked P2a, the service minute which existed at the time "the Circular" was issued on 25-04.2006, but as per "the Circular" it was operative since 01.01.2006. Therefore, P2a was operative only up to 31.12.2005. According to P2a, there were only 3 Grades in the Sri Lanka Accountants' Service Namely Class II Grade II, Class II Grade I and Class I. Clause 5 (a) of the said service minute identified the Cadre of the said service as follows;

Class I	-122
Class II-Grade I	-1224
Class II-Grade II	

As observed by this court, the highest grade under the previous service minute was Class I, and Cadre of 122 was identified for the said Grade separate of the combine cadre of 1224 for the balance two grades including the recruitment Grade. In these circumstances, it is not correct for the Petitioners to argue that the promotions in the Sri Lanka Accountants' Service is not cadre base but it is automatic within the combine cadre.

The new service minute introduced in year 2010 (effective from 01.01.2006) provided for four Grades and Clause 6.1 and 6.2 identified the cadre as follows;

6.1

Grade III	1600
Grade II	
Grade I	
Special Grade	

6.2 No of Combined Officers :1600 (Grade III, II and I)

When consider the above provisions in the new service minute, it is once again clear, that the three lower grades in the service had put together to a combine cadre of 1600 keeping the Special Grade separately but no cadre had been identified for the Special Grade under the new service minute.

In these circumstances, I cannot agree with the argument placed before this court by the learned President's Counsel for the Petitioners, that the new service minute had also provided a non-cadre base promotion scheme based on a combine cadre of 1600 for the Sri Lanka Accountants' Service. As further observed by this court, the combine cadre of 1600 is only for Grade I, II, and III of the said service and not for the Special Grade.

As revealed during the argument before us, the Public Service Commission was not in operation when the service minute of the Sri Lanka Accountants' Service was published by the Secretary to the Ministry of Finance and Planning in the Government Gazette Extra Ordinary 1670/30 dated 2010.09.10

The Minister in charge of the Subject of Finance and Planning had submitted a Cabinet Memorandum in order to obtain the approval to the service minute and to grant promotions to officers who are entitled for promotions to higher Grades. (P6a) The Cabinet of Ministers by its decision dated 23.03.2010 had approved the said request as follows; (P6)

i) To implement the new service minute of the Sri Lanka Planning Service and the Sri Lanka Accountants' Service to be effective from 01.01.2006; and
ii) To grant promotions to officers with requisite qualifications in accordance with the provisions of the relevant service minutes, without payment of arrears of salary up to 30.06.2010

When going through the above documents it is clear, that the approved service minute did not have the cadre for the Special Grade and therefore the approval granted cannot be implemented without

an amendment to the service minute. Even though the learned President's Counsel for the Petitioners argued that the Public Service Commission is bound to implement the policy decision of the Cabinet of Ministers and therefore any amendment made to the service minute by the Public Service Commission is *ultra vires* and arbitrary, this court cannot agree with the said argument for the simple reason that the Public Service Commission being the Appointing Authority since it is re-constituted on 12.06.2011, will not able to appoint anybody to a Grade which does not have a cadre identified in its creature itself. In the said circumstances, it is the duty of the Public Service Commission to amend the service minute in consultation with the relevant stake holders.

When P10 was submitted by the Secretary to the Ministry of Finance and Planning requesting to nominate an interview panel, to conduct interviewers to promote Grade I officers belonging to the Sri Lanka Accountants' Service to the newly established Special Grade of the said Service, the said memorandum was considered and approved under sub-heading 59.07 by the Cabinet under the main heading 59; "Institutional work that has to carried out by the Cabinet of Ministers until the Public Service Commission is appointed."

In the said circumstances, it is clear, that the approval granted by the Cabinet of Ministers to hold interviews as proposed by the Secretary to the Ministry of Finance and Planning does not come within the "Policy Decisions" taken by the Cabinet of Ministers.

The Public Service Commission was re-constituted on 12th June 2011 and since then all appointments, transfers dismissal and disciplinary control of Public Servants and all matters relating to the same, including work entrusted to the Public Service Commission by its procedural rules, was to be carried out by the Public Service Commission.

The steps Public Service Commission has taken with regard to the appointments to the Special Grade of the Sri Lanka Accounts' Service has been explained by the Respondents as follows;

a) Special Grade is a grade created by "the circular" for officers in All Island Services and in all such services, the appointment to the Special Grade is not automatic but based on Cadre Vacancies.
b) In the Service minute of the Sri Lanka Accountant' Service, which was published by the Secretary to the Ministry of Finance and Planning in 2010, a separate cadre for Special Grade was not identified
c) Cabinet of Ministers had granted approval to conduct interviews to promote officers belonging to the Grade I to Special Grade of the Sri Lanka Accountants' Service, prior to Constitute the Public Service Commission, but the Commission approval was sought to continue with the interview by letter dated 16.06.2011.
d) In the absence of a specific Cadre identified in the service minute, the relevant authority was instructed to identify the cadre for the Special Grade before conducting the interviews. These instructions were given to the Secretary to the Ministry of Finance and Planning who published the service minute and also obtained cabinet approval to conduct interviews for the promotion to the Special Grade, in order to maintain equal standard between the All-Island Services.
e) Even though approval was sought to hold interviews subject to the identification of the cadre by a special committee appointed for that purpose, the said approval was not granted. However, prior to the approval being granted to conduct the interviews, several preliminary issues such as finalizing the qualifications required and the transitional provisions that will applicable for the promotions to the Special Grade (R7, R8) were resolved.
f) By letter dated 23.11.2012, Deputy Secretary to the Treasury wrote to the Public Service Commission informing that 45 posts had already being identified as posts for Special Grade Officer and submitted 33 approvals the Ministry received from the Department of

Management Service, and sought approval to conduct Interviews, after publishing the necessary advertisements.

g) Subsequent to the conduct of the interviews by calling applications, summoning the 82 applicants who had applied with required qualification, 41 names were recommended to the Public Service Commission by the Deputy Secretary Treasury by letter dated 30.06.2014 (R-10).

h) Even thereafter several letters were exchanged between the relevant stake holders to grant the maximum relief to all those who had the necessary qualifications to be promoted to the Special Grade and in this regard, the transitional period that has to be expired on 31.12.2014 was extended until 28.02.2015.

i) The Department of Management Service had approved a cadre of 47, for the Special Grade and that too was published in the Gazette Extraordinary 1981/99 dated 27.08.2016.

j) Whilst the interview process was commenced after following the due process and finalizing other matters such as applicability of the transitional provisions to those who had the requisite qualifications, the necessary amendments were made to the service minute of the Sri Lanka Accountants' Service in keeping with standard between All Island Services by publishing the amendments in the Government Gazette extraordinary 1856/36 dated 6th June 2014 but Clauses 19 and 20 were not subject to any amendment and continued to be in force until the end of the extended period referred to above.

During the argument before this court, the learned President's Counsel submitted that the relevant stakeholders such as Department of Management Services, Directors Establishment were not consulted by the Public Service Commission when amending the service minute but we cannot agree with the said argument since there is material before this court that, there were consultations between the Public Service Commission, Ministry of Finance and the Department of Management Service in identifying the cadre for the Special Grade of the Sri Lanka Accounts' Service.

Petitioners challenged the steps that has been taken by the Public Service Commission to amend the service minute already approved by the Cabinet of Ministers by its decision dated 23.03.2010 and argued that the Public Service Commission did not have the power to amend the service minute, to introduce cadre vacancy requirement, as P 5, constitute a policy decision of the Cabinet of Ministers.

When considering the above argument, it is necessary to refer to the relevant provisions of the Constitution which refers to the powers and functions of the Public Service Commission and the Cabinet of Ministers with regard to the Public Service.

At the time the service minute was approved by the Cabinet in the year 2010, the applicable text of the Constitution was the 17th Amendment and Article 55 (1) and 55 (4) of the 17th Amendments were as follows;

Article 55 (1); Appointment, promotion, transfer, disciplinary control and dismissal of public officer shall be vested in the Commission.

Article 55 (4); Subject to the provisions of the Constitution, the Cabinet Ministers shall provide and determine all matter of policy relating to public officers.

The above two Sub Articles were replaced in the 18th Amendment to the Constitution and subsequent to the said Amendment the relevant Sub Articles of the Constitution reads as follows;

Article 55 (1): The Cabinet of Ministers shall provide for and determine all matters of policy relating to public officers, including policy relating to appointments, promotions, transfers, disciplinary control and dismissal.

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.

Whilst referring to the difference between the two texts in the relevant Articles, on behalf of the Respondents it was argued that, in the text that was operative in 2010, the Cabinet's policy making power specially, with regard to appointments, promotions and transfers was narrowed in contrast to the broader policy making power introduced by the 18th Amendment.

However, I am not inclined to accept the above argument since the policy making power with regard to the Public Service was never entrusted to the Public Service Commission but was with the Cabinet of Minister, whatever the language used in the relevant Article, whether it was more elaborated by identifying specific functions or identified as "all matters of policy relating to public officers".

As further observed by me, the policy with regard to appointment to the highest grade of the Sri Lanka Accountants' Service is very much clear when perusing the two service minutes of the above service. As already observed in this judgement, the highest grade under the old service minute was Class I and a separate cadre of 122 was identified for this grade in the service minute. In the new service minute, a combine cadre of 1600 was identified for the three lower grades, i.e., Grade III, Grade II and Grade I but no cadre was identified for the Special Grade. If the Cabinet was to identify the Special Grade within the combine cadre, there was no restriction on the Cabinet to do so and include the Special Grade within the combine cadre.

Therefore, it is crystal clear that the Government Policy with regard to the appointments to the highest grade was to make it cadre base to an identified cadre but not within a combine cadre. Therefore,

identifying a specific cadre for the Special Grade cannot be considered as a violation of the Government Policy with regard to the appointments to the Sri Lanka Accountants' Service.

When a specific cadre is identified to a Specific Grade there is a competition to enter into the said Grade. Conducting a routine interview to check the qualifications will not be sufficient in such a situation. The amendments made to the New Service Minute by the Public Service Commission had further clarified this position and therefore that too cannot be considered as a violation of the Government Policy.

In the said circumstances, it is my considered view, that P-25 the amendments made to the service minute of the Sri Lanka Accountants' Service by Publishing in Gazette Extraordinary 1865/36 date 06.06.2014 is not in violation of the fundamental rights guaranteed under Article 12 (1) of the 1st to 7th Petitioners.

Application is accordingly dismissed.

I make no order with regard to the costs.

Judge of the Supreme Court

Justice Janak de. Silva

I agree,

Judge of the Supreme Court

Justice M. A. Samayawardhena

I 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. 216/2014

W. A. D. S. Wanasinghe,
Hanthinawa,
Halmillawewa
Kurunegala.

PETITIONER

-Vs-

01. Kamal Paliskara
Assistant Superintendent of Police (II)
Nugegoda.

02. Inspector General of Police,
Police Headquarters,
Colombo 01.

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

RESPONDENTS

Before: **P. PADMAN SURASENA J**

E. A. G. R. AMARASEKARA J

A. L. S. GOONERATNE J

Counsel: Ravindranath Dabare for the Petitioner.

Madhawa Tennakoon SSC for the Hon. Attorney General.

Argued on : 15-03-2021

Decided on : 23-06-2021

P Padman Surasena J

The Petitioner, filed the Petition pertaining to the instant application in this Court on 18-07-2014, praying *inter alia,* for;

i. leave to proceed under Article 11, 12 (1) and 13 (1) of the constitution;
ii. a declaration that the 1st Respondent/all the Respondents and/or the state has infringed or has been in continuous infringement of the fundamental rights guaranteed to the petitioner under Article 11, 12 (1) and 13 (1) of the Constitution;
iii. compensation of Five Million Rupees (Rs. 5,000,000/=).

This Court on 13-10-2014, having heard the submissions of the learned counsel for the Petitioner, had decided to grant leave to proceed in respect of the alleged violations of Article 12(1) of the Constitution.

When the matter was taken up for argument on 15-03-2021, the learned Senior State Counsel raised a Preliminary Objection against the maintainability of this application on the basis that the application of the Petitioner has been filed out of time provided by law.

The learned counsel for the Petitioner sought to counter that argument by stating that the complained acts by the 1st Respondent were continuous infringements.

Although the Petitioner in his petition, has alleged infringements of fundamental rights guaranteed to him under Article 11, 12 (1) and 13 (1) of the Constitution,[1] this Court, as has been already mentioned above, has granted leave to proceed only in respect of the alleged infringements of Article 12(1) of the Constitution.

Out of the averments in the petition, one can observe that the petitioner has alleged only the following instances as acts of infringement by the 1st Respondent.

i. The 1st Respondent who was an Assistant Superintendent of Police in Nugegoda Police Division, has sent a Police message,[2] to Hettipola Police Station to inform the petitioner to appear before him at 10.30 AM on 24th October 2013.
ii. The 1st Respondent on 24th October 2013 (presumably after the Petitioner had appeared before him consequent to the above message), had allowed the management of Nilkem (pvt) Ltd. to question and harass the Petitioner.
iii. When the Petitioner attended the 1st Respondent's office on 24th October 2013, the 1st Respondent had 'harassed and made demands from the Petitioner without taking down any proper complaint by anybody.
iv. The 1st Respondent on 24th October 2013 had obtained the signature of the petitioner to a document containing eight pages and forced the Petitioner to pay Rs. 942,214.13 to Nilkem (pvt) Ltd. without affording an opportunity to explain what actually had happened. [3]
v. The 1st Respondent has again summoned the Petitioner on 07th November 2013 and insisted that the Petitioner must pay the alleged sum of money due to Nilkem (pvt) Ltd.[4]
vi. The 1st Respondent has again sent a Police message,[5] informing the Petitioner to come to his office at 10.30 AM on 05th December 2013.

[1] Paragraph 29 and prayers of the Petition dated 18.07.2014.
[2] Produced marked as **P-2**.
[3] Paragraph 14 of the Petition.
[4] Paragraph 16 of the Petition.
[5] Produced marked as **P-3**.

vii. The 1st Respondent has sent another Police message,[6] to Hettipola Police Station to inform the Petitioner to come to his office at 11.00 AM on 12th December 2013.

viii. On or about 12th December 2013, the 1st Respondent had demanded the Petitioner to withdraw the case filed by the Petitioner in the District Labour office Kuliyapitiya and the complaint lodged at the Police Station Hettipola. He had also threatened to file criminal proceedings against the Petitioner if he ignores the said demands.[7] According to the Petitioner, this was despite the Petitioner proving before the 1st Respondent that he had already settled all the monies due to Nilkem (pvt) Ltd.[8]

ix. On or about 22nd December 2013, on the instructions of the 1st Respondent, Nilkem (pvt) Ltd had lodged complaints at the Special Investigation Unit – Nugegoda. Consequently, the Petitioner had to appear in the Special Investigation Unit - Nugegoda on 07th January 2014. [9]

x. On 07th January 2014, the 1st Respondent had arranged the petitioner to go to Hettipola Police Station accompanied by P C 30674 Priyankara to bring back a Motor cycle to Colombo. The Petitioner, after bringing and handing over the said motor cycle to Mirihana Police Station, was arrested and produced before the Magistrate who had enlarged the Petitioner on bail.[10]

According to the Petitioner, the 1st Respondent through the above acts, has infringed the fundamental rights guaranteed to him under Article 12 (1) of the Constitution. The Petitioner has stated in his petition that the above acts are continuing infringements.[11]

The Petitioner has filed the instant application on 18-07-2014. The latest alleged act of infringement, according to the petition, had occurred on the 07th January 2014. Thus, the Petitioner has filed the instant application more than six months after the aforesaid latest alleged act of infringement.

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[6] Produced marked as **P-4**.
[7] Paragraph 25 of the petition.
[8] Paragraph 21 of the petition.
[9] Paragraph 26 of the petition.
[10] Paragraphs 27 and 28 of the petition.
[11] Paragraph 29 of the petition.

Next question to be considered is whether the alleged infringements are continuing infringements as alleged by the learned counsel for the petitioner. According to the Petitioner, the 1st Respondent who was an Assistant Superintendent of Police in Nugegoda Police Division, has allegedly violated his fundamental rights, by sending several Police messages informing him to come to the 1st Respondent's office, by threatening, by harassing, by demanding certain acts to be done and finally by arresting and producing him before Nugegoda Magistrate. The final act had occurred on 07th January 2014. The Petitioner does not allege any act, attributable to the 1st Respondent, as having occurred thereafter. At its least, there is no material before Court even to ascertain whether the 1st Respondent, during the period of more than six months after 07th January 2014, in fact continued to be an Assistant Superintendent of Police in Nugegoda Police Division. Moreover, it must be noted that the Petitioner has only made allegations of violations against the 1st Respondent. In the above circumstances, and having regard to the nature of the acts of infringements alleged against the 1st Respondent, I am of the view that the acts of infringements alleged by the Petitioner in his petition, had not continued after 07th January 2014. Therefore, the said alleged acts cannot be identified as continuing infringements as alleged by the learned counsel for the petitioner.

There is yet another question to be considered. That is the question of applicability of provisions in section 13 (1) of the Human Rights Commission of Sri Lanka Act No. 21 of 1996. This is because the Petitioner has averred in his petition that he had lodged a complaint dated 21st January 2014, at the Human Rights Commission under the No. HRC/299/14. The Petitioner has produced, marked **P-6**, a receipt issued by the Human Rights Commission.

Section 13 (1) of the Human Rights Commission of Sri Lanka Act No. 21 of 1996 is as follows.

"where a complaint is made by an aggrieved party in terms of section 14, to the Commission, within one month of the alleged infringement or imminent infringement of a fundamental right by executive or administrative action, ***the period within which the inquiry into such complaint is pending*** [12] *before the Commission,*

[12] Emphasis added.

shall not be taken into account in computing the period of one month within which an application may be made to the Supreme Court by such person in terms of Article 126 (2) of the Constitution."

What section 13 (1) states is, not to take, the period within which the inquiry into a complaint is pending before the Commission, into account, for the purpose of computing the period of one month referred to in Article 126 (2) of the Constitution.

I only find a bare averment in the petition of a fact that he had lodged a complaint at the Human Rights Commission. The receipt issued by the Human Rights Commission produced marked **P-6**, only shows the fact that a complaint had been made.

In the case of H K Subasinghe Vs The Inspector General of Police and seven others,[13] the learned State Counsel raised a preliminary objection that the petitioner in that case had not made the complaint of the alleged infringements within the period of one month as provided in Article 126 (2) of the Constitution. Having considered the submissions, His Lordship S N Silva Chief Justice stated as follows.

"The Petitioner seeks to bring the complaint within the time limit on the basis that he made the complaint to the Human Rights Commission of Sri Lanka within the stipulated time. In this regard the petitioner relies on section 31 (sic) [14] 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 filled 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 the case of Ranaweera and others Vs Sub Inspector Wilson Siriwardena and others,[15] the second preliminary objection raised by the respondents in that application

[13] SC (spl) No.16/1999, decided on 11-09-2000.
[14] Section 13 appears to have been inadvertently typed as section 31 in this judgment.
[15] 2008 (1) SLR 260.

is that the petitioners' application had been filed out of time. The petitioners in that application, relied on an averment in their petition that they had made a complaint to the Human Rights Commission within one month from the date of the acts resulting in the alleged violation of the petitioners' fundamental rights. Like in the instant case, the petitioners in that application, had produced a receipt issued by the Human Rights Commission acknowledging their complaint.

His Lordship Justice Gamini Ameratunga followed the decision in Subasinghe's case[16] and stated as follows.

"It is very clear from the section quoted above that the mere act of making a complaint to the Human Rights Commission is not sufficient to suspend the running of time relating to the time limit of one month prescribed by Article 126(2) of the Constitution. In terms of the said section 13(1), the period of time to be excluded in computing the period of one month prescribed by Article 126(2) of the Constitution is "the period within which the inquiry into such complaint is pending before the Commission."

Section 14 of the Human Rights Commission Act (in so far as it is relevant to the present purpose) reads as follows. "The Commission may ..... on a complaint made to it by an aggrieved person investigate an allegation of an infringement or imminent infringement of a fundamental right of any person ....."

Thus the Human Rights Commission is not legally obliged to hold an investigation into every complaint received by it regarding the alleged violation of a fundamental right. Therefore a party seeking to utilize section 13(1) of the Human Rights Commission Act to contend that "the period within which the inquiry into such complaint is pending before the Commission shall not be taken into account in computing the period of one month within which an application may be made to the Supreme Court" is obliged to place material before this Court to show that an inquiry into his complaint is pending before the Human Rights Commission.

This is the view taken by this Court in the case of Subasinghe v the Inspector General of Police.[17] *In that case the petitioner sought to invoke section 13(1) of the Human*

[16] Supra.
[17] Supra.

Rights Commission Act to claim exemption from the time limit set out in Article 126 of the Constitution. In that case My Lord the Chief Justice has held that the petitioner has to adduce some evidence to show that there has been an inquiry pending before the Human Rights Commission into his complaint. In the absence of any such material placed before Court by the petitioner, the objection relating to the time bar was upheld."

The Petitioner in his written submissions has relied on the case of Romesh Cooray Vs Jayalath, Sub-Inspector of Police and others.[18] The 6th respondent in that case, had contended that the alleged infringement of the fundamental rights by the 1st to 6th respondents in that case had taken place on 06.07.2003, whereas the application of the petitioner in that case had been filed only on 11.12.2003. it was on that basis that the said 6th Respondent had contended that the said application had not been made within one month from the alleged infringement, as required by Article 126 (2) of the Constitution.

Her Ladyship Justice Shirani Bandaranayake[19] rejected the contention of the said 6th Respondent, for two main reasons. The first reason is that the 6th respondent had not raised the said preliminary objection either in his objections or in the written submissions. It appears that the said 6th respondent had taken the said objection belatedly and after all the Court pleadings were completed. It was in that background that Her Ladyship stated the following.

"Accordingly on a consideration of the aforementioned Rules, it is evident that a preliminary objection should be raised at the time the objections are filed and/or should be referred to in the written submissions that has to be tendered in terms of the Rules. The objective of this procedure is quite easy to comprehend. The whole purpose of objections and written submissions is to place their case by both parties before Court prior to the hearing and when the petitioner's objections are taken along with the objections and/or written submissions filed by the respondents prior to the hearing, it would not come as a surprise either to the affected parties or to Court and the applications could be heard without prejudice to any one's rights. Therefore, as

[18] 2008 (2) SLR 43.
[19] As she then was.

correctly pointed out by the learned President's Counsel for the petitioner, the earliest opportunity the 6th respondent had of raising the aforementioned preliminary objection was at the time of filing his objections and written submissions in terms of the Supreme Court Rules, 1990; as the objections and/or the written submissions should have contained any statement of fact and/or issue of law that the 6th respondent intended to raise at the hearing."

The second reason for rejecting the said 6th Respondent's argument regarding the time bar is because the petitioner in that case had adduced material to satisfy Court that the inquiry before the Human Rights Commission had been still pending. This is clear from the following excerpt from Her Ladyship's judgment.

"….. Admittedly, the petitioner had complained to the Human Rights Commission about the said infringements on 08.07.2003. The petitioner in paragraph 47 of his petition dated 11.12.2003 clearly stated thus:

"The petitioner states that he has made a complaint to the Human Rights Commission on 08th July 2003 against the aforesaid unlawful conduct of the respondents and the inquiry in respect of the same is pending in the Human Rights Commission. The petitioner annexes hereto a copy of the letter issued by the Human Rights Commission marked P 11 in proof thereof. "

The document marked P 11 is issued by the Human Rights Commission of Sri Lanka, which refers to the complaint made on behalf of the petitioner on 08.07.2003. Accordingly, a complaint had been made to the Human Rights Commission within one month from the date of the alleged incident. …."

"…. Considering the aforementioned circumstances, it is clear that the petitioner had complied with the provisions laid down in Section 13(1) of the Human Rights Commission Act and had complained to the Human Rights Commission within one month of the alleged infringement of his fundamental rights. Further, when he had filed the present application before this Court on 11.12.2003, the inquiry before the Human Rights Commission had been still pending.

In the circumstances, it is quite clear that the petitioner had filed his application before this Court within the stipulated time frame in terms of Article 126(2) of the Constitution. … "

The Petitioner in the instant application has also placed reliance on the case of Amura Deshapriya Alles and another Vs Road Passenger Services Authority of the Western Province and others.[20] His Lordship Justice Marsoof PC had rejected the objection of time bar in that case for the reasons similar to those in Romesh Cooray's[21] case. Moreover, it is clear from the following passage from the judgment of His Lordship Justice Marsoof PC in that case, that the Human Rights Commission after conducting an inquiry into the complaint made by the relevant petitioner, had even proceeded to make a recommendation as well. The relevant passage is reproduced below.

" … It is admitted that even when the Petitioners invoked the jurisdiction of this Court in terms of Article 126 of the Constitution on 8th June 2009, the said complaint was pending before the said Commission, which made its recommendations as provided in the Human Rights Commission of Sri Lanka Act No. 21 of 1996 on 30th November 2009 (X4) ….. "

In the instant case, the 1st Respondent in his affidavit, has specifically raised the preliminary objection against the maintainability of this application on the basis that the application of the Petitioner has been filed out of time provided by law. Thus, the Petitioner was put on notice that this preliminary objection would be raised at the argument of the case. However, the Petitioner has neither taken any further step nor adduced any further material to counter the said objection. It is thereafter, that the learned Senior State Counsel when this case was taken up for argument at the very commencement, raised the same objection as a preliminary issue.

The Petitioner in the instant case, has neither adduced any evidence to show that there has been an inquiry pending before the Human Rights Commission nor made any attempt to explain the long delay in filing this application.

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[20] SC (FR) Application No. 448/2009, Decided on 22-02-2013.
[21] Supra.

In the above circumstances, it is apparent that there is no merit in the submissions made by the learned counsel for the Petitioner.

Thus, for the foregoing reasons, I conclude that the Petitioner has failed to file the instant application within one-month time period specified in Article 126 (2) of the Constitution. Therefore, I uphold the preliminary objection raised by the learned Senior State Counsel and proceed to dismiss this application without costs.

JUDGE OF THE SUPREME COURT

E A G R AMARASEKARA J

I agree,

JUDGE OF THE SUPREME COURT

A L S GOONERATNE J

I agree,

JUDGE OF THE SUPREME COURT

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

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

Charith Eshanka Hopwood,
No. 60/5, Kerawalapitiya Road,
Hendala,
Wattala.

Petitioner

SC. FR. Application

No. 257/2018

Vs.

1. Inspector of Police Gunawardena,
   Officer-in-Charge,
   Minor Offences Branch,
   Police Station,
   Ragama.

2. Chief Inspector of Police Gunasekera,
   (Acting Officer-in-Charge),
   Police Station,
   Ragama.

3. Inspector General of Police,
   Police Headquarters,
   Colombo 01.

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

Respondents

Before: **Justice Buwaneka Aluwihare, PC**
Justice E.A.G.R. Amarasekara
Justice A.L. Shiran Gooneratne

Counsel: Shyamal A. Collure with Prabath S. Amarasinghe, A.P. Jayaweera and Ravindra Silva **for the Petitioner.**

Ms. Induni Punchihewa, SC **for the Respondents.**

Argued on: 23/02/2021

Decided on: **29/07/2021**

A.L. Shiran Gooneratne J.

The Petitioner, the Chief Manager of Rainbow Garments Technologies (Pvt) Ltd. contends that his arrest and detention by the 1st Respondent, the Officer-in-Charge of the Ragama Police Station, on 18/07/2018, and producing him in the Magistrates Court of Negombo on 19/07/2018, in Case Bearing No. L. 69786, is a violation of his fundamental rights guaranteed by Article 11, 12(1), 13(1), 13(2) and 14(1)(g) of the Constitution. This Court granted Leave to Proceed on 04/09/2018 to the Petitioner in respect of the alleged infringements of Article 12(1), 13(1), 13(2) and 14(1)(g) of the Constitution.

The facts of the case as established from the pleadings and the documents therein are set out as follows:

Rainbow Garments Technologies (Pvt) Ltd. is a limited liability company dealing in the purchase and sale of ready-made garments from various suppliers and one such supplier was M.B. Subani Chathuri. During a business transaction, Dinesh Wimalachandra, the Managing Partner of the said company issued two cheques to Subani Chathuri, to the value of Rs. 216,150/- and Rs. 217,775/- for garments supplied to the company. Having observed that some of the garments supplied were damaged and/or defective, the company informed the said supplier to replace the said items. Since there was no response from the supplier, the company advised the respective banks to stop payment which is reflected in the cheque return notifications marked 'P8' and 'P9' endorsed as *"payment stopped by drawer"*.

The cheques marked '1R3(a)' and '1R3(b)' have been issued by the proprietor of 'Rainbow Fashion World', Dinesh Wimalachandra and not by the Petitioner. Therefore, the Petitioner contends that there can be no suspicion that the Petitioner had committed any offence arising from the complaint made by Subhani Chathuri, marked '1R1'.

The Petitioner states that on or about the first week of June 2018, on a complaint lodged by the said supplier, the 1st Respondent informed the company that a representative be present at the Ragama Police Station. Accordingly, the Petitioner and another employee representing the company informed the 1st Respondent about the events leading up to the "stop payment" of the relevant cheques. The 1st Respondent by a Police message addressed to the Officer-in-Charge of the Police Station Thalangama, required Dinesh Wimalachandra, the proprietor of the company to be present at the Ragama Police Station on 18/07/2018. The Police Message marked '1R5(a)' dated 13/07/2018, confirms this position. Since Dinesh Wimalachandra was indisposed, the Petitioner responded to the Police message by presenting himself at the Police Station.

The Petitioner states that he was arrested by the 1st Respondent on 18/07/2018 and a statement was recorded around 8.30 p.m. on the same date and held overnight in the Police cell.

On 19/07/2018, the Petitioner was taken to the Negombo Magistrates Court and was produced in Case Bearing No. L. 69786 for misappropriating a sum of Rupees 646,325/- an offence punishable under Section 386 of the Penal Code. The Petitioner further claims that the 2nd Respondent filed a police report dated 19/07/2018 in the Magistrates Court and moved that the Petitioner be placed in remand custody until 26/07/2018, pending further investigations. The Petitioner contends that due to immense pressure being brought about, the Petitioner was forced to pay the amount alleged to have been misappropriated and settle the case.

The Petitioner's claim as set out in the Petition is based on the following contentions.

a) that there was no complaint lodged against him by M.B. Subani Chathuri at the Police Station of Ragama.
b) the arrest and detention of the Petitioner at the Ragama Police Station on 18/07/2018, is contrary to the procedure established by law and therefore is illegal, unlawful, and arbitrary.

Subani Chathuri in her complaint dated 05/06/2018, marked '1R1', has clearly stated that Dinesh Wimalachandra of Rainbow Fashion World (Pvt) Ltd. had instructed the relevant banks to stop payment of cheques bearing his signature issued to her and therefore, Dinesh Wimalachandra should be summoned and questioned regarding this transaction.

In the first week of June 2018, a person introducing himself as the 1st Respondent, had informed the Petitioner that a representative of the company be present at the Ragama Police Station for an inquiry in connection with the complaint lodged by the complainant.

At the said inquiry, The Petitioner had explained to the 1st Respondent the circumstances, which led to the present situation. Thereafter, by Police message dated 13/07/2018, the 1st Respondent through the Officer-in-Charge of Thalangama Police summoned Dinesh Wimalachandra, as the accused in Case bearing No. 69786, to be present at the Ragama Police Station on 18/07/2018, in order to record a statement on a charge relating to a cheque fraud. The Officer-in-Charge of the Thalangama Police Station, by message dated 17/07/2018, marked '1R5(b)', informed the Ragama Police that Wimalachandra is not to be found in the given address and therefore, a copy of the message had been handed over to a manager of the company by the name Indika Mano. Since Wimalachandra was indisposed, the Petitioner voluntarily presented himself at the Ragama Police on 18/07/2018, around 11 a.m.

The investigation report dated 21/06/2018, filed by the 1st Respondent clearly identified Wimalachandra as the suspect. According to the Police message dated 13/07/2018, Wimalachandra was required to be present at the Ragama Police Station for further investigations. However, when the Petitioner arrived at the police station on 18/07/2018, the 1st Respondent arrested him and kept him overnight in the Police cell and was produced before the learned Magistrate of Negombo on 19/07/2018. The 1st Respondent having produced the Petitioner, filed a handwritten charge sheet dated 19/07/2018, marked 'P7', and a further report moving Court to remand the Petitioner until 26/07/2018.

In paragraph 13 of the affidavit, the 1st Respondent clearly states that the person wanted in connection of the alleged fraud is Wimalachandra and that he deliberately evaded investigations into the matter with no valid reason. However, relying on purchase orders marked '1R6' and '1R7', the 1st Respondent alleges that the Petitioner was a person in authority who should be responsible for the said transaction. In the affidavit tendered to Court the 1st Respondent has contended that the Petitioner was arrested due to the "continuous evasion of Dinesh Wimalachandra".

Section 23(1) of the Code of Criminal Procedure Act sets out the procedure in making an arrest of a person, *inter alia*, it states,

> *"in making an arrest the person making the same … shall inform the person to be arrested of the nature of the charge or allegation upon which he is arrested."*

The Explanation provided in ***Section 23(1) of the Code of Criminal Procedure Act*** states thus;

> *"Keeping a person in confinement or restraint without formally arresting him or under the colourable pretension that an arrest has not been made when to all intents and opposes such person is in custody shall be deemed to be an arrest of such person".*

In ***Tuduge Achalanka Srilal Perera Vs. Police Sergeant Ananda & Other S.C. (F/R) App. No. 198/2011,*** the Court held that,

> ***"****Every arrest by a police officer, attracts Section 23 (1) of the Code of Criminal Procedure Act and it is mandatory that the person arrested should be informed of the nature of the charge or allegation upon which he is arrested. A bare assertion that the arrest is in accordance with the procedure established by law, falls far short of the standard expected of the applicable legal provision."*

In order to justify the arrest of the Petitioner, the 1st Respondent relied on an affidavit dated 12/03/2019, marked '1R4' made by the Attorney-at-Law who represented the complainant at the inquiry held at the Ragama Police. The Attorney in her affidavit states that the Petitioner in his capacity as a manager of the company had signed the documents relating to the transaction and accordingly did undertake to pay the monies due to the complainant. The Attorney further states that the Petitioner who is an authorized person of the company was represented by an Attorney-at-Law at the said inquiry, undertook to settle the amount due to the complainant.

The Petitioner denies that he was represented by an Attorney-at-Law and also deny that he had the capacity to settle such disputes.

The arrest and detention of the Petitioner on 18/07/2018 is justified by the 1st Respondent on the basis that the Petitioner was a person in authority (manager) of the said company. The 1st Respondent relied on the statement made by the complainant and the affidavit made by the Attorney-at-Law who is alleged to have accompanied the complainant to the Ragama Police.

The complaint dated 05/06/2018 was against Wimalachandra.

According to the investigation report dated 21/06/2018, Wimalachandra was the suspect in Case Bearing No. L.69786, pending before the Magistrates Court of Negombo. On 19/07/2018, a further investigation report together with a handwritten charge sheet was filed and the Petitioner was produced in Court as the accused in the aforesaid case. The 1st Respondent produced the Petitioner before the learned Magistrate and made an application to remand the Petitioner pending further investigations.

The learned State Counsel submitted that the Petitioner was arrested in terms of ***Section 32(1)(b) of the Code of Criminal Procedure Act*** and justifies the arrest on the basis that:

> *"a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists",*

to arrest the Petitioner and therefore the arrest and detention of the Petitioner was according to procedure established by law.

In an application for a Writ of Habeas Corpus, H. N. G. Fernando, C.J. in ***Gunasekara vs. De Fonseka, (1972) 75 NLR 246 at p. 250*** stated as follows**,**

> *"Only if a person is informed of the ground for his arrest, or in other words, of the offence which he is suspected, that he will have the opportunity to rebut the*

suspicion or to show that there was some mistake as to identity" ---- "exceptional cases in which the requirement will not apply, particularly cases in which it is obvious in the circumstances that a person must necessarily know why he is being arrested. Examples of such cases are found in paragraphs (a), (c), (e) and (f) of s. 32 (1) of the Criminal Procedure Code."

Therefore, an arrest made in terms of Section 32 (1) (b) would not be within the said exception.

In ***Guneththige Misilin Nona and others vs. P.C. Muthubanda, (10312), Police Station, Moragahahena and others (S.C. (F/R) No. 429/2003)***, Shiranee Thilakawardana J. cited with approval the case of ***R vs. Howell (1981) 3 All ER 383***, where Watkins LJ, observed on the English Common Law power to arrest for breach of peace as follows:

"The public expects a Policeman not only to apprehend the criminal but to do his best to prevent the commission of crime, to keep the peace in other words. To deny him therefore, the right to arrest a person who he reasonably believes is about to breach the peace would be to disable him from preventing that of which might cause serious injury to someone or even to many people or to property. The common law, we believe, whilst recognizing that a wrongful arrest is a serious invasion of a person's liberty, provides the Police with this power in the public interest. In those instances of the exercise of this power which depend on a belief that a breach of the peace is imminent it must be established that it is not only an honest, albeit mistaken belief but a belief founded on reasonable grounds"

The investigation reports filed in Court did not cast any reasonable justification to arrest the Petitioner as a suspect in the case.

The Petitioner as a manager of the company, on notice, willingly participated at the inquiry held by the 1st Respondent, in the absence of Wimalachandra, due to ill health. However, the 1st Respondent without any reasonable suspicion detained the Petitioner over night at the police cell and produced him before the Magistrate on the following day.

Dicey defines the right to personal liberty as:

> *"a person's right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of any legal justification"* ***Guneththige Misilin Nona and others vs. P.C. Muthubanda, (10312), Police Station, Moragahahena and others (supra)***

Rights of an arrested person was discussed in the case of ***Joginder Kumar vs. State of UP and others, (AIR 1994 SC 1349)*** where the Indian Supreme Court observed that:

> *"a person was not liable to arrest merely on the suspicion of complicity in an offence and there must be some reasonable justification in the opinion of the police effecting the arrest that such arrest was necessary and justified".*

In ***Gamlath vs. Neville Silva and others (1991) 2 SLR 267***, having observed that,

> *"a suspicion is proved to be reasonable if the facts disclosed that it was founded on matters within the police officer's own knowledge or on statements made by other persons in a way which justify him giving them credit",* ***(Baba Appu vs. Adan Hamy)****.*

Kulatunga, J. held that;

> *"The observance of the procedure for arrest without a warrant is now a constitutional right under Article 13(1) of the Constitution which guarantees freedom from arrest. The information on which the arrest is based must be credible by the application of the objective test. An arrest based purely on the subjective satisfaction of the police officer would be arbitrary and in violation of Article 13(1)".*

The first investigation report dated 21/06/2018, or the subsequent police messages by the 1st Respondent does not cast an aorta of reasonable suspicion or a reasonable complaint of the commission of the offence against the Petitioner. To the contrary, the

police message dated 17/7/2018, states that Wimalachandra is required to be present in the Negombo Magistrates Court on 18/07/2018. Therefore, there was absolutely no justification for the 1st Respondent to arrest the Petitioner on 18/07/2018.

In Channa Peiris and Others Vs. Attorney General and Others (1994) 1 SLR 1 at page 47 the Court held, thus:

> *"However, the officer making an arrest cannot act on a suspicion founded on mere conjecture or vague surmise. His information must give rise to a reasonable suspicion that the suspect was concerned in the commission of an offence for which he could have arrested a person without a warrant. The suspicion must not be of an uncertain and vague nature but of a positive and definite character providing reasonable ground for suspecting that the person arrested was concerned in the commission of an offence."*

It is the position of the Petitioner that his statement was recorded around 8.30 p.m. on 18/07/2018, and thereafter he was detained in the Police cell. The 1st Respondent admits that the Petitioner did make a statement to the Police. The statement made by the Petitioner could have undoubtedly shed more light to the events which culminated in his arrest. Despite a direction given by court to tender the said statement together with the investigation notes before the date fixed for hearing, the 1st Respondent has failed to do so. (vide Journal entry dated 04/09/2018). Therefore, the grounds upon which the Petitioner was arrested as contended in the affidavit of the 1st Respondent are not supported by evidence.

The 1st Respondent was better placed to tender such documents to prove his bona fides and to vindicate himself from the alleged arbitrary arrest, which he failed to do, for reasons best known to him.

The 1st Respondent does not deny the arrest of the Petitioner nor his detention overnight. However, there is no formal arrest of the Petitioner on record nor reasons for his arrest made known to him.

The allegation upon which the Petitioner was arrested is described by the 1st Respondent in **Paragraph 15** of his Affidavit as:

> *"all attempts to get Wimalachandra down failed. Wimalachandra purposely evaded such inquiries. The Petitioner appeared at the Police Station each time when Wimalachandra was summoned".*

This clearly, *"inter alia"* shows that the 1st Respondent was aware that the Petitioner presented himself at the police station on notice to represent the interest of Wimalachandra.

Sharvananda C.J. in his "**Treatise on Fundamental Rights in Sri Lanka"** (page 141) observed as follows;

> *"The requirement that the person arrested should be informed of the reason for his arrest is a salutary requirement. It is meant to afford the earliest opportunity to him to remove any mistake, misapprehension or misunderstanding in the mind of the arresting authority and to disabuse the latter's mind of the suspicion which triggered the arrest and also for the arrested person to know exactly what the allegation or accusation against him is so that he can consult his Attorney-at-Law and be advised by him....." (**Tuduge Achalanka Srilal Perera Vs. Police Sergeant Ananda & Others (S.C. (F/R) Application No: 198/2011**)*

In Landage Ishara Anjali & Other Vs. Waruni Bogahawatte & Others (2019), SC (FR) Application No. 677/2012, the Supreme Court elaborating on the scope of Article 13(1) stated as follows:

> *"Article 13 (1) of the Sri Lankan Constitution declares the rights relating to personal liberty and criminal procedure. It reads;*
>
> *"No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest."*

The Article guarantees freedom from arbitrary arrest and mandates that any deprivation of liberty should strictly follow the procedure established by law. These procedural safeguards are set in place to avoid rule by whim or caprice and to prevent the abuse of judicial process for individual gain and for political purposes."

This Court in several previous judgments have very clearly held that taking a person into custody and detaining for the purpose of procuring evidence in the circumstances of the case, to obtain their assistance to locate another person, as a first step in the process of bringing criminal suspects to justice or any other deprivation of personal liberty amounted to be violative of Article 13(1) of the Constitution. **(*Weragama vs. Indran and others*, *SC application 396 and 397/93 SC minutes 24 February 1995, SC application 27/88 SC minutes 6 April 1990*)**

This is not a case of mistaken identity. The 1st Respondent was aware that the person under investigation was not the Petitioner. When all attempts to arrest the person under investigation failed, the 1st Respondent without any reasonable explanation, arbitrarily exercised his power to detain and arrest the Petitioner. By not following the procedure established by law, the 1st Respondent deprived the Petitioner of knowing the nature of the offence or the reason for his arrest. Therefore, the 1st Respondent has failed to satisfy this Court that the arrest and detention of the Petitioner was in accordance with the procedural and substantive safeguards provided by law. In all probability, the 1st Respondent connived with the complainant to arrest and detain the Petitioner to place him under restraint in order to force a settlement of the money due to the complainant. The 1st Respondent's conduct depriving the Petitioner of his personal liberties, as noted above, cannot be condoned by this Court.

In all the above circumstances, the Court observes that the deprivation of personal liberty of the Petitioner amounts to a violation of Article 13(1) of the Constitution for which the 1st Respondent should be personally responsible. Therefore, the Petitioner is entitled for an order for relief.

Accordingly, the 1st Respondent is directed to pay Rupees 100,000/- to the Petitioner and Rupees 20,000 as 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 and in terms of Article 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

S.C. (F/R) Application No. 265/2011
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S.C. (F/R) Application No. 269/2011
S.C. (F/R) Application No. 270/2011
S.C. (F/R) Application No. 271/2011
S.C. (F/R) Application No. 272/2011
S.C. (F/R) Application No. 273/2011
S.C. (F/R) Application No. 274/2011
S.C. (F/R) Application No. 346/2011
S.C. (F/R) Application No. 347/2011
S.C. (F/R) Application No. 348/2011

Petitioners

H. M. M. Sampath Kumara,
Mamunugama,
Moragollagama.
(Petitioner S.C. (F/R) Application No. 265/2011)

A. Rohitha Amarasinghe,
Aluth-Ala Road,
Paluwa,
Galgamuwa.
(Petitioner S.C. (F/R) Application No. 266/2011)

C. A. H. M. O. Buddhika Atapattu,
147/1, Mapitigama,
Ambanpola.
(Petitioner S.C. (F/R) Application No. 267/2011)

R. R. M. Dhanushka Sanjeewa,
8/10,
Amandoluwa,
Seeduwa.
(Petitioner S.C. (F/R) Application No. 268/2011)

Anesh Imalka Fernando,
Paalasola,
Madurankuliya.
(Petitioner S.C. (F/R) Application No. 269/2011)

N. L. T. Iresha,
134/2,
Japalawatte,
Minuwangoda.
(Petitioner S.C. (F/R) Application No. 270/2011)

Nisshanka Wanigasekera,
13 Post,
Bandaragama,
Pemaduwa.
(Petitioner S.C. (F/R) Application No. 271/2011)

R. A. H. M. Jayatissa Rajakaruna,
230/4,
Sarath Mawatha,
Katunayake.
(Petitioner S.C. (F/R) Application No. 272/2011)

S. P. L. Ranjan Lasantha Perera,
19, St. Xavier Mawatha,
Kimbulapitiya Road,
Akkara 50.
(Petitioner S.C. (F/R) Application No. 273/2011)

H. M. Lalinda Herath,
No 21/09, Yatiyana,

Minuwangoda.

(Petitioner S.C. (F/R) Application No. 274/2011)

M. Pradeep Kumara Priyadarshana

Jambolagahamulla,

Dippitiya,

Mahapallegama.

(Petitioner S.C. (F/R) Application No. 346/2011)

U. G. Nalin Sanjaya Jayatileke,

625/1, Aluthgama,

Nabata,

Malsiripura.

(Petitioner S.C. (F/R) Application No. 347/2011)

M. H. A. Sameera Sandaruwan Hettiarachchi,

Welimada,

Daragala,

Dumkola Watta,

Sameera-Sewana.

(Petitioner S.C. (F/R) Application No. 348/2011)

Vs.

Respondents

1. Officer-in-Charge,
   Police Station,
   Katunayake.

2. Officer-in-Charge,
   Police Station,
   Seeduwa.

3. Deputy Inspector General of Police,
   Negombo DIG Office,
   Negombo.

4. Mahinda Balasooriya,
   Former Inspector General of Police,
   C/O Police Headquarters,
   Colombo 01.

5. N. K. Illangakoon,
   Former Inspector General of Police,
   Police Headquarters,
   Colombo 01.

5A. Pujith Jayasundara,

   Inspector General of Police,
   Police Headquarters,
   Colombo 01.

6. Board of Investment of Sri Lanka,
   West Tower-World Trade Centre,
   Echelon Square,
   Colombo 01.

7. Lt. Gen. Jagath Jayasooriya,
   Commander- Sri Lanka Army,
   Army Headquarters,
   Colombo 03.

8. Hon. Attorney General,
   Attorney General's Department,
   Hulftsdorp,
   Colombo 12.
   (Respondents in all cases)

9. Gamini Lokuge MP
   Hon. Minister of Labour,
   Ministry of Labour & Labour Relations,
   Labour Secretariat,
   Narahenpita,
   Colombo 05.
   (8th Respondent in S.C. (F/R) Application No. 346/2011)

BEFORE: Buwaneka Aluwihare, PC. J.

Priyantha Jayawardena, PC. J.

H. N. J. Perera J.

COUNSEL: J. C. Weliamuna with Pulasthi Hewamanna for Petitioners in 265/11, 267/11, 269/11, 271/11, 273/11, 347/11, 348/11,

Saliya Peiris PC with Anjana Rathnasiri and Harindrini Corea for the Petitioner in 266/11,

Shantha Jayawardena with Chamara Nanayakkarawasam for Petitioner in 272/11,

Chrishmal Warnasuriya with Jayathu Wickramasuriya for Petitioner in 346/11,

Uditha Egalahewa PC with Vishva Vimukthi for Petitioner in 268/11

Eraj de Silva for Petitioner in 274/11 and

N. Anketell for the Petitioner in 270/11,

Parinda Ranasinghe SDSG with Lakmali Karunanayake SSC for Respondents.

ARGUED ON: 01. 11. 2017

DECIDED ON: 05. 04. 2019

Aluwihare PC J.,

The Petitioners, being workers employed in factories situated within the Free Trade Zone, alleged the infringement of their fundamental rights by the Police in quelling a protest held by the Free Trade Zone workers against a proposed bill that would affect them. Counsel representing the Petitioners in all the cases referred to in the caption, were agreeable to consider these applications together in view of the fact that the violations alleged had emanated from one and the same incident and were also agreeable to abide by a single judgement. As such all thirteen petitions were considered together.

Leave to proceed was granted in;

Application no. SC FR 265/2011 for the infringements of Articles 11, 12(1) and 14(1)(b) of the Constitution,

Application no. SC FR 266/2011 for the infringements of Articles 11, 12(1), 13(1), and 14(1)(b) of the Constitution,

Application no. SC FR 267/2011 for the infringements of Articles 11, 12(1), and 14(1)(b) of the Constitution,

Application no. SC FR 268/2011 for the infringements of Articles 11, 12(1), 13(1), and 14(1)(b) of the Constitution,

Application no. SC FR 269/2011 for the infringements of Articles 11, 12(1), and 14(1)(b) of the Constitution,

Application no. SC FR 270/2011 for the infringements of Articles 11, 12(1), and 13(1), 14(1)(b) of the Constitution,

Application no. SC FR 271/2011 for the infringements of Articles 11, and 12(1) of the Constitution,

Application no. SC FR 272/2011 for the infringements of Articles 11, 12(1), 13(1) of the Constitution,

Application no. SC FR 273/2011 for the infringements of Articles 11, 12(1), and 13(1) of the Constitution,

Application no. SC FR 274/2011 for the infringements of Articles 11, 12(1) and 13(1) of the Constitution,

Application no. SC FR 346/2011 for the infringements of Articles 11, 12(1), and 14(1)(b) of the Constitution,

Application no. SC FR 347/2011 for the infringements of Articles 11, 12(1), and 14(1)(b) of the Constitution,

Application no. SC FR 348/2011 for the infringements of Articles 11, 12(1), and 14(1)(b) of the Constitution,

In 2011 a bill was tabled, titled the 'Employees' Pension Benefits Fund Bill' which proposed to introduce a pension scheme for private sector workers. The workers of the Katunayake Free Trade Zone (FTZ) entertained an apprehension that this bill would affect their savings related to EPF, ETF, gratuity etc. The Joint Trade Union Alliance (JTUA) which opposed the aforesaid bill held a seminar to educate the workers on the adverse consequences of the bill at the Jayawardene Centre in Colombo. On the 24th of May 2011 a protest organized by JTUA was held with the participation of about 40,000 FTZ workers to demonstrate their opposition to the bill. The protest was held outside the FTZ at the 18th Mile Post since the Police had prevented the protestors from congregating at the Urban Council Grounds in Katunayake. The protest had obstructed vehicular traffic and trains plying along the railway line nearby. At the conclusion of the protest an altercation had occurred, with the Seeduwa Police and having to baton charge and use tear gas. Around 30 protestors had been arrested in the process, who had been later released.

A few days later on 28th May, an impromptu meeting was held at the BOI Auditorium within the FTZ with the participation of the Minister for Labour and representatives of the FTZ workers. The meeting had been attended by other politicians of the Government as well. At the meeting no agreement could be reached by the parties. Following the meeting, leaflets urging the workers to support the bill were distributed by an unidentified group of persons purporting to be members of the JTUA. The leaflets carried the name of the JTUA but it carried the address of a political party. The Police, however, had allowed these persons to distribute leaflets within the FTZ premises. In the early hours of the 29th a large number of posters soliciting support for the bill had also sprung up in and around the FTZ.

In such a volatile backdrop, on the 30th of May 2011 the day on which the alleged violations took place, around 4000 to 5000 FTZ workers had commenced their protest within the FTZ premises around 10.15 am. At the time, around 600 protestors had gathered, and scores of Police Officers had also been present on duty presumably to control the situation had it disturbed the public tranquility. Coincidently, around 11 am on that day, the Seeduwa *Brandex* (sic) Factory had to be closed and the workers sent home due to a contamination of its water supply which had caused diarrhea among the workers. On an earlier occasion i.e. on the 24th the demonstrators had come in a procession and attempted to get the employees of the same factory to join the protest on the 24th. (vide page 3 of the Presidential Committee Report on the incident, the 'Mahanama Tilakaratne Report'). Even though the protest had started peacefully, towards noon the situation had become tense with the number of protestors increasing and stones being pelted on both sides. Even though several politicians had intervened and assured that the bill would not be passed without heeding the views of the FTZ workers, they had continued the protest demanding a credible guarantee of such assurance.

Around 10.30 am pelting of stones had started and stones had been thrown back and forth. The version of the Police is that it had been communicated to the protestors through loudspeakers by the Senior Police Officers that the FTZ workers would be taken out of the purview of the bill and that steps were being taken to broadcast that decision over the media as requested by the protestors (per the statement of objections of the Fourth Respondent) and, later that the bill would be withdrawn (per the statement of objections of the Third Respondent). Despite these guarantees the protestors who had congregated near Gate IV of Phase II of the FTZ had not dispersed but kept moving towards the roads. Thereafter, without warning, stones had been pelted towards the police. Dhanawardene Gurusinghe, Negombo Assistant Superintendent of Police in his affidavit marked as '5R2' with the statement of Objections of the 5th Respondent states that a large amount of stones was pelted at the Police by a group of persons who were about 25 meters behind the protestors, a position taken up by the Inspector General of Police, the 4th Respondent in his Statement of Objection as well. The president of the CMU Union admitted that the stones thrown at them by the Police were thrown back at the Police by them (vide page 7, Presidential Committee report). The Respondents allege that when the police officers who were taken by surprise retreated to the Katunayake police station to avoid further injuries, the protestors had started attacking the police station which was situated about 100m away from Gate IV damaging property within the premises and several police vehicles.

The position taken up by the Respondents is that there was an apprehension that the protestors may barge out of the FTZ causing further damage. The 1st Respondent OIC of the Katunayake Police Station in his statement of Objections had stated that DIG Ravi Wijegunawardena was assaulted by the protestors and had to be hospitalized since he was badly wounded. According to the Respondents Tear Gas was fired to protect the Police Officers retreating from the stone attack. The statements recorded in the Presidential Committee Report and the petitions reveal that it had been around 12.30 pm when the Police had fired tear gas on the

protestors and charged them with batons, iron rods etc. Firearms had also been fired.

I shall first detail the case of each Petitioner and the alleged events that they had had to face on the 30th.

Around 10.15 am the petitioner in **FR application 265/2011, H. M. M. Sampath Kumara** too had joined the protest along with the majority of the workers of the factory where he was employed at. Having been in one of the open areas of the FTZ where the protestors had been gathered, he had started to run towards the *Crystal Martin* factory to escape the charge. While he was running he had been hit by gunfire and had fallen down. He had then been carried into the factory where he worked by several other workers. Due to the critical nature of his injuries the petitioner had been taken to the Negombo Base Hospital where he had had to undergo surgery and was kept in the Intensive Care Unit. Later he was transferred to the Colombo General Hospital where he remained warded. Due to the gunshot injuries received, the petitioner who was 19 years old at the time, has sustained permanent disabilities of a serious nature affecting his reproductive and digestive systems.

Another FTZ worker, 22-year-old Roshen Chanaka succumbed to the injuries sustained due to the shooting.

Following the firing of tear gas and live ammunition and the subsequent charge, the facts reveal that, the police had launched an attack on the factories within the FTZ- Phase II, entering their premises by force, damaging property and indiscriminately attacking those within the respective premises. All the petitioners except the petitioner in SC FR 265/2011 had been assaulted by the police with blunt weapons during this attack. After the attack the Petitioners in SC FR 268/2011, 270/2011, 271/2011, 272/2011, 273/2011, 274/2011, 346/2011, 347/2011 and 348/2011 had been detained at the Katunayake Police

Station before being sent to receive medical treatment. Their affidavits bear testimony to the attack carried out by the police against the workers.

The Petitioner in **FR Application 266/2011, Rohitha Amarasinghe**, an employee of the *Toroid International* Factory had joined the protest with his fellow workers. They had congregated near the *MAS Active* Factory and had gradually moved into the more open spaces of the FTZ. Isolated skirmishes had started to break out between the police and the protestors by this time. He states that around 12.30 pm the police suddenly made a concerted move to disperse the demonstration by firing tear gas and engaging in a baton charge resulting in the workers rushing into the nearby factories for safety. Hundreds of Police officers had then broken into the factories such as *Toroid International, DSL Global* and *Noratel*. The petitioner, having accompanied another protestor who had received an injury during a skirmish into the factory, had been inside the factory at this time. Due to the tense situation outside and having heard gunshots immediately after their return to the factory the petitioner had remained within the factory.

When the police entered the factory premises by force the petitioner along with other workers had fled into the locker room of *Toroid International* and locked themselves in. However, the police had broken down the door with iron rods and dragged them out of the lavatories where they were hiding by this time. The police had also dragged along some female workers, forced them to kneel and had started to assault them. When the petitioner attempted to intervene, he had been assaulted with iron rods and kicked and trampled on. When they were subsequently instructed to leave the factory, the petitioner finding it difficult to walk, had crawled out and on his way, he had been detained by some police officers who forced him to stand against a wall and had assaulted him with a rubber hose. The Petitioner was then dragged towards the Human Resource office of the factory where several other injured workers were gathered and were transported to the Negombo Base Hospital in a van belonging to the factory.

Because of the attack detailed above, the petitioner Amarasinghe had sustained a fracture of his right 3rd finger and contusions to his left upper arm. Having had a known history of Epilepsy for which he had not been on regular treatment for 2 years, the petitioner had also developed fitting attacks while he was in hospital and continues to suffer from panic attacks.

During the charge following the tear gas attack, the petitioner in **SCFR 267/2011, Buddhika Atapattu** who had also joined the protest around 10.00 am, had run back to his factory *Noratel International* where he and several others had been assaulted with iron rods, iron chains and transformer parts (manufactured in the factory) by the Police who had pursued them there. In shielding himself from a blow to the head by an iron rod his wrist had got fractured. Around 1.00pm they had been taken near the FTZ gate where other workers who also had severe injuries had been gathered. There, they had been assaulted by the Police again before being taken to the Negombo Base Hospital.

Having finished the night shift at *A.T.G Gloves* around 6.00 am, Dhanushka Sanjeewa, the Petitioner in 268/2011 had returned to his boarding house nearby. Around 10.00 am the Petitioner had gone to Phase II to withdraw money from the Automated Teller Machine there. The protest had commenced by then and, there had been around 4000 to 5000 workers gathered. When the Petitioner attempted to exit Phase II the police at the gate had refused to allow him to pass through. Thereafter, not being able to leave Phase II the Petitioner too had joined the protest. When the police charge occurred, he had run inside *A.T.G Gloves*. Around 2.00 pm a Sectional Head of the factory had locked the entrance to that area of the factory with the help of the petitioner and some other workers. In the meantime, the police had broken into the factory and 25-30 police officers had demanded that the locked entrance be opened. When those inside did not comply, they had begun to destroy the wooden and glass fixtures outside. Therefore, the Sectional Head had opened the door and the police had entered and assaulted everyone

inside with batons. The petitioner had received blows to his head, left wrist, right arm and torso. The blows on his head had made the petitioner nauseous and he had started to vomit. The workers had then been forced to leave the factory premises and then ordered to kneel down and assaulted again.

Following the assault, they had been taken to the Katunayake Police Station on foot and detained in a cell with 50-60 other workers including those injured due to live ammunition and due to the use of tear gas. Though many had been screaming in pain and the petitioner himself was bleeding they had not been given any assistance by the police. After about three hours, his personal details had been recorded. The police had then announced that the injured would be taken to Negombo Base Hospital and had asked them to come out. Though some had gone out, the petitioner had not joined them due to the uncertainty about what the police would do next. Eventually, he had been released around 5.00 pm and had returned to his boarding place from where a friend had taken him to the Negombo Base Hospital. Reaching the hospital around 6.30 pm the petitioner had been turned away due to overcrowding.

The petitioner in application 269/2011, Anesh Imalka Fernando had reported to work at *Toroid International* around 1.30 pm on the 30th and joined the protestors after putting on his uniform. When the Police charged the protestors, he had run into *Toroid International* and escaped through a door at the rear of the building. However, he had been caught by some police officers and had been assaulted while two police officers held him tightly by the arms. He asserts that the assault continued even after he fell down feeling faintish. After some time, a police officer had shaken him and when he opened his eyes he had again been assaulted with iron rods and kicked by that same officer and then ordered to walk to the main gate of the FTZ. By this time he had noticed two wounds on his hands and when he had told the police officer that he is unable to stand up he had been told to crawl there. When the petitioner tried to stand up he had been assaulted again. However,

the petitioner had managed to walk to the gate with great difficulty and collapsed there. He had seen other workers too being assaulted. Around 3.00 pm he had been taken to the Negombo Base Hospital by his fellow workers and had to have stitches to his head and ears and had been referred to the Eye Clinic. Even by the date of his application to this court, the petitioner states that he continues to suffer from bodily pains accompanied by dizziness. (Medico-legal report states that even though the injuries are non-grievous, if the scar on the forehead becomes prominent after healing, it may disfigure the face and therefore could be categorized as grievous under limb (f) of Section 311 of the Penal Code.)

Being an employee of *Naigai Lanka* the petitioner in application 270/2011, N. L. T. Iresha had joined the protest around 12 noon along with the majority of the workers at the factory. She and other *Naigai Lanka* workers had run back to the factory when the police charged the protestors. However, the police had caught up with them and abused them in contumelious language and had ordered them to kneel on the ground. When they complied, they had been beaten with iron poles repeatedly, resulting in injuries to her upper arms, elbow and torso, several of which resulted in bleeding. After several minutes, the petitioner and the others had been ordered to leave/run and when they attempted to do so they had been assaulted on their back and buttock areas and were physically apprehended. Afterwards, the female workers had been handed over to three women police constables who had been outside *Naigai Lanka.* They had escorted the petitioner and the others on foot to the Katunayake Police Station and had assaulted them on the way as well. They had been repeatedly scolded in abusive language to the effect that they were allowed inside the FTZ to work and not to protest.

At the Katunayake Police Station, when they had attempted to sit on the benches there they had been scolded by a woman police constable and forced to sit on the floor. Then, around 1.00pm they had been taken to the *Crime Branch* of the Police Station and locked inside a room with 8-10 other female workers. Within a period

of about one hour almost 60 female workers had been detained in that room. Due to the crowding the petitioner and several others had suffered from claustrophobic feelings and breathing difficulties akin to asthma or panic attacks. There had been several workers detained in that room who had bleeding wounds, including those sustained from live ammunition and tear gas. They had not been given any first-aid or medical assistance. In addition to these traumatic events, the petitioner states that she heard the screams of persons outside the room whom she believes were male workers. Around 4.30/5.00 pm those of the detainees who had injuries, including the petitioner had been forced onto a bus and taken to the Negombo Base Hospital. The Petitioner's name and address had been taken down by the Hospital Police Post, but no statement had been recorded. However, she had been forced to sign a document by the Police. Due to the injuries sustained, the petitioner has been rendered unable to fully extend or flex her left arm, at the time of the application.

An employee of *Sterling Lanka,* the petitioner in application 271/2011, Nisshanka Wanigasekera had reported for work around 6.45 in the morning of the 30th. Around 9.15 am he had gone to the *Smart Shirt* warehouse situated in Phase II by three-wheeler, accompanied by the driver, Jayatissa and another worker named Nilusha, in order to collect and deliver some samples. When they were returning to *Sterling Lanka* around12 noon the roads had been blocked due to the protest and since they were unable to proceed further by three-wheeler the driver had stopped the vehicle on the side of the road. By this time the police had been behaving in an aggressive manner and minor skirmishes were breaking out between the protestors and the police. When the police made the concerted move to disperse the protestors around 30 police officers had attacked their three-wheeler as well and dragged out the petitioner and his companions. The petitioner asserts that he had been brutally assaulted with iron rods until he lost consciousness and became separated from his companions. He had suffered injuries to his jaw, teeth, nose and fingers of the left arm resulting in bleeding. The petitioner had lost consciousness several times but recalls that he was dragged to

the Katunayake Police Station by two police officers and that he regained consciousness inside a police cell in the company of Jayatissa. There had been about 50 persons detained in the cell, some with injuries from live ammunition and the use of tear gas. Even though the petitioner had been bleeding and vomiting blood and many of the detainees had been screaming in pain, no assistance had been provided by the police. Later, the petitioner had been dragged out of the cell and a woman police constable had recorded the details on his factory identity card. He had been assaulted again before being dragged onto a bus and taken to the Negombo Base Hospital.

The petitioner states that he is unable to recall the details of his hospitalization properly due to the trauma he underwent. However, he recalls receiving stitches to the head and being transferred to the National Hospital immediately via ambulance, since he was vomiting blood. As his jaw and several teeth had broken an iron plate had been inserted into his jaw. His nose had been broken and he had been informed that it would require surgery in the near future. A statement had been recorded from him by an officer in civilian clothing. He had not been shown that statement but had been required to sign some document the details of which he cannot recall. Due to the injuries the petitioner is unable to flex the fingers in his left arm. He has trouble breathing and finds it difficult to move his jaw which causes difficulties when eating. At the time of the application he was undergoing further treatment and was in severe pain.

The Petitioner in application 272/2011, Jayatissa Rajakaruna drove the three-wheeler in which the petitioner in 271/2011(Nisshanka) had been travelling. During the attack on them the police had caused damage to the three-wheeler and assaulted the petitioner on his arms, left leg, back and head with iron rods while some police officers restrained him. He had received a bleeding wound to the head. He was then taken to the Katunayake Police Station on foot. About an hour later he had observed that Nisshanka who had been separated from him earlier was also

put into the same cell and could not even stand unaided and was in severe pain. Around 3.30/4.00 pm the injured workers in the cell had been forced onto a private bus and taken to the Negombo Base Hospital. The petitioner was admitted to Ward 2 which he believes to be the Eye Ward of the hospital and states that during his stay there until the 02nd of June he noticed a heavy police presence at the hospital. The petitioner states that at the date of the application he still finds it difficult to walk in addition to bouts of dizziness.

The petitioner in 273/2011, Ranjan Lasantha Perera an employee of the *Smart Shirt* factory had been within the factory premises when around 12 noon he had witnessed hundreds of protestors fleeing from the police attack and entering the factory premises. He had heard gunfire and had feared for his life. Several dozen police officers had broken open the factory gate and had assaulted the security officers who attempted to prevent them. The factory's security room had been destroyed in the process. Several police officers had opened fire within the factory premises and caused injuries to the fleeing workers and damaged the factory property. He had run to the canteen area of *Smart Shirt* where he and several other workers had been chased by a group of police officers armed with batons and weapons. They had cornered the petitioner and the others and had assaulted them with batons and wooden planks. When the petitioner fell down due to the attack he had been told to stand up and had been assaulted on the head, legs and arms. Due to this he had sustained injuries to his left leg and fractured his right leg. Around 2.00 pm the petitioner had been carried to the Katunayake Police Station by four of the police officers who had assaulted him. The petitioner had been left outside the police station building. Later he had been instructed to go to the police cell and since he could not walk he had crawled into the Police station. Around 4.30 pm he had been carried into a bus by police officers and taken to the Negombo Base Hospital.

The Petitioner in FR Application 274/2011, Lalinda Herath who was employed at the *Global Sports* Factory had not joined the protest even though about 50 workers from his factory had joined it. In their attack on the factories the police had forcibly entered the *Global Sports* Factory by assaulting the Security Personnel and proceeded to assault the Petitioner and his fellow workers. In order to avoid the attack, they had run towards the printing room of the cutting section, during which time the petitioner had been continuously attacked by a police officer. The police had then broken the glass windows of the room and assaulted the petitioner and four others who were taking cover there. The petitioner had been beaten on the ears, head and stomach. After the beating they had been ordered to leave the room two by two holding hands. Then they had been taken to the Katunayake Police Station and detained in a cell for about 45 minutes. They had been checked by police officers and Rs. 2000 which had been in the petitioner's pocket had been taken away. After this period of detention, the petitioner along with other injured workers had been forced onto a bus and taken to the Negombo Base Hospital, where he was admitted for treatment. At the time of filing the application the petitioner asserts that he was still suffering from pain in his ears and his hearing had been impaired. (Medico-Legal Report dated 8th August 2011 by Judicial Medical Officer, Negombo District General Hospital however only records a contusion of 6cm into 3cm on the lower side of the left cheek.)

The Petitioner in application 346/2011, Pradeep Kumara Priyadarshana who was an employee of *Noratel International* had joined the protest around 11.30 am along with the majority of his fellow workers at the factory. The Police had fired tear gas on the protestors gathered near the entrance to Phase II and charged them, throwing stones and other objects at the protestors fleeing them. In paragraph 12 of his petition, the Petitioner states that since several hundred workers converged near *Noratel International* after the charge, they spontaneously decided to engage in a peaceful sit-in/ sit-down there, in which the petitioner too had participated in. The police who had by this time dispersed the protest near Gate IV of Phase II

had proceeded into the FTZ continuing to use tear gas as well as iron rods. While some protestors had been severely injured, the petitioner and others had managed to flee into *Noratel International.* However, police officers had forced their way in to the factory, assaulting the security officers who attempted to prevent them and demolishing the factory security room. Thereafter the police had broken into the factory by breaking doors and windows and had even fired tear gas into the factory causing asthma-like symptoms in some workers. The petitioner and about 75 others had barricaded themselves inside the Production Office on the upper floor. The police had then surrounded the office and threatened them in abusive and contumelious language threatening to open fire if they did not come out. Due to these threats the workers had come out of the office and had been compelled to walk in between about 100 police officers who continuously assaulted them on their way to the exit of the factory. The police had kept up an angry rhetoric that they were allowed inside the FTZ only to work and not to protest. The petitioner's right arm was fractured due to the assault and was bleeding profusely. When the workers came out of the factory they had been ordered to sit down on the ground inside the factory premises, where some workers including a pregnant worker were again assaulted.

According to the Petitioner, Priyadarshana around 1.30 pm these workers had been transported to the Katunayake Police Station by a bus where their personal details were recorded by a woman police constable who verbally abused them for taking part in the protest. An Army officer who appeared to be a high ranking official and another person who appeared to be a local politician had informed them that the enactment of the bill was halted and instructed them to return to the FTZ and inform the protestors within, of this development. Accordingly, the workers had been loaded onto a bus and taken to Phase II where several hundred protestors were congregated. Several army officers who had been on the bus had then instructed them to inform the other protestors that the bill would be halted. At this point, the workers on the bus who were in severe pain due to injuries and

the tear gas attack pleaded with the driver to take them to a hospital whereby they were taken to the Vijaya Kumaratunga Memorial Hospital. Upon admission there, due to the critical nature of their wounds, the petitioner and several others were immediately transferred to the Ragama Teaching Hospital.

Around 1.45 pm on the 30th, the petitioner in application 347/2011, Nalin Sanjaya Jayatileke had made his way to the First Aid Room of *Noratel Lanka* as he had been suffering from a headache. On his way he had noticed that the protestors were being chased by the police while continuously assaulting them with batons. He had also been caught up in this and had been caught by a police officer. When he explained that he had not been engaged in any unlawful activity he had been released by that police officer. However other police officers in the vicinity had ordered that no one should be allowed to leave and then he had been continuously assaulted by several police officers and forcibly taken to the entrance of *Noratel Lanka* where he had been instructed to sit on the ground. Several dozen workers had been forced to sit there and some of them had injuries from live ammunition, iron rods and injuries caused by the firing of tear gas. Around 100 police officers had been present there and several of them had been assaulting the workers seated there. While there the petitioner had been assaulted several times on the back of his head, left side of the jaw, back and the left side of the cheek below the eye. The petitioner had fainted due to the severe pain from the assault especially from the blows below the eye which had caused a fracture. The petitioner had regained consciousness after some time and the police had instructed one of the workers to bring a vehicle belonging to the factory to transport the injured to the factory. Upon a *Noratel Lanka* Nurse who was present there informing the police that their officers were damaging private vehicles and therefore it would not be safe to transport the injured they had agreed to send one of their officers to prevent any such attack. The petitioner and about 10 other workers who had been seriously injured had been taken by van to the hospital. Several of those workers had been unconscious and some had been drifting in and out of consciousness. Whilst within

Phase II the van had been stopped by police and instructed to go to the Katunayake Police Station instead of the hospital. At the Police Station a woman police constable had recorded the personal details of the workers despite the semi-conscious or incoherent state some of them were in. They had been taken to the hospital only afterwards. On the 31st, since the Negombo Base Hospital had been overcrowded with injured workers the petitioner had been discharged against his will and had not been given any documents regarding his treatment. On the 01st of June, as he was coughing up blood the petitioner had attempted to admit himself to the Kandy Teaching Hospital but had been turned away since he did not have any medical reports or official discharge papers. Subsequently, he had been admitted to a private hospital in Kandy since he was bleeding from the mouth. X-rays taken there had revealed that the bone below his left eye had been fractured.

The petitioner in application 348/2011, Sameera Sandaruwan Hettiarachchi had entered Phase II to report to work at *Noratel Lanka* around 1.30 pm. There had been a large number of police officers at the gate and he had been allowed inside only after an extensive security check. He had observed injured workers lying on the ground and some being escorted out of the FTZ by the police. He had heard the gun shots and sounds of altercations. Fearing for his safety the petitioner had quickly made his way to *Noratel Lanka.* Seeing factory workers injured from live ammunition and tear gas being taken to the First Aid Room of the factory he had gone there to offer assistance. When he proceeded to report to work the protestors who were being pursued by the police had started to run in his direction. He had also run into *Noratel International (Pvt) Ltd- New Division* for safety and barricaded the building along with some other workers. The police had surrounded the building, partially broken the door and three police officers had entered the building. They had started to assault the workers nearest to the entrance who happened to be predominantly women. Immediately afterwards the main entrance to the building had been broken open and several dozen police officers had entered the building and assaulted those inside. Being assaulted on the

back of his head the petitioner had lost consciousness. Though he cannot recall the incidents that occurred afterwards, he had been informed by his fellow workers that they had been taken to the Katunayake Police Station in a private van accompanied by a nurse from *Noratel.* The petitioner had given his details to the police-which he does not recall- and then had been taken to the Negombo Base Hospital where he regained consciousness. Due to the assault he had required stitches to his nose and the back of the head. A tooth on the right side of the jaw had also broken. At the time of the application, the petitioner states that due to the injuries he has difficulty breathing, opening his mouth completely and has reduced vision in his right eye.

Infringement of the Freedom of Peaceful Assembly

Article 14(1)(b) of the Constitution recognizes the freedom of peaceful assembly, the qualification being the 'peaceful' nature of the assembly. Therefore, even a protest may be protected under Article 14(1)(b) as long as it remains peaceful. The jurisprudence of the European Commission of Human Rights is to the effect that an assembly may be deemed 'peaceful' where the organizers do not intend violence which results in public disorder. It has been recognized that it is the *intention* to hold a peaceful assembly that is significant in determining whether an assembly is peaceful or not; rather than the *likelihood* of violence because of the reactions of other groups or other factors. Violence or disorder that is *incidental* to the holding of a peaceful assembly will not remove it from the protection of freedom of assembly and association. (emphasis added) ***Christians against Racism and Fascism v. United Kingdom*** (No. 8440/78, Commission decision of 16 July 1980, Decisions and Reports (DR) 21, p. 138)

In ***Bandara and Others v Jagoda Arachchi, Officer-in-Charge, Police Station Fort, and Others*** (2000) 1 Sri LR 225 the Supreme Court, setting out a test for recognizing what maybe considered a peaceful or an unlawful assembly, held that

"An assembly crosses the line of being peaceful when the general behaviour of those assembled leads to a reasonable apprehension that they are likely to cause a disturbance of the public peace," thereby ceasing to enjoy the protection of Article 14(1)(b).

Thus, an assembly of persons can start off as a peaceful assembly with the organizers intending no violence but later on take an unlawful hue if the general behavior of the participants leads to a reasonable apprehension that it is likely to cause a disturbance of the public peace. When a peaceful assembly later takes on an unlawful hue in the above manner it no longer enjoys the full entitlement to the freedom of assembly recognized in Article 14(1)(b). In the event of such an assembly, by the operation of Article 15(7) of the Constitution, it is permissible to impose such restrictions "as may be prescribed by law" imposed *inter alia* "in the interests of... public order".

Since the classification of the assembly in the instant case depends significantly on its impact on public order, it is useful to distinguish what the term denotes, especially as opposed to 'law and order'. In ***Ashok Kumar v Delhi Administration and Others*** 1982 AIR 1143, 1982 SCR (3) 707 it has been observed that "*The true distinction between the areas of "public order" and "law and order" lies not in the nature or quality of the act, but in the degree and extent of its reach upon society…Acts similar in nature but committed in different contexts and circumstances might cause different reactions. In one case it might affect specific individuals only and therefore touch the problem of law and order while in another it might affect public order. The act by itself therefore is not determinant of its own gravity. It is the potentiality of the act to disturb the even tempo of the life of the community which makes it prejudicial to the maintenance of public order.*" (emphasis added) Thus, 'public order or peace' envisages a climate in which the public can go about their routine of daily activities without unusual disturbances. Whether an act constitutes a disturbance of the public order or peace

depends on the extent of its ability to disrupt the usual pace of daily activities of the public.

Accordingly, whether the FTZ workers' protest created a reasonable apprehension of acts which have a sufficient potentiality to disturb the usual flow of the daily activities, must be gauged based on the particular circumstances of the case. The FTZ is an Industrial Zone managed by the Board of Investment (BOI) which is well-fortified with all entry points guarded by BOI Security Personnel and the Katunayake Police. Entry into the FTZ is allowed only to persons granted permission by the BOI. A protest taking place within the FTZ could disturb the activities of the factories but not necessarily the public order since the public do not engage in their daily activities within the zone.

On the 30th, the protest had commenced within the confines of the FTZ near the vicinity of the factories, with the protestors gradually moving out into the more open spaces of the FTZ. That in the run up to the charge by the police there were minor skirmishes taking place between the police and the protestors is a point conceded by the petitioners. This transformation of the protest and the pelting of stones combined with the experience of the protest a few days earlier i.e. the 24th which resulted in the holding up of road and rail traffic culminating in a tear gas attack and a baton charge would have led the police to form a reasonable apprehension that the protestors may exit the FTZ and cause havoc outside. Regarding the alleged attack on the Katunayake Police Station the Presidential Committee has been of the view that a serious attack where the protestors overran the police station and caused serious damage to the property is unlikely in the circumstances. The Committee observes (vide page 15) that the Katunayake Police Station is situated too far away for the protestors within the FTZ near Gate IV to cause serious damage by throwing stones especially since the buildings are covered by trees. The Presidential Committee report expresses the view that had the protestors entered the Police Station premises, at least 500 Police Officers and 16

gazetted Officers had been present there to handle the situation. However, it is possible that the police officers entertained a fear that the protestors would storm the Katunayake Police Station when they congregated in large numbers in the vicinity of Gate IV. Even though a police force of a considerable strength were present at the scene it has to be appreciated that the protestors too amounted to at least 4000 in number and that water cannons which could have been effectively used to keep the protestors at bay and prevent them from spreading out into areas outside the FTZ were not available. In such a context, it is probable that, the police harboured a strong apprehension that the protestors would cause a disturbance of and disruption to the day to day life of the general public if they exited the FTZ. While these facts and the apprehension renders the protest unlawful, the quelling of the protest can only be called extreme due to the use of live ammunition and weapons such as iron rods and nail studded poles. The actions of the Police are by no means proportionate to the protest even though resorted to for the purpose of maintaining public order. Therefore, it is an unwarranted move on the part of the police and not a permissible restriction of Article 14(1)(b).

Justice Sharvananda in his treatise 'Fundamental Rights in Sri Lanka' (vide page 267) points out that "Without legislative authority, the Executive cannot impose any restrictions upon any of the Fundamental Rights guaranteed by Article 14. It is only by a law or regulation having statutory force and not by executive or departmental instructions that a valid restriction on Fundamental Rights can be imposed." The legal provisions made under Section 95 of the Code of Criminal Procedure Act become applicable in respect of the extent of force that can be used to disperse an unlawful assembly.

Section 95(1) of the Code of Criminal Procedure Act No. 15 of 1979 empowers a police officer not below the rank of Inspector of Police to command an unlawful assembly which is likely to cause a disturbance of public peace to disperse and places a duty on the members of such an assembly to disperse upon such command.

It however does not allow the police to unleash unbridled power on the assembly in circumstances where the persons constituting the assembly do not abide by such duty. Section 95(2) categorically states that the police may lawfully use only "such force as is *reasonably necessary* to disperse the assembly." (emphasis added)

While what constitutes reasonable force in dispersing an assembly would depend mostly on the facts of each particular case some general guidelines regarding the use of force have been identified. Force should be used only where absolutely necessary and only as a last resort. The degree of force used must be the minimum required to achieve the lawful objective sought.

Police Departmental Order A19 under B(4) (marked 'A4') categorically states that in dispersing a disorderly and riotous crowd "Under no circumstances can fire be opened unless the crowd is committing or attempting to commit any of the offences contained in the Police 'Firing Orders'". In the present circumstances where the crowd was not committing or attempting to commit any of those offences there is no justification for the Police to open fire on the crowd. Committing or attempting to commit grievous hurt entitles a police officer to open fire on a mob under B(4)(a) of the Police Departmental Order A19 after considering "*whether immediate action is necessary or whether the mere presence of the armed party will not be sufficient to cause the mob to desist.*" A careful consideration of the facts of the case show that that entitlement does not apply here. The 2nd Respondent states that the protestors had been holding several police officers including a senior officer to the ground and assaulting them and did not leave even after shots were fired in the air, compelling him to shoot at the crowd. However, if the events had transpired in that manner it is not possible that the deceased Roshen Chanaka would fall at a point well within the FTZ near the *Crystal Martin* Factory, especially in a context where Inspector of Police, R. P. K. L. Ranasinghe, the subordinate officer who fired under the 2nd Respondent's orders states that he shot at the protestors from about 30 meters away (vide page 43, Presidential Committee

report). It bears evidence that the Police opened fire on a retreating crowd, which conclusion is further consolidated by the fact that the Petitioner as well as the deceased Roshen Chanaka had sustained injuries from shots fired from behind. The Police Departmental Order (A19) states in no uncertain terms that "if any members of the mob are shot in the back, the police will be accused of firing longer than necessary." Thus, the second Respondent and his subordinate Inspector of Police who followed his orders to shoot are liable for using excessive force by shooting when it was no longer absolutely necessary to do so.

The Respondents contend that the shooting was in exercise of the right of private defence of Police Officers and Armed Forces provided for by Article 15(8) of the Constitution in relation to Articles 12(1), 13 and 14. The 2nd Respondent does not state that he was compelled to shoot as an immediate action in order to ensure his own safety. Even if the protestors were attacking Police officers, firing as undertaken here is disproportionate since it is evident that the crowd had been shot at even after it had started to disperse and that a number of bullets had been fired above the knee as shown by the injuries above the knee sustained by several persons. The officers ought to have considered that given the density of the crowd firing in such a manner may prove fatal to the protestors.

In order to classify the assembly of the FTZ Workers on the 30th of May as unlawful, it has been submitted by the Respondents that the requirement to give notice of processions set out in Section 77 of the Police Ordinance has not been complied with. Section 77 of the Police Ordinance No. 16 of 1865 requires that in case a procession is to be held, at least 6 hours' notice should be given to the Officer-in-Charge of the Police Station nearest to where the procession is to commence. Section 77 only requires such notice to be given of 'processions.' Further, the 6 hours' notice requirement presumes that the procession is not a spontaneous one. The evidence which surfaces in the instant case does not support a conclusive declaration on whether the protest was spontaneous or was organized earlier.

The Petitioners state that the protest on the 30th was a spontaneous congregation of the workers within the FTZ who were seeking to demonstrate their opposition to the proposed bill. By the 30th the suspicion of the FTZ workers that their views would not be considered regarding the bill if they did not keep up a protest would have grown stronger, after the protest organized by the JTUA on the 24th failing to bear fruit and the meetings with the Minister and several political figures failing to address their concerns about the bill. The leaflet distribution and poster campaign would have given rise to the notion, that the government was determined to pass the bill. Therefore, it is possible that the assembly of the 30th would have taken place with an element of prior preparation, especially as supported by the crowd quickly swelling from around 600 to 4000-5000 in number, and the displaying of placards as stated by the petitioners in their petitions. S. R. S. Kumari in her Statement to the Presidential Committee (at page 52 of the report) states that there was influence from outside to participate in the protest. Persons who seemed to be outsiders as indicated from their clothes and manner of speaking had given contradictory information about the bill and appeared to be trying to advance the agendas of some outside force. This position finds backing in the Second Respondent's statement where he observed that the manner of speech and behavior of some of the protestors indicated that they were not FTZ workers and that while the workers behaved in a disciplined manner the outsiders used abusive language and acted violently (page 33, Presidential Committee Report), is not corroborated by the other workers except for the ambiguous statement by K. Wasantha Kumara Silva; "උද්ඝෝෂණ වලට සහභාගි නොවීම නිසා ගැටලු ඇති වුනා" (at page 54 of the report). Senarath Rajapakse recalls that workers from other factories came to their gate and requested them to join the protest and they had joined consequently but does not mention any influence from an external force (at Page 68 of the report).

In ***Nurettin Aldemir v Turkey*** (Nos. 32124/02, 32126/02, 32129/02, 32132/02, 32133/02, 32137/02 and 32138/02, 18 December 2007) at Paragraph 34 the European Court of Human Rights held that interference in meetings held in opposition to a proposed bill and the force used by the police to disperse the participants, as well as the subsequent prosecution against the applicants, could have had a chilling effect and discouraged the applicants from taking part in similar meetings. Accordingly, it was found to be a violation of Article 11 of the European Charter of Human Rights. In the present case too the circumstances are similar and this court is of the opinion that it was a violation of Article 14(1)(b) of the constitution. The Police has failed to strike an adequate balance between the right to peaceful assembly and maintaining public order thereby violating the rights of the petitioner under Article 14(1)(b).

This court in ***Senasinghe v Karunatilleke, Senior Superintendent of Police, Nugegoda and Others*** [2003] 1 Sri L.R has set out forcefully that; *"The freedom of peaceful assembly, speech and expression are also designed to promote peace and order. It, inter alia, assures the freedom to dissent. The process of decision making in public matters is hereby enriched. If dissent is suppressed there is every likelihood of it taking a devious form which may ultimately endanger peace and order."* The same has to be reiterated given the trajectory of events marked by the incidents of the 30th where the police and the workers were caught up in an opaque climate of confusion heavy with various elements pushing to further their objectives. The state should ensure that its citizens do not feel that dissent will be dismissed without due attention in a fair and democratic manner or, will be suppressed at all costs. More often than not, a protest will get out of hand if the response of the authorities does not kindle confidence in the protestors and they feel that they would have no other means of making their views heard or considered, thus rendering them obsolete. On the other hand, the protestors and the organizations that give them leadership such as Trade Unions have a duty incumbent on them to follow the lawful rules and regulations set out in relation to

protests, not only for the preservation of public order but for the security of the protestors themselves. Where a satisfactory resolution to a problem seems distant and emotions are running high the organizers of a protest should take measures to ensure that the public tranquility is maintained, and no inconvenience is caused to the public who are outside the theatre of protests and no disruption is caused to the public life. This is of paramount importance if they intend to assemble a crowd over the numbers of which they are unable to exercise sufficient control.

Torture or Cruel, Inhuman or Degrading Treatment or Punishment

It is common ground that around 12 noon on the 30th stones had been thrown and that tear gas had been used by the Police. The FTZ workers who had remained within their factories without joining the protest have stated to the Presidential Committee, that they observed stones being thrown on both sides and that gunshots were also heard later, a version common to their statements. This version is plausible when considered together with the 2nd Respondent's statement to the Presidential Committee that he reached the vicinity of Gate IV around 12.55 or 01.00 pm. As he arrived he had been told that DIG Ravi Wijegunawardane and some other officers were being assaulted by the protestors. Subsequently, he had shot in the air upon observing that the protestors were attacking a senior Police officer and other police officers. The 2nd Respondent has stated that since the protestors did not leave the police officers whom they were holding onto the ground and attacking, he shot at the crowd without targeting anyone, thereby causing them to disperse. According to the Confidential Report submitted by the Attorney General regarding the incident (filed consequent to the Order of the Court dated 15.11.2011 prior to leave to proceed being granted) 8 persons had sustained gunshot injuries that day. Inspector of Police R. P. K. L. Ranasinghe, the other police officer who is accused of shooting, has stated that he fired 4 shots into the air and 2 shots below the knee upon the orders of his superior, the 2nd

Respondent. He however, does not mention that he witnessed police officers being assaulted by the protestors. In the absence of any affirmation by way of affidavit by DIG Ravi Wijegunawardane or any other Senior Officer that they were assaulted by the protestors as described by the 2nd Respondent, it is difficult to conclusively pronounce that such assaults had in fact taken place. However, given the climate of confusion and violence that appears to have prevailed and the large number of protestors, the benefit of the doubt has to be given to the 2nd Respondent. In shooting at the crowd he has been driven by the need to disperse the crowd and prevent any further unlawful activities from taking place.

Be that as it may, the police have exceeded the force that they may have lawfully used, as earlier elaborated in this judgment and also in violation of the Police Departmental Order A19. Due to the shooting the Petitioner in application 265/2011 sustained severe injuries to his reproductive system and his rectum was fully injured. The extent of the injuries is such that he has to pass urine and feces in disposable bags. The gunshot injuries of the victims such as those of the Petitioner, injuries to the kidneys as sustained by the deceased Roshen Chanaka and other wounds such as a bullet embedded near the eye of a protestor (vide page 17 of the Presidential Committee report) indicate that the Police opened fire on persons retreating or fleeing and that the shooting was indeed not below the knee only. Even if the protestors had been involved in assaulting Police officers, the actions of the Police are in violation of Departmental Order A19 under B(1) which states that "a crowd must not be punished for an offence already committed and that force can only be used while the commission of the offense is in progress."

In ***Amal Sudath Silva v Kodithuwakku*** 1987 2 SLR 119,127 this court has stated in relation to Article 11 that "*It is an absolute fundamental right subject to no restrictions or limitations whatsoever. Every person in this country, be he a criminal or not, is entitled to this right to the fullest content of its guarantee. Constitutional safeguards are generally directed against the State and its organs.*

the Police force, being an organ of state, is enjoined by the Constitution to secure and advance this right and not to deny, abridge or restrict the same in any manner and under any circumstances. Just as much this right is enjoyed by every member of the Police force, so is he prohibited from denying the same to others, irrespective of their standing, their beliefs or antecedents." The absolute prohibition in Article 11 that no person whatever their conduct shall be subjected to torture or to cruel inhuman or degrading treatment or punishment has been violated by the Police through their violent conduct following the shooting.

The 3rd Respondent in his statement of Objections states that the situation was brought under control by 2.00pm. According to the statements of the FTZ workers recorded by the Presidential Committee (vide page 45-74) following the gunshots there had been an attack by the Police on the factories, which can only be understood as an attack to punish the workers and intimidate them so as to break up the protest and prevent any further opposition. The nature of the wounds on the victims such as injuries to arms, wrists, fingers etc. show that they were sustained in defending themselves from blows dealt with blunt weapons such as nail studded poles, iron rods and wooden poles as described by the workers. The police officers engaged in the attack had worn numberless uniforms, demonstrating an intention to hide the identities of the assailants. It also shows that the attack was a planned one.

The words of the police officers නොපි චණ්ඩි ද? නොපි පොලීසියටත් ගහන්න නේද ආවේ? පොලීසියේ තරම දැන්වත් දැනගනිව්! (vide page 11 of the Presidential Committee Report) as recalled by one of the workers who was assaulted by the Police clearly indicate the intention of the Police officers to punish the workers for their involvement in the protest. The same worker recalls 'an officer with 2 stars' saying "Now it is enough" regardless of which the beating continued. The statements of the victims of the attack contained in the Presidential Committee report bear evidence to the deplorable conduct of the Police officers,

including women police constables who had come to the scene later on. Assaulting security officers who attempted to prevent the Police from entering the factories, hitting pregnant workers and female workers despite pleas for mercy, use of abusive language, removing belongings of workers such as helmets, three-wheeler keys and gold chains, causing damage to the property of factories and assaulting everyone within the factories regardless of whether they were involved in the protest or not is ample evidence of the cruel, inhuman or degrading treatment that was meted out by the Police.

Per the Presidential Committee Report (vide page 22) 268 civilians received treatment from the Negombo Base Hospital, Ragama Hospital and the Vijaya Kumaratunga Memorial hospital whereas 29 police officers had been admitted to hospitals. The number of injured civilians may have been more, since some did not immediately seek medical assistance for fear of reprisals and others due to overcrowding of the hospitals. The large number of civilians injured in contrast to the number of police officers injured point to a brutal crackdown by the police.

The Police had prevented those injured in the shooting and the attack from being taken to the hospital. The area had been cordoned off and the villagers nearby had had to break down parapet walls of factories in order to take the injured to hospitals. The windscreen and shutters of the vehicle into which Roshen Chanaka was put into had been smashed with iron rods by Police officers, thus delaying the vehicle. According to the Medico Legal Report the Petitioner, H. M. M. Sampath Kumara too had been admitted to the Negombo Hospital at 1.57pm, a considerable delay- given the shooting had occurred between 1-1.30pm- in light of his serious injuries. Denying of medical treatment has been held to be cruel treatment in ***Thomas v Jamaica*** (Communication No. 321/1988, UN Doc. CCPR/C/49D321/1988(1993) cited in ***Somawardena v Superintendent of Prisons and Others*** SC App 494/93 Spl SC Minutes 22 March 1995. The deliberate prevention of timely medical attention to persons with serious gunshot wounds

and other wounded persons is a cruel, inhuman or degrading treatment meted out as punishment.

The mass of evidence corroborated by each of the versions of the petitioners set out in their respective petitions as well as the statements of their fellow workers reproduced in the Presidential Committee report is overwhelming in their testimony of the reprehensible conduct of the police in their attack on the factories.

Arbitrary Arrest

Article 13(1) guarantees that "No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest." In ***Wickremabandu v Herath*** SC Application 27/88 SC Minutes 6 April 1990 it has been held that Arrest in 13(1) *"includes an arrest in connection with an alleged or suspected commission of an offence, as well as any other deprivation of personal liberty."* The petitioners in applications SC FR 268, 270, 271, 272, 273, 274, 346, 347 and 348 who had been detained in the Katunayake Police Station following the attack of the police on the factories therefore can be considered as arrestees. The Petitioners were not properly informed of the "nature of the charge or allegation" upon which they were arrested as required by Section 23(1) of the Code of Criminal Procedure Act. They were thus not afforded the "opportunity of removing any mistake, misapprehension or misunderstanding" (vide ***Mariyadas Raj v Attorney General and Another*** (1983) 2 SRI L. R. 461) that they had been engaged in any unlawful activity during the protest. Considering these circumstances, the rights of the Petitioners under Article 13(1) have been violated.

The arrests are unlawful in that the police had entered the factory premises by force, in their pursuit of the protestors fleeing from their charge and then deprived

the personal liberty and assaulted workers including the petitioners and others who had been inside their factories either working or not engaging in the protest.

The detention of the petitioners in applications SC FR 268, 270, 271, 272, 273, 274, 346, 347 and 348 in the Police Cell and in a room in the Crime Branch at the Katunayake Police Station amounts to arbitrary detention.

Violation of Article 12(1)

Equality before law and the equal protection of the law guaranteed to all persons by Article 12(1) has been violated by the arbitrary exercise of power by the Police.

In ***Sanghadasa Silva v Anuruddha Ratwatte*** 1998 1 SLR p250 it was stated that *"it is now well settled law that powers vested in the state, public officers and public authorities are not absolute and unfettered but are held in trust for the people to be used for the public benefit and not for improper purposes."* Even though Police officers are charged with the duty of maintaining law and order they cannot exercise the power granted for that purpose in a manner that negates the equality provision. Regardless of the fact that the workers may have joined in the protests and engaged in unlawful activity their entitlement to the protection of the law does not diminish.

Conduct of the Senior Officers

When one considers the events that had taken place immediately prior to the incidents that led to police action on this occasion, it is quite evident that the tension among the FTZ workers was simmering over a period of time. Thus, it could be reasonably deduced that the authorities would have entertained the apprehension that the situation could get unruly or lead to violence as it turned out to be, in the instant case. I am of the view that the state, as the guardian of the

fundamental rights, has a duty to take every precautionary step in ensuring that a riotous situation is quelled with minimum damage both to human lives and property. It was no secret that the FTZ is populated with a sizeable worker community and authorities were put on notice that the days immediately prior, they were emotionally disturbed due to the apprehension that their retirement benefits will be adversely affected as a result of the Bill that was proposed to be legislated. Correctness or otherwise of that apprehension apart, the law enforcement authorities ought to have foreseen the events that unraveled. Thus, derive the duty on their part to take the adequate steps to meet the situation. The manner in which the law enforcement authorities have acted in this instance cannot be complimented and the conduct of the Senior Officers of the law enforcement in the events referred to falls short of foresight and the diligence expected of them. It is needless to stress that using live ammunition to quell a worker protest ought to have been the last resort after exhausting all other practices normally deployed in a situation of this nature. For example, had water cannons been stationed at the site of the protest the Police Officers would not have had to fear that they would be helpless if the crowd exited the FTZ and caused havoc outside and therefore use fatal measures. The 2nd Respondent in his statement to the Presidential Committee observes that had water cannons and adequate riot squads been available the situation could have been easily brought under control. The second respondent in his statement to the Presidential Committee (vide page 38) has stated that when he arrived at the Katunayake Police Station and the vicinity of Gate IV and that there were no senior officers to issue orders to them and that he took the decision to fire. The inaction and the failure of the Senior Officers to issue proper orders has only aggravated the situation. The IGP states that two trained Riot Squads were placed at the two exit gates of the FTZ, a number clearly insufficient, as indicated by the turn of events where officers not specially trained for handling crowds dealt with the protestors, with grave consequences.

A particular 'Notice to all employees' produced in the Presidential Committee report (vide page 18) refer to the IGP's views on the demonstrations on the 24th - "they were unhappy about the unlawful assembly and violation of law and order due to the actions taken by the workers on the 24th May at 18th Mile Post, Katunayake. Further he expressed that repetition of such unlawful actions will not be tolerated in the future." This view that the protestors' right to demonstrate their opposition to the bill extends only to an arbitrary extent that the Police thinks acceptable and not to the full extent guaranteed by the Constitution and, any action in excess can be quelled mercilessly appears to be the general attitude of the Police towards the protestors as later manifested in the violence they unleashed against them.

In ***Sanjeewa, Attorney-at-Law on behalf of Gerald Mervyn Perera v Suraweera*** [2003] 1 Sri LR 317 SC 'The duty imposed by Article 4(d) to respect, secure and advance fundamental rights...extends to all organs of Government and the Head of the Police (The Inspector General of Police) can claim no exemption…A prolonged failure to give effective directions designed to prevent violations of Article 11, and to ensure the proper investigation of those which nevertheless take place followed by disciplinary or criminal proceedings, may well justify the inference of acquiescence and condonation if not also of approval and authorization."

State Liability

Per Amerasinghe. J. in ***Saman v Leeladasa (1989) 1 SLR 1*** "*The test of liability relates to the performance or purported performance of his official duties and not to his rank or position in the official hierarchy. If the act was done within the scope of the express or implied sense of the authority of the public officer concerned, there is executive or administrative action in the relevant sense…Where there is no express or implied, authority, the act of the public officer may nevertheless be regarded as executive or administrative action if it could be inferred from the*

circumstances-that the act was done with the intention of doing good to the State and not for his own purpose. In such a case of ostensible authority it may be no defence that the officer concerned was acting beyond his power or authority and even in disregard of a prohibition or special direction provided, of course, that the act was incidental to what the officer was employed to do." It follows from this view that the state with which the primary duty to safeguard fundamental rights enshrined in the Constitution lies, is liable for the inaction of the Respondents.

Since the identities of the police officers who perpetrated the concerted charge and the subsequent attack on the factories have not been specifically identified, it is not possible to pin individual liability on individual officers.

Declarations and Compensation

Upon consideration of the material placed before the court, I am of the view that the Petitioners have established that their fundamental rights have been violated and each of the Petitioners is entitled to a declaration to that effect;

Accordingly, I declare that the fundamental rights of

a) H. M. M. Sampath Kumara, under Articles 11, 12(1) and 14(1)(b) had been violated (SC FR 265/2011)
b) A. Rohitha Amarasinghe, under Articles 11, 12(1), 13(1) and 14(1)(b) had been violated (SC FR 266/2011)
c) C. A. H. M. O. Buddika Atapattu, under Articles 11, 12(1) and 14(1)(b) had been violated (SC FR 267/2011)
d) R. R. M. Dhanushka Sanjeewa, under Articles 11, 12(1), 13(1) and 14(1)(b) had been violated (SC FR 268/2011)
e) Anesh Imalka Fernando, under Articles 11, 12(1) and 14(1)(b) had been violated (SC FR 269/2011)

f) N. L. T. Iresha, under Articles 11, 12(1), 13(1) and 14(1)(b) had been violated (SC FR 270/2011)
g) Nisshanka Wanigasekera, under Articles 11 and12(1) had been violated (SC FR 271/2011)
h) R. A. H. M. Jayatissa Rajakaruna, under Articles 11, 12(1) and 13(1) had been violated (SC FR 272/2011)
i) S. P. L Ranjan Lasantha Perera, under Articles 11, 12(1) and 13(1) had been violated (SC FR 273/2011)
j) H. M. Lalinda Herath, under Articles 11, 12(1) and 13(1) had been violated (SC FR 274/2011)
k) M. Pradeep Kumara Priyadarshana, under Articles 11, 12(1) and 14(1)(b) had been violated (SC FR 346/2011)
l) U. G. Nalin Sanjaya Jayatileke, under Articles 11, 12(1) and 14(1)(b) had been violated (SC FR 347/2011)
m) M. H. A. Sameera Sandaruwan Hettiarachchi, under Articles 11, 12(1) and 14(1)(b) had been violated (SC FR 348/2011)

I am of the view that this is a fit matter to consider payment of compensation to the Petitioners. In deciding the quantum of compensation to be awarded the court took into consideration the gravity of the injuries sustained by the Petitioners and the court also took in consideration that some of the petitioners have not taken part in the protest but are victims of circumstances. Accordingly;

a) In SC FR Application No. 265/2011 the Petitioner H. M. M. Sampath Kumara is awarded a sum of Rs. 250,000 as compensation.

b) In SC FR Application No. 266/2011 the Petitioner A. Rohitha Amarasinghe is awarded Rs.75,000 as Compensation.

c) In SC FR Application No. 267/ 2011 the Petitioner C. A. H. M. O. Buddika Atatpattu is awarded Rs. 75,000 as compensation.

d) In SC FR Application No. 268/2011 the Petitioner R. R. M. Danushka Sanjeewa is awarded Rs. 50,000 as compensation.

e) In SC FR Application No. 269/2011 the Petitioner Anesh Imalka Fernando is awarded Rs. 50,000 as compensation.

f) In SC FR Application No. 270/2011 the Petitioner N. L. T. Iresha is awarded Rs.75,000 as compensation.

g) In SC FR Application No. 271/2011 the Petitioner Nisshanka Wanigasekara is awarded Rs. 100,000 as compensation.

h) In SC FR Application No. 272/2011 the Petitioner R. A. H. M. Jayatissa Rajakaruna is awarded Rs. 75,000 as compensation.

i) In SC FR Application No. 273/2011 the Petitioner S. P. L. Ranjan Lasantha Perera is awarded Rs. 100,000 as compensation.

j) In SC FR Application No. 274/2011 the Petitioner H. M. Lalinda Herath is awarded as Rs. 40,000 as compensation.

k) In SC FR Application No. 346/2011 the Petitioner M. Pradeep Kumara Priyadarshana is awarded Rs. 75,000 as compensation.

l) In SC FR Application No. 347/2011 U. G. Nalin Sanjaya Jayatileke is awarded Rs. 75,000 as compensation.

m) In SC FR Application No. 348/2011 the Petitioner M. H. A. Sameera Sandaruwan Hettiarachchi is awarded Rs. 50,000 as compensation.

The compensation awarded to the Petitioners referred to above is payable by the State.

Applications allowed.

JUDGE OF THE SUPREME COURT

JUSTICE H. N. J. PERERA

I agree

CHIEF JUSTICE

JUSTICE PRIYANTHA JAYAWARDENA, PC.

I agree

JUDGE OF THE SUPREME COURT

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

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

S.C.(F.R.) Application No. 269/2021.

01. Rajaye Thakserukaruwange Sangamaya
රජයේ තක්සේරුකරුවන්ගේ සංගමය
(Government Valuers Association)
No.146/C/3, 4th Lane,
Rajasinghe Mawatha,
Korathota, Kaduwela.

02. D. M. Senevirathna
General Secretary,
Rajaye Thakserukaruwange Sangamaya
(Government Valuers Association)
No.146/C/3, 4th Lane,
Rajasinghe Mawatha,
Korathota, Kaduwela.

And

218/39, Moragahawatte,
Yakahatuwa,
Horampella,Minuwangoda.

03. K. G. Nevil Indrajeewa
146/C/3,

4th Lane,
Rajasinghe Mawatha,
Korathota, Kaduwela.

04. D. Keerthi Abeysekera,
7/6,
Pragathi Mawatha,
Katuwana Road, Homagama.

05. N. S. Lakshman Rajapaksha
No.6A,
G. H. Perera Mawatha,
Raththanapitiya,
Boralesgamuwa.

06. R.L.Jjayantha,
59/12,
School Lane,
Rukmale,
Pannipitiya.

Petitioners

Vs.

1. P. P. D. S. Muthukumarana
Government Chief Valuer,
748, Maradana Road,
Colombo 10.

2. Hon. Mahinda Rajapaksa,
Minister of Economic Policies & Plan Implementation
Ministry of Economic Policies & Plan Implementation

3. Anusha Palpita
Secretary,

Ministry of Economic Policies & Plan Implementation

04. S. R. Attygalle,
Secretary to the Ministry of Finance
Ministry of Finance,
The Secretariat,
Colombo 01.

05. Jagath Balapatabendi
Chairman,
Public Service Commission.

06. Indrani Sugathadasa,
Member,
Public Service Commission.

07. C. R.C. Ruberu
Member,
Public Service Commission.

08. A.L.M. Saleem,
Member,
Public Service Commission.

09. Leelasena Liyanagama,
Member,
Public Service Commission.

10. Dian Gomes
Member,
Public Service Commission.

11. Dilith Jayaweera,
Member,
Public Service Commission.

12. W. H. Piyadasa,
Member,
Public Service Commission.

13. M. A. B. Daya Senarath,
Secretary.
Public Service Commission,

All 5th to 13th Respondents at
Public Service Commission,
No.1200/9,
Rajamalwatta Road,
Battaramulla.

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

Respondents

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BEFORE : **E. A. G. R. AMARASEKARA,** J.
A. H. M. D. NAWAZ, J.
ACHALA WENGAPPULI, J.

COUNSEL : Dilrukshi Dias Wickramasinghe, P.C. with Dilumi de Alwis and Thishya Weragoda instructed by Sanjay Fonseka for the Petitioner.
Viveka Siriwardena, P.C., A.S.G. with Nayomi Kahawita S.C. for the Respondents.

ARGUED ON : 08th December, 2021

DECIDED ON : 17th December, 2021

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ACHALA WENGAPPULI, J.

The 1st Petitioner, a registered trade union (**රජයේ තක්සේරුකරුවන්ගේ සංගමය**) and five of its members (2nd to 6th Petitioners) have, by their petition dated 2nd September 2021 supported by an affidavit of the 3rd Respondent, invoked the jurisdiction conferred on this Court by Article 126 of the Constitution, alleging that a series of wrongful, illegal, unlawful and arbitrary administrative/executive actions of the 1st Respondent, the Government Chief Valuer *P.P.D.S. Muthukumarana,* culminated in the publication of a paper advertisement on 17th July 2021 (P46A and B), which meant to favour certain others to score higher marks on seniority whilst having a negative impact on them, are violative of their fundamental rights as guaranteed under Articles 12(1),14(1)(a),(b),(c),(d) and (g) of the Constitution.

It is averred that the 2nd to 6th Petitioners have been recruited to the Department of Valuation as Grade II of Class III Assistant District Valuers and some of them were promoted as Grade I of Class II Assistant Valuers. It is alleged by the Petitioners that when the 1st Respondent sought to amend the Service Minute of the Sri Lanka Valuation Service arbitrarily in 2017, the 1st Petitioner trade union had launched a trade union action opposing the said move in November 2017, which continued for three months. During this period, the membership of the 1st Petitioner Union had refrained from submitting their progress reports as a trade union action but continued to perform other duties that were allocated to them from time to time. The trade union action was duly informed by letters dated 20th November 2017 and the 1st Respondent was informed of further escalation of trade

union action through a series of letters, in view of the fact that no resolution of the dispute was provided by her.

On 5th February 2018, the dispute was amicably resolved after negotiations with the Hon. Minister of Finance, who agreed that resorting to the aforesaid trade union action will not have any effect on their career prospects. However, it is alleged that the 1st Respondent had directed the Regional Valuers of *Sabaragamuwa* and *Uva Provinces* to temporarily suspend the salary increments for a period of six months in relation to certain officers, an act indicative of *mala fide* on the part of the said Respondent. This suspension was made on the basis that those officers have failed to submit their progress reports for the Month of November 2017. This was strongly objected to by the 1st Petitioner Union by its letter dated 17th August 2018 and the Secretary to the Ministry of Finance was kept informed of this development on 21st January 2019.

The 1st Respondent had inquired from the 3rd Petitioner on 20th August 2019 as to why he had failed to submit his progress reports for the months of November and December 2017 and January 2018. The 3rd Petitioner conveyed that the failure was due to trade union action.

The current Service Minute of the Sri Lanka Valuation Service was published by the Public Service Commission in Gazette Extraordinary bearing No. 2142/75 of 27th September 2019 (P18A), substituting the previous Service Minutes. After the publication of the

current Service Minute, Field/Office based officers were absorbed to the relevant grade under Clause 14 thereof and therefore members of the 1st Petitioner Union who were from the batch of 2005 and 2008 and had a service period of well over 10 years were absorbed to Grade I of Class II while others who did not have 10 years were absorbed to Grade II of Class II. The Petitioners claim that there was no notification indicating the membership of the 1st Petitioner Union that their seniority had been suspended/affected by a period of 6 months for resorting to trade union action. The Petitioners further claim that a loss of seniority of 6 months would affect them gravely inasmuch as it would determine the Class they would fall into, namely Grade II of Class II or Grade I of Class II.

At a meeting convened by the 2nd Respondent (Hon. Minister of Economic Policies and Plan Implementation) on 24th February 2020, and held between the concerned officials and the members of the 1st Petitioner Union, a decision was taken to resolve the issue, in relation to the members who have taken part of the trade union action and had their salary increments suspended, in a manner that will not affect their career progression.

On 4th December 2020, officers of the 2010 batch who completed 10 years of service received letters from the 1st Respondent informing them of being promoted to Grade I of Class II, but only after omitting a period of 6 months from the service period for engaging in trade union action, and thereby preventing their promotion to Grade I of Class II.

Most of the membership of the 1st Petitioner Union have lodged appeals to the Public Service Commission against the said arbitrary act.

It is averred that on 3rd March 2021, the Public Service Commission had informed the 3rd Petitioner that his salary increment had been suspended for legitimate reasons and could be excluded when computing the period of satisfactory service, whilst conceding that it had not considered whether the said suspensions made by the 1st Respondent is in compliance with the due procedure (P25). The Public Service Commission, upon an enquiry made by the 3rd Respondent into the identical issue, repeated its view. The 2nd to 6th Petitioners had therefore preferred their appeals against the said decision by the Public Service Commission to the Administrative Appeals Tribunal.

The 1st Respondent, by her letter dated 13th November 2020, had initiated the process of calling for applications for the recruitment for the executive officer post of Valuer in Grade III of Class I of the Sri Lanka Valuation Service on the basis of Service Experience and Merit (P44A to E). The notice of calling applications was published on 16th November 2020. In response, the members of the 1st Petitioner Union, inclusive of 3rd, 4th and 6th Petitioners have applied seeking appointment to the said post.

Whilst the said Petitioners and others were awaiting their interviews, the Public Service Commission published yet another notice in the print media on 17th July 2021, making reference to the said notice of 16th November 2020, causing an amendment to the allocation of marks given for seniority as set out in the table published therein. It is this amendment the Petitioners resist as they claim it favours a certain group of applicants to score higher marks on seniority whilst having a

negative impact on others including the members of the 1st Petitioner Union.

The Petitioners have thereby primarily sought to challenge the proposed interview process and also the legality of the suspension of their increments by the 1st Respondent for engaging in trade union activity and loss of seniority of 6 months. They claim the said suspension of increments had been made by the 1st Respondent, contrary to specific direction of the Hon. Minister and to the provisions of Public Administration Circulars, and thereby frustrating their legitimate expectations. They claim these illegal actions coupled with the amendment introduced to the Service Minute to facilitate the ulterior motives of the 1st Respondent are violative of their fundamental rights guaranteed under the Constitution.

The 1st to 4th and 14th Respondents resisted the Petitioners' application and, in view of the nature of the interim reliefs sought, the Respondents have tendered limited objections setting out the factual basis of their version.

When the instant petition was supported by the learned President's Counsel for the Petitioners on 8th December 2021, learned Additional Solicitor General who appeared for the 1st to 4th Respondents raised preliminary objections as to the maintainability of the same and sought its dismissal *in limine*. Parties were heard extensively on the preliminary objections and afforded a further opportunity to substantiate their respective position by tendering applicable judicial precedents, in addition to the ones already referred to in their respective submissions.

During her submissions, the Learned Additional Solicitor General had articulated three grounds on which she wished to raise her objections as to the maintainability of the instant application. It was firstly contended that the latest of the series of decisions, namely the publication of the notice calling for applications to Grade III of Class I of Sri Lanka Valuation Service was published on 17th July 2021, whereas the petition challenging its validity had been tendered only on 2nd September 2021, well beyond the mandatory '*one month rule*', as laid down in Article 126(2) of the Constitution.

In addition to the said preliminary objection, the learned Additional Solicitor General also contended that the 1st Petitioner, being a trade union, had no *locus standi* to institute proceedings under Article 126, and that the Petitioners have failed to name the necessary parties to their application, who would be adversely affected, if this Court grants relief.

Learned President's Counsel for the Petitioners sought to counter the first of the three objections on the basis that the Petitioners have alleged '*continuous violation*' of their fundamental rights and also have sought intervention of the Human Rights Commission seeking redress to their grievance and therefore, in terms of Section 13 of the Human Rights Commission Act No. 21 of 1996, the petition of the Petitioners could still be entertained by this Court. She invited attention of this Court to the averments contained in paragraph 96 of the petition where the 2nd to 6th Petitioners have specifically pleaded that they have preferred individual complaints to the Human Rights Commission on 15th August 2021 and relied on the *dicta* of *Murdu N.B. Fernando* J in the judgment of this Court in ***Ranasinghe Arachchige Nadeesha Seuwandi Ranasinghe and another v Ceylon Petroleum Storage Terminals***

Limited (SC FR No. 244/2017 – S.C. Minutes of 22.02.2019), that " … *in view of the provisions of Section 13(1) of the Human Rights Commission Act, time would not run during the pendency of proceedings before the Human Rights Commission and such time will not be taken into account in computing the period of one month within which an application may be made to this Court in terms of Article 126(2) of the Constitution*."

Since the first of the three preliminary objections refers to the invocation of jurisdiction of this Court, I shall consider the same at the very outset.

Relevant Sections of the Article 126(2) of the Constitution states that any person, who alleges that a fundamental right or language right relating to such person has been infringed or is about to be infringed by executive and administrative action, either he or his Attorney at Law, "… *within one month thereof*", in accordance with such rules of Court as may be in force, apply to the Supreme Court. It is clear from the wordings of the said sub-Article that in order to ascertain the all-important one-month period, the date of the alleged infringement must be taken as the starting point.

The first reported instance of determining the nature and the applicability of the limitation of one month as imposed by Article 126(2) perhaps arose before this Court in ***Ranatunga v Jayawardena and Others*** (1979) 1 Sri L.R. 124, where *Samarakoon* CJ, in upholding the objection raised by the learned Solicitor General on behalf of the Respondents, stated thus;

> "… *no action under Article 126 could have been embarked on prior to 7th September 1978. However, assuming that this was a threatened infringement and it*

> *continued till the 7th of September 1978 it was up on to the petitioner to make this application after the 7th September 1978. But then the time limit of one month for institution of this application becomes applicable, and the application should therefore have been made within one month after 7th September 1978. The application has in fact been filed on the 4th June 1979, which is long after the prescribed period. Counsel for the petitioner sought to get over this provision by stating that words "within one month thereof" in Article 126(2) refers only to an infringement and not to the threatened infringement referred to in that section. I am unable to agree with this contention. The word "thereof" refers to the executive or administrative action complained of and for the purpose of this application must depend on what the petitioner alleges in this petition as the wrongful action."*

Since the promulgation of the 1978 Constitution on 7th September 1979, with the above quoted pronouncement by *Samarakoon* CJ, for over a period of four decades, this Court had consistently held that the one-month period from the alleged infringement, as imposed by the Article 126(2), is a mandatory requirement.

In the instant application, the Petitioners allege that a series of acts and decisions attributed to the 1st Respondent and the Public Service Commission, which culminated with the publication of the notice of amended marking scheme applicable to the candidates to fill 63 vacancies of Grade III of Class I of the Sri Lanka Valuation Service, as per the order of the Public Service Commission, on 17th July 2021 (P46B) had infringed their fundamental rights. Learned President's Counsel for

the Petitioners termed the instant application is in relation to an instance of a '*continued violation'* of their fundamental rights.

In this regard, the *dicta* of *Marsoof* J in the judgment of ***Lake House Employees Union v Associated Newspapers of Ceylon Ltd*** (SC FR Appln. No. 637/2009 – S.C. Minutes of 17.12.2014) is relevant. His Lordship states "… *any complaint based on a continuing violation of fundamental rights may be entertained by this Court if the party invokes the jurisdiction of this Court within the mandatory period of one month from the last act in the series of acts complained of* ."

It is evident from the factual narration in the preceding paragraphs that the last of the series of acts that allegedly violate their fundamental rights is the said publication of the notice (P 46B) on 17th July 2021. Parties agree that no date had been notified for the interviews of the applicants who responded to the said notice. The Petitioners have had sufficient notice of the said publication since they have lodged complaints to the Human Rights Commission against it. However, the Petitioners have filed the instant application at the Registry of this Court only on the 2nd September 2021. Therefore, the Petitioners invoked the exclusive jurisdiction of this Court conferred under Articles 17 and 126, way past the said mandatory period of one month, reckoned from the date of the last of the series of such acts attributed to the 1st Respondent and the Public Service Commission, which allegedly had infringed their fundamental rights.

In these circumstances, it is necessary to consider the contention advanced by the learned President's Counsel on behalf of the Petitioners that in view of the fact that they have tendered applications seeking redress to the alleged violation of fundamental rights to the Human Rights Commission, and with the operation of the statutory provisions of section 13 of Human Rights Commission Act, whether the preliminary objection that the application is time barred, should be rejected.

Section 13(1) of the Human Rights Commission Act No. 21 of 1996 reads as follows;

> *"Where a complaint is made by an aggrieved party in terms of Section 14 of the Commission, within one month of the alleged infringement or imminent infringement of a fundamental right by executive or administrative action, the period within which the inquiry into such complaint is pending before the Commission, shall not be taken into account in computing the period of one month within which an application may be made to the Supreme Court by such person in terms of Article 126(2) of the Constitution."*

This Court on several instances had the occasion to consider the effect of the said statutory provisions in relation to an application that had been tendered to Court after the mandatory one-month period.

His Lordship *S.N. Silva* CJ, in the judgment of ***Subasinghe v The Inspector General of Police and Others*** (SC Spl. No.16 of 1999 – S.C. Minutes of 11.09.2000) where the Petitioner had relied on section 13 of the Human Rights Commission Act to bring his application within the

time limit imposed by Article 126(2), had rejected that contention on the basis that " *the petitioner has failed to adduce any evidence that there has been an inquiry pending before the Human Rights Commission*."

In a situation where the petitioner had produced the receipt issued by the Human Rights Commission confirming the lodgement of an application for violation of human rights, *Amaratunga* J, in ***Ranaweera and Others v Sub Inspector Vinisias and Others*** (SC FR Appln. No. 654/2003 – S.C. Minutes of 13.05.2008) held that "… *the Human Rights Commission is not legally obliged to hold an investigation into every complaint received by it regarding the alleged violation of a fundamental right. Therefore, a party seeking to utilise section 13(1) of the Human Rights Commission Act … is obliged to place material before this Court to show that an inquiry into his complaint is pending before the Human Rights Commission.*"

The Petitioners have placed heavy reliance of the already quoted dicta of Fernando J in ***Ranasinghe Arachchige Nadeesha Seuwandi Ranasinghe and another v Ceylon Petroleum Storage Terminals Limited*** (supra). But the circumstances that related to the Petitioners' application on applicability of Section 13 are clearly distinguishable from one important factor as referred to in the said judgment. It is stated clearly therein (at p. 15 of the judgment) that the petitioners in that application had declared in the petition that "… *a complaint was made to the Human Rights Commission and that the said complaint was acknowledged by the Human Rights Commission*." In the instant application, what the Petitioners have averred in paragraph 96 of their

petition is "*the Petitioners state that the 1st Petitioner on behalf of its Members and the 2nd to 6th Petitioners have individually preferred complaints to the Human Rights Commission on the 15th August 2021 concerning matters complained hereof.*"

The instant application was filed on 2nd September 2021 and was taken up for support to consider granting of leave to proceed on 8th December 2021. During the said interval of three months the Petitioners could have at least tendered any communication addressed to them by that Commission that their applications were accepted and are pending investigations. But they did not. Thus, the Petitioners have failed "*to place material before this Court to show that an inquiry into his complaint is pending before the Human Rights Commission"* per ***Ranaweera and Others v Sub Inspector Vinisias and Others*** (supra). In this context, it is relevant to note that this Court had frowned on the practice of those petitioners, who seek to '*circumvent*' the limitation imposed by Article 126(2) by resorting to statutory provisions of Section 13(1) of the Human Rights Commission Act. In the judgment of ***Kithsiri v Faizer Musthapha and Others*** (SC FR Appln No. 362/2017 – S.C. Minutes of 10.01.2018) *Aluwihare* J held that in the absence of any material to show that an inquiry into the petitioner's complaint is pending before the Commission and in view of the petitioner's desire not to have his complaint investigated into by the Commission, the preliminary objection raised on time bar is entitled to succeed.

It must also be noted that, despite the mandatory requirement consistently imposed on a petitioner in invoking the jurisdiction under Article 126 within the stipulated period of one month since the alleged

infringement, this Court had however retained its discretion to entertain applications which allege violation of fundamental rights but are filed beyond the said period of one month, if certain conditions are fulfilled.

In ***Gamaethige v Siriwardana*** (1988) 1 Sri L.R. 384, *Mark Fernando* J had held (at p.402) that "… *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.*" His lordship had decided so upon a position that had arisen for consideration in the case of ***Edirisuriya v Navaratnam and Others*** (1985) 1 Sri L.R. 100. The petitioner in that matter had been arrested and detained under a detention order without allowing access to his family or to any lawyer. When access was permitted subsequently his visitors were advised '*not to discuss about the case*'. He complained of violation of his fundamental rights guaranteed under Articles 13(1), (2), 12(1) and (2) of the Constitution. The Respondents have taken up the position that the application of the petitioner is time barred, as he had taken more than a month since his arrest to come before Court.

At the hearing, it was conceded by the learned Deputy Solicitor General, who represented the respondents, that "*if the petitioner had, after he was taken into custody by the Police, been held incommunicado, then the period he was so held without having the opportunity of communicating with his relations and or lawyers and of taking any meaningful steps to invoke the jurisdiction of this Court should not and would not be counted in computing the period of one month referred to in sub-article (2) of Article 126 of the Constitution and that the maxim lex non cogit ad impossibilia would, in such a situation, apply*".

In view of the constraints placed on the said petitioner, *Fernando* J had stated in ***Gamaethige v Siriwardana*** (at p.401) "*the time limit of one month prescribed by Article 126(2) has thus been consistently treated as mandatory; where however by the very act complained of as being an infringement of a petitioner's fundamental right, or by an independent act of the respondents concerned, he is denied such facilities and freedom (including access to legal advice) as would be necessary to involve the jurisdiction of this court, this Court has discretion, possibly even a duty, to entertain an application made within one month after the petitioner ceased to be subject to such restraint.*"

In order to exempt from the one-month time limit, it is for the Petitioners to satisfy this Court of the existence of unavoidable circumstances that had prevented them from invoking the jurisdiction of this Court. It was also stated in ***Gamaethige v Siriwardana*** (supra) (at p. 401) that it is "*a heavy burden on a petitioner who seeks that indulgence*".

The Petitioners have apparently not relied on this exception, as they have not averred any circumstances that the resultant delay is "*no lapse, fault or, delay on the part of the petitioner*".

In view of the considerations referred to above, I am of the view that the preliminary objection on the time bar raised by the learned Additional Solicitor General on behalf of the 1st to 4th and 14th Respondents is entitled to succeed. The petition of the Petitioners is clearly time barred. Therefore, the necessity to consider the two remaining preliminary objections does not arise.

Accordingly, the petition of the Petitioners is dismissed *in limine* as it had been filed beyond the mandatory one-month period as imposed by Article 126(2) of the Constitution.

I make no order as to costs.

JUDGE OF THE SUPREME COURT

E. A. G. R. AMARASEKARA, J.

I agree.

JUDGE OF THE SUPREME COURT

A. H. M. D. NAWAZ, J.

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an application in terms of Articles 12(1), 14(1)(g) and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka

G.G.H.N. Gunasekera,
95/35, Sumudu Place,
Samagi Mawatha, Magammana,
Homagama.

Petitioner

SC. FR. Application No. 270/2016

Vs,

1. Chief Secretary,
   Provincial Council of the Western Province,
   Office of the Chief Secretary - Western Province,
   "Sravasthhi Mandiraya", 32,
   Sri Marcus Fernando Mawatha,
   Colombo 07.

   Presently at
   No. 204, Western Provincial Council Office Complex,
   Level 4, Denzil Kobbekaduwa Mawatha,
   Battaramulla.

2. Deputy Chief Secretary (Planning),
   Provincial Council of the Western Province,

Office of the Chief Secretary - Western Province,
"Sravasthhi Mandiraya", 32,
Sri Marcus Fernando Mawatha,
Colombo 07.

Presently at
No. 204, Western Provincial Council Office Complex,
Level 4, Denzil Kobbekaduwa Mawatha,
Battaramulla.

3. Director (Planning),
Provincial Council of the Western Province,
Office of the Chief Secretary - Western Province,
"Sravasthhi Mandiraya", 32,
Sri Marcus Fernando Mawatha,
Colombo 07.

Presently at
No. 204, Western Provincial Council Office Complex,
Level 4, Denzil Kobbekaduwa Mawatha,
Battaramulla.

4. Deputy Chief Secretary (Administration),
Provincial Council of the Western Province,
Office of the Chief Secretary - Western Province,
"Sravasthhi Mandiraya", 32,
Sri Marcus Fernando Mawatha,
Colombo 07.

Presently at
No. 204, Western Provincial Council Office Complex,
Level 4, Denzil Kobbekaduwa Mawatha,
Battaramulla.

5. Hon. Ranjith Maddumabandara,
Minister of Public Administration and Management,
Ministry of Public Administration and Management,
Independent Square,
Colombo 07.

5A. Hon. Ranjith Maddumabandara,
Minister of Public Administration,
Disaster Management and Rural Economic Affairs,
Ministry of Public Administration,
Disaster Management and Livestock Development,
Independent Square,
Colombo 07.

5B. Hon. Janaka Bandara Thennakoon,
Minister of Public Administration,
Home Affairs, Provincial Councils and Local Government,
Ministry of Public Administration,
Home Affairs, Provincial Councils and Local Government,
Independent Square,
Colombo 07.

5C. Hon. Janaka Bandara Thennakoon,
Minister of Public Service, Provincial Councils

and Local Government,
Ministry of Public Service, Provincial Councils and Local Government,
Independent Square,
Colombo 07.

6. Secretary,
Ministry of Public Administration and Management,
Independent Square,
Colombo 07.

6A. Secretary,
Ministry of Public Administration,
Disaster Management and Livestock Development,
Independent Square,
Colombo 07.

6B. Secretary,
Ministry of Public Administration,
Home Affairs, Provincial Councils and Local Government,
Independent Square,
Colombo 07.

6C. Secretary,
Ministry of Public Service, Provincial Councils and Local Government,
Independent Square,
Colombo 07.

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

8. The Governor,
   Western Province,
   5th Floor, 109,
   Galle Road,
   Colombo 03.

   Presently at
   No. 204,
   Western Provincial Council Office Complex,
   Level 10, Denzil Kobbekaduwa Mawatha,
   Battaramulla.

Respondents

Before: **Justice P. Padman Surasena**

Justice E.A.G.R. Amarasekara

Justice A.L. Shiran Gooneratne

Counsel: Dr. Jayatissa de Costa, PC, with Wijeratne Hewage and Chanuka Ekanayake **for the Petitioner.**

Uditha Egalahewa, PC, with Damitha Karunarathna, Arunodha Jayawardena **for the 1st to 4th and 8th Respondents.**

Rajitha Perera, SSC **for the Hon. Attorney General.**

Argued on: 17/02/2021

Decided on: **28/10/2021**

A.L. Shiran Gooneratne J.

The Petitioner was working in the Chief Secretary's office under the Director (Planning) and the Deputy Chief Secretary, (Planning) of the Western Provincial Council. In the Amended Petition dated 01/10/2016, the Petitioner claims that he was released from the Western Provincial Council and assigned duties in the Ministry of Primary Industries by the Ministry of Finance and Planning by its impugned decision as reflected in document marked P11, which the Petitioner claims was in violation of his fundamental rights guaranteed under Article 12(1) and 14(1)(g) of the Constitution. Leave to proceed was granted on 15/11/2017, on the alleged infringement of Article 12(1) of the Constitution.

The facts of the case as established by the pleadings and the documents therein are set out as follows.

The Petitioner was appointed to Grade II class II in the Planning Service and was posted to the Provincial Council of the Western Province with effect from 22/06/2009. The Petitioner states that due to his unblemished service record he became popular among the members of the Provincial Council, which prompted some of his colleagues to show displeasure towards him. Such acrimonious behavior towards the Petitioner had prevented him from performing his lawful functions and duties in the Planning Department.

By letter dated 24/09/2013, marked R5, fellow officers at the Planning Department had informed the Deputy Chief Secretary (Planning) and the Chief Secretary, that due to the unsatisfactory working relationship with the Petitioner, they find it impossible to carry out their duties. Letters written to the 1st Respondent by several management assistants had requested that the Petitioner be transferred from his post. According to letter dated 14/07/2014 marked R6, and 14/07/2014 marked R8, fellow officers have alleged that working with the Petitioner has become an impossibility due to arduous accusations and unwarranted interference by the Petitioner with their work.

The 1st Respondent contends that due to the conduct of the Petitioner, severe hardship and inconvenience was caused to the Audit branch and its co-workers. Therefore, he requested that the Petitioner be transferred out of the said branch. (Documents marked R12, R13 and R14). Due to the unsatisfactory working relationship with other officers, the 1st Respondent by letter dated 29/09/2014 marked R14, has written to the Secretary of the Ministry of Finance and Planning that the Petitioner be released from service from the Western Provincial Council.

However, at the request of the Petitioner, a committee was appointed to look into the administrative issues faced by the Planning Department. Accordingly, the Director of Internal Audit conducted an inquiry into this matter and by letter dated 05/11/2014, marked R13, recommended that the Petitioner be given a service transfer or a release from the Provincial Council.

In the circumstances, the Petitioner filed a fundamental rights application bearing No. SC/FR/70/2015 allegedly, to safeguard his rights to engage in lawful occupation and to discharge his duties. However, this application was withdrawn by the Petitioner.

Thereafter, by letter dated 07/06/2016, the Petitioner was summoned by the 4th Respondent (Deputy Chief Secretary (Administration)) for an inquiry relating to alleged disputes arising over employee duties in the Planning Division. The Inquiry was scheduled for 08/06/2016, at 10.30 a.m. The Petitioner states that he did not appear before the Committee of Inquiry on the said date due to the Planning Division not receiving the letter scheduling the inquiry on time. However, the inquiry had proceeded in the absence of the Petitioner which the Petitioner claims to be a denial of his right to defend. Thereafter, by the impugned letter dated 04/08/2016 marked P11, the Petitioner was released from the Western Provincial Council and was required to report to the Ministry of Public Administration and Management.

The Petitioner submits that in the absence of a request from the 5th and 6th Respondents to obtain the services of the Petitioner, the 1st Respondent's decision to transfer the Petitioner

from the Western Provincial Council to the Ministry of Public Administration and Management constitutes illegal, arbitrary and mala-fide actions which violates the fundamental rights guaranteed by Article 12(1) of the Constitution.

The Petitioner prayed, *inter-alia*, to quash the decision of the Respondents contained in the impugned document marked P11, which released the Petitioner from the service of the Western Province Provincial Council.

The claim, as set out in the Petition is based on the following contentions, that;

a) in the absence of lawful representation by the Petitioner, the decision of the Commission of Inquiry held on 08/06/2016, to transfer the Petitioner from the Western Provincial Council to the Ministry of Planning and Management on the basis of service requirement, is illegal and ultra vires.
b) in the absence of a request from the 5th and 6th Respondents to have the Petitioner released on service requirement, the 1st Respondent had no authority to fill in service requirements of an institution other than the Provincial Council of the Western Province and as such the decision to transfer the Petitioner from the Western Provincial Council is ultra vires, illegal and unjustifiable.

Article 12 (1) of the Constitution deals with the right to equality which states that:

"All persons are equal before the law and are entitled to the equal protection of the law"

In ***Ramuppillai Vs. Festus Perera, Minister of Public Administration, Provincial Councils and Home Affairs and Others***, Fernando J. held:

"that 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'

The Secretary to the Ministry of Public Administration and Management by letter dated 19/11/2016, marked R3, released the Petitioner from the Western Province Public Service to the Ministry of Primary Industries. In this application the Petitioner has challenged his release from the Western Province Public Service as reflected in the impugned document marked P11, however the Petitioner has not challenged the decision to report to work at the new service station i.e., Ministry of Primary Industries as reflected in document marked R3. On the said premise, the learned President's Counsel appearing for the 1st to 4th and 8th Respondents raised a preliminary objection to this application stating that,

> *"The application of the Petitioner is now academic and the relief prayed for by the Petitioner cannot be granted by this court".*

Since the questions of law posed by the Petitioner would substantially answer the issue of futility, I will now turn to the merits of this application.

According to Paragraph 12 of the Amended Petition, the Petitioner received a letter dated 07/06/2016, (Notice of Inquiry marked P10) from the Deputy Chief Secretary, (Administration) summoning him for an inquiry relating to the alleged disputes over duties of the employees in the Planning Division.

The Petitioner claims that it was not practically possible for him to appear before the Committee of Inquiry on short notice, which the Petitioner claims to be a deliberate act on the part of the 1st Respondent to keep him away from the inquiry. By letter dated 08/06/2016 marked, 2P9, the Petitioner has sought for further time to participate in the inquiry on the basis that he received the said notice on 08/06/2016, at 11.10 a.m. The hand written entry of the figures 11.10 a.m. indicating the time acknowledging receipt of notice by the Planning Division is disputed by the 1st Respondent.

The 1st Respondent's position is that the hand written date stamp entry, 11.10 a.m. appearing in the Notice of Inquiry was placed fraudulently by the Petitioner to deliberately avoid the inquiry.

The 1st Respondent contends that the inquiry was carried out 20 meters away from the Petitioner's own division and therefore, the Petitioner had no difficulty in attending the inquiry on the given date. It is further contended that the letter marked 'P10' was delivered in the morning of 08/06/2016, to the Petitioner to grant the Petitioner sufficient time to participate in the inquiry and was not delivered at 11.10 a.m. as alleged by the Petitioner and deny any *mala fides* on their part.

Based on the report submitted by the Inquiry Committee, it is observed that on the date of inquiry, the Petitioner was not found in the workplace or could not be contacted by telephone. However. the attendance summary which is marked R21, indicates that on 08/06/2016, the Petitioner was present at the workplace between 9.11 a.m. and 4.21 p.m. The 1st Respondent contends that the Petitioner was requested to make a statement but refused stating that he had not received any written request to do so. However, having given a written request, the Petitioner failed to provide a statement.

According to the findings of the Committee of Inquiry, the Petitioner was given sufficient time and opportunity to be heard but has deliberately refrained from participating at the inquiry. By letter dated 04/08/2016, the Petitioner was released from the Western Provincial Council to report to the Ministry of Public Administration and Management on grounds of exigencies of service.

Responding to the complaints brought against him by his fellow officers, that it has become impossible to work with the Petitioner, as more fully set out in documents marked R15, R16, to R18, the Petitioner states that most of the officers who complain are Management Assistants and officers who have not worked under him or who are not competent to comment on his duties and accordingly has denied all allegations leveled against him.

The Petitioner strongly alleges that due to his continuous revelations of fraudulent and dishonest transactions of the officers attached to the Provincial Council, the superior officers of the Planning Division were desperate to get rid of him and therefore maliciously engineered his release. The Petitioner states that there was no dispute between himself and

fellow officers in his department and denies that he requested a committee to be appointed to look into the problems faced by him and fellow officers. However, the Petitioner states that he was aware that a Committee of Inquiry was scheduled to inquire into allegations brought against him. The said Committee was appointed by the 1st Respondent to look into the problems in the Planning Division.

In ***Tennakoon, Assistant Superintendent of Police Vs. T.P.F. De Silva, Inspector General of Police and others, (1997) 1 SLR 16 at page 34, Fernando J.*** delivering a majority judgement on the Petitioners rights under Article 12(1), observed that:

> *"A working relationship is that which exists between superior and subordinate, or colleague and colleague, in one workplace; or even between two persons in different departments, institutions or services, when the public interest requires that they work together".*

In the given circumstances, the decision to appoint a committee to look into the unsatisfactory relationship between the Petitioner and fellow officers, in my view, was best in the public interest.

In defining a working relationship in the public interest, in ***Tennakoon, Assistant Superintendent of Police Vs. T.P.F. De Silva, Inspector General of Police and others, (1997) 1 SLR 16 (supra)*** Fernando J. observed;

> *"Let me assume, however, such a working relationship was required, in the public interest. A bare assertion that it was unsatisfactory is not enough. The court must ascertain whether there were grounds for that opinion, and, if there were, it must examine those grounds; upon such an examination the court is not entitled to substitute its own opinion, simply because it disagrees with the 1st Respondent; and it can only intervene if that opinion is found to be arbitrary, capricious, unreasonable or discriminatory (or otherwise violative of fundamental rights)"*

Deliberately or otherwise, the Petitioner did not participate at the Committee of Inquiry specially appointed to look into the grievances of the officers. If time constraints were to

prevent the Petitioner from participating at the said inquiry which was carried out a mere 20 meters away from the Petitioner's own Division, the most prudent thing for him to have done was to immediately present himself before the inquiring officer, the Deputy Chief Secretary, (Administration) and requested for further time, which he failed to do. The Petitioner merely avoided the inquiry process for reasons best known to him.

The strong stand taken by the Petitioner against holding an inquiry is amplified by the answer filed to the counter affidavit of the 1st Respondent, where he has reiterated that he never requested for an inquiry to be held. The Inquiring Officer's decision to transfer the Petitioner from the Planning Department was based on the materiel placed before him. It is observed that at no time has the Petitioner made a request that the proposed transfer be varied.

In the 1st contention, the inquiring officer's findings are challenged on the basis that the Petitioner was not given a reasonable opportunity to present his case. As noted above, the facts surrounding the inquiry fails to justify this position. The decision of the Inquiry Committee is not challenged in this application. In any event it would be inappropriate to review the decision of the Inquiry Committee and to substitute the opinion of court to that of the said decision. I am of the view that the inquiring officer considered the material placed before the committee objectively and reasonably before arriving at the impugned decision.

It is also clearly evident that the Petitioner was informed of the date of inquiry, however has failed to avail himself the opportunity of lawful representation before the committee of inquiry on the given date.

For the reasons stated above, the Petitioner's 1st contention should fail.

The 2nd contention of the Petitioner is that, when transferring the Petitioner to the Finance and Planning Ministry, the 1st Respondent failed to follow Procedural Rule 218 and 219 of the Public Service Commission, published in Gazette Notification No. 1589/30, dated 20/02/2009, marked P13. It is further contended that the decision to transfer the Petitioner

in terms of the said rules should necessarily be taken by the 6th Respondent, for reasons acceptable to him and accordingly the Petitioner moves to quash the impugned letter marked P11.

The Petitioner further states that the 1st Respondent nor any other Respondent has the authority to transfer the Petitioner in terms of Section 32 of the Provincial Councils Act No. 42 of 1987, since it shall apply to all officers in the Provincial Public Service.

According to the Petitioner, Procedural Rule 218 and 219 of the Public Service Commission, published in Gazette Notification No. 1589/30, dated 20/02/2009 (marked P13) should be followed and reasons for transfer should be made known to him. The Petitioner states that as a result of the arbitrary decision to transfer the Petitioner taken by the 1st and 8th Respondents, denied him of his employment, monthly salary and professional dignity he earned during his carrier.

The Petitioner was released by the 4th Respondent from the Provincial Public Service of the Western Province in order to report to the Ministry of Administration and Management on the basis of service requirements.

In terms of the letter of appointment dated 11/12/2008 issued by the Public Service Commission, marked P1, the Petitioner is an officer belonging to the Planning Service. The Secretary to the Ministry of Finance and Planning by letter dated 19/06/2009, marked P2, released the Petitioner to serve in the Western Province in terms of clause 7 of the Letter of appointment, service minute and the PSC Rules.

According to the terms of Service Minute of the Planning Service Rule 12(i), in Gazette Bearing No. 1670/32, published on 10/09/2010, marked R23, and the Procedural Rule 218 and 219 of the Public Service Commission (document marked P13) and the Public Services Gazette No. 1941/41, published on 20/11/2015 marked R24, if the Provincial Council has no further need to retain the services of the Petitioner, it is within the powers of the authorities of the Provincial Council to release the Petitioner from service of the Provincial Council.

Due to exigencies of service, the Petitioner was released from the Western Province Public Service to the Planning and Administration Ministry by letter dated 02/08/2016 marked R2. The Secretary to the Ministry of Public Administration and Management by letter dated 19/11/2016 marked R3, informed the Petitioner to report to the new station referred to therein.

Section 32 of the Provincial Council Act states thus;

1) *Subject to the provisions of any other law the appointment, transfer, dismissal and disciplinary control of officers of the Provincial Public Service of each Province is hereby vested in the Governor of that Province.*
2) *The Governor of a Province may, from time to time, delegate his powers of appointment, transfer, dismissal and disciplinary control of officers of the Provincial Public Service to the Provincial Public Service Commission of that Province.*
3) *The Governor shall provide for and determine all matters relating to officers of the Provincial Public Service, including the formulation of schemes of recruitment and codes of conduct for such officers, the principles to be followed in making promotions and transfers, and the procedure for the exercise and the delegation of the powers of appointment, transfer, dismissal and disciplinary control of such officers, In formulating such schemes of recruitment and codes of conduct the Governor shall, as far as practicable, follow the schemes of recruitment prescribed for corresponding officers in the public service and the codes of conduct prescribed for officers holding corresponding officers in the public service.*

Rule Number 218 and 219 deals with transfers on Exigencies of Service. Accordingly, Rule 218-A states;

Public Officer may be transferred on exigencies of service by the Appointing Authority for any one of the following reasons,

(i) Where the services of an officer is no longer needed at his present station;

(ii) Where an officer is needed for service in another station or that particular officer himself is needed;

(iii) Where it is found, due to administrative reasons, that the retention of an officer in his present station is not suitable. (Emphasis is mine)

Rule 219 states,

Before a Public Officer is transferred on exigencies of service, the Authority with Delegated Power shall personally satisfy himself that need has actually arisen as specified in Section 218 above and that the transfer cannot be deferred till the next annual transfers.

In terms of Section 32 of the Provincial Council Act No. 42 of 1987, all powers relating to appointment, transfer, dismissal and disciplinary control of public officers of the Provincial Council are vested with the Governor and the release of officers from service is on the advice and the concurrence of the Governor. On a plain reading of this Section, it is clear that such power can be delegated by the said authority.

The Petitioner also contends that the 1st Respondent or any other officer is not empowered to transfer the Petitioner from the Provincial Council since the authority to transfer the Petitioner is exclusively vested with the 6th Respondent in terms of Procedural Rule 218 and 219 of the Public Service Commission, published in Gazette Notification No. 1589/30 dated 20/02/2009. (P13).

Procedural Rule 218, 219 and 221 of the Public Service Commission Rules are contained in Chapter XVIII titled transfers and under the sub heading Transfers on exigencies of service.

In ***SC/FR/484/2011 decided on 16/01/2017***, K. Sripavan, C.J**.** discussed Procedural Rule 218 and 219 of the Public Service Commission published in Gazette Notification No. 1589/30 dated 20/02/2009, where he observed that;

"The Procedural Rules of the Public Service Commission published in Government Gazette (Extra Ordinary) No. 1589/30 dated 20/02/2009 deals with the types of transfers that could be effected. Clause 196 of the said Rules reads thus:

Transfers are fourfold as indicated below,

i. *Transfers done annually;*
ii. *Transfers done on exigencies of service;*
iii. *Transfers done on disciplinary grounds;*
iv. *Mutual Transfers on requests made by officers."*

In terms of Section 32 of the Provincial Council Act No. 42 of 1987, all powers relating to public officers of the Provincial Council are subject to the powers vested with the Governor and therefore, the release of the Petitioner from his service should be with the concurrence of the Governor. The Governor may delegate such powers to the Provincial Public Service Commission and the said Provincial Public Service Commission may delegate its powers to the Chief Secretary or any officer of the Provincial Public Service. Therefore, the Petitioner's release from the Provincial Public Service, on the basis of service requirements, (P11) is valid in law.

The Senior State Counsel appearing for the 7th Respondent contends that the Petitioner's position that the transfer was in violation of Procedural Rules 219 and 221 published in the Gazette extraordinary of 1589/30 dated 20/02/2009 is misconceived.

The learned Counsel has drawn the attention of court to the impugned letter marked P11, and also to documents marked R2 and R3. It is observed that the wording of the letters and the documents connected thereto, indicate that the Petitioner was released from the Provincial Public Service and not transferred under Chapter XVIII of the Public Service Commission Rules. Besides, even if it is considered as a transfer, in terms of Rule-218-A, smooth running of the present station falls within the exigencies of service.

Therefore the 2nd contention of the Petitioner also has to be rejected.

Accordingly, we hold that the Petitioner has failed in establishing that his fundamental rights guaranteed in terms of Articles 12(1) of the Constitution has been infringed by the actions of the Respondents.

The Petition is dismissed. I order no costs.

Judge of the Supreme Court

P. 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 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) 336/2016

1. G. T. D. Nishantha Kumara,
   Kahagollawatte,
   Pol Abeygoda,
   Ussapitiya.

2. N. A. Jayashantha,
   No. 294/9, 1st Lane,
   Widyala Mawatha,
   Makola South,
   Makola.

3. W. P. A. Roshan Weerawadhana,
   No. 50/14, Prestije City,
   Kothalawala, Kaduwela.

4. M. A. Chandika Jagath Kumara,
   Woskasathin, Siyabalagaswewa,

Sippikulama,

Off Anuradhapura.

5. L. H. P. De Silva,

   Wimalasara Mawatha,

   Galkanuwa Road,

   Gorakana,

   Panadura South.

6. M. M. A. D. Tissa,

   No. 452/1,

   Makola North, Makola.

7. L. H. N. De Silva,

   No. 174/5,

   Pallemulla, Keselwatta,

   Panadura.

8. W. A. Tissa Sarathchandra,

   3rd Lane,

   Ratnagiriya Watta,

   Kirana,

   Panadura.

9. D. C. Dayananda,
   No. 72, Serpentine Road,
   Colombo 08.

10. B. A. A. Jayasinghe,
    32/2B, Gunasekara Mawatha,
    Maththumagala,
    Ragama

11. W. M. W. Weerasinghe,
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    Pannipitiya.

12. H. K. S. Wijayagunawardena,
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    Katukurunda,
    Kalutara.

13. W. A. R. Wijelal,
    6/95, Ihala Hanwella,
    Hanwella.

14. M. P. Waidyathilake,
    Kamvita,

Hunumulla,

Ganemulla.

15. W. M. K. P. Wijayamanne,

"Vijayanthi", Medagoda,

Amithirigala.

16. Gamage Dayaratne,

Domwatte Road,

Kumarapura 2nd Lane,

Hulandawa, Monaragala.

17. K. R. N. K. Tissa Bandara,

No. 6119, Near Ayurwedaya,

New Town, Embilitpitiya

18. H. N. Punyasiri,

No. 96, Kiripattiya Road,

Thibolketiya, Kolambageara.

19. R. M. Ajantha Pushpakumara,

No. 606/8A,

Makola North,

Makola.

20. N. A. Gunawardena
    No. 38,
    Gampulul Kirime Vyaparaya,
    Bendiwewa,
    Polonnaruwa.

21. W. H. De Silva Gunasekera,
    "Mercy" Andakadawila,
    Chilaw.

22. V. A. Pushpakumara,
    No. 486, School Lane,
    Piliyandala Road,
    Arewwala.

23. R. W. K. Ariyarathne,
    No. 5/6, Rahula Mawatha,
    Mailagasthenna,
    Badulla.

24. W. G. Bandara,
    No. 14, Nawa Janapadaya,
    Paradise, Kuruwita.

25. P. P. R. L. A. Gamlath

    No. 31, 1st Lane,

    Ranawiru Gammanaya Asala,
    Aluwihare,

    Mathale.

26. K. A. R. W. Kumarapeli,

    No. 228/1, Asiri Mawatha,

    Yakkala.

27. D. W. M. R. N. Dasanayake,

    D. 16/5, Menerigama Road,

    Nadeniya,

    Mawanella.

28. M. H. M. G. Seneviratne Banda,

    No. 55B, Aluthgama,

    Jambugahapitiya.

29. Kulasiri Udugampola,

    No. 21, Galkanda Road,

    Eswatte, Kandy.

30. W. A. Ranjith Kumara,
    No. 31, Riverside Garden,
    Illukmodara, Thenne Kumbura,
    Kandy.

31. Roshan Terrance Wedergert,
    No. 5/A/3,
    Hanthane Housing Scheme,
    Kandy.

32. K. R. Lakshitha Fernando,
    No. 7, Shri Sudharmara Road,
    Wattala.

33. Alliyar Abdul Wahid,
    No. 34, New Bridge Road,
    Addalachenna 10.

34. Siripala Lokuhettumudali,
    Kapugampotha,
    Weeraketiya.

35. A. H. S. W. M. R. W. Diwelagama,
    No. 128/30, Navodya Garden,

Angulana Station Road,

Moratuwa.

36. Nishantha Alwis,

No. 61/20,

Pannipitiya Road,

Battaramulla.

37. P. M. C. J. B. Palihena,

No. 25/2A, Angammana Road,

Rathnapura.

38. A. I. U. Athulathmudali,

No. 123, Galanga,

Menikdiwela.

39. R. M. Lakshman Norbert Bandara,

No. 73/88,

St. Catherine Gardens,

Horahena Road,

Hokandara East.

40. G. D. Kumarasinghe,

No. 408/5, South Thalpitiya,

Wadduwa.

41. D. H. D. L. Udugamage,
No. 273/5, Annasiwatte,
Galoluwa, Minuwangoda.

42. R. A. Chandrakumara Ranasinghe,
No. 50, Mailawalana,
Kirindiwela.

43. K. Ashoka,
No. 23, Judge Mawatha,
Weligampitiya,
Ja-ela.

44. K.M.N. Rodrigo,
No. 510/4,
Janatha Mawatha,
Eldeniya,
Kadawatha.

PETITIONERS

Vs.

1. J. P. Wijeweera,

   Secretary,

   Ministry of Law and Order and Southern Development,

   Floor No. 13 Stage II

   Sethsiripaya,

   Battaramulla.

2. B.M. Basnayake,

   Chairman

   Committee to Inquire into Political Victimization,

   Ministry of Law and Order and Southern Development,

   Floor No. 13 Stage II,

   Sethsiripaya,

   Battaramulla.

3. Neil Hapuhinne,

   Secretary,

   Committee to Inquire into Political Victimization,

   Ministry of Law and Order and Southern Development,

   Floor No. 13 Stage II,

Sethsiripaya,

Battaramulla.

4. Ravi Wijegunawardena,

   Member,

   Committee to Inquire into Political Victimization,

   Ministry of Law and Order and Southern Development,

   Floor No. 13 Stage II,

   Sethsiripaya,

   Battaramulla.

5. Prof. Siri Hettige,

   (Chairman),

6. Mr. P. H. Manatunga,

   (Member)

7. Mrs. Savithree Wijesekara,
   (Member),

8. Mr. Y. L. M. Zawahir,

   (Member),

9. Mr. Anton Jeyandan,

   (Member),

10. Mr. Tilak Collure,

    (Member),

11. Mr. Frank De Silva,

    (Member)

12. N. Ariyadasa Cooray,

    Secretary to the National Police Commission,

    All of whom are of the National Police Commission,

    Block No. 09, B.M.I.C.H. Premises,

    Bauddhaloka Mawatha,

    Colombo 07.

13. J. D. Dadallage,

    Secretary,

    Ministry of Public Administration and Management,

    Independent Square,

    Colombo 07.

14. Hon. Ranil Wickramasinghe,

    Prime Minister and Minister of National Policies and Economic Affairs.

15. Hon. Sagala Rathnayake,

    Minister of Law and Order and Southern Development.

16. Hon. Akila Viraj Kariyawasam,

    Minister of Education.

17. Hon. John Amaratunga,

    Minister of Tourism

    Development of Christian Religious Affairs and Lands.

18. Hon. Gamini Jayawickrama Perera,

    Minister of Sustainable Development and Wildlife.

19. Hon. Nimal Siripala Silva,

    Minister of Transport and Civil Aviation.

20. Hon. Mangala Samaraweera,

    Minister of Foreign Affairs.

21. Hon. S. B. Dissanayake,

    Minister of Social Empowerment and Welfare.

22. Hon. W. D. J. Senevirathne,

    Minister of Labour and Trade Union Relations.

23. Hon. Lakshman Kiriella,

    Minister of Higher Education and Highways.

24. Hon. Sarath Arumugam,

    Minister of Special Assignments.

25. Hon. Rauff Hakeem,

    Minister of City Planning and Water Supply.

26. Hon. Anura Priyadarshana Yapa,

    Minister of Disaster Management.

27. Hon. Susil Premajayanthe,

    Minister of Science Technology and Research.

28. Hon. (Dr.) Rajitha Senarathne,

    Minister of Health Nutrition and Indigenous Medicine.

29. Hon. Ravi Karunanayake,

    Minister of Finance.

30. Hon. Mahinda Samarasinghe,

    Minister of Skill and Vocational Training.

31. Hon. Vajira Abeywardane,

    Minister of Home Affairs.

32. Hon. S. B. Navinne,

    Minister of Int. Affairs

    Wayaba Development and Cultural Affairs.

33. Hon. Rishad Bathiudeen,

Minister of Industry and Commerce.

34. Hon. Patali Champika Ranawake,

Minister of Megapolis and Western Development.

35. Hon. Mahinda Amaraweera,

Minister of Fisheries and Aquatic Resources Development.

36. Hon. Navin Dissanayake,

Minister of Plantation and Industries.

37. Hon. Ranjith Siyambalapitiya,

Minister of Power and Renewable Energy.

38. Hon. Duminda Dissanayake,

Minister of Agriculture.

39. Hon. Vijith Vijayamuni Zoysa,

Minister of Irrigation and Water Resources Management.

40. Hon. Dr. Wijayadasa Rajapakshe,

Minister of Justice and Buddha Sasana.

41. Hon. P. Harrison,

    Minister of Rural Economy.

42. Hon. Kabir Hashim,

    Minister of Public Enterprises Development.

43. Hon. Madduma Bandara,

    Minister of Public Administration and Management.

44. Hon. Gayantha Karunathilake,

    Minister of Parliamentary Reforms and Mass Media.

45. Hon. Sajith Premadasa,

    Minister of Housing and Construction.

46. Hon. Arjuna Ranatunga,

    Minister of Ports and Shipping.

47. Hon. U. Palani Digambaram,

    Minister of Hill Country New Villages Infrastructure and Community Development.

48. Hon. (Mrs.) Chandrani Bandara,

    Minister of Women and Child affairs.

49. Hon. (Mrs.) Thalatha Atukorale,

    Minister of Foreign Employment.

50. Hon. M. H. A. Haleem,

    Minister of Posts Postal Services and Muslim Religious Affairs.

51. Hon. Faiszer Mustapha,

    Minister of Provincial Councils and Local Government.

52. Hon. D. M. Swaminathan,

    Minister of Prison Reforms Rehabilitation, Resettlement and Hindu Religious Affairs.

53. Hon. Chandima Weerakkody,

Petroleum Development.

54. Hon. Dayasiri Jayasekara,

    Minister of Sports.

55. Hon. Harin Fernando,

    Minister of Telecommunication and Digital Infrastructure.

56. Hon. Mano Ganeshan

    Minister of National Co-Existence, Dialog and Official Languages.

57. Hon. Daya Gamage,

    Minister of Primary Industries.

58. Hon. Malik Samarawickrama,

    Minister of Development Strategies and International Trade.

59. Field Marshal Hon. Sarath Fonseka,

    Minister of Regional Development.

    All of the office of the Cabinet of Ministers Republic Square

Sir Baron Jayathillleke Mawatha,

Colombo 01.

60. Sumith Abeysinghe,

Secretary to the Cabinet of Ministers,

Republic Square,

Sir Baron Jayathillake Mawatha,

Colombo 01.

61. A. L. Abeygunasekara

Officer in Charge,

Weerambugedara Police Station,

Weerambugedara.

62. R. A. K. Premaratna

No. 54, Chatham Street,

Central Police Building,

Colombo 01.

63. Mahesh Menon Kumarasinghe,

Special Investigation Bureau,

New General Secretary Building,

Police Headquarters,

Colombo 01.

64. A. C. C. A. Perera,
    No. 1145/01,
    Dharmodaya Mawatha,
    Battaramulla.

65. S. K. Senanayaka.
    C/69, Keppitpola Mawatha,
    Colombo 05.

66. A. W. S. J. K. Denial,
    "Sampatha",
    Udugama,
    Aranayake.

67. Gunasena Thenabadu,
    In front of Nawagamuwa Police,
    Nawagamuwa,
    Ranala.

68. R. M. I. B. Jayasinghe,
    In front of Police Station,
    Kurundagaha Hethemma.

69. Priyashantha Jayakodi,
    Gajaba Mawatha,
    Ganemulla Road,
    Kadawatha.

70. Gamini Siyambalapitiya,
    No. 175/A, Pubudu Mawatha,
    Thudella,
    Ja-Ela.

71. Kingsley Ekanayake,
    No. 203/30, Sapumal Uyana,
    Madapatha, Piliyandala.

72. Ananda Ratnaweera,
    No. 322, Nagahamula Junction,
    Gonawala, Kelaniya.

73. Pujith Jayasundera,
    Inspector General of Police,
    Police Headquarters,
    Colombo 01.

74. Hon. Attorney General,

Attorney General's Department,

Colombo 12.

RESPONDENTS

Before: **P PADMAN SURASENA J**

E. A. G. R. AMARASEKARA J

A. H. M. D. NAWAZ J

Counsel: Ikram Mohamed, PC with M. S. A. Wadood, Palitha Subasinghe, Hashane Mallawarachchi, Vinura Jayawardena, Buddhika Jayakoday, and Ms. Dulmini Liyanage instructed by Mrs. P. Nilusha G.C. Silva for Petitioners.

Rajiv Goonetilleke, SSC for the 5th – 12th and 73rd and 74th Respondents.

Widura Ranawaka with Menaka Warnapura and Sudath Perera instructed by Indunil Bandara for the 71th Respondent.

Lal Matarage instructed by S. B. Dissanayake Associates for the 72nd Respondent.

Argued on: 22-03-2021

Decided on: 16-12-2021

P Padman Surasena J

Petitioners are police officers and retired police officers claiming to have been politically victimized during the period 1994 to 31-07-2014 by successive Governments.

Consequent to the change of Government in 2015 the then Cabinet of Ministers, having considered the Memorandum dated 09-03-2015,[1] under the title "To provide relief to those who were victimized for political reasons", submitted by the then Prime

[1] Produced marked **P 1**.

Minister, decided on 08-04-2015 to issue a Public Administration Circular to provide a reasonable period of time for those officers, if any, who have been subjected to political victimization and who wish to seek relief, but not yet submitted their appeals, to submit their appeals. The Cabinet of Ministers also decided to authorize the Secretary Ministry of Public Administration to appoint an official committee comprising of three retired public officers who had served in the capacity of Additional Secretary or any other similar or higher post to examine the said appeals and make recommendations. The Petitioners have produced the said cabinet decision made on 08-04-2015, marked **P 2**.

As authorized by the said cabinet decision, the Secretary Ministry of Public Administration had issued the Public Administration circular No. 09/2015 dated 17-04-2015, calling for appeals to be submitted to the Ministry of Public Administration by 05-05-2015. The Petitioners have produced the said Public Administration circular No. 09/2015 marked **P 3**.

The Minister of Public Order and Christian Affairs had appointed Gamini Siyambalapitiya (retired Additional Secretary), Kinsley Ekanayake (Former Senior Deputy Inspector General of Police) and Ananada Ratnaweera (Former Superintended of Police) as members of the "Political Victimization Committee" by the letter dated 21-06-2015 produced marked **R 1**. The said letter (**R 1**) has been addressed to "The Secretary, Political Victimization Committee, Jathika Sevaka Sangamaya, Kotte Road, Pitakotte" which is not a Government institution. Further, the said letter has not indicated how and why either the said committee or its members came to be appointed. Thus, the purpose of the said "Political Victimization Committee" appointed by the Minister of Public Order and Christian Affairs is not clear. Be that as it may, this committee will be hereinafter referred to as the 'Siyambalapitiya Committee'. Said 'Siyambalapitiya Committee is not a committee that has been appointed in consequence or under any authority of any Cabinet decision.

The Secretary, Ministry of Public Administration, by the letter dated 23-06-2015 produced marked **R 2** has informed the Secretary of the Ministry of Public Order and Christian Affairs that a three-member committee to look in to the relief to be granted to persons subjected to political victimization, had already been established in the

Ministry of Public Administration. In the same letter, the Secretary, Ministry of Public Administration had agreed that the said Siyambalapitiya Committee could assist the three-member committee set up in the Ministry of Public Administration in its work relating to appeals pertaining to the officers coming under the Ministry of Public Order and Christian Affairs. The said letter **R 2** had asked the Secretary of the Ministry of Public Order and Christian Affairs to forward its recommendations regarding the said appeals to the Secretary of the Ministry of Public Administration. Thus, the mandate if any, the letter **R 2** had granted to the Secretary of the Ministry of Public Order and Christian Affairs is only to forward its recommendations relating to appeals pertaining to its officers. The mandate if any, the letter **R 2** had granted to the said Siyambalapitiya Committee is only to assist the Secretary of the Ministry of Public Order and Christian Affairs in preparing the requested recommendations to be submitted to the Secretary of the Ministry of Public Administration. Indeed, the letter **R 2** had not only mandated the said Siyambalapitiya Committee but mandated any other members of its staff also to render assistance required for preparation of the requested recommendations.

The Secretary of the Ministry of Public Order and Christian Affairs, by the letter dated 12-01-2016 produced marked **R 5**, had forwarded the recommendations of the Siyambalapitiya Committee to the secretary Ministry of Public Administration as requested by the letter dated 23-06-2015 (**R 2**). It is to be noted that the said letter **R 5** has merely forwarded the report of the Siyambalapitiya Committee rather than the recommendations of the Secretary of the Ministry of Public Order and Christian Affairs. The Petitioners have also produced the aforesaid letter dated 12-01-2016 marked **P 6**.

It then came to light that the official committee appointed by the Secretary to the Ministry of Public Administration as per the decision by the Cabinet of Ministers (**P 2**)

and the Siyambalapitiya Committee appointed by the Minister of Public Order and Christian Affairs, had made conflicting recommendations in respect of some officers. It was in this backdrop that the Minister of Law and Order and Southern Development, by the Cabinet memorandum dated 06-04-2016, sought Cabinet approval to appoint a new three member committee comprising of an Additional Secretary of the Ministry

of Public administration, Additional Secretary of the Ministry of Law and Order and Southern Development and a Senior Deputy Inspector General of Police to reconsider and make recommendations on the appeals of police officers who were subjected to political victimization. Hon. Attorney General has produced the said Cabinet memorandum dated 06-04-2016 marked **R 6**. The document produced by the Petitioners marked **P 7** appears to be a copy of **R 6**.

Pursuant to the said Cabinet memorandum (**R 6**) the Cabinet of Ministers decided on 19-04-2016 to approve the said proposal to appoint a three-member committee by the Minister of Law and Order and Sothern Development and to forward the recommendations of the said committee to the Cabinet. Hon. Attorney General has produced the said Cabinet decision on 19-04-2016 marked **R 7**.

It was pursuant to the said Cabinet decision (**R 7**) that a committee comprising of Ms. B. M. M. M. Basnayake (Additional Secretary Ministry of Public Administration), Neil Hapuhinna (Additional Secretary Ministry of Law and Order) and Ravi Wijegunawardene (Senior Deputy Inspector General of Police) were appointed to reconsider and make recommendations regarding the afore-stated appeals. This Committee (hereinafter sometimes referred to as the "Basnayake Committee") recommended granting relief to 129 police officers. Hon. Attorney General by way of Motion dated 2nd February 2018 has produced the Basnayake Committee report marked **Y**.

Thereafter, the Minister of Law and Order and Southern Development, by the Cabinet Memorandum dated 10th June 2016, sought the approval of the Cabinet of Ministers, for the implementation of the recommendations of the Basnayake Committee. Hon. Attorney General has produced the said Cabinet Memorandum dated 10th June 2016 marked **R 8**.

The Cabinet of Ministers, having considered the above Memorandum (**R 8**), the observations in that regard forwarded by the Minister of Finance dated 18th June 2016 (**R 9**), the observations dated 23rd June 2015 forwarded by the Minister of Public Administration and Management (**R 10**), decided on 28th June 2016, to request the Prime Minister to propose a methodology to grant relief to officers who had been

subjected to disciplinary measures. Hon. Attorney General has produced the said Cabinet decision on 28th June 2016, marked **R 11**.

Upon the above request, the Prime Minister had proposed that those who were not facing any pending disciplinary proceedings, be granted relief without delay. The Prime Minister had also proposed that those who were facing disciplinary proceedings be granted relief if they are exonerated. The Note to the Cabinet dated 26th of July 2016 containing the said proposal by the Prime Minister has been produced by Hon. Attorney General, marked **R 12**.

The President has approved the said proposal made by the Prime Minister subject to the condition that the relief could be granted only if such a course of action would not affect the seniority of other serving police officers. Hon. Attorney General has produced the said observations of the President dated 29th July 2016 marked **R 14**.

The Cabinet of Ministers having considered the Note to the Cabinet forwarded by the Prime Minster (**R 12**) along with the observations of the President (**R 14**) and the observations of the Minister of Finance (**R 9**), decided on 9th August 2016 to direct the Secretary Ministry of Law and Order and Southern Development to implement the proposals recommended in the Note to the Cabinet (**R 12**) forwarded by the Prime Minister subject to the conditions set out in the observations of the President (**R 14**). The Cabinet of Ministers also decided to treat the above decision as a matter of Policy. Hon. Attorney General has produced the copy of the said Cabinet decision dated 9th August 2016 marked (**R15**). For clarity I would reproduce below the relevant extract from the said Cabinet decision **R15**.

Given below is an extract of Item (08) of the Minutes of the Cabinet Meeting held on 2016-08-09.

Item (08)

Cabinet Paper No. 16/1473/702/053, a Note to the Cabinet dated 2016-07-26 by the Prime Minister on ***"Providing relief to those who faced difficulties due to political reasons"****- (Cabinet decision dated 2016-04-19 on CP No. 16/0654/748/010 and 2016-06-28 on CP No. 16/1134/748/010-I refers) the above Note was considered*

along with the observations of H.E the President and the Minister of Finance. After discussion, it was decided-

a) *To grant approval treating this as matter of policy, to the proposals (I) and (II) in paragraph 03 of the Note;*

b) *To direct the Secretary, Ministry of Law & Order and Southern Development-*

   (i) *to take note of the matters highlighted in the observations of H.E the President and pursue action accordingly, and*

   (ii) *to obtain the concurrence/approval of the relevant authorities prior to implementation of the proposals referred to at (a) above, as indicated in the observations of the Minister of Finance.*

It was also decided to treat this decision as confirmed and to authorize the Secretary to the Cabinet of Ministers to convey the same to the relevant authorities for necessary action accordingly.

Action by: ***Secretary to the Prime Minister*** *- above observations annexed.*

My/Law & Order and Southern Development *- copy of Note and above observations annexed.*

Copied to: ***Secretary to the President -*** *observations of the Minister of Finance annexed.*

My/Finance - *observations of H.E the President annexed.*

My/Public Administration and Management - *copy of Note and above observations annexed.*

Secretary, National Police Commission *- copy of Note and above observations annexed.*

Let me at this stage turn to the complaint made by the Petitioners. The Petitioners in their petition have stated that the Siyambalapitiya Committee appointed by the Minister of Public Order and Christian Affairs, having interviewed 812 police personnel

(who had submitted appeals) and having considered their appeals, recommended relief to 333 officers on the grounds of political victimization.

The Petitioners have stated that the "Siyambalapitiya Committee" in its report has recommended that the Petitioners be given various relief and that the said relief are set out in the circular dated 18.03.2016 which was issued for the purpose of implementing the said recommendations. The Petitioners have not produced the said circular but produced the circular **P 5** which is applicable to the Education Service.

The Petitioners complain that the subsequently appointed Basnayake Committee conducted fresh interviews in respect of only the 333 officers recommended by the Siyambalapitiya Committee and another 100 officers recommended by some other ad hoc committee and failed to reconsider appeals of remaining police officers from the list of 812 appellants from the Police Department. The Petitioners also complain that the Basnayake Committee selected only 92 people from the previously selected list of 333 leaving out 241 people out of the said list including the 11th to 44th Petitioners. The Petitioners further complain that the Basnayake Committee has also considered and included the names of 9 officers, who are 61st to the 69th Respondent who were not amongst the appellants considered by the Siyambalapitiya Committee or any other ad hoc committee. The Petitioners complain that the action of Basnayake Committee recommending a total number of 129 Police Officers for redress, is arbitrary, unfair and/or unreasonable and/or devoid of any rational basis and hence violates their fundamental rights.

Further, the Petitioners state that the Basnayake committee has given lesser relief for the 1st to 10th Petitioners than the relief recommended by Siyambalapitiya Committee. The Petitioners also state that Basnayake Committee has arbitrarily dropped the recommendations of the Siyambalapitiya Committee in respect of 11th to 44th Petitioners who were waiting to receive the said recommended relief.

The Petitioners allege that the above action by subsequently appointed Basnayake Committee is ultra vires, arbitrary and has violated the fundamental rights of the petitioners. The Petitioners therefore seek to challenge the said Basnayake Committee recommendations in this application.

It is in that backdrop that the Petitioners in this application have prayed inter alia, for the following relief in their petition.

(i) Declare that the Fundamental Rights of the Petitioners guaranteed by Article 12 (1) of the Constitution has been violated by the 2nd to 4th Respondents and/or 14th to 59th Respondents

(ii) Declare that the recommendations of the Basnayake Committee to grant relief to the 129 persons without granting the reliefs recommended to the Petitioners by the Siyambalapitiya Committee is unlawful and/or wrong in law and is violative of the Petitioners fundamental rights guaranteed by Article 12 (1) of the Constitution and/or the implementation thereof by the 14th to 59th Respondents is violative of the Petitioners fundamental rights

*(iii) Declare that the Petitioners are entitled to be granted the reliefs recommended by the Siyambalapitiya Committee marked as "**P 4**" after addressing the anomalies contained therein*

*(iv) Direct that the Petitioners be granted the reliefs recommended by the "Siyambalapitiya Committee" marked "**P4**" after addressing the anomalies contained therein*

(v) Grant compensation in an amount of Rs. 750,000/- to the Petitioners

In the instant case, the Court has granted leave to proceed under Article 12(1) of the Constitution. Thus, the task of this Court at this moment must be to ascertain whether anyone or more of the Respondents have infringed the fundamental rights of the petitioners guaranteed under Article 12(1) of the Constitution.

By looking at the prayers of the petition, it is clear that it is the recommendations made by the Siyambalapitiya Committee that the Petitioners seek to enforce in this application. As has been mentioned above, Siyambalapitiya Committee is not a committee that has been appointed in consequence or under any authority of any Cabinet decision. The decision of the Cabinet of Ministers marked **P 2** has only authorized the Secretary Ministry of Public Administration to appoint an official committee to examine the said appeals and make recommendations. Thus, the

appointment, the proceedings and the decision of the Siyambalapitiya Committee does not have any lawful basis.

The letter dated 23-06-2015 (**R 2**) had only asked the Secretary of the Ministry of Public Order and Christian Affairs to forward its recommendations regarding the relevant appeals to the Secretary of the Ministry of Public Administration. Thus, the mandate if any, the letter **R 2** had granted to the Secretary of the Ministry of Public Order and Christian Affairs by the Secretary Ministry of Public Administration was only to forward its recommendations (relating to appeals pertaining to the officers coming under the Ministry of Public Order and Christian Affairs) to the Secretary of the Ministry of Public Administration. This clearly shows that the recommendations made by Siyambalapitiya Committee is not final but would be open for review.

It would be opportune at this juncture to consider the position taken up by the learned counsel for the 71st respondent.

One of the three members of the Siyambalapitiya Committee is Ananda Ratnaweera (Former Superintended of Police). It has come to light in the course of these proceedings that the recommendations made by Siyambalapitiya Committee (**P 4**) contains a recommendation favorable to that member Ananda Ratnaweera. This is found under item No. 191 of the said report. Thus, it is clear that the Siyambalapitiya Committee which comprised of three members has not had any hesitation or restrain to proceed to make a recommendation favorable to one of its members also. This in my view violates the breach of rules of natural justice namely the rule *'Nemo judex in causa sua'* which is sufficient to vitiate the proceedings and the recommendations made by Siyambalapitiya Committee as appearing in **P 4**.

Bamunu Mudiyanselage Kandewalawwe Kingsley Ekanayake who is the 71st Respondent in this application has also filed an affidavit stating that the document **P 4** which the Petitioners seek to enforce in this proceeding is not the genuine recommendations made by the Siyambalapitiya Committee of which he was one of the three members. Moreover, the learned counsel for the 71st respondent Mr. Widura Ranawaka, having highlighted many discrepancies between **P 4** and genuine copy also revealed before this Court that **P 4** contains interpolations made by the General Secretary of the United National Party Cabir Hashim who had placed his seal on **P 4**.

This is indicative of the fact that a particular political party had been involved in the decision-making process at least as far as the said document (**P 4**) (as has been produced to this Court) is concerned. In the afore-stated circumstances, this court is unable to accept and enforce the recommendations contained in the said document (**P 4**) as a legal document.

In these circumstances and for the foregoing reasons, The Petitioners are not entitled to succeed with the prayers in this application. This Court decides to dismiss this application but without costs.

JUDGE OF THE SUPREME COURT

E. A. G. R. AMARASEKARA J

I agree,

JUDGE OF THE SUPREME COURT

A. H. M. D. NAWAZ J

I 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.

S.C.(FR) Application No. SC/Ref 343/19

1. Herath Mudiyanselage Dilshan Mahela Herath,
   No.39, Boyagama,
   Peradeniya.
2. Liyanage Lakni Eshini Perera,
   350/2, Sanasa Lane,
   Nagahawila Road,
   Kotikawatte.
3. Gajanayaka Mudalige Ashani Mihika Bastiansz,
   No. 27/6C,
   Deepananda Mawatha,
   Waidya Road, Dehiwala.
4. Galawata Henegedara Pamodya Madhubhashini
   Guruge Niwasa, Wattakgoda,
   Weligama.
5. Halpandeniya Hewage Charith Madhuranga,
   No.109/7 Dehiwala Road,
   Maharagama.
6. Kuruwalana Prabhavi Arushika Chathubashini,
   "Ramani",
   Dharmapala Mawatha,
   Naththandiya.
7. Weliweriya Liyanage Don Achinthya Sahan Wijesinghe,

No.42/B2, Awriyawatta,
Sisila Uyana, Alubomulla,
Panadura.

8. Wannakuwaththa Mitiwaduge
Sachini Shehara Perera,
No.42/12A, 6th Lane, Nagoda,
Kalutara.

9. Nambu Nanayakkara
Palliyaguruge Nayanathara
Palliyaguru,
"Sri Manthi", Rikillagaskada.

10. Athapaththu Arachchige Sanduni
Athapaththu,
93/46,1st Lane, Pragathipura,
Madiwela, Kotte.

11. Wijendra Gamalath Acharige
Karunadika Nimaya Veenavi
Morayas.
270/Hettiwaththa,
Thambagalla,
Kakkapalliya.

12. Gamvari Naveen Tharanga
"Sri Anura" Bogahawaththa.
Ambalangoda.

13. Warnakulasooriya Krishmal
Malintha Fernando,
Kanubichchiya
Dummalasuriya.

14. Wanninayake Mudiyanselage
Yasara Amarashmi Kumari
Wanninayaka
Near the Town Board,
Kurunegala Road,
Anamaduwa.

15. Weeramuni Arachchilage Seneth
Rashmika Deewanjana,
No. 133, Hiripitiyawa,
Galnewa.

16. Kondasinghepatabandilage
Dulakshi Amaya Kularathna,
Rathna Iron Works,
Thammannawa,
Hurigaswawe.
17. Kalpani Erandi Nanayakkara
316/1, Vishwakala Road,
Mampe,
Piliyandala.
18. Weerasinghe Mudiyanselage
Sachintha Piumal ,
No.26/2, Dalukhinna,
Dematawelhinna
Badulla.
19. Rathnayaka Mudiyanselage
Buddhika Prabhath Rathnayake
"Buddhi".Pahalanagahamura,
Nannapurawa
Bibila.
20. Adikari Arachchilage Ahinsa
Dulanjani Adikari
Meegahapelessa.
Welipennagahamulla.
21. Pabasara Hansini
Handunneththige
202/12,, Kotagedara Road,
Bataketththara,
Piliyandala.
22. Witharanage Neranjana
Thathsarani Pieris,
Neranjana Sangeetha Asapuwa,
Kajuwaththa
Medapura
Pohoranwewa
Dambulla.
23. Hansini Emali Mallikarathna
No. 140/1C, Sethsiri Mawatha
Thalahena
Malabe.

24. Pahalagedara Hewayalage Udani Hansamala
Sandawikumgama
Nagahaliyedda
Lolgoda.
25. Kodimarakkalage Nashen Madhuhansa Fernando
25/6, Blasius Road,
Indibedda
Moratuwa.
26. Welathanthrige Miran Archana Botheju
Sumangala Road,
Assedduma
Kuliyapitiya.
27. Welisarage Hiruni Kavindya Perera
No. 175/4 Gangadisigama
Madapatha
Piliyandala.
28. Siripalage Dilshan Madhuranga
No.160, Hendegama
Kebithigollewa.
29. Konasinghe Arachchilage Dinith Sachintha Sampath
No.5, Panthiyawaththa,
Munagama
Horana.
30. Maliduwa Liyanage Navindi Tharushika
N.191/2 Poramba
Akuressa.
31. Madawalage Tishani Diwyangi
No. 4/25, Sunrise Park
Kamburugamuwa
Matara.
32. Weligamage Don Kavindi Nimni Rashmika Silva
No. 30, Uyanwatta, Dissagewatta

Matara.

33. Ovitagala Vithanage Giranka Deshani
Princess Tailor
Samagi Mawatha
Bathalahena
Hallala
Weligama.

34. Kandapeli Arachchillage Navoda Nethmini Nandasiri
174, Iddamalgoda
Getaheththa.

35. Pinnagoda Liyanarachchige Don Dinindu Sachinthana
400 'A' Ihala Opalla
Kobawaka
Govinna.

36. Kalubovilage Don Sahan Pramudhith Gunawardana
"Sahan" Millagahawala Kanda Road,
Kobawaka
Govinna.

37. Thiththagalla Gamage Sanka Sadeepa
"Aradana" Tea Room
Kalubowitiyana.

38. Hamanduwa Gamage Thisara Sudarshana
Kospalakanaththa
Wewahamanduwa
Matara.

39. Udawaththa Kankanamlage Vimansala Viduranga Priyashantha
"Wasana", Mussenduwa
Watagedara
Nadugala

Matara.

40. Kankanamalage Avya Sandalee Ariyasinghe
289/14, Peak View
Colombo Road
Ratnapura.

41. Dissanayake Mudiyanselage Chinthaka Madushan Wimalasiri Dissanayaka
Gonathalawa Road
Dambagalla
Monaragala.

42. Asurappulige Senani Uththara Adhikari
"Sirikatha", Hunuwila
Eladadagama.

43. Gunasekara Seeman Arachchige Danajaya Krishan Gunasekera
No.39/B, Thispahegama
Kashyapapura.

44. Kodikara Gedara Pradeepa Chalani Kodikara
No.272, Mahadamana
Allewewa.

45. Thanthulage Amasha Meheruni Fernando
No. 7A, Mangala Mawatha
Kalutara North.

46. Gangabada Arachchilage Mudra Padmapani Gunathilaka
Kethsiri
Kuripoththa
Pothuhera.

47. Rathnayake Mudiyanselage Tharindu Sampath
T169, 24th post
Kandaketiya
Badulla.

48. Palligoda Arachchige Don Shenal Radeesha Jayawardena,
No. 240/D,
Sri Jinarathana Mawatha,
Batakattara
Piliyandala.
49. Ilukvinna Koralage Madhubhashani Senarath
Kapuwatta, Mahawalathenna,
Balangoda.
50. Narissa Gamaethige Dilmini Saranga
122/E/3, Balawinna,
Godakawela.
51. Thenuwara Kumarawanshalage Taneeja Kithmini Kulathunga.
300/1, Dodampegoda, Pinnawala
Balangoda.
52. Ranasinghage Sashini Hansana Madubhani
4/1, Katapitiya, Kahanwila,
Horana.

Petitioners

-Vs-

1. University of the Visual and Performing Arts
No.21, Albert Crescent
Colombo 07.
2. Senior Prof. Sarath Chandrajeewa
Former Vice Chancellor, Former Chairman of the Governing Council of the University of the Visual and Performing Arts.
2A. B. Asoka Keerthi De Silva,
Competent Authority,
University of the Visual and Performing Arts.

2AA. Emeritus Prof. W.M. Abeyrathna Bandara
Competent Authority,
University of the Visual and Performing Arts
No.21, Albert Crescent
Colombo 07.

2AAA. Senior Professor Rohana P. Mahaliyanaarachchi
Vice Chancellor, Chairman of the Governing Council of the University of the Visual and Performing Arts.

3. Senior Prof. Mudiyanse Dissanayake
Dean, Faculty of Dance & Drama,
Member of the Governing Council of the University of the Visual and Performing Arts.

3A. Dr. Indika Ferdinando
Dean, Faculty of Dance & Drama,
Member of the Governing Council of the University of the Visual and Performing Arts.

4. Senior Lecturer Chiltus Dayawanasa
Dean, Faculty of Music, Member of the Governing Council of the University of the Visual and Performing Arts.

4A. Dr, Saman Panapitiya
Dean, Faculty of Music, Member of the Governing Council of the University of the Visual and Performing Arts.

5. Senior Lecturer M. Jagath Raveendra,
Dean, Faculty of Visual Arts,
Member of the Governing Council

of the University of the Visual and Performing Arts.

6. Dr. S.P.D. Liyanage
Dean, Faculty of Graduate Studies, Member of the Governing Council of the University of the Visual and Performing Arts.

6A. Dr. Priyantha Udagedara
Acting Dean, Faculty of Graduate Studies, Member of the Governing Council of the University of the Visual and Performing Arts.

7. Prof. (Mrs.) Kusuma Karunaratne
Member of the Governing Council of the University of the Visual and Performing Arts.

8. Retired Prof. (Mrs.) Mangalika Jayatunga
Member of the Governing Council of the University of the Visual and Performing Arts.

8A. Professor Rohana Lakshman Piyadasa
Member of the Governing Council of the University of the Visual and Performing Arts.

9. Dr. Sunil Wijesiriwardena.
Member of the Governing Council of the University of the Visual and Performing Arts.

9A. Emeritus Prof. N.K. Dangalla.
Member of the Governing Council of the University of the Visual and Performing Arts.

10. Mr. C. Maliyadda
Member of the Governing Council of the University of the Visual and Performing Arts.

11. Mr. Gunasena Thenabadu

Member of the Governing Council of the University of the Visual and Performing Arts.

12. Mr. D. Bandaranayake
Member of the Governing Council of the University of the Visual and Performing Arts.

12A. Mr. Lakshman Abeysekara
Member of the Governing Council of the University of the Visual and Performing Arts.

13. Mr. B.M.K. Mohottala
Member of the Governing Council of the University of the Visual and Performing Arts.

13A. Mr. Ranjith Liyanage.
Member of the Governing Council of the University of the Visual and Performing Arts.

14. Mr. T. Darmarajah
Member of the Governing Council of the University of the Visual and Performing Arts.

15. Senior Lecturer Dr. Indika Fernando
Senate Nominee
Member of the Governing Council of the University of the Visual and Performing Arts.

15A. Senior Lecturer J.A.S.P. Aravindana
Senate Nominee
Member of the Governing Council of the University of the Visual and Performing Arts.

16. Senior Lecturer Iranga Samindinee Silva Weerakoddy
Senate Nominee

Member of the Governing Council
of the University of the Visual
and Performing Arts.

17. Mr. B. M. Dayawansa
Secretary to the Governing
Council and the Registrar of the
University of the Visual and
Performing Arts.
3rd to 17th Respondents all of No.
21, Albert Crescent
Colombo 07.

18. University Grants Commission
No20, Ward Pace,
Colombo 07.

19. Prof. Mohan de Silva
Chairman
University Grants Commission.

19A. Senior Prof. Sampath
Amaratunge,
Chairman
University Grants Commission.

20. Dr. Priyantha Premakumara
Secretary
University Grants Commission.

21. Prof. P.S.M. Gunaratne
Vice Chairman.
University Grants Commission.

21A. Prof. Jaynitha Liyanage,
Vice Chairman.
University Grants Commission.

22. Prof. Malik Ranasinghe,
Commission Member,
University Grants Commission.

23. Prof. Kollupitiye Mahinda
Sangharakkhitha Thero.
Commission Member,
University Grants Commission.

24. Prof. Hemantha Senanayake,
Commission Member,

University Grants Commission.

25. Dr. Ruvaiz Haniffa
Commission Member,
University Grants Commission.

26. Prof. R. Kumaravadivel.
Commission Member,
University Grants Commission.

27. Dr. Kapila Senanayake
Commission Member,
University Grants Commission.

27A. Prof. Ananda Jayawardena
Commission Member,
University Grants Commission.

27B. Prof. Premakumara De Silva
Commission Member,
University Grants Commission.

27C. Prof. Vasanthy Arasaratnam
Commission Member,
University Grants Commission.

27D. Mr. Palitha Kumarasinghe PC
Member,
University Grants Commission.
19th to 27C Respondents all of
University Grants Commission
No.20, Ward Place
Colombo 07.

28. J. H. M.T. N. Jayampathma
Samurdi Mawatha,
Ihala Uswewa,
Maha Usweea.

29. W.M.S. Nethmini
Walgama North,
Beligalgoda Road, Thawaluwila
Ambalanthota.

30. M.R.P.L.A. Rathnayaka
53/1, Liyanage Road,
Dehiwala.

31. Hon. Attorney General
Attorney General's Department,

Colombo 12

Respondents.

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BEFORE : **L.T.B. DEHIDENIYA, J.**
A.L.S. GOONERATNE, , J.
ACHALA WENGAPPULI, J.

COUNSEL : Upul Kumarapperuma with Muzar Lye and Ms. Radha Kuruwitabandara instructed by Ms.Darshika Nayomi for the Petitioners.
Senany Dayaratne with Ms.Nishadi Wickramasinghe for the 18th – 27C Respondents.
Ms. Sureka Ahamed S.C. for the 1st to 17th & 31st Respondents.

ARGUED ON : 26th March, 2021

DECIDED ON : 26th November, 2021

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ACHALA WENGAPPULI, J.

This is an application filed by fifty-two Petitioners, who invoked the jurisdiction conferred on this Court by Article 126(1) of the Constitution, alleging that they legitimately expected to gain admission to the Faculty of Music of the University of the Performing and Visual Arts (the 1st Respondent University), since they possess the requisite qualifications for admission, as stipulated in the admission policy published by the 18th Respondent Commission (The University Grants Commission) in its handbook P2 (UGC Handbook). Despite the Petitioners' eligibility to be selected for University admission, it is alleged that one of more Respondents, in selecting students for admission, had acted contrary to the said published admission policy,

by inclusion of students who have failed to satisfy the said admission criterion. Hence the Petitioners claim that the said administrative/executive act of the Respondents is in violation of their fundamental right to equality as guaranteed under Article 12(1).

The Petitioners sat for the Advanced Level Examination held in August 2018, offering three subjects in the Arts stream and have secured Z-scores, which made them eligible to seek admission to a State University. The Petitioners have aspired for admission to the Faculty of Music of the 1st Respondent University for the academic year 2018/2019, as undergraduates of the degree Bachelor of Performing Arts–Music (Special). They have accordingly tendered their applications to the 18th Respondent Commission, in compliance with the instructions contained in the said UGC Handbook.

The entry requirements to the Faculty of Music in the 1st Respondent University, as stipulated in the UGC Handbook, are that each student to have sufficient Z-score, at least a Credit pass for the subject of Music and also to 'pass' the mandatory aptitude test conducted by the 1st Respondent University, under its bylaws. The Petitioners have taken the mandatory aptitude test, conducted by a total of 20 Judges who sat in four separate panels. Those four panels had examined supportive documents in their skills and abilities, subjected them to a *viva voce* examination and assessed them in singing and instrumental performances. In May 2019, they were informed in writing by the 1st Respondent University that they had "*passed the aptitude test*".

When the 18th Respondent Commission had eventually released the names of the 250 students, who had been selected for admission to the Faculty of Music of the 1st Respondent University, the Petitioners

found that their names were not included in that list. The Petitioners claim that in August 2019 they learnt that some of the students, who did not 'pass' the said mandatory test, were selected for admission to the 1st Respondent University for admission by the 18th Respondent Commission, leaving them out. It is also alleged that the 30th Respondent is one such student, who had been selected to the Faculty of Music of the 1st Respondent University, "*despite being failed from the mandatory aptitude test*" and they were unaware whether the 28th and 29th Respondents too were selected to the said faculty.

In alleging violation of their fundamental rights, the Petitioners claim that "… *consideration of the applicants who failed in the mandatory aptitude test, being the foremost requirement that needed to be complied with and the subsequent selection of them to the final list of 250 students to be enrolled to the 1st Respondent University by the 18th Respondent, over the Petitioners who have passed the mandatory test by obtaining 50 or above marks*" is violative of their right to equality.

The Petitioners further allege that the 18th Respondent Commission's failure to consider only the 360 students, inclusive of the 52 Petitioners, who scored 50 or more marks and 'pass' the mandatory aptitude test, coupled with the act of making selections contrary to the declared admission policy, as contained in the UGC Handbook, by considering students who ought not to have been considered for admission to the 1st Respondent University. The Petitioners further allege that the decision of the said Commission is therefore illegal, unfair, arbitrary, unreasonable and violative of their '*legitimate expectation*' to be enrolled to the said University.

In resisting the Petitioners' application, the 2AA Respondent, being the Competent Authority of the 1st Respondent University, takes up the position that the said application is misconceived in law and they had failed to establish any violation of their fundamental rights.

In his statement of objections, it is averred that the 18th Respondent Commission, had directed the 1st Respondent University to conduct an aptitude test, in order to select students for admission. This was in conformity with the admission policy as published in the UGC Handbook. The Senate of the 1st Respondent University had thereupon approved a set of guidelines under which the said aptitude test is to be held. It also stipulated that the pass mark at 50. Of the 787 students who had taken part in the aptitude test, only 360 students had obtained marks above 50 and only their names were sent to the 18th Respondent Commission in the first instance. The said Commission then insisted that the 1st Respondent University comply with the requirement of sending three times the proposed intake, as indicated in its letter P16(i), which '*compelled*' the 1st Respondent University to "*bring down pass mark to 26*" and to prepare a 2nd list of 393 names of students, based on that revised 'pass mark'.

In the statement of objections of the 19A Respondent, the incumbent Chairman of the 18th Respondent Commission, in seeking dismissal of the Petitioners' application, had averred that their application is without merit or basis and they have no entitlement, either in law or in fact, to have and maintain the instant application.

In clarifying the applicable criterion in selection of students for admission to the 1st Respondent University, the 18th Respondent Commission states that it places primacy on the individual Z-score of

each student, in making selections for University admissions, based on the District Quota, in addition to All Island Merit Quota, in conformity with the national policy for University admission. Therefore, it was imperative to the 1st Respondent University to tender a list of 750 names of students, which is three times in value to the actual intake, in order to apportion the placement of students in terms of the said quota system. This is a requirement imposed by the 18th Respondent Commission on all the Universities that conduct aptitude tests.

It is further stated by the 19A Respondent that the marks of the aptitude test conducted by each such University, despite being a mandatory requirement, is only a secondary consideration and therefore does not supersede the primary consideration, namely the individual Z-score obtained by each student, at the G.C.E. Advanced Level examination. It is also stated by the said Respondent that the students have already had practical tests in the relevant subjects, such as music, in that examination.

The requirement of '*three times the proposed number*' was necessitated due to the national policy imperatives and therefore the pass mark of 50 as stipulated by the 1st Respondent University, at best, is only a '*notional figure*' and not determinative. Since the proposed intake for the degree in Music was 250, the 18th Respondent Commission required 750 names of students who had passed the aptitude test to make the selection. He further asserts that the pass mark of the aptitude test could not be pre-determined, as the 1st Respondent University did in this particular instance, since it essentially is a variable figure, which is dependent upon the marks obtained by the said 750th student.

He further alleges that setting up of a pass mark is a *nullity* as it had not been set up according to the by-laws of the 1st Respondent University. He further states that the intake of students for the Faculty of Music of the 1st Respondent University consists of students who have been selected from both these lists sent by the said University and the 18th Respondent Commission had, in fact, utilised both these lists to reconcile and adjust the District Quota, adhering to the National Policy.

When the Petitioners have supported their application on 04.08.2020, this Court granted leave to proceed on their allegation of the violation of Article 12(1) of the Constitution. The Court also made order granting interim relief, as prayed for by the Petitioners, by issuance of a stay primarily on the admission process, initiated by the 1st Respondent University on the selections of students made by the 18th Respondent Commission.

At the hearing of this application, learned Counsel for the Petitioners contended that the decision of the 18th Respondent Commission to consider the Z-scores of the students, who have '*failed*' the aptitude test, contrary to its published admission criterion, is illegal, unfair, arbitrary and unreasonable.

Learned Counsel for the Petitioners had founded his contention on the premise that once the 1st Respondent University has forwarded the list of names of the students, who have passed the test in the order of merit, the 18th Respondent Commission then "*selects the mark obtained by the 250th applicant in the said list and sets the Z-score received by the 250th applicant as the final cut off Z-score for the enrolment of applicants to the Faculty of Music of the 1st Respondent for the respective year*" and "*accordingly the 250 applicants selected to the Faculty of Music in the 1st*

Respondent University, first and foremost pass the mandatory aptitude test and then subsequently must satisfy the minimum Z-score set by the 18th Respondent …". He added that the said Commission had failed to provide with a substantial justification for disregarding the results of the mandatory aptitude test, lowering of the pass mark, changing the selection criteria laid down by the 1st Respondent University, in making the selection of students for admission.

In view of these factors, learned Counsel for the Petitioners had contended that the 18th Respondent Commission had prevailed upon the 1st Respondent University, compelling it to lower the threshold mark, in order to accommodate the students who did not initially pass the aptitude test. He submits that it is an act that should be regarded as a clear interference with the authority of the 1st Respondent University over its academic affairs and therefore *ultra vires*. It was his contention that the said departure from the declared admission policy had forestalled the Petitioners' legitimate expectations to be admitted to the Faculty of Music of the 1st Respondent University and thereby violated their right to equality.

The Petitioners have made the allegation of right to equality on frustration of their legitimate expectation, in denying admission to the Faculty of Music of the 1st Respondent University contrary to the declared admission policy. The Petitioners totally rely on the admission policy as published in the UGC Handbook in support of their contention. Therefore, it is relevant to consider as to how the Petitioners have perceived the admission procedure, as described in the UGC Handbook.

The Petitioners' perception of the selection process of 250 students to the Faculty of Music are found in paragraphs 8 to 15 of their petition. The Petitioners assert therein that the 250 vacancies for students are to be filled by the ones who have obtained at least a Credit pass to the subject of music, in addition to two Ordinary passes at the Advanced Level Examination. Upon fulfilment of the said basic requirement, the Petitioners state that a student then had to "… *qualify the mandatory aptitude test conducted by the 1st Respondent University according to the University's own guidelines*". Once the 1st Respondent University conducts the aptitude test, it would then "*constructs a list of the applicants who have passed the aptitude test, in the order of the highest receiving mark, and refer the same to the 18th Respondent*". Having received the said list, the 18th Respondent Commission, then, "… *selects the mark obtained by the 250th applicant in the said list and sets the Z-score received by the 250th applicant as the final cut off Z-score for the enrolment of applicants to the Faculty of Music of the 1st Respondent for the respective year*." The Petitioners further state "… *accordingly the 250 applicants selected to the Faculty of Music in the 1st Respondent University, first and foremost pass the mandatory aptitude test and then subsequently must satisfy the minimum Z-score set by the 18th Respondent …*".

It would appear from the above quoted segments of the petition, that it reflects the reading of the Petitioners as to the declared policy on the selection process the 18th Respondent had published in the UGC Handbook and therefore the policy it must adopt, in making selection of students for admission to the Faculty of Music. The 18th Respondent Commission, however asserts that the primary determinant factor is the Z-score and not the individual marks received by a student at the aptitude test, as the Petitioners contend.

In view of these conflicting claims, it is necessary for this Court to examine the admission process of the 18th Respondent Commission as described in the said UGC Handbook, particularly in relation to the interplay of the marks of the aptitude test and the individual Z-score of each student.

The UGC Handbook issued by the 18th Respondent Commission consists of 10 sections. Section 1 dealt with the overarching policies and principles governing selection for admission to undergraduate degree programs conducted by the State Universities and such other institutions. In ***Kaviratne and Others v Commissioner General of Examination and Others*** *2012 [B.L.R.] 139* at p. 150, it was stated that *"The Hand Book issued by the University Grants Commission becomes an important Source Book for the students who are aspiring to commence higher studies in a National University."*

The description of subjects at G.C.E. (A.L.) that made a particular student eligible to enter the 1st Respondent University is indicated in the UGC Handbook (at p.35) as it states " … *a student wishing to follow Music must have a Credit pass or more in Music in the Advanced Level Examination*". It also states that "*The University also conducts practical/aptitude tests for selection. These are for Music, Dance, Drama and Theatre and Visual Arts. The examination is conducted under the by-laws of the university*". Importantly, it is further stated in the said UGC Handbook (at p.36) "*If a student fails the practical/aptitude test he/she is deemed ineligible for admission for the relevant course of study*."

There is no dispute that all of the 52 Petitioners have satisfied the minimum entry requirements that are needed to be satisfied, inclusive of the 'pass' at the aptitude test, in order to be considered for admission

to the 1st Respondent University. Since the dispute among the parties revolves around the results of the aptitude test, the statement that "*If a student fails the practical/aptitude test he/she is deemed ineligible for admission for the relevant course of study*", needed to be considered in a little more detail.

The said sentence is obviously had been constructed in the negative form, for it indicates that the failure of the aptitude test is deemed to be a disqualification for university admission rather than passing of the aptitude test is taken as a qualification. However, what is important is that statement does not offer an undertaking or a promise of benefit to any prospective student that passing of the aptitude test alone is sufficient for University selection. It is thus fair to infer that the said sentence was intentionally inserted into the UGC Handbook by the 18th Respondent Commission, after taking extra care not to create a hope or a promise for a placement upon merely passing the aptitude test.

But the UGC Handbook also states that the aptitude test is conducted under the "*by-laws of the university*".

The origin of the alleged violation of right to equality, based on frustration of legitimate expectation, could easily be traced to the initial decision of the 1st Respondent University, to consider only the students who scored 50 or more in the aptitude test, as students who have '*passed*' the said test. The 1st Respondent University seeks to justify its action of setting up a pass mark of 50, on the basis that the aptitude test conducted by it under the by-laws of the University, and that should be given adequate weightage, in the selection of students for admission to the aesthetic courses of study it conducts. When the 18th Respondent

Commission instructed it to send the names of students who have 'passed' the test, it is entitled to determine the threshold of a pass mark, at which point the distinction of pass or fail could be made.

The Petitioners have pushed that position another step further when they contended that the selection should primarily be based on the order of merit of the results of the aptitude test and the cut-off point of the Z-score should also be decided by picking the Z-score of the student, who was placed at the 250th position, in the said test. It is therefore contended by the Petitioners, that when the 18th Respondent Commission directed the 1st Respondent University to conduct an aptitude test under the by-laws of the University, that University had the power to set the 'pass mark' and decided 50 as the pass mark for the aptitude test in 2018.

The 19AA Respondent, in his objections had stated that the 'Pass Mark' for the aptitude test cannot be pre-determined, as the 1st Respondent University did in this particular instance and could be determined only on the mark received by the 750th candidate. The requirement of the names of students who passed the aptitude test, three times the proposed intake, is insisted by the 18th Respondent Commission, because of the applicable national policy imperatives.

The Petitioners position that the 1st Respondent University, being an autonomous institution, had the authority to conduct the aptitude test under its own by-laws and also to set up a 'pass mark' to the said test. They further contend that the 18th Respondent Commission had interfered with the affairs of the Senate of the 1st Respondent University, the academic authority of the said University, when it intervened to "*lower the pass mark set by the University and thereby*

admitting students who had not met the required aesthetic competence" contrary to section 46 of the Universities Act. This alleged act of interference, which the Petitioners have termed as an act of the 18th Respondent Commission, in *ultra vires* of its powers.

It was also contended by the Petitioners that the 1st Respondent University must accordingly decide the 'pass' mark of a student and the 18th Respondent Commission must accordingly accept the 1st list that had been sent containing only 360 names of students, who have scored above 50 marks for the aptitude test. The Petitioners claim that the said Commission had no power to call for a list of 750 names. Learned Counsel, in the course of his submissions stressed the point that the students who are admitted to the 1st Respondent University should possess an inherent aesthetic talent and hence it was important for the 18th Respondent to give adequate weightage to the assessment of the said University had on such talents of the students.

In the objections of the 2AA substituted Respondent, it is indicated that the Senate of the said University had approved a set of guidelines for the conduct of the aptitude test in respect of the course of study in music, and made it effective from 2018 and applicable in relation to the aptitude test held in 2019 as well. The Senate also decided that a student should score from all segments of the aptitude test, a minimum of 50 marks in total (2R2). It is claimed that the said set of guidelines were made available to the students.

Learned State Counsel who appeared for the 1st Respondent University, contended that when the 18th Respondent Commission directed the 1st Respondent University to send the names of the students who have 'passed' the aptitude test, the University must first

determine if a student had 'passed' the test and it can make such a determination only by having a 'bench mark' and therefore a pass mark of 50 was set up. In view of this fact, she submitted that the 18th Respondent Commission should not be permitted to fault the University for fixing a pass mark, in order to determine if a student had passed the aptitude test, as it was done in compliance with the instructions contained in P16(i). In her reply to the Petitioners' contention, she also submitted that if the 18th Respondent Commission had not intended the 1st Respondent University to determine a pass mark for the aptitude test, then the Commission should have issued clear instructions of what is expected of the 1st Respondent University. In the absence of such instructions, she submitted that the 18th Respondent Commission should not be allowed to find fault with the University for complying with their "badly drafted" directions, contained in P16(i)/X2/2R4.

It is the position of the 19A Substituted Respondent that for certain selected disciplines, subject to the objects and powers of the 18th Respondent Commission entrusted to it under the Universities Act No. 16 of 1978 as amended, the relevant Universities are empowered to conduct an aptitude/practical test for students and the 1st Respondent University is one such University. It is specifically stated by the said 19A substituted Respondent that the "*sole objective of the said aptitude/competency test is to select the candidates that would be forwarded to the 18th Respondent for processing, from and amongst the students who have applied to the relevant course of study. Consequently the 'pass mark' at the said test would be based on the number of students that the 18th Respondent requires for the purpose of making its selections*".

The contention of the Learned Counsel for the 18th Respondent Commission, was that the pass mark of the aptitude test cannot be pre-determined as it is dependent on the mark obtained by the 750th student, since the 750 names of the students who passed the aptitude test are warranted by the National Policy imperatives. Therefore, he contends that the pass mark of 50, that had been initially indicated by the 1st Respondent University, in relation to the aptitude test, is a decision which the 18th Respondent was not informed of, and therefore should be considered as 'notional' at its best and not determinative on the selection for admission.

It is evident from the above that the submissions made by the learned Counsel for the Petitioners and submissions of the Learned State Counsel who appeared for the 1st Respondent University are at variance with the submissions of the learned Counsel for the 18th Respondent Commission as to the practicality and legality of setting up of a pre-determined 'pass mark' of 50 to the aptitude test, that had been conducted in response to the direction issued by the 18th Respondent Commission with P16(i).

It is advisable that these aspects are considered at the very outset of the judgment, before I venture out to other contentious areas.

When the 18th Respondent directed the 1st Respondent University to call for applications and to conduct practical/aptitude tests by its letter dated 16.01.2019 (2R4), it was acting under the powers conferred under sections 3(5) and 15(vii) of the Universities Act, as amended. Importantly, this letter also directs the then Vice Chancellor of the said University to send " … *the lists of names of the students who have passed the practical/aptitude tests on or before 16th April 2019, indicating the full name,*

index number of the A/L Examination 2018 and the National Identity Card Number, as a soft copy as well as a hard copy. Importantly, make sure that you send three times the proposed intake of students who have passed the practical/ aptitude tests from each course of study for the academic year 2018/2019".

The 1st Respondent University, after calling applications from the Petitioners and other students, conducted an aptitude test during the time period commencing from 01.03.2019 and ending with 05.04.2019. It then compiled a list of 330 names of students, who have received 50 or more marks in that test. In compliance with the direction on 09.05.2019, the 1st Respondent University had then forwarded " … *the details of the students who have passed in the practical test*" consisting of those 336 names of students, inclusive of the names of the Petitioners, instead of sending a list consisting of "*three times the proposed intake of students*", as required by the 18th Respondent in 2R4.

The 19th Respondent, in view of the partial compliance of his direction by the 2nd Respondent, reminded the latter that " *you are required to send three times the proposed intake of students who have passed the practical /aptitude test*" and had redirected him to "*take immediate actions to send the details of not less than three times the proposed intake of students who have passed the practical /aptitude test*". It is said that this requirement was insisted upon due to the policy imperatives in University admission. It is important to note the emphasis placed by the 18th Respondent Commission on the requirement of sending three times the proposed intake of students who have passed the aptitude test in the said letter 2R4.

On 27.05.2019, the 1st Respondent University had then forwarded another 393 names of students after compiling a 2nd list, in addition to

the 360 names that had already been sent to the 19AA Respondent (X5) by its 1st list. In the covering letter of the 2nd list, the then Vice Chancellor of the 1st Respondent University informed the 19th Respondent, the then Chairman of the Commission, that " *we were compelled to bring down the pass mark of the aptitude test to fulfil the proposed intake*". This letter also conveyed his disapproval of the insistence of 750 names, as it indicated that "*it is unfortunate that we would have to enrol students to the UPVA based on the Z-score requirement, but not on the marks they obtained in the aptitude test*".

However, the 1st and the 2nd lists sent by the 1st Respondent University indicate that all 750 names sent to the 18th Respondent Commission are of the students "*who have passed the practical /aptitude test*". Thus, the 2nd list consisting of 393 names of students are students who have also been termed by the 1st Respondent University as students who have '*passed the aptitude test*', contrary to the claim of the Petitioners that the Commission had admitted students who have '*failed*' in the aptitude test conducted by the 1st Respondent University.

The Petitioners claim that the 1st Respondent University has the power to decide the admission requirements of students, a position strongly countered by the 18th Respondent Commission. Thus, it is necessary to refer to the statutory provisions contained in the Universities Act in relation to the power to admit students to the Universities under the purview of the 18th Respondent Commission.

Section 3(5) of the said Act recognises that "*the regulation of the admission of students to each Higher Educational Institution;…*" as one of the objects of the 18th Respondent Commission while section 15(vii) had

conferred power on it "*to select students for admission to each Higher Educational Institution, in consultation with an Admissions Committee…*".

In contrast, section 29 confers power to the Universities, including the 1st Respondent University, but they are to be exercised subject to the powers, duties and functions of the Commission. It states that a University shall have power;

(a) to admit students and to provide for instruction in any approved branch of learning;
(b) to hold examinations for the purpose of ascertaining the persons who have acquired proficiency in different branches of learning

Thus, it is clear that the 18th Respondent Commission alone has the power to "*select students for admission*" to the Universities and other Higher Educational Institutions, while the Universities that are under its purview were obligated to "*admit*" such students who had been selected by the said Commission, based on the national policy of selecting students to be admitted to the State Universities. This Court, in ***Kaviratne and Others v Commissioner General of Examination and Others*** (supra) at p.150 observed that the "*objectives and the powers vested with the Commission clearly indicate that the University Grants Commission has the overall authority in selecting the students for relevant and different courses of studies in the Higher Educational Institutions.*"

In this connection, this Court must consider, *albeit* briefly, the contention of the Petitioners that once the 1st Respondent University has forwarded the list of names of the students, who have passed the test in the order of merit, the 18th Respondent Commission then "*selects*

the mark obtained by the 250th applicant in the said list and sets the Z-score received by the 250th applicant as the final cut off Z-score for the enrolment of applicants to the Faculty of Music of the 1st Respondent for the respective year." Clearly, this contention presupposes that the list of names of the students of those who have passed the test had been prepared inclusive of the marks each student had individually received and is arranged and presented in the order of merit. However, in the 1st list of 360 names, which included the Petitioners' names, or in the 2nd list that had been sent to the 18th Respondent Commission by the 1st Respondent University does not contain such detailed information.

The Petitioners have annexed the said 1st list to their Petition, marked as P16(vi). It is similar in format to the 2nd list of 393 names, marked as P16(vii). The 2AA Respondent too had annexed those two lists annexed to his objections, marked as 2R4 and 2R4A respectively.

Thus, it is noted that in any of these lists, neither the individual marks obtained by any of the 750 students nor the marks of each student in the order of merit were made available to the 18th Respondent Commission by the 1st Respondent University. This is a factor in support of the position of the said Commission. The 1st Respondent University describes the 393 students whose names appear in the 2nd list (2R4A) also as students who have 'passed' the aptitude test in fulfilling the 750 names of students who have passed the aptitude test requirement.

The 18th Respondent Commission, upon the receipt of the said 2nd list of students, who are now confirmed by the 1st Respondent University as students who also have 'passed' the said test, had in turn conveyed to the said University by letter dated 14.06.2019 (X6) that it

had "*decided to consider all the students in the lists sent*" by the said University for admission, including the names of the 52 Petitioners.

The validity of contention of the Petitioners that the 1st Respondent University forwarded the names of the students who have scored 50 and above, in their order of merit, is negated when the two lists of names that had been sent are perused. In the absence of details as to the individual marks received by each student and without having their names arranged in an order of merit, even if this was the methodology adopted in making selections, it is impossible for the 18th Respondent Commission to select "*the mark obtained by the 250th applicant in the said list and sets the Z-score received by the by the 250th applicant as the final cut off Z-score for the enrolment of applicants to the Faculty of Music of the 1st Respondent for the respective year*" in the absence of such information.

In this context, it is important to note that the insistence to have "*three times the proposed intake of students who have passed the practical /aptitude test*" by the 18th Respondent Commission commenced with the selection of students for the Faculty of Music of the 1st Respondent University from academic year 2018/2019. The 18th Respondent Commission, as a result of a situation that had arisen in selecting students for the course of study in Speech & Hearing Sciences at the University of *Kelaniya*. The act of the University of *Kelaniya,* in setting the 'pass mark' of the aptitude test it conducted at 70, resulted in the non-selection of students, who ought to have been selected on Z-score. The 18th Respondent Commission had to make arrangements to admit them at a later point of time, in excess of the number of vacancies. Therefore, the said Commission had decided on 09.08.2018 to "*inform all*

the universities who conduct aptitude tests, that after the test the university must submit three times more names than the enrolled number" (X1).

In this respect it is important to bear in mind that when the 18th Respondent Commission issued the UGC Handbook and thereby set out the selection criteria for the University selection process for the academic year 2018/2019, the mode of the selection process had already been formulated upon the national policies and communicated to the 1st Respondent University, inclusive of the requirement of sending " … *three times the proposed intake of students who have passed the practical /aptitude test*".

It is thus clear, when the Petitioners were sitting for their Advance Level Examination in August 2018 the 18th Respondent had already instructed the 1st Respondent University of the requirement to send "*three times the proposed intake of students who have passed the practical /aptitude test*". By then the Petitioners were yet to be informed of their respective Z-scores by the Department of Examinations (a necessary pre-qualification even to apply in seeking University admission) and are yet to complete the basic requirement even to apply for University admission.

The series of correspondence between the two State institutions, namely the 18th Respondent Commission and the 1st Respondent University, over the issue of sending insufficient number of the names of students who 'passed' the aptitude test, as reflected by P16(i)/X2/2R4, P16(iii)/X4/2R5, P16(iv)/X5/2R6 and P16(v)/X6, also indicative of the consistency of the application of the said admission policy that had already been formulated by the 18th Respondent Commission and published in the said UGC Handbook.

The reason as to why the contents of these correspondents were referred to in such detail in the preceding paragraph was that the Petitioners had annexed those letters to their petition, marked P16(i) to P16(v), as documents, which are supportive of their contention. Therefore, its contents had to be examined carefully, in order to verify, whether they contain some indication of any undertaking made by the said 18th Respondent Commission for the Petitioners to entertain a substantive legitimate expectation, even though they were not addressed to the Petitioners. If there was such an undertaking or a promise of benefit, then only the Petitioners could demand the said Commission to act on that undertaking i.e. only the students who have scored 50 and above at the aptitude test will be admitted to the Faculty of Music of the 1st Respondent University.

In view of the submissions of the learned Counsel for the Petitioners as well as of the learned State Counsel, it is necessary to consider the allegation that the 18th Respondent Commission had acted in *ultra vires* in interfering with the affairs of the 1st Respondent University.

Section 46(1) of the University Act states that "*the Senate shall be the academic authority of the University*" while proviso to section 45(2)(xviii) defines the term " academic matter "*to mean any matter which is subject to the control and general direction of the Senate*". Describing powers and functions conferred on a Senate of a University, section 46(5) and (6) lists out the specific areas that are placed under it. Section 46(6)(viii) states that a Senate could "*recommend to the Council requirements for the admission of students to courses of study.*"

This is relevant, in view of the contention advanced by the learned Counsel for the Petitioners that the 1st Respondent University, being a University established under the Universities Act, under sections 29(a), 46 and 46(5) of the said Act, the Senate of that University had the autonomy to make decisions relating to their academic functions, to have by-laws relating to admittance of students, and also in determining the selection criteria to admit students into the said University. He submits therefore the setting up of a pass mark and the stage at which it is decided to set up the pass mark are clearly within the purview of the Senate.

Apparently, the basis for the allegation of the Petitioners that the 18th Respondent Commission had interfered with the affairs of the Senate in excess of its powers could be found in the contents of the letter of instructions the said Commission had issued to the University on 23.05.2019, marked as P16(iii). In that letter, the 18th Respondent Commission informed the 1st Respondent University of the reasons as to why it insists on three times the proposed intake of students who have 'passed' the aptitude test and reminds that the University had not sent the requested number of students who passed the aptitude test. The allegation of interference is therefore clearly referable to the insistence of sending 750 names of students "*who passed the aptitude test*" by the 18th Respondent Commission.

The requirement of sending 750 names was first mentioned in the letter P16(i) by which the 19th Respondent, the then Chairman, on behalf of the 18th Respondent Commission had instructed the 2nd Respondent, the then Vice Chancellor of the 1st Respondent University, to conduct an aptitude test and send the names of students who have passed that test.

In order to have a clear understanding of the nature of the instructions, in the context in which it had been issued, the relevant paragraph from the said letter is reproduced below in its entirety:

> *"Moreover, please send me the lists of names of students* ***who have passed*** *the practical/aptitude test* ***on or before 16th April 2019*** *indicating the* ***Full Name, Index Number of the A/L Examination, 2018 & the National Identity Card Number,*** *as a soft copy as well as a hard copy. Importantly, make sure that you send* ***three times the proposed intake*** *of students who have passed the practical/aptitude tests from each of course of study for the academic year 2018/2019." (emphasis original)*

The letter P6(i) is a letter addressed to all Universities.

As already referred earlier on in this judgment, it is this act of non-compliance by the 2nd Respondent, in his failure to send three times the proposed intake, prompted the 19th Respondent to insist on sending of 750 names of students who passed the test by letter P6(iii) addressed to the 2nd Respondent, by which the latter had provided an explanation for the insistence of 750 names. It is stated that "*this requirement is to satisfy the district quota allocated for the particular course of study from each district. Moreover, there is a tendency that the students who passed the practical/aptitude tests getting selected to some other courses of study of Universities due to the Z-score obtained and the preferences indicated by them in their application forms. Therefore, if an adequate number of students who passed the practical/aptitude tests are not provided by the Universities, the proposed intake of such courses of study may not be satisfied*."

The 2AA Respondent had tendered a document containing the methodology which had been adopted in conducting the aptitude test on the students inclusive of the Petitioners as 2R1. In that document it is clearly stated that the methodology of conducting the aptitude test and the applicable criteria, inclusive of the pre-determined pass mark of 50 are applicable from the year 2018.

Strangely, the then Vice Chancellor of the 1st Respondent University has placed his signature to that document only on 14.02.2019 whereas the 18th Respondent Commission, almost a month before, had issued instructions by P16(i)/X2/2R4 on 16.01.2019, insisting that the 1st Respondent University to send three times the proposed intake of students "*who have passed the practical /aptitude test*". The said requirement in P16(i) is descriptive enough to put the 1st Respondent University on notice, in foreseeing the practical consequences of its decision to apply the 'pass mark' of 50 and classifying the students on that pre-determined 'pass mark'.

It appears that the 1st Respondent University had not taken any note of the requirement of sending three times the proposed intake at that point of time despite the insistence by the 18th Respondent Commission in P16(i) of that requirement. The 1st Respondent University nevertheless proceeded to classify the students who have 'passed' the aptitude test with the pass mark of 50, it had already set up.

The act of the 1st Respondent University in sending only 360 names of students in its 1st list upon a pre-determined pass mark is a direct result of adopting a methodology it had set up on 14.02.2019 (2R1) and said to be made applicable retrospectively to the year 2018, in

relation to the aptitude test conducted for the academic year 2018/2019, without giving effect to the set of instructions given by the 19th Respondent by issuance of P16(i). Given the fact that the said requirement, which had been formulated by the 18th Respondent to prevent the recurrence of the practical difficulties it had to deal with over the insufficient number of names sent by the University of *Kelaniya,* in falling short of the required number of student intake, as indicated by X1, a more responsible approach should have been adopted by the 1st Respondent University.

In adopting a pre-determined pass mark had an inherent defect attached to it. There existed the risk of occurring an eventuality of not having sufficient numbers of students, who have scored 50 and above, in order to fill in the required number of 750 names. The overall performance of the students who took the aptitude test was not known by then. If the University, with the full awareness of what is required of that institution, had considered the said eventuality, then it could easily have avoided proceeded along with that particular course of action, in view of the unnecessary risk factor. There is no material in the statement of objections or in the supportive documents to indicate that the 1st Respondent University had in fact considered the practical implications of its decision to set up a pre-determined pass mark, inclusive of the situation that resulted in the filing of the instant application.

If the University could have considered the several options before proceeding on the course of action it had adopted, it could very well have left the issue of fixing a pass mark shifted down to a point at which an overall assessment of the performance of students could be

undertaken. It appears that, by setting up a pre-determined pass mark, the 1st Respondent University had clearly painted itself into a corner.

Interestingly, it is noted that not only the 1st Respondent University, but several other Universities too were troubled with the identical practical problem, after applying a pre-determined pass mark. Those institutions also, have adopted the same escape route, as the 1st Respondent University did, in order to satisfy the requirement of sending '*three times the proposed intake*' of names of students who have passed the aptitude test by lowering the pass mark. This is indicative from the correspondence the 18th Respondent Commission had with the University of *Sri Jayawardenepura* and *Swami Vipulananda* Institute of Aesthetic Studies of the Eastern University, that have been tendered marked as Y2 and Y3.

In replying to the submissions of the Commission on the setting up of a pre-determined pass mark, Learned State Counsel accused the 18th Respondent Commission for its alleged failure to give specific and clear instructions in the manner of setting up of such a 'pass mark'. In view of the powers and functions that have been conferred on a University by section 29 of the Universities Act, the reluctance of the Commission to do so could be understood as, in its act of issuing instructions to send the names of those "*who have passed the practical /aptitude test*", the Commission had clearly left the task of determining the students who have passed, to the 1st Respondent University itself. The manner in which it conducts the aptitude test and the criterion of selection of students for the purpose of compilation of the pass list too were therefore left to the discretion of the 1st Respondent University.

Nowhere in any of these letters of instructions it did indicate that the 19th Respondent had 'interfered' with the affairs of the 1st Respondent University by 'forcing' them to lower the pass mark as alleged by the Petitioners. The insufficient number of 360 students in the 1st list was a direct consequence of the act the 1st Respondent University in setting up of a pre-determined 'pass mark', simply by following the guide lines it had set up for the previous year's aptitude test, and thereby not complying with the instructions that made it imperative that the University to send 750 names of students who have 'passed' the aptitude test for the current academic year.

In order to comply with the instructions of the 18th Respondent Commission of 750 names of students, who have 'passed' the aptitude test, subsequent to its insistence, the 1st Respondent University had on its own decided to lower the pass mark to 26 from the previous 50. This was due to the decision of the 1st Respondent University, upon realisation of the practical impasse it had created, in setting up a pre-determined pass mark even before it conducted the aptitude test. It is only in order to reconcile with the requirement of 750 names, the 1st Respondent University did revise the pass mark and lower it to 26 from 50.

By this subsequent revision of the pass mark, the 1st Respondent University had shifted the point at which it had set up the pass mark and thereby made its earlier pass mark of 50, changed into a provisional pass mark. The decision to shift the point of fixing the pass mark, from a point prior to the aptitude test further down to a point, after the aptitude test is conducted and thereby enabling the University to identify 750 names of students who passed the test, made a way out of the difficult situation. That decision was taken by the University itself

and the said shift of the point of fixing the pass mark and its subsequent revision were made clearly within its scope and powers.

In these circumstances, the pass mark of 50, as set up by the 1st Respondent University, should clearly be considered only as a 'provisional' pass mark, as the said University had subsequently reduced the pass mark to 26, on its own motion.

These factors effectively negates the Petitioners' contention that the 1st Respondent University was compelled to lower the pass mark by the 18th Respondent Commission to accommodate the students who have 'failed' the aptitude test, since the 1st Respondent University, in setting up its own '*notional*' pass mark, should have been mindful of the requirement that had been insisted upon by the 18th Respondent Commission in P16(i) that the University must forward a list "*three times the proposed intake of students who have passed the practical /aptitude test*".

Contrary to the allegation, these factors support a conclusion that the 18th Respondent Commission only directed the 1st Respondent University to conduct a practical/aptitude test and to send names of students who have passed the test in three times of the proposed intake and did not instruct them to determine a 'pass mark' at any stage, let alone instructing them to lower the pass mark to accommodate students, who have initially *'failed'* the aptitude test, as the Petitioners have alleged.

This certainly is a convenient point to turn to the contention of the Petitioners that the selection for university admission should primarily be based on the marks received by each student at the aptitude test, shifting the Z-score to a secondary consideration. This position is clearly indicated in the petition of the Petitioners that the 18th

Respondent Commission, having received the list of the students who have passed the aptitude test, would thereupon "*selects the mark obtained by the 250th applicant in the said list and sets the Z-score received by the 250th applicant as the final cut off Z-score for the enrolment of applicants to the Faculty of Music of the 1st Respondent for the respective year*" and "*accordingly the 250 applicants selected to the Faculty of Music in the 1st Respondent University, first and foremost pass the mandatory aptitude test and then subsequently must satisfy the minimum Z-score set by the 18th Respondent …*".

Learned Counsel for the 18th Respondent Commission submitted that the aptitude test cannot be considered as the sole determinative factor in proof of proficiency in respect of the relevant artistic field, as the Advanced Level examination also has a inbuilt stringent practical component that each candidate had to complete and therefore regardless of how the Petitioners have fared at the aptitude test, all students who have a Credit pass to their chosen field of study possesses sufficient level of proficiency in that field to be able to productively pursue a degree course.

In section 1 of the UGC Handbook, under the heading 1.1, admissions policy for State Universities and Higher Educational Institutes under the 18th Respondent Commission are spelt out. Section 2.1. refers to "*Titles of each course of study under different subject streams*"

Under the heading 1.2, with the title '*Minimum requirements for University Admission*', the UGC Handbook makes reference to the Z-score as it states " *Selection of students for university admission for the academic year 2018/2019 will be determined on the basis of rank order on average Z-scores obtained by candidates at the G.C.E. (Advanced Level)*

Examination held in year 2018, released by the Commissioner General of Examinations."

The UGC Handbook, under the heading of admission policy, stated " *For students seeking admission to Arts courses mentioned in 1 to 9 of the section 2.1.(1) of this Hand Book All Island Merit is the main criterion used for selection*."

Section 2.1.(1) in turn states that admission to courses of study mentioned in 1 to 9 above will be made on an 'All Island Merit' basis and the 1st Respondent University is identified as its 13th institution. Courses of study 1 to 9 are described under the heading 2.2.2.1 and Music, the course of study the Petitioners seek admission to, is listed as item 8, i.e. "*Music, Dance, Drama and Theatre and Visual Arts in the University of the Visual and Performing Arts, Colombo*".

The said section specifically refers to students, who seek admission to Arts courses in 1 to 9 of the section 2.1, which is inclusive of the course of study in Music, of the selection criterion it had stipulated. It states, "*All Island Merit is the main criterion used for selection*." However, section 1.1 also states that there is one exception to All Island Merit selection criterion for selection of students to Arts Courses inclusive of "Music", under the heading 1.1.1, and adds that "*selection for these courses is based on the district quota system*". The manner in which the district quota system operates too had been described in that section, to which I shall refer in more descriptive terms, at a later stage in this judgment.

Thus, the selection criterion for Music is clearly laid out as 'All Island Merit' basis and that in turn is based on the 'rank order on average Z-scores obtained by candidates at the G.C.E. (Advanced Level)

Examination held in year 2018'. As noted earlier on, in relation to Music, only the failure of the aptitude test would disentitle a candidate for admission to the 1st Respondent University.

It had been observed in ***De Alwis v Anura Edirisinghe and seven Others*** (2011) 1 Sri L.R. 18 at p.24 that "*It is not disputed that since 2001 in Sri Lanka, the University admissions were based on the Z-scores obtained by the individual candidates at the Advanced Level Examination. This method was introduced by the University Grants Commission in order to avoid any unfairness in the process of selection*." There was no contention before this Court that the Z-score should be ignored in selection for university admission.

It is already noted that the selection for the course of study of Music, as stated in pages 8 and 9 of the UGC Handbook, is "*based on the district quota system*". It is also stated that up to 40% of the available places are selected on the Z-score ranking of 'All Island Merit'. Of the remaining 60%, up to 55% are selected on the district quota system and accordingly available places in each course of study will be allocated to the 25 districts, in proportion to the total population of each district on the ratio calculated by taking into consideration of the total population of that particular district and the total population of the country. In addition, 16 districts had been categorised as "*educationally disadvantaged districts*" and the remaining 5% of the total available places are given to students of these districts. Of that 5%, the number of places allocated to each of the 16 districts would be decided, upon the ratio of the population in a particular district to the total population of the 16 districts. Having allocated the number of places for each of the districts, the students are grouped on the basis of their district, after the 'All Island Merit' criterion is complied with, and thereupon are

arranged in their district ranking on the Z-score. The Z-score of the last student in the order of merit, who fills the number places allocated to a particular district last, is taken as the cut of mark for that particular academic year for that district. Then only the selection process for university admission is finalised by the 18th Respondent Commission, leaving only the task of issuing a notification to the respective Universities of the selected students.

At this juncture, it is prudent to consider the relative Z-scores of the students who have been selected for admission to the said Faculty by the 18th Respondent Commission, especially in view of the allegation of the Petitioners that the 2nd list, sent by the 1st Respondent University, did contain names of students who have *'failed'* the aptitude test and therefore are disentitled to be selected for admission.

The 18th Respondent Commission had tendered a list it had prepared in a table form, along with its limited objections (XII), based upon the information contained in the two lists of names of students sent by the 1st Respondent University; with separate columns under the following headings - the index number, full name, the District considered for admission, the individual Z-score, the cut off mark, selection status along with the category and finally, remarks. Under the said 'remarks' column, the 18th Respondent Commission had described the relative status of the Petitioners, stating whether each of them would have been selected for admission under list 1 or list 2. Based upon that classification, the 18th Respondent Commission averred that, out of the 52 Petitioners, 24 of them could not be selected because of their low Z-scores while the balance of 28 Petitioners could have been selected on their Z-scores, if only the 1st list is considered. It is also indicated, if the selections are made, out of the 336 names of the 1st list

containing the names of students who have passed the aptitude test by obtaining 50 or more marks, only 96 students would qualify to be admitted, thereby leaving wide gulf of 154 vacancies for admission to 1st Respondent University vacant.

The 18th Respondent Commission had determined the cut off marks for each of the districts after selecting students from the 1st list and the 2nd list. Since the Z-score being the primary consideration, exclusion of students with low Z-score from the selection list is clearly justified as it had been the declared and accepted selection policy contained in the UGC Handbook.

In order to have a clear understanding of the relative Z-scores of the students who had been selected from the districts from which the Petitioners also have sat for their Advance Level Examination, the highest and the lowest of Z-scores for that district along with the relevant cut off marks, and the Z-scores of the 52 Petitioners are arranged in tabulated form below, based on the information contained in the document P1 tendered by the Petitioners as well as the document marked X11 by the 18th Respondent Commission. In P1, the Petitioners have indicated the districts in which they sat for the Advanced Level Examination and the Z-score each of them has obtained.

Colombo District		
Petitioner	Z- Score	Highest and the cut off mark of the Z- score of the students from both lists for Colombo District
		Highest Z-score: 1.7738 (Index

2nd Petitioner	0.2383	No. 1136321
3rd Petitioner	0.5451	Lowest Z-score: 0.9382 (Index No. 1046535)
6th Petitioner	0.6353	Cut off Mark 0.9382
10th Petitioner	0.6949	
17th Petitioner	0.8401	
21st Petitioner	0.8558	
23rdPetitioner	0.7811	
25th Petitioner	0.2124	
27th Petitioner	0.2943	
29th Petitioner	0.2391	
48th Petitioner	0.5233	

Kalutara District		
Petitioner	Z- Score	Highest and the cut off mark of the Z- score of the students from both lists for Kalutara District
5th Petitioner	0.3011	Highest Z-score: 1.7478 (Index No. 1765264)
7th Petitioner	0.5105	Lowest Z-score: 0.93 (Index No. 1682474)
8th Petitioner	0.6353	Cut off Mark 0.93
35th Petitioner	0.9208	
36th Petitioner	0.3555	
45th Petitioner	0.5339	
52nd Petitioner	0.9149	

Matara District		
Petitioner	Z- Score	Highest and the cut off mark of the Z- score of the students from both lists for Matara District
4th Petitioner 30th Petitioner 31st Petitioner 32nd Petitioner 33rd Petitioner 37th Petitioner 38th Petitioner 39th Petitioner	0.8698 0.6966 0.9854 0.3473 1.0242 1.0955 0.9705 0.7828	Highest Z- score: 1.7834 (Index No. 2005123, but selected for a higher preference) Lowest Z -score: 1.1571 (Index No. 2106086) Cut off Mark 1.1571

Ratnapura District		
Petitioner	Z- Score	Highest and the cut off mark of the Z- score of the students from both lists for Ratnapura District
34th Petitioner 40th Petitioner 49th Petitioner 50th Petitioner 51st Petitioner	0.2383 0.5451 0.6353 0.6949 0.8401	Highest Z- score: 1.5552 (Index No. 2311160) Lowest Z -score: 1.0971 (Index No. 2289911) Cut off Mark 1.0971

Anuradhapura District		
Petitioner	Z- Score	Highest and the cut off mark of the Z- score of the students from both lists for Anuradhapura District
15th Petitioner 16th Petitioner 22nd Petitioner 28th Petitioner	1.0145 1.0522 0.3687 0.9300	Highest Z- score: 1.8504 (Index No. 3022889) Lowest Z -score: 1.054 (Index No. 2938820) Cut off Mark 1.054

Puttalam District		
Petitioner	Z- Score	Highest and the cut off mark of the Z- score of the students from both lists for Puttalam District
11th Petitioner 14th Petitioner 20th Petitioner 26th Petitioner	0.3389 0.4370 0.4958 0.4466	Highest Z- score: 1.1669 (Index No. 2916860) Lowest Z -score: 0.7412 (Index No. 29116894) Cut off Mark 0.7412

Kurunegala District		
Petitioner	Z- Score	Highest and the cut off mark of the Z- score of the students from both lists for Kurunegala District
13th Petitioner 42nd Petitioner 46th Petitioner	0.9179 0.738 1.0805	Highest Z-score: 1.5859 (Index No. 2670496- but selected for a higher preference) Lowest Z -score: 1.0922 (Index No.2752867) Cut off Mark 1.0922

Badulla District		
Petitioner	Z- Score	Highest and the cut off mark of the Z- score of the students from both lists for Badulla District
18th Petitioner 47th Petitioner	0.6052 0.3101	Highest Z- score: 1.9434 (Index No. 3660559) Lowest Z -score: 0.8746 (Index No.3592260) Cut off Mark 0.8746

Monaragala District		
Petitioner	Z- Score	Highest and the cut off mark of the Z- score of the students from both lists for Monaragala District

19th Petitioner 41st Petitioner	0.2533 0.8243	Highest Z- score: 1.6043 (Index No. 3694631) Lowest Z -score: 0.974 (Index No. 3701883) Cut off Mark 0.974

Polonnaruwa District		
Petitioner	Z- Score	Highest and the cut off mark of the Z- score of the students from both lists for Polonnaruwa District
43rd Petitioner 44th Petitioner 20th Petitioner 26th Petitioner	0.6418 0.6416 0.4958 0.4466	Highest Z- score: 1.8446 (Index No. 3121429) Lowest Z -score: 0.9903 (Index No. 3111091) Cut off Mark 0.9993

Kandy District		
Petitioner	Z- Score	Highest and the cut off mark of the Z-score of the students from both lists for Kandy District
1st Petitioner	0.8055	Highest Z- score: 1.4974 (Index No. 3247260 - but selected for a higher preference) Lowest Z -score: 0.9954 (Index No.

		3272117) Cut off Mark 0.9954

Nuwara Eliya District		
Petitioner	Z- Score	Highest and the cut off mark of the Z- score of the students from both lists for Nuwara Eliya District
9th Petitioner	0.4141	Highest Z-score: 1.0141 (Index No. 3498794) Lowest Z-score: 0.7472 (Index No. 3479498) Cut off Mark 0.7412

Kegalle District		
Petitioner	Z- Score	Highest and the cut off mark of the Z-score of the students from both lists for Kegalle District
24th Petitioner	1.0424	Highest Z- score: 1.8558 (Index No. 2477297) Lowest Z -score: 1.0591 (Index No. 2503034) Cut off Mark 1.0591

Galle District		
Petitioner	Z- Score	Highest and the cut off mark of the Z-score of the students from both lists for Galle District
12th Petitioner	0.8314	Highest Z-score: 1.6250 (Index No. 1946358) Lowest Z -score: 1.0014 (Index No. 1897551) Cut off Mark 1.0014

It is already noted that the Petitioners have primarily relied on the instructions contained in the UGC Handbook in support of their claim of frustration of legitimate expectation. Therefore, it is important to examine the applicable instructions and policy statements contained in the said document, particularly in order to determine whether there was an undertaking or a promise of such a benefit, based on aptitude test marks, had been offered to the Petitioners by the 18th Respondent Commission. It is for this reason, the Petitioners contentions were considered against the policy statements contained in the UGC Handbook, in the preceding paragraphs.

But before I proceed with that undertaking, it is prudent to examine the applicable legal principles that defines the concept of legitimate expectation beforehand, since it is the basis on which the Petitioners have sought intervention of this Court to redress their grievance.

In *De Smith's Judicial Review,* 8th Ed, at p. 673, it is stated that "*It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires regularity, predictability, and certainty in government's dealings with the public*." The first use of the phrase 'legitimate expectation', in the context of Public law, is attributed to *Lord Denning* MR in the judgment of ***Schmidt v. Secretary of State for Home Affairs*** [1969] 2 Ch. 149, and only in the House of Lords decision in ***Council of Civil Service Unions v. Minister for Civil Service*** [1985] A.C. 374 where it was identified by the Court of the two situations in which a 'legitimate expectation' would arise. It had been stated by the House of Lords that legitimate expectation would arise if a person is deprived of some benefit or advantage which either he had been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until it is communicated to him some rational ground for withdrawing it on which he has been given an opportunity to comment or, he has received assurance from the decision maker will not be withdrawn without first giving him an opportunity of advancing reasons for contending that they should not be withdrawn.

De Smith (at p. 676) and Craig on *Administrative Law* 5th Ed (at p.421) has described a third category on which legitimate expectation could arise, as an extension from the second category referred to above. *De Smith* describes it as "*Such an obligation to consult will arise if, without any promise, a public authority has established a policy distinctly and substantially affecting a specific person or group who in the circumstances was in reason entitle to rely on its continuance and did so*" and identifies the

expectation of the continuance of the policy as a "*substantive expectation*".

What is understood as '*substantive legitimate expectation*' as against procedural legitimate expectation was clarified by *Weerasuriya* J in ***Sirimal & Others v. Board of Directors of the Co-operative Wholesale Establishment & Others*** (2003) 2 Sri L.R. 23, at pg.28 with the statement *"If the legitimate expectations are protected only procedurally, the most employees could hope for, would be an order requiring consultation before a change of policy is affected. If however, the legitimate expectations are substantive the position is different, in that it is open to a Court to require the public authority to confer upon the person the substantive benefit which he is expected to receive under the earlier policy."*

In a more recent pronouncement of ***Ariyarathne and Others v. Illangakoon and Others*** (SC FR Application No. 444/2012 – decided on 30.07.2019) *Prasanna Jayawardena* J had observed that the "… *phrase 'substantive legitimate expectation' captures the situation in which the applicant seeks a particular benefit or commodity, such as a welfare benefit or a license, as a result of some promise, behaviour or representation made by the public body*". To elaborate the point further, his Lordship had cited Professor *Craig* on Administrative Law, 7th Ed. at p.679, where the learned author states that "*the doctrine of substantive legitimate expectation is based on the "principle of legal certainty" which requires that a person should be "able to plan action" on the basis of representations made to him by a public authority and which he has "reasonably relied on*".

When viewed in the light of the above principles, it appears that the Petitioners are in fact alleging frustration of their 'substantive' legitimate expectations as they seek a substantive relief, in the form of a direction from this Court on the Respondents, in admitting the

Petitioners to the Faculty of Music of the 1st Respondent University. The Petitioners' prayer seeking the said relief is a clear indication that they do not seek a procedural legitimate expectation, by which they could only seek an opportunity of being heard, before a decision is taken.

Where an applicant relies on frustration of his legitimate expectation, in seeking to challenge a decision made by a public authority, the Court would have to satisfy itself as to the '*legitimacy*' of that expectation. In ***R v. North and East Devon Health Authority, ex p Coughlan*** [2000] 3 All E.R. 850, it was stated that in a situation where frustration of substantive legitimate expectation is alleged, the "*Court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy*". But it would undertake that task "*once the legitimacy of the expectation is established*". In ***Kaviratne and Others v Commissioner General of Examination and Others*** *2012 [B.L.R.] 139* at p.149, it was declared that *"whether an expectation is legitimate or not is a question of fact".*

Therefore, it is necessary for this Court to satisfy itself that the undertaking or promise of a benefit from which the 18th Respondent Commission had resiled from, as alleged by the Petitioners in support of their claim of frustration of legitimate expectation, is a "*clear, unambiguous and devoid of relevant qualification*" per Lord Justice *Bingham* in ***R v. IRC Ex p. MFK Underwriting Agencies*** [1990] 1 W.L.R. 1545 at 1570. In examining whether such an undertaking is a "*clear, unambiguous and devoid of relevant qualification*", the House of Lords, in the case of ***Francis Paponette and Others v. The Attorney General of Trinidad and Tobago*** [2010] UKPC 32, adopted the test used in ***R***

(Association of British Civilian Internees: Far East Region) v. Secretary of State for Defence [2003] QB 1397at para 56: by stating "*… how on a fair reading of the promise it would have been reasonably understood by those to whom it was made*."

How, this objective test is applied is illustrated by the reasoning adopted in the judgment of ***R v. North and East Devon Health Authority, ex p Coughlan*** [2000] 3 All E.R. 850. This was an instance where a woman with special needs was assured by the National Health Service that she would receive nursing care 'for life' at a purpose-built facility by that service. At a later point of time, the National Health Service had decided to transfer her care to a local authority, after closing down that facility.

In determining the question whether the "*legitimacy of the expectation is established*", the Court considered the words used in a letter issued by a General Manager of the predecessor to the local health authority, which stated:

> *"I am writing to confirm therefore, that the Health Authority has made it clear to the Community Trust that it expects the Trust to continue to provide good quality care for you at Mardon House for as long as you choose to live there. I hope that this will dispel any anxieties you may have arising from the forthcoming change in management arrangements, about which I wrote to you recently.*"

When the National Health Service challenged her application on the basis that there was no legitimate expectation since the letter did not actually use the expression '*home for life*', the Court, after accepting that

the words of the letter did create a legitimate expectation for care for life in a dedicated facility, said: " *once the legitimacy of the expectation is established, the Court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change in policy*".

In relation to the consideration, whether there is frustration of substantive legitimate expectation, the Court observed:

> *"The Court has, in other words, to examine the relevant circumstances and to decide for itself whether what happened was fair. This is of a piece with the historic jurisdiction of the Courts over issues of procedural justice. But in relation to a legitimate expectation of a substantive benefit (such as a promise of a home for life) doubt has been cast upon whether the same standard of review applies."*

De Smith, (supra) states (at p.680) that the judgment of ***R v. North and East Devon Health Authority, ex p. Coughlan*** (ibid) is where " *a personally directed representation occurred in one of the earliest cases on the substantive expectation (although those words were not used)*" and adds that an example for the creation of a legitimate expectation would be " *where an express undertaking is given which induces an expectation of a specific benefit or advantage*" and the "*form of the express representation is unimportant as long as it appears to be a considered assurance, undertaking or promise of a benefit, advantage or course of action which the authority will follow*." Professor *Craig* describes this judgment as the "*leading decision*" at that point of time on substantial legitimate expectation, in the 5th edition of his book (at p.649).

The 18th Respondent Commission is the sole authority who decides whether a student is selected for university admission or not. That is a decision taken on the basis of the individual Z-score of the student. The 1st Respondent University had no such authority to select students for admission. The 1st Respondent University, in informing each Petitioner of his or her result in relation to the aptitude test, through letters P11(i) to P11(lii), thought it fit to remind them of the fact that their selection to the University is dependent on the result of the aptitude test as well as their Z-score. Hence, the fact that, in securing 50 or more marks in the aptitude test, the Petitioners have satisfied an additional entry requirement for University admission, in turn offered them of no undertaking or a promise of a benefit by the 18th Respondent Commission.

Irrespective of the selection criterion for the admission to the State Universities, whether they are selected under the *'All Island Merit'* or the *'District Quota'*, the primary consideration adopted by the 18th Respondent Commission is the "rank *order of the Z-scores obtained by the candidate*" for that particular year in the Advance Level Examination. The said Commission asserted that it had selected the students for the Faculty of Music of the 1st Respondent University on that basis and the above table referring to the relative Z-scores supports that position. The emphasis of Z-score in selection for admission by the 18th Respondent Commission is clearly stated in the UGC Handbook. The achievement of 50 or more marks at the aptitude test by the Petitioners, only indicated that they are not disqualified for admission to the course of study in music. If they were to be selected to the 1st Respondent University, they had to have the required level of the Z-score, which is set under the district basis scheme and also to 'pass' the aptitude test.

Thus, I am of the view that the contention of the Petitioners, that once the 1st Respondent University conducts the aptitude test, it would then "*constructs a list of the applicants who have passed the aptitude test, in the order of the highest receiving mark, and refer the same to the 18th Respondent*" as one of the important procedural requirements that had to be followed in the selection process, is based on an erroneous assumption made on the selection policy, as declared in the UGC Handbook.

It is already noted elsewhere, that the manner in which the Petitioners have perceived the selection process employed by the 18th Respondent Commission for selection of students for University admission is that the said Commission, having received the list of the students who have passed the aptitude test from the 1st Respondent University, then, "*selects the mark obtained by the 250th applicant in the said list and sets the Z-score received by the 250th applicant as the final cut off Z-score for the enrolment of applicants to the Faculty of Music of the 1st Respondent for the respective year*".

It is clearly evident from the above considerations that this is not the procedure of selection as set out in the UGC Handbook issued by the 18th Respondent Commission. Clearly the Petitioners have misled themselves in adopting the said view in relation to the actual selection process for admission to the Faculty of Music in the 1st Respondent University. It is not a situation where the application of a simple equation in which the names of the students who have scored 50 or more are arranged in the order of merit and then the 18th Respondent Commission picks the Z-score obtained by the 250th student as the cut off mark for university admission.

The perception of the Petitioners, in relation to the selection process that "*accordingly the 250 applicants selected to the Faculty of Music in the 1st Respondent University, first and foremost pass the mandatory aptitude test and then subsequently must satisfy the minimum Z-score set by the 18th Respondent …*" could not be termed as a perception that had been created upon 'fair reading' of the statements contained in the UGC Handbook.

The factual situation as well as the legal principles that had been relied upon by the Petitioners are more or less akin to what had been relied upon by the Petitioner in her application under Article 126, as indicative from the judgment of this Court in ***De Alwis v Anura Edirisinghe and Others*** (2011) 1 Sri L.R. 18.

In that application, the Petitioner, being a student who had been initially selected for the medical faculty on her Z-score, as indicated in a provisional list, was subsequently selected to the dental faculty. The said provisional list was revised upon the release of re-correction results of other candidates. The re-correction results had changed the overall Z-score of students, which in turn resulted in receiving a lower Z-score by the Petitioner than her previous Z-score. In these circumstances she had, in support of her allegation of violation of Article 12(1) of the Constitution, claimed frustration of substantive legitimate expectation, alleging that "*she had a legitimate expectation that she could enter a Faculty of Medicine without sitting for the Advanced Level Examination for a further time*". The Respondents had taken up the position that her selection to Medical Faculty was made on the provisional Z-score and therefore is not final. They also contended that there was no change in the applicable policy and accordingly she could not have entertained any legitimate expectation, based on the said provisional Z-score result.

This Court, having relied on dicta of Lord *Diplock* in ***Council of Civil Service Unions v. Minister for the Civil Service (The GCHQ Case)*** - (1984) 3 All E.R. 935, that *'if a person relies on legitimate past practice that had been withdrawn or changed suddenly without any notice or reason for such withdrawal or change*', determined that there was no '*promise or an undertaking*' on the part of the Respondents, which established a past conduct on which the student could have founded her claim on a legitimate expectation.

It is held by the Court that :

> " … *the present application, as has been shown clearly, there is no material to indicate that the past practice has been changed or withdrawn at the time the petitioner had sat for the Advanced Level Examination or at the time the results were released. On the contrary the same system which was used in the previous year had been followed and the candidates were told that depending on the results of the re-scrutiny of papers, the Z-scores could change*."

Similarly, in this instance too, there was no change in the declared admission policy by the 18th Respondent Commission. The 1st Respondent University partially complied with the directive of the 18th Respondent Commission to send names of students who have passed the aptitude test in three times the proposed intake. In fulfilling the said requirement, the 1st Respondent University therefore revised its pre-determined pass mark and made an additional list of another 393 names of students in its 2nd list, as students, who also have passed the aptitude test.

This fact does not validate the contention advanced by the Petitioners that the students, whose names are contained in the 2nd list, were selected to be admitted to the 1st Respondent University by the 18th Respondent Commission, in spite of the fact that they had 'failed' in the aptitude test. The said 1st list of names of 360 students could be taken only as a provisional list, in view of the subsequent revision of the pass mark by the 1st Respondent University in compiling the 2nd list. Hence none of the students included in the 2nd list can be considered as disqualified for admission, as they too have passed the aptitude test.

Learned Counsel for the 18th Respondent Commission contended that the Petitioners have failed to demonstrate to this Court that there has been an established practice by the said Commission of giving primacy to the results of the aptitude test over that of the Z-score obtained by students and had relied on the following quotation from the judgment of Ariyaratne ***et al v. Illangakoon et al*** (SC FR Application No. 444/2012 – SC minutes of 30.07.2019), in support:

> *"… the first characteristic which will sustain a Petitioner's claim that he has a substantive legitimate expectation the respondent public authority will act in a particular manner with regard to him, is that the petitioner must establish the public authority gave him a specific, unambiguous and unqualified assurance that it will act in that manner [or, alternatively, that the respondent 57 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."

As in the case of, ***De Alwis v Anura Edirisinghe and Others*** (supra) in this instance too, the Petitioners have failed to establish that there is an undertaking or a *'promise of a benefit'* contained in the UGC Handbook or in any other notification addressed to them stating that the selection for admission for the Faculty of Music of the 1st Respondent University by the 18th Respondent Commission would be made on the basis that the *" … mark obtained by the 250th applicant in the said list and sets the Z-score received by the 250th applicant as the final cut off Z-score for the enrolment of applicants to the Faculty of Music of the 1st Respondent for the respective year*".

In applying the objective test of '*fair reading*' on the policies and the applicable selection criterion as stated in the UGC Handbook, on which the Petitioners have founded their contention before this Court, I find that there never was an undertaking or a '*promise of a benefit'* given to any of the Petitioners by the 18th Respondent Commission that in selecting students for admission to the Faculty of Music of the 1st Respondent University, it would only consider the students who have scored 50 marks and above in the aptitude test. In the absence of any undertaking or a promise of a benefit, the legitimacy of the expectation, being an integral component of the Petitioners contention, remain an unestablished factor.

On the other hand, the UGC Handbook (P2) indicates the consistency of the position adopted by the 18th Respondent Commission before this Court, in very clear terms to any Petitioner, who took the trouble to read the 20th question and answer in the section titled

"*Frequently Asked Questions by the Students*" (at p. 215). It is appropriate to quote the particular frequently asked question and its answer relevant to this application in *verbatim*, to illustrate how the 18th Respondent Commission had indicated its admission policy on this aspect.

The question No. 20 reads as follows:

> "What, if I pass the practical/aptitude test but not within the cut off for the same course of study?
>
> To enter the course of study that requires a practical/aptitude test, you must obtain required Z-score in addition to passing the practical/aptitude test. You will not be selected to a course of study merely by passing the practical/aptitude test, if you have not obtained sufficient Z-score."

This question and its answer under FAQ, provides an unambiguous answer to the issue, whether there was any undertaking or a *promise of a benefit,* that had emanated from the 18th Respondent Commission, that students with 50 or more marks are only considered for admission to the 1st Respondent University irrespective of their individual Z-score, clearly in the negative. It is explicitly stated therein that only the students, who obtained the '*required Z-score*', in addition to '*passing*' the aptitude test are selected. In applying the said objective test of 'fair reading' of the highlighted policies and instructions contained in the UGC Handbook (P2) I am of the view that there never was such an undertaking or a promise of a benefit given to any of the Petitioners by the 18th Respondent Commission.

It is indeed unfortunate that if the internal squabble between the two State institutions that are invested with statutory powers and functions relating to tertiary level education over the failure to send 750 names, had created a mistaken belief of a '*legitimate expectation*' in the minds of the Petitioners for selection for admission to the 1st Respondent University, to which they had no reasonable prospect of, due to their relatively low Z-score values. This Court empathies with the Petitioners and understands their frustration in failing to fulfil their aspirations to pursue higher education in their chosen areas of study. Not only the Petitioners have scored more than 50 marks at the aptitude test; most of them have secured A passes for the subject of music in the Advanced level examination, a clear indication of being gifted with a natural talent in music. But the highly competitive and therefore tightly-regulated University selection process designed to minimise inequality, based on the national policies on University admission, and gave them no undertaking or a *'promise of a benefit*' of making the selections the way they have expected. Accordingly, the Petitioners are not entitled to relief under the public law principle of substantive legitimate expectation.

The imposition of an additional requirement of a 'pass' in the practical/aptitude test, in the selection for admission to the degree programs in the Arts, apparently had a troubled history. The 1st Respondent University strongly felt the result of such a test should be the determinant factor for selection of students to the degree programmes conducted by it. However, the 18th Respondent Commission is not so convinced of the validity of an argument for attributing an enhanced status to the results of the aptitude test in the University selection process. Essentially, this is a policy issue best left to

be resolved by the concerned public entities, who possess the required expertise to formulate a policy that addresses these concerns, in the light of the Directive Principles of State Policy, as set out in the Article 27(2)(h) of the Constitution.

Before I part with this judgment, there is one more allegation of the Petitioners that should be considered. In their act of citing the 28th, 29th and 30th Respondents, the Petitioners would have intended to demonstrate to Court that at least in the selection of one of the said three Respondents to the Faculty of Music of the 1st Respondent University, the 18th Respondent Commission had acted contrary to its own selection of policy of admitting students who "… *fails the practical/aptitude test he/she is deemed ineligible for admission for the relevant course of study*."

Despite making the claim that the 28th, 29th and 30th Respondents have 'failed' the aptitude test, the Petitioners did not substantiate that assertion by making reference to them in the two lists sent by the 1st Respondent University to the 18th Respondents, marked as 2R4A and 2R6A/XII. These two documents contain only the names of the students who have 'passed' the aptitude test along with their index numbers and the NIC numbers, as confirmed by the 1st Respondent University. No individual marks were mentioned in any of these two lists. It is only in the list, marked as 2R3, details of the marks received by each student is disclosed to Court but that too under the reference "Exam No" with no mention of their names, index numbers or the NIC numbers. Hence, whether the 28th and 29th Respondents have passed or failed in their aptitude test were not established or could be ascertained.

Name of the 30th Respondent is listed under No.4 in *Colombo* district with a Z-score of 1.2032 and included as No.114 in the list of selected students for admission (2R2A). It is clear from the above tabulation that the 30th Respondent has a Z-score over and above the cut off mark of 0.9382 for *Colombo* district. The Z-score of the 21st Petitioner, who had the highest Z-Score of 0.8558, when compared with the other Petitioners who sat for the Advance Level Examination from the *Colombo* district, is obviously a lower Z-score than the said cut off mark. The 30th Respondent's name is included in the 2nd list containing names of the students who have 'passed' the aptitude test conducted by the 1st Respondent University under No. 169 and therefore does not disqualify herself for admission, since the applicable policy consideration clearly stipulated that the failure of the aptitude test only made a particular student "*ineligible for admission for the relevant course of study.*"

Considering all the facts and circumstances that had been placed before this Court and for the reasons set out above, I have reached the conclusion that the Petitioners have failed to establish the legitimacy of their expectation in the selection of the students for admission to the degree program of Bachelor of Performing Arts – Music (Special) conducted by the Faculty of Music in the 1st Respondent University, for the academic year 2018/2019 by the 18th Respondent Commission. Therefore, the said selection made by the 18th Respondent Commission could not be termed as an illegal, unfair, arbitrary or an unreasonable act, which had violated any of the 52 Petitioners' fundamental right to equality as guaranteed under Article 12(1) of the Constitution, by frustrating their substantial legitimate expectation.

Therefore, I hold that the Petitioners have not been successful in establishing that their fundamental rights guaranteed under Article 12(1) of the Constitution were infringed by one of more Respondents.

This application is accordingly dismissed. I make no order as to costs.

JUDGE OFTHE SUPREME COURT

L.T.B. DEHIDENIYA, J.

I agree.

JUDGE OF THE SUPREME COURT

A.L.S. GOONERATNE, J.

I agree.

JUDGE OF THE SUPREME COURT

IN THE SUPREME COURT OF THE

DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application in terms of Article 126 read with Article 17 of the Constitution of the Democratic Socialist Republic of Sri Lanka in respect of violation of Article 12(1) of the Constitution.

S C (F R) 350/2016

1. Saman Ratnayake,
   11/4, Jeswel Place,
   Mirihana,
   Nugegoda.
2. Suresh Prasanna Kumara Warnasooriya,
   17, Tourbo Housing Scheme,
   Pitawella Road,
   Boralesgamuwa.
3. Janaka Indrajit de Alwis Goontileke,
   35, Nanda Mawatha,
   Nugegoda.
4. Liyanage Samansiri Sigera,
   No. 232/01/A, Makola South,
   Makola.
5. Kariyawasam Don Anandasiri Weerasinghe,
   17/2, Railway Station Lane,
   Udahamulla,
   Nugegoda.

PETITIONERS

Vs.

1. National Police Commission
2. Siri Hettige, (Chairman)
3. P. H. Manatunga, (Member)
4. Savithree Wijesekara, (Member)
5. Y. L. M. Zawahir, (Member)
6. Anton Jayanadan, (Member)
7. Tilak Collure, (Member)
8. Frank de Silva, (Member)
9. N. Ariyadasa Cooray, (Secretary)

   1st to 9th are of

   National Police Commission, Block No. 9

   BMICH Premises,

   Baudhaloka Mawatha,

   Colombo 07.
10. Pujith Jayasundara,

    Inspector General of Police,

    Police Headquarters,

    Colombo 01.
11. B. M. Basnayaka,

    Chairman,

    Committee to inquire into Political Victimization,

    Ministry of Law and Order and Southern Development,

    Floor No. 13, Stage II,

    Sethsiripaya,

    Battaramulla.
12. Neil Hapuhinne,

    Secretary,

    Committee to inquire into Political Victimization,

Ministry of Law and order and Southern Development, Floor No. 13, Stage II, Sethsiripaya, Battaramulla.

13. Ravi Wijegunawardana,
Member,
Committee to inquire into Political Victimization,
Ministry of Law and order and Southern Development, Floor No. 13, Stage II, Sethsiripaya, Battaramulla.

14. J. Sumith Abeysinghe,
Secretary to the Cabinet,
Republic Square,
Sir Baron Jayathilaka Mawatha,
Colombo 01.

15. P. Wijeweera,
Secretary,
Ministry of Law and order and Southern Development, Floor No. 13, Stage II, Sethsiripaya, Battaramulla.

16. J. J. Rathnasiri,
Secretary – Ministry of Public Administration and Management,
Independent Square,
Colombo 07.

17. S. A. D. M. P. Gunasekara,
43/44, Field Garden, Navinna,
Maharagama.

18. Sagala Rathnayaka,

Minister of Law and order and Southern Development,
Ministry of Law and order and Southern Development, Floor No. 13, Stage II, Sethsiripaya,
Battaramulla.

19. Hon. Attorney General,
Department of Attorney General,
Colombo.

RESPONDENTS

Before: **P PADMAN SURASENA J**

E. A. G. R. AMARASEKARA J

A. H. M. D. NAWAZ J

Counsel: Philip Chandraratne for the 2nd Petitioner.

Rajiv Goonetilleke, SSC for the Hon. Attorney General.

Argued on: 22-03-2021.

Decided on: 16-12-2021

P Padman Surasena J

Petitioners are police officers and retired police officers claiming to have been politically victimized during the period 1994 to 31-07-2014.

In 2015, the then Cabinet of Ministers, having considered the Memorandum dated 09-03-2015[1] under the title "To provide relief to those who were victimized for political reasons" submitted by the then Prime Minister, decided on 08-04-2015, to issue a Public Administration Circular to provide a reasonable period of time for those officers, if any, who have been subjected to political victimization and who wish to seek relief, but not yet submitted their appeals, to submit their appeals. The Cabinet of Ministers also decided to authorize the Secretary Ministry of Public Administration to appoint an

[1] Produced marked **P 3**.

official committee comprising of three retired public officers who had served in the capacity of Additional Secretary or any other similar or higher post to examine the said appeals and make recommendations. The Petitioners have produced the said cabinet decision made on 08-04-2015, marked **P 4**.

As authorized by the said cabinet decision, the Secretary Ministry of Public Administration had issued the Public Administration circular No. 09/2015 dated 17-04-2015, calling for appeals to be submitted to the Ministry of Public Administration by 05-05-2015. The Petitioners have produced the said Public Administration circular No. 09/2015 marked **P 5**.

The Petitioners have stated in their petition[2] that the Minister of Public Order and Christian Affairs thereafter sought approval for the implementation of the recommendations of the Committee referred to in the said Public Administration circular No. 09/2015 (**P 5**), from the Cabinet of Ministers, by the Cabinet Memorandum dated 17th June 2015. The Petitioners have produced the said Cabinet Memorandum dated 17th June 2015 marked **P 6**. The 9th Respondent (Secretary, National Police Commission) has also produced the same marked **9 R1**.

The Cabinet of Ministers had thereafter decided inter alia on 17th June 2015, to obtain the observations of the 19th Respondent (Hon. Attorney General) on the implementation of the recommendations of the above Committee. The 9th Respondent has produced the said decision made by the Cabinet of Ministers on 17th June 2015 marked **9 R2**.

The Petitioners have also stated in their petition that the approval of the Cabinet of Ministers was conveyed by **P 7** by the 14th Respondent (Secretary to the Cabinet of Ministers) to the Secretary Ministry of Law and Order. The Petitioners have produced the said decision made by the Cabinet of Ministers on 21st October 2015 marked **P 7**. The 9th Respondent has produced the said decision made by the Cabinet of Ministers on 21st October 2015 marked **9 R4**.

The Petitioners have stated that subsequently another committee (hereinafter sometimes referred to as the "Basnayake Committee") comprising of Ms. B. M. M.

[2] Paragraph 3 (c) of the petition dated 04-10-2016.

Basnayake (11th Respondent), Neil Hapuhinna (12th Respondent) and Ravi Wijegunawardene (13th Respondent) was appointed to reconsider and make recommendations as there were anomalies in the recommendations made by two previous committees. This Committee (Basnayake Committee) recommended granting relief to 129 police officers. The Petitioners have produced the Basnayake Committee report marked **P 8 A**.

The Minister of Law and Order and Southern Development thereafter sought approval for the implementation of the recommendations of the Basnayake Committee from the Cabinet of Ministers, by the Cabinet Memorandum dated 10th June 2016. The Petitioners have produced the said Cabinet Memorandum dated 10th June 2016 marked **P 8**. The 9th Respondent has produced the said Cabinet Memorandum dated 10th June 2016 marked **9 R7**.

The Cabinet of Ministers having considered the Note to the Cabinet dated 26-07-2016 (**9 R8**) forwarded by the Prime Minster, Cabinet Decision dated 19th April 2016, the observations of the President (**9 R9**) and the observations of the Minister of Finance (**9 R10**), had decided on 9th August 2016 to direct the Secretary Ministry of Law and Order and Southern Development to implement the proposals recommended. The Cabinet of Ministers also decided to treat the above Decision as a matter of Policy. The Petitioners have produced the copy of the said Cabinet Decision dated 9th August 2016 marked (**P 9**). The 9th Respondent has also produced the copy of the said Cabinet Decision dated 9th August 2016 marked (**9R 11**). For clarity I would reproduce below the said Cabinet decision **P 9** (**9R 11**).

(B) Agenda Items:

(I) Cabinet Papers - General

08. Cabinet Paper No. 16/1473/702/053, a Note to the Cabinet dated 2016-07-26 by the Prime Minister on ***"Providing relief to those who faced difficulties due to political reasons"*** *- (Cabinet decisions dated 2016-04-19 on CP No. 16/0654/748/010 and 2016-06-28 on CP No. 16/1134/748/010-I refers) the above Note was considered along with the observations of H.E the President and the Minister of Finance. After discussion, it was decided-*

a) to grant approval treating this as matter of policy, to the proposals (I) and (II) in paragraph 03 of the Note;

b) to direct the Secretary, Ministry of Law & Order and Southern Development-

(i) to take note of the matters highlighted in the observations of H.E the President and pursue action accordingly, and

(ii) to obtain the concurrence/approval of the relevant authorities prior to implementation of the proposals referred to at (a) above, as indicated in the observations of the Minister of Finance.

It was also decided to treat this decision as confirmed and to authorize the Secretary to the Cabinet of Ministers to convey the same to the relevant authorities for necessary action accordingly.

Action by: ***Secretary to the Prime Minister*** *- above observations annexed.*

My/Law & Order and Southern Development *- copy of Note and above observations annexed.*

Copied to: ***Secretary to the President -*** *observations of the Minister of Finance annexed.*

My/Finance - *observations of H.E the President annexed.*

My/Public Administration and Management - *copy of Note and above observations annexed.*

Secretary, National Police Commission *- copy of Note and above observations annexed.*

The Petitioners state that thereafter, replying to a letter by the National Police Commission (1st Respondent), the Inspector General of Police (10th Respondent) submitted his report by his letter bearing reference DP/OW/813/2016 dated 15/09/2016, to the National Police Commission giving clearance for 17 officers mentioned in the Basnayake Committee report (**P 8 A**). The Petitioners have produced the copy of the said letter marked **P 10** and the report of the Inspector General of Police marked **P 10 A**.

The Petitioners state that thereafter, S A D M P Gunasekara, the 17th Respondent, who was the OIC Division, Nugegoda was promoted with effect from 10-06-2016,[3] from the rank of Senior Superintendent of Police to the rank of Deputy Inspector General of Police on the approval of National Police Commission on the grounds of political victimization discriminating others who were in similar circumstances. The Petitioners allege that the promotion of the 17th Respondent is violative; as his name is not in the list cleared by the Inspector General of Police **P 10** and **P 10 A**; there were others having similar qualifications left out. It is in that backdrop that the Petitioners in this application have prayed inter alia, for the following relief in their petition.

i. *Declare that the Petitioners' fundamental rights enshrined in Article 12 (1), have been violated and/or are subject to continuing infringement by the Respondents and State;*
ii. *Declare that the 1st, 3rd and 5th Petitioners are eligible to be promoted to the rank of Deputy Inspector General of Police with effect from 10-06-2016, in view of **P 8**, **P 8A**, **P 9** and **P1 0**;*
iii. *Declare that the 2nd Petitioner is eligible to be promoted to the rank of Superintendent of Police with effect from 01-01-2016 in view of **P 8**, **P 8A** **P 9**, **P 1**, **P 2**, and **P 10**;*
iv. *Declare that the 4th Petitioner is eligible to be promoted to the rank of Superintendent of Police with effect from 01-01-2016 in view of **P 8**, **P 8A**, **P 9** and **P10**;*
v. *Issue direction to 1st to 8th and 10th Respondents to appoint the Petitioners according to above declarations;*
vi. *Issue directions to 10th Respondent Inspector General of Police to provide all privileges entitled to their ranks, to the Petitioners, once they are promoted;*
vii. *Grant each petitioner a compensation of Rs. 1 million.*

In the instant case, the Court has granted leave to proceed under Article 12(1) of the Constitution. Thus, the task of this Court must be to ascertain whether anyone or

[3] Telephone message produced marked **P 11**.

more of the Respondents have infringed the fundamental rights of the petitioners guaranteed under Article 12(1) of the Constitution. In that regard I would examine whether the promotion of the 17th Respondent has been made discriminating the Petitioners thereby infringing their fundamental rights guaranteed under Article 12(1) of the Constitution.

At the outset, one must bear in mind that according to the case advanced by the Petitioners, the promotions of the Petitioners or the 17th Respondent or any other officer in the given instance is possible only under the terms of the relevant Cabinet decision. As can be clearly seen from the said Cabinet decision dated 09th August 2016 (**P 9**), the implementation of the proposals recommended in the Note to the Cabinet forwarded by the Prime Minister has been approved subject to the following conditions (reproduced in verbatim):

(i) to take note of the matters highlighted in the observations of H.E the President and pursue action accordingly, and

(ii) to obtain the concurrence/approval of the relevant authorities prior to implementation of the proposals referred to at (a) above, as indicated in the observations of the Minister of Finance.

Thus, the implementation of the relevant Cabinet decision must necessarily be done subject to the aforesaid conditions. The 9th Respondent has produced the observations of the President referred to in the relevant Cabinet decision marked **9 R 9** which clearly shows that the said Cabinet decision must be implemented in such a way that the implementing of the relief recommended by the committee should not affect the seniority of other serving police officers.

The Affidavit of the 9th Respondent, Nawalage Ariyadasa Cooray - Secretary, National Police Commission sheds light as to why the Petitioners could not be promoted in terms of the relevant Cabinet decision. He has explained that the relief recommended to the Petitioners could not be implemented due to the following reasons and the said reasons are set out in the observations received from the 10th Respondent. Indeed, it is the Petitioners themselves who have produced the relevant observations of the

Inspector General of Police marked **P 10** and **P 10 A**. The said reasons are as follows (reproduced in verbatim):

- *1st Petitioner – The seniority of 93 other police officers of similar rank to him (SSP) will be adversely affected if his promotion is backdated to 10.06.2011.*
- *2nd Petitioner – Although there is a recommendation to promote him to the rank of DIG with effect from 01.01.2016, there is no recommendation on his promotion within the ranks of IP to SSP.*
- *3rd Petitioner – The seniority of other police officers of similar rank (SSP), but more senior to him, will be adversely affected if his promotion is backdated to 10.06.2011.*
- *4th Petitioner – The seniority of police officers of similar rank (SSP), but more senior to him, will be adversely affected if his promotion is backdated to 10.06.2011.*
- *5th Petitioner – The seniority of 1124 other police officers of similar rank to him (SSP) will be adversely affected if his promotion is backdated to 10.06.2011.*

Let me now examine whether the 17th Respondent could have been promoted in terms of the relevant Cabinet decision. The 9th Respondent, (Secretary, National Police Commission) has also explained as to how the promotion of the 17th Respondent was possible in terms of the said Cabinet Decision.

The 17th Respondent is one of those 129 police officers whose names were submitted to the Cabinet, by the Cabinet Memorandum dated 10.06.2016. His name appears as No. 08 in the schedule (**P 8A**). He was to retire on 19.09.2016. Thus, his promotion on the grounds of political victimization could not have materially affected the seniority of any other serving police officer holding a similar rank held by the 17th Respondent at the time (SSP) or an officer holding a rank similar to which the 17th Respondent was promoted (DIG). The 9th Respondent has produced a copy of the letter dated 19.08.2016 sent to him by the 10th Respondent marked **9 R13**. This letter has indicated the 17th Respondent's date of retirement and the fact that the backdating of his promotion would not affect the seniority of the other serving police officers.

Therefore, the implementation of the relief recommended in respect of the 17th Respondent did not adversely affect the seniority of any other serving officer holding similar rank and therefore, was in compliance with the Cabinet Decision (**P 9**).

Thus, the Petitioners have been unable to prove that the Respondents have infringed the fundamental rights of any of the Petitioners by promoting the 17th Respondent, from the rank of Senior Superintendent of Police to the rank of Deputy Inspector General of Police with effect from 10-06-2016.[4]

Despite the above conclusion, looking at this case from somewhat different perspective, I am prompted to add the following comments also in relation to the promotions of public officers in this country. This is because the Police officers were also basically public officers coming under the purview of the Public Service Commission until the 17th Amendment to the Constitution established the National Police Commission and vested the powers of carrying out functions relating to the appointment, promotion, transfer, disciplinary control and dismissal of police officers other than the Inspector-General of Police, in that Commission. Later, the 20th Amendment to the Constitution repealed Article 155 G which entrusted the aforesaid powers to the National Police Commission bringing back the Police officers again under the purview of the Public Service Commission.

The Public Service Commission was initially established in Sri Lanka by Article 58 of the then existing Constitution of Ceylon. [Ceylon (Constitution) Order in Council 1946 (Chapter 379)]. That Constitution was promulgated as a result of the endeavors of the Soulbury Commission appointed in the years 1944 and 1945 by His Majesty's Government under the chairmanship of the Right Honourable Herwald, Baron Soulbury, O.B.E., M.C., to visit the then Island of Ceylon in order to examine and discuss proposals for constitutional reforms. Thus, it became commonly known as the Soulbury Constitutuion. The country known as Ceylon then, was a member of the British Commonwealth of Nations which had an autonomous state within the British Empire. Having a common allegiance to the British Crown then was a prominent feature in that Constitution and was compatible with then Dominion Status of Ceylon.

[4] Telephone message produced marked **P 11**.

Thus, Article 57 of the Soulbury Constitution had expressly provided for the tenure of office of state officers in the following manner.

> *57. Save as otherwise provided in this order, every person holding office under the Crown in respect of the Government of the Island shall hold office during Her Majesty's pleasure.*

However, Article 58(1) of the Ceylon (Constitution) Order in Council 1946, established a Public Service Commission and the said Article read as follows;

> *58. (1) There shall be a Public Service Commission which shall consist of three persons, appointed by the Governor-General, one at least of whom shall be a person who has not, at any time during the period of five years immediately preceding, held any public office or judicial office. The Governor-General shall nominate one of the members of the Commission to be the Chairman*. …..

Article 60 of that Constitution vested the powers of appointment, transfer, dismissal and disciplinary control of public officers in the Public Service Commission. Provisions such as disqualifying the Senators or the Members of Parliament from becoming members of the Public Service Commission,[5] restraining the members of the Public Service Commission from holding any paid office as a servant of the Crown and making them ineligible for subsequent appointment as Public Officers,[6] entitlement of members of the Public Service Commission to hold office for a period of five years from the date of their appointment,[7] the mandatory requirement for the Governor-General to assign a cause when removing any member of the Public Service Commission from his office,[8] the requirement to determine the salary payable to the members of the Public Service Commission by Parliament and the inability to reduce their salaries during their terms of office,[9] were salient features of the Public Service Commission under the Soulbury Constitution. Those provisions aimed at maintaining the independence of the Public Service Commission. Thus, right from the inception,

[5] Article 58 (2) of the Ceylon (Constitution) Order in Council of 1946.
[6] Article 58 (3) of the Ceylon (Constitution) Order in Council of 1946.
[7] Article 58 (4) of the Ceylon (Constitution) Order in Council of 1946.
[8] Article 58 (5) of the Ceylon (Constitution) Order in Council of 1946.
[9] Article 58 (7) of the Ceylon (Constitution) Order in Council of 1946.

the Public Service Commission was an institution meant to be an independent body charged with the powers of appointment, transfer, dismissal and disciplinary control of public officers.

However, the first Republican Constitution (1972) did away with the Public Service Commission and vested the powers of the appointment, transfer, dismissal and disciplinary control of state officers in the Cabinet of Ministers.

Article 106 of the 1972 Constitution read as follows;

> *106. (1) The Cabinet of Ministers shall be responsible for the appointment, transfer, dismissal and disciplinary control of state officers and shall be answerable therefor to the National State Assembly.*
>
> *(2) Subject to the provisions of the Constitution, the Cabinet of Ministers shall have the power of appointment, transfer, dismissal and disciplinary control of all state officers.*
>
> *(3) Subject to the provisions of the Constitution, the Cabinet of Ministers shall provide for and determine all matters relating to state officers including the constitution of state services, the formulation of schemes of recruitment and codes of conduct for state officers, the procedure for the exercise and the delegation of the powers of appointment, transfer, dismissal and disciplinary control of state officers.*
>
> *(4) The Cabinet of Ministers may notwithstanding any delegation of powers as is referred to in this Chapter exercise its powers of appointment, transfer, dismissal and disciplinary control of state officers.*
>
> *(5) No institution administering justice shall have the power or jurisdiction to inquire into, pronounce upon or in any manner call in question any recommendation, order or decision of the Cabinet of Ministers, a Minister, the State Services Advisory Board, the State Services Disciplinary Board, or a state officer, regarding any matter concerning appointments, transfers, dismissals or disciplinary matters of state officers.*

Article 107(1) of the 1972 Constitution expressly provided for the tenure of office of state officers and related powers vested in the National State Assembly in that regard in the following manner;

> 107. (1) Save as otherwise expressly provided by the Constitution, every state officer shall hold office during the pleasure of the President. The National State Assembly may however in respect of a state officer holding office during the pleasure of the President provide otherwise by a law passed by a majority of those present and voting.

Thereafter, the second Republican Constitution (1978) continued to vest the powers of appointment, transfer, dismissal and disciplinary control of public officers in the Cabinet of Ministers. However, there was provision for the Cabinet of Ministers to delegate from time to time, its powers of appointment, transfer, dismissal and disciplinary control of public officers other than Heads of Departments, to the Public Service Commission. Thus, the 1978 Constitution at its inception, re-established the Public Service Commission as a body exercising authority delegated to it by the Cabinet of Ministers.

Article 55 of the 1978 Constitution in its original form was as follows;

> *"55 (1) Subject to the provisions of the Constitution, the appointment, transfer, dismissal and disciplinary control of public officers is hereby vested in the Cabinet of Ministers, and all public officers shall hold office at pleasure.*
> *(2) The Cabinet of Ministers shall not delegate its powers of appointment, transfer, dismissal and disciplinary control in respect of Heads of Departments.*
> *(3) The Cabinet of Ministers may from time to time, delegate its powers of appointment, transfer, dismissal and disciplinary control of other public officers to the Public Service Commission.*
> *Provided that ……."*

Although the original Article 55 of 1978 Constitution chose to continue with the principle that all public officers shall hold office at pleasure,[10] it however made the decisions made by those exercised power under Article 55 amenable to the fundamental rights jurisdiction of the Supreme Court[11] removing hitherto existed bar for any court or institution administering justice to inquire into, pronounce upon or in any manner call in question any such decision. This was a yet another step taken to ensure the correctness of such decisions.

Thereafter, the 17th Amendment to the Constitution which was certified on 03rd October 2001, brought about fundamental changes to the afore-stated original position in the 1978 Constitution. The 17th Amendment to the Constitution repealed the whole of original Chapter IX and substituted it with a new Chapter IX. The changes included the structure of the powers vested in the Cabinet of Ministers in relation to appointment, transfer, dismissal and disciplinary control of public officers. Most importantly, the 17th Amendment to the Constitution transferred the powers of appointment, promotion, transfer, disciplinary control and dismissal of public officers other than the Heads of Department back to the Public Service Commission and abolished the principle that 'all public officers shall hold office at pleasure' which continued to be in the Constitutions of this country from the time of British Colonization period up until the implementation of the 17th Amendment to the Constitution. The Cabinet of Ministers continued to retain the power in relation to appointment, transfer, dismissal and disciplinary control of the Heads of Departments and also retained the power to provide for and determine all matters of policy relating to public officers. The relevant Articles 55 (1), 55(3) and 55(4) introduced by the 17th Amendment to the Constitution read as follows,

> *55 (1) The appointment, promotion, transfer, disciplinary control and dismissal of public officers shall be vested in the Commission.*
>
> *55 (3) Notwithstanding the provisions of paragraph (1) of this Article, the appointment, promotion, transfer, disciplinary control and dismissal of all Heads*

[10] As Article 55(1) of 1978 Constitution stood before the 17th Amendment to the Constitution.
[11] As Article 55(5) of 1978 Constitution stood before the 17th Amendment to the Constitution.

of Departments shall vest in the Cabinet of Ministers, who shall exercise such powers after ascertaining the views of the Commission.

55 (4) Subject to the provisions of the Constitution, the Cabinet of Ministers shall provide for and determine all matters of policy relating to public officers.

Article 55 (5) introduced by the 17th Amendment to the Constitution states that the Public Service Commission will carry out its affairs according to the policies laid down by the Cabinet of Ministers and the Public Service Commission is answerable to the parliament in regard to carrying out its functions.

Article 59 brought in by the 17th Amendment to the Constitution also introduced a procedure to enable any aggrieved party to challenge the decisions made by the Public Service Commission by way of preferring an appeal to the Administrative Appeals Tribunal appointed by the Judicial Service Commission which was given an appellate power to alter, vary or rescind any order or decision made by the Public Service Commission.

The 17th Amendment to the Constitution continued to preserve the fundamental rights jurisdiction of the Supreme Court over the decisions made by the relevant bodies in the following manner;

Article 61A.

Subject to the provisions of paragraphs (1), (2), (3), (4) and (5) of Article 126, no court or tribunal shall have power or jurisdiction to inquire into, or pronounce upon or in any manner call in question any order or decision made by the Commission, a Committee, or any public officer, in pursuance of any power or duty conferred or imposed on such Commission, or delegated to a Committee or public officer, under this Chapter or under any other law.

Another important change that was introduced by the 17th Amendment to the Constitution is the insertion of a new Chapter XVIIIA immediately after Article 155 of the Constitution establishing the National Police Commission by Article 155A thereof and vesting it with powers in relation to the appointment, promotion, transfer, disciplinary control and dismissal of police officers other than the Inspector-General of Police. Article 155G which vested those powers in the National Police Commission was as follows,

155G. (1) (a) The appointment, promotion, transfer, disciplinary control and dismissal of police officers other than the Inspector-General of Police, shall be vested in the Commission. The Commission shall exercise its powers of promotion, transfer, disciplinary control and dismissal in consultation with the Inspector-General of Police.

(b) The Commission shall not in the exercise of its powers under this Article, derogate from the powers and functions assigned to the Provincial Police Service Commissions as and when such Commissions are established under Chapter XVIIA of the Constitution.

(2) The Commission shall establish procedures to entertain and investigate public complaints and complaints of any aggrieved person made against a police officer or the police service, and provide redress in accordance with the provisions of any law enacted by Parliament for such purpose.

(3) The Commission shall provide for and determine all matters regarding police officers, including the formulation of schemes of recruitment and training and the improvement of the efficiency and independence of the police service, the nature and type of the arms, ammunition and other equipment necessary for the use of the National Division and the Provincial Divisions, codes of conduct, and the standards to be followed in making promotions and transfers, as the Commission may from time to time consider necessary or fit.

(4) The Commission shall exercise all such powers and perform all such functions and duties as are vested in it under Appendix I of List I contained in the Ninth Schedule of the Constitution.

However, the 18th Amendment to the Constitution which was certified on 09th September 2010, repealed Article 155G; it also repealed hitherto existed Article 55 and replaced it with new Article 55 which is as follows;

55. (1) The Cabinet of Ministers shall provide for and determine all matters of policy relating to public officers, including policy relating to appointments, promotions, transfers, disciplinary control and dismissal.

(2) The appointment, promotion, transfer, disciplinary control and dismissal of all Heads of Department shall, vest in the Cabinet of Ministers.

(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.

(4) The Commission shall not derogate from the powers and functions of the Provincial Public Service Commissions as are established by law.

(5) The Commission shall be responsible and answerable to Parliament in accordance with the provisions of the Standing Orders of Parliament for the exercise and discharge of its powers and functions. The Commission shall also forward to Parliament in each calendar year, a report of its activities in respect of such year.

That resulted in re-transferring the National Police Commission's powers in relation to the appointment, promotion, transfer, disciplinary control and dismissal of police officers back to the Public Service Commission. This brought the police officers back under the category of public officers coming under the purview of the Public Service Commission. All matters pertaining to the appointment, promotion, transfer, disciplinary control and dismissal of police officers pending before the National Police Commission stood transferred to the Public Service Commission by virtue of section 36(5) of the 18th Amendment to the Constitution.

This also brought the power to provide for and determine all matters of policy relating to police officers back under the Cabinet of Ministers by virtue of Article 55 (1) introduced by the 18th Amendment to the Constitution.

In the instant case, it was in the year 2015 that the then Cabinet of Ministers having considered the Memorandum dated 09-03-2015[12] under the title "To provide relief to those who were victimized for political reasons" submitted by the then Prime Minister, had decided on 08-04-2015, to issue a Public Administration Circular calling for the officers subjected to political victimization who wish to seek relief, to submit their appeals to be considered by a committee comprising of three retired public officers appointed by the Secretary Ministry of Public Administration. As the 18th Amendment to the Constitution came into force with effect from 09th September 2010, the powers

[12] Produced marked **P 3**.

in relation to the appointment, promotion, transfer, disciplinary control and dismissal of public officers including the police officers was with the Public Service Commission and the power to provide for and determine all matters regarding public officers including the police officers, was with the Cabinet of Ministers.

It was in the year 2016 that the Cabinet of Ministers had decided (**P 9**) to direct the Secretary Ministry of Law and Order and Southern Development to implement the proposals recommended by the Basnayake Committee treating that decision as a matter of Policy. The law had changed by that time as the 19th Amendment to the Constitution came into force with effect from 15th May 2015.

The 19th Amendment to the Constitution re-transferred the powers in relation to the appointment, promotion, transfer, disciplinary control and dismissal of police officers back to the National Police Commission from the hands of the Public Service Commission. It re-introduced an article numbered 155G in the following form;

> *155G. (1) (a) The appointment, promotion transfer, disciplinary control and dismissal of police officers other than the Inspector-General of Police, shall be vested in the Commission. The Commission shall exercise its powers of promotion, transfer, disciplinary control and dismissal in consultation with the InspectorGeneral of Police.*
>
> *(3) The Commission shall, in consultation with the Inspector-General of Police, provide for and determine all matters regarding police officers, including:-*
>
> > *(a) the formulation of schemes of recruitment, promotion and transfers, subject to any policy determined by the Cabinet of Ministers pertaining to the same;*
> >
> > *(b) training and the improvement of the efficiency and independence of the police service;*
> >
> > *(c) the nature and type of the arms, ammunition and other equipment necessary for the use of the National Division and the Provincial Divisions; and*

(d) codes of conduct and disciplinary procedures.

(4) The Commission shall exercise all such powers and discharge and perform all such functions and duties as are vested in it under Appendix I of List I contained in the Ninth Schedule to the Constitution.

Thus, after the 19th Amendment to the Constitution it was the National Police Commission which was charged with the power to provide for and determine all matters regarding police officers, including the formulation of schemes of recruitment and promotion in consultation with the Inspector-General of Police, subject to any policy determined by the Cabinet of Ministers pertaining to the same. This was the legal position existed when the Cabinet of Ministers made the decision contained in **P 9** on 09-08-2016.

Let me now examine the scope of power that should have been exercised by the Cabinet of Ministers at the relevant time. It is important to bear in mind that the policies the Cabinet of Ministers are empowered to make must be only to lay down mere schemes of promotions in the nature of general rules and regulations and not decisions to promote any individual public or Police officer. On the other hand, any recommendation made by the Cabinet of Ministers to promote individuals cannot be categorized as policy decisions falling under Article 55(1) or 155G 3(a) of the Constitution. This is reflected in the following judicial precedence which interpreted Article 55 as it had stood at the times of those relevant judgments.

The case of Abeywickrema Vs. Pathirana,[13] is an election petition where the petitioner in that case challenged the validity of the election of the 1st respondent in that case as a Member of Parliament for Akmeemana electorate. The said petitioner sought a declaration that the election of the said respondent is void in law on the ground that he was a public officer and was therefore disqualified under Article 91 (1) (d) (vii) of the Constitution for election as a Member of Parliament. The said respondent was a principal of a school coming under the Department of Education which meant that he was a public officer. The petitioner in that case argued that although the 1st respondent in that case (school principal) had submitted a letter of resignation from

[13] 1986 (1) Sri L. R. 120.

the said public service position, that letter of resignation was neither submitted nor accepted by the due authority. This was because the 1st respondent in that case (school principal) had tendered his resignation to the Regional Director of Education of the area where he was serving and getting that resignation accepted by the Regional Director who relieved him from his duties; according to the petitioner in that case, the said process did not effectively terminate the services of the said 1st respondent (school principal) as a public officer, to qualify him as a candidate at a parliamentary election. It was on that basis that the said petitioner sought to argue that there had been no valid resignation in fact or in law by the said 1st respondent school principal who was therefore disqualified under the aforementioned provision to be a Member of Parliament as he had continued to hold a public office. Delivering the majority judgment of Court in 1986, Chief Justice Sharvananda interpreting Article 55(4) of 1978 Constitution as it stood before the 17th Amendment to the Constitution, held that the Constitution of 1978 has given a statutory dimension to the Establishments Code and the said 1st respondent (school principal) was bound by section 4 of the Establishments Code to obtain proper acceptance of his resignation. The Chief Justice further holding, that the said letter of resignation did not bring about a valid termination of the said school principal's contract of service because it was neither addressed nor accepted by the Appointing Authority i.e., the Educational Services Committee; and that the Regional Director, Galle is not the proper authority to accept the resignation; went on to state in his judgment the following;

> *"Article 55(4) empowers the Cabinet of Ministers to make rules for all matters relating to public officers, without impinging upon the overriding powers of pleasure recognised under Article 55(1). Matters relating to 'public officer' comprehends all matters relating to employment, which are incidental to employment and form part of the terms and conditions of such employment, such as provisions as to salary, increments, leave, gratuity, pension, and of superannuity, promotion and every termination of employment and removal from service. The power conferred on the Cabinet of Ministers is a power to make rules which are general in their operation though they may be applied to a particular class of public officers. This power is a legislative power and*

this rule making function is for the purpose identified in Article 55(4) of the Constitution as legislative not executive or judicial in character."

His Lordship Justice Wanasundara who was one of the members of the five-judge bench which heard the above case, did not agree with the majority judgment in that case and delivered a dissenting judgment. However, His Lordship Wanasundara J cited the above passage in his judgment in the case of The Public Service United Nurses Union Vs. Montague Jayawickrama, Minister of Public Administration and others.[14] This was because the majority judgment in Abeywickrema 's case which existed at the time was binding on Court.

In that case, the Public Services United Nurses Union (Petitioner) to which the majority of the Government nurses at that time had belonged, struck work demanding an increase in their salaries. The strike was considered illegal because the relevant service was declared an essential service by His Excellency the President under the Emergency (Miscellaneous Provisions and Powers) Regulation No. 3 of 1986. The Government then decided to treat those who struck work as having vacated their posts and took steps to evict those who occupied Government quarters. However, the strike was eventually settled, the notices of vacation of post were withdrawn and those nurses were allowed to resume work without loss of back pay. Subsequently, the Cabinet of Ministers decided to award a special ad hoc benefit of two increments to the nurses who were members of a rival trade union i.e., the Public Services United Nurses Union, who had worked during the entirety of the strike period and one increment to the nurses who reported for duty at various later stages. The petitioner union challenged the said Cabinet decision on the basis that it was a serious infringement of its members' fundamental right of equality guaranteed under Article 12 of the Constitution. His Lordship Justice Wanasundara having noted that an increment in the public service according to the existing rules and regulations has to be earned by a public officer by satisfactory work and conduct during a specified period of time, namely, one year; and any stoppage, postponement or deprivation of an increment has to be in the nature of a penalty consequent to disciplinary action against a public officer; and held that instantly rewarding particular public officers with one or

[14] 1988 1 Sri L. R. 229.

two increments and placing the others at a disadvantage in relation to them, goes against the grain of the existing administrative provisions and the legitimate expectations which public servants entertain based on the principles and policies existing in the Establishments Code and the Administrative Regulations. Justice Wanasundara went on to state in the judgment, the following as well;

> *"When Article 55 of the Constitution vests authority over public affairs in the Cabinet and make it mandatory for the Cabinet to formulate schemes of recruitment, and codes of conduct for public officers, the principles to be followed in making promotions and transfers etc., the Constitution contemplated fair, and uniform provisions in the nature of general rules and regulations and not action that is arbitrary or ad hoc or savouring of bias or discrimination".*[15]

Time and again, this Court has held that the promotions of public servants must be carried out according to the schemes specified by the Government. The seniority of a public servant has always been an important component which is required to be given due weight in such schemes. In the case of A. H. Wickramatunga and three others Vs. H. R. de Silva and fourteen others,[16] the Supreme Court referred to the principles in the International Covenant on Economic, Social and Cultural Rights (ICESCR) and stated as follows;

> "….*[I]n a scheme of promotion based on 'Seniority' and 'Merit', sufficient weightage must always be given to 'Merit' based upon a proper assessment of actual past performance: efficiency, productivity, timeliness, accuracy, initiative, creativity, ability to work with others, co-operation etc. Article 7 of the International Covenant on Economic, Social and Cultural Rights recognizes the right to an "equal opportunity for everyone to be promoted in his employment to an appropriate higher level,* ***subject to no considerations other than those of seniority and competence."*** *[Emphasis Added]*

[15] Supra, at page 237; this case also interpreted Article 55 as it stood before the 17th Amendment to the Constitution.
[16] SC (FR) 551/98; decided on 31-08-2001.

His Lordship Justice Fernando may have thought it fit to refer to ICESCR in the above case because the Democratic Socialist Republic of Sri Lanka has become a state party to the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1980 by way of accession.

In the instant case, the observations of the president (**9R9**), referred to in the relevant cabinet decision to preserve the seniority of the serving police officers is in conformity with the above principle. In terms of Article 155 G of the Constitution, the National Police Commission which was vested with the powers relating to promotions of Police officers at the relevant time, was required to act in consultation with the Inspector General of Police. Thus, it was in order for the National Police Commission, to take into consideration, the relevant observations of the Inspector General of Police (10th Respondent) marked **P 10** and **P 10 A**. This Court cannot ignore the seniority of the serving police officers and give directions to promote officers who are less senior merely because the political victimization committee had recommended to do so. The Supreme Court cannot be, and should not become, a mere rubber stamp to endorse any such recommendation of a political victimization committee.

The Case of Poojya Mawanane Sominda Thero and thirteen others Vs. V. K. Nanayakkara and eleven others,[17] also stands as a good example to understand the scope of power vested in the Cabinet of Ministers to provide for matters of policy. That case was in relation to an implementation of a Cabinet decision concerning Pirivena Education. The Petitioners in that case were Lecturers attached to the Seethawakapura Pirivena Teacher Training Institute at Avissawella and Coordinators attached to the Provincial Education Offices. They claimed that according to Pirivena Education Act, No. 64 of 1979, the Government assumed the responsibility of assisting Pirivena education to function parallel to education offered by State. In order to recommend inter alia, changes that should be effected to the above Act, the Government appointed a committee in 1994 to submit its recommendations to the Ministry of Education. The said petitioners sought the implementation of the Cabinet decision based on the afore-stated recommendations. The petitioners in that case complained to Court, that the relevant Committee of the Public Service Commission

[17] SC (FR) 146/2003; decided on 15-07-2004.

should have implemented the said policy decisions and the non-implementation of those recommendations had caused a serious violation of their fundamental rights. Her Ladyship Justice Shirani A Bandaranayake,[18] having considered whether the relevant decision taken by the Cabinet of Ministers pertains to a matter of policy coming under the purview of Article 55(4) introduced by the 17th Amendment to the Constitution, stated in her judgment as follows.

> *The Concise Oxford Dictionary refers to a matter of policy as the 'course or general plan of action to be adopted by government, party or a person'. Professor Galligan, on the other hand, defines a decision of policy in the following words (Due Process and Fair Procedures, Clarendon Press, Oxford, 1996, pg. 454),*
>
> *"A decision of policy is one where the authority has to draw on general considerations of a social, economic or ethical kind in deciding an issue, where the decision is likely to affect a range of groups and interests."*
>
> *Accordingly, the general norm in the definition of 'a policy matter' would be for the action taken to be for the common good. As pointed out by Professor Galligan (supra) while interests and claims of individuals and groups are ingredients to be added to the cauldron of policy- making the final decision should reach beyond particular concerns to a broader sense of the interests of all". The necessity for the generalization therefore would be the essential ingredient in defining 'policy' and this is clear as one examines the meaning given to the said word in the Oxford Companion to Law, where it reads thus:*
>
> *"The general consideration which a governing body has in mind in legislating, deciding on a course of action or otherwise acting (David Walker; Clarendon Press Oxford, 1980. pg.965)."*
>
> *Therefore, a policy decision necessarily will have to be applicable in general and cannot be interpreted to include specified persons.*

[18] (Later became Chief Justice).

The Cabinet Memorandum dated 03.09.2001 (1 R3) basically deals with 3 main items. The first item is with regard to the creation of a post designated as Assistant/Deputy Director (Pirivena) for each Provincial Department of Education. The second item refers to the absorption of 8 priests who were holding the positions as Pirivena Coordinators in different provinces. The third item is the upgrading of the ten Lecturers presently attached to the Sudharmarama Pirivena at Avissawella. An examination of the said items would clearly indicate that item 1.1 of the Memorandum clearly deals with a policy matter as it relates in general to the creation of a specific post. The second limb of this item, viz., item 1.2 however refers to the appointment of 8 selected persons and thereby is not in a category which deals with policy matters. This could have been avoided, if there was no special reference to the appointment of 8 persons who were holding positions as Pirivena Co-ordinators. The next item in the Memorandum is not dealing with a policy matter as it clearly refers to the absorption of 10 lecturers who had been serving for a period of over 10 years at the Sudharmarama Pirivena at Avissawella.

In the circumstances, it is apparent that the first item which deals with the creation of a post designated as Assistant/Deputy Director (Pirivena) for each Provincial Department of Education deals with a policy matter and the other two items do not come within the category of policy.

Furthermore, in Black's Law Dictionary a policy is defined: in its 5th edition, as '*The general principles by which a government is guided in its management of public affairs, or the legislature in its measures'* ; and in its 11th edition, as '*A standard course of action that has been officially established by an organization, business, political party, etc.'* Thus, all the above material clearly indicate that a policy decision must be applicable in general as opposed to specific individuals. If a particular policy decision focuses on specific individuals and fails to be applicable in a general context, it will not fall within the ambit of a policy decision.

Therefore, it is apparent that in the instant case, the petitioners cannot rely on the relevant Cabinet Decision to get relief on the basis that their names are included in a

report of a political victimization committee as such a decision cannot be considered as a decision pertaining to a matter of policy for the aforementioned reasons.

I need to mention here a yet another relevant matter. We have a legal system which reasonably protects the citizens' rights including fundamental rights. In such a situation the Petitioners who complain about infringement of their fundamental rights must first show as to why they did not seek an appropriate relief from Court at the time they were politically victimized, if in fact such a victimization had occurred as alleged. On the other hand, if the Petitioners had indeed sought relief from a Court, they should have revealed the details and outcome of such action. The absence of the above explanations, would further vitiate the Petitioners' claim that they were indeed politically victimized. Thus, the Petitioners cannot now complain that their fundamental rights have been violated by the Cabinet of Ministers which anyway did not have power to deal with individual promotions as shown above. This Court cannot directly or indirectly enforce recommendations made solely on political reasons, by implementing recommendations made by a Political Victimization Committee. Such actions would indeed negate the advancement of equal protection of law principle enshrined in Article 12 (1) of the Constitution.

Let me conclude this judgment citing the following passage from the judgment of Her Ladyship Justice Shirani Bandaranayake (as she then was) in the case of Farook Vs Dharmaratne, Chairman, Provincial Public Service Commission, Uva and others.[19]

> *The petitioner's relief sought from this Court is to declare that his transfer as Principal of Pitarathmale No. 1 Tamil Vidyalaya, Haputale and the 6th respondent's transfer as Principal of Sri Razick Fareed Maha Vidyalaya, Bandarawela are null and void. In view of the forgoing analysis of the material placed before this Court the petitioner has no right to be the Principal of Razick Fareed Maha Vidyalaya as he has not got the requisite qualifications. However, the petitioner quite clearly has sought to obtain relief on the basis of unequal treatment. When a person does not possess the required qualifications that is necessary for a particular position, would it be possible for him to obtain relief in terms of a violation of his*

[19] 2005 (1) Sri L. R. 133 at page 140.

fundamental rights on the basis of unequal treatment ? If the answer to this question is in the affirmative, it would mean that Article 12(1) of the Constitution would be applicable even in a situation where there is no violation of the applicable legal procedure or the general practice. The application of Article 12(1) of the Constitution cannot be used for such situations as it provides to an aggrieved person only for the equal protection of the law where the authorities have acted illegally or incorrectly without giving due consideration to the applicable guidelines. Article 12(1) of the Constitution does not provide for any situation where the authorities will have to act illegally. The safeguard retained in Article 12(1) is for the performance of a lawful act and not to be directed to carry out an illegal function. In order to succeed the petitioner must be in a position to place material before this Court that there has been unequal treatment within the framework of a lawful act.

In these circumstances and for the foregoing reasons, The Petitioners are not entitled to succeed with the prayers in this application. I dismiss this application but without costs.

JUDGE OF THE SUPREME COURT

E. A. G. R. AMARASEKARA J

I agree,

JUDGE OF THE SUPREME COURT

A. H. M. D. NAWAZ J

I 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) 383/2016

1. Kaluwahandi Garwin Premalal Silva,
   Galle Road,
   Devinigoda,
   Rathgama.

2. Siyabalapitiyage Don Kusum Chandra Siyabalapitiya,
   No. 253, Samadi Mawatha,
   Welagedara Uyana,
   Kurunegala.

3. Ranasinghe Patikiri Koralalage Anura Wasantha Kumara Ranasinghe,
   No. 90/5, Ranasinghe Mawatha,
   Meegahawatta,
   Siyambalape.

4. Diwale Mahagedara Nilupul Chandana Somasinghe,
   No. 53/01, Bodhiyangana Mawatha,
   Bowala.

5. Mohammed Ramzil Noordeen,

No. 113, Diddeniya Watta,
Dambokka,
Boyagane.

6. Mangala Saman Kumara Wickramanayake,
Balapaththawa,
Awissawella Road,
Galigamuwa Town.

7. Doowage Chanaka Pradeep Kumarasinghe,
Perakum Mawatha,
Medalanda Watta,
Kurunegala.

8. Dewanarayanage Ravindra Sampath Dharmadasa,
No. 260,
Hulangamuwa Road,
Matale.

9. Hettiarachchige Nevil Verginton De Silva,
No. 124/4/A,
Bank Place,
Himbutana,
Mulleriyawa.

10. Hettiarachchige Don Kamal Sanjeewa Perera,
No. 795,

Kularathna Mawatha,
Colombo 10.

11. Hettiarachchi Halpe Kankanamlage
Jagath Chaya Samarasinghe,
No. 39/06,
Wakunagoda Road,
Galle.

12. Welivita Vithanalage Don Gnanabandu
Samanthilake,
No. 04/05, Police Quarters,
Maligawatte,
Colombo 10.

13. Lalith Priyantha Warnakulasooriya,
No. 20, Kirula Place,
Colombo 05.

14. Hemantha Chamindra Ovitigama,
No. 177/7, Kalapaluwawa,
Rajagiriya.

PETITIONERS

Vs.

1. K. W. E. Karaliyadda,
Chairman
National Police Commission.

1A. S. C. S. Fernando,

Chairman,
National Police Commission.

2. Ashoka Wijethilaka,
Member,
National Police Commission.

2A. S. Liyanagama,
Member,
National Police Commission.

3. Savithree Wijesekara,
Member,
National Police Commission.

3A. A. S. P. S. P. Sanjeewa,
National Police Commission.

4. Y. L. M. Zawahir,
Member,
National Police Commission.

4A. N. S. M. Samsudeen,
Member,
National Police Commission

5. Gamini Nawathne,
Member,
National Police Commission.

5A. M. P. P. Perera,
Member,

National Police Commission.

6. Tilak Collure,
   Member,
   National Police Commission.

6A. G. Wickramage,
   Member,
   National Police Commission.

7. G. Jeyakumar,
   Member,
   National Police Commission.

7A. T. P. Paramaswaran,
   Member,
   National Police Commission.

8. Secretary,
   National Police Commission.

   All of whom at the Office of the
   National Police Commission,
   Block No. 9, BMICH Premises,
   Baudhaloka Mawatha, Colombo 07.

9. C. D. Wickramathne,
   Inspector General of Police,
   Police Headquarters,
   Colombo 01.

10. Secretary

Ministry of Public Administration,
Local Government and Democratic
Governance,
Independence Square,
Colombo 07.

10A. Secretary,
Ministry of Public Services,
Provincial Council and Local
Government,
Independence Square,
Colombo 07.

11. Secretary,
Ministry of Law and Order and Southern
Development,
Floor -13, 'Sethsiripaya',
(Stage II),
Battaramulla.

11A. Secretary,
Ministry of Defence, No. 15/5,
Baladaksha Mawatha,
Colombo 03.

11B. Secretary,
Mininstry of Public Security,
"Suhurupaya"
Battaramulla.

12. Hon. Sugala Rathnayaka,

(Former) Minister of Law and Order and Southern Development,
Ministry of Law and Order and Southern Development,
Floor-13,
'Sethsiripaya', (Stage II)
Battaramulla.

12A. Minister of Defence,
Ministry of Defence, No. 15/5,
Baladaksha Mawatha,
Colombo 03.

12B. Hon. Sarath Weerasekara,
Minister of Public Security,
'Suhurupaya',
Battaramulla.

13. Secretary to the Cabinet of Ministers,
Cabinet Office,
The Republic Building,
Colombo 01.

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

RESPONDENTS

15. Hon. Justice Jaagath Balapatabendi,
Chairman,
Public Service Commission.

16. Indrani Sugathadasa,
    Member,
    Public Service Commission.

17. V. Shivagnanasothy,
    Member,
    Public Service Commission.

18. T. R. C. Ruberu,
    Member,
    Public Service Commission.

19. Ahamod Lebbe Mohamed Saleem,
    Member,
    Public Service Commission.

20. Leelasena Liyanagama,
    Member,
    Public Service Commission.

21. Dian Gomes,
    Member,
    Public Service Commission.

22. Dilith Jayaweera,
    Member,
    Public Service Commission.

23. W. H. Piyadasa,
    Member,
    Public Service Commission.

24. M. A. B. D. Senarath,
Secretary,
Public Service Commission.

All of whom at the Office of the Public Service Commission,
No. 1200/9, Rajamalwatta Road,
Battaramulla.

ADDED RESPONDENTS

Before: **P PADMAN SURASENA J**

E. A. G. R. AMARASEKARA J

A. H. M. D. NAWAZ J

Counsel: Harsha Fernando with Chamith Senanayake, Yohan Cooray and Ruven Weerasinghe instructed by J. Talgaswattage for the Petitioners.

Rajiv Goonetilleke, SSC for the Hon. Attorney General.

Argued on: 22-03-2021

Decided on: 16-12-2021

P Padman Surasena J

Petitioners are police officers claiming to have been subjected to various acts of victimization due to political reasons during the period 1994 to 2014.

In 2015, the then Cabinet of Ministers, having considered the Memorandum dated 09-03-2015, under the title "To provide relief to those who were victimized for political reasons", submitted by the then Prime Minister, decided on 08-04-2015 to issue a Public Administration Circular to provide a reasonable period of time for those officers, if any, who have been subjected to political victimization and who wish to seek relief, but not yet submitted their appeals, to submit their appeals. The Cabinet of Ministers also decided to authorize the Secretary Ministry of Public Administration to appoint an official committee comprising of three retired public officers who had served in the

capacity of Additional Secretary or any other similar or higher post to examine the said appeals and make recommendations. The Petitioners have produced the said Cabinet Memorandum dated 09-03-2015 marked **P 1** and the letter dated 05-04-2015 communicating the said Cabinet decision marked **P 2**.

As authorized by the said cabinet decision, the Secretary Ministry of Public Administration had issued the Public Administration circular No. 09/2015 dated 17-04-2015, calling for appeals to be submitted to the Ministry of Public Administration by 05-05-2015. The Petitioners have produced the said Public Administration circular No. 09/2015 marked **P 3**.

The Petitioners as well as the 8th Respondent in their respective affidavits have referred to few more events that had taken place since the issuance of (**P 3**) up to the time of submitting the Cabinet Memorandum dated 06-04-2016 marked **P 9** which will be referred to in the next paragraph. However, they are now history as far as this application is concerned and hence need not be referred to in this judgment.

After the above events, at one point of time, it had come to light that the committees appointed to consider appeals as per the Public Administration circular No. 09/2015 (**P 3**) had made conflicting recommendations in respect of some officers. Then the Minister of Law and Order and Southern Development, by the Cabinet memorandum dated 06-04-2016, sought Cabinet approval to appoint a new three member committee comprising of an Additional Secretary of the Ministry of Public administration and Management, Additional Secretary of the Ministry of Law and Order and Southern Development and a Senior Deputy Inspector General of Police to reconsider and make recommendations on the appeals of police officers who were subjected to political victimization. The Petitioners have produced the said Cabinet Memorandum dated 06-04-2016 marked **P 9**. The 8th Respondent (Secretary-National Police Commission) has produced the said Cabinet Memorandum dated 06-04-2016 marked **8 R5**.

Pursuant to the said Cabinet memorandum (**P 9**) the Cabinet of Ministers decided on 19-04-2016 to approve the said proposal to appoint a three-member committee by the Minister of Law and Order and Southern Development and to forward the

recommendations of the said committee to the Cabinet. The 8th Respondent has produced the said Cabinet decision on 19-04-2016 marked **8 R 6**.

Subsequent to the said committee recommending relief for 129 Police officers, as per a Cabinet decision on 28th of June 2016, the Prime Minister had proposed that those who were not facing any pending disciplinary proceedings, be granted relief without delay. The Prime Minister had also proposed that those who were facing disciplinary proceedings be granted relief if they are exonerated. The Petitioners have produced the said note to the Cabinet dated 26th of July 2016 containing the said proposal by the Prime Minister marked **P 10**. The 8th Respondent has produced the said note to the Cabinet dated 26th of July 2016 marked **8 R 8**.

The Cabinet of Ministers having considered the said Note to the Cabinet forwarded by the Prime Minster (**P 10**) along with the observations of the President and the Minister of Finance, decided by its decisions on 9th August 2016 and 15h August 2017 to direct the Secretary Ministry of Law and Order and Southern Development to implement the proposals recommended in the said Note to the Cabinet (**P 10**) forwarded by the Prime Minister subject to the conditions set out in the said Cabinet Decisions. The 8th Respondent has produced the said Cabinet decisions on 9th August 2016 and 15h August 2017 marked respectively **8 R11** and **8 R12**. The Petitioners have produced the letter dated 11-08-2016 marked **P 11** which has conveyed the Cabinet decision dated 09-08-2016 which also contains an extract of the relevant Cabinet decision.

The Petitioners have produced the aforesaid list containing 129 Police Officers approved by the Cabinet of Ministers for granting of relief, marked **P 12**. This is the list prepared by a committee comprising of Ms. B. M. M. M. Basnayake [Additional Secretary Ministry of Public Administration and Management], Neil Hapuhinna [Additional Secretary Ministry of Law and Order and Southern Development] and Ravi Wijegunawardene [(Senior Deputy Inspector General of Police (North Central and North Western Province)]. The Petitioners state that their names are also included in the said list as persons recommended for relief.

The Petitioners state that while awaiting the implementation of the Cabinet decision marked **P 11** read with **P 12**, they were made aware of the promotion of only three officers from the said list of 129. The Petitioners have produced the copies of the

letters dated 06.10.2016 marked respectively **P 13A**, **P 13B** and **P 13C** by which the promotions of the said three officers namely B.D.S.D.S. Senanayake, M.S.J. De Silva and R.F. Sisil De Silva have been implemented.

The Petitioners complain that the Petitioners and the above named B.D.S.D.S. Senanayake, M.S.J. De Silva and R.F. Sisil De Silva are similarly circumstanced and therefore the non-implementation of the Cabinet decision marked **P11** read with **P12** in respect of the Petitioners by the National Police Commission and/or the Inspector General of Police is discriminatory and hence amounts to an unequal treatment violating the fundamental Rights of the Petitioners guaranteed under Article 12 (1) of the Constitution.

The Petitioners have submitted that the Cabinet decision marked **P11** sought to be implemented by this application should be uniformly applied to all officers named in the list marked **P12**, except those that have disciplinary findings against them. It is in that backdrop that the Petitioners in this application have prayed inter alia, for the following relief in their petition.

a) *Declare that the Petitioners' Fundamental Rights enshrined in Article 12 (1) of the Constitution, have been violated and/or are subject to continuing infringement by one or more of the Respondents due to non-implementation of the recommendations in **P 12** read with **P 11** with regard to the Petitioners;*
b) *Declare that the Petitioners are eligible to be promoted as per the Cabinet decision marked **P11** read with **P 12**;*
c) *Direct the 1st-7th, 8th, 9th, 10th and 11th Respondents to give effect to **P 11** and **P 12** forthwith without discriminating and grant the promotions and appointments to the Petitioners as recommended by **P 12**;*

In the instant case, the Court has granted leave to proceed under Article 12(1) of the Constitution. The complaint made by the petitioners is that they are similarly circumstanced with those who have been promoted namely B.D.S.D.S. Senanayake, M.S.J. De Silva and R.F. Sisil De Silva.

Thus, I would now examine whether the promotion of B.D.S.D.S. Senanayake, M.S.J. De Silva and R.F. Sisil De Silva has been made discriminating the Petitioners thereby infringing their fundamental rights guaranteed under Article 12(1) of the Constitution.

At the outset, one must bear in mind that according to the case advanced by the Petitioners, the promotions of the Petitioners or B.D.S.D.S. Senanayake, M.S.J. De Silva and R.F. Sisil De Silva or any other officer in the given instance is possible only under the terms of the relevant Cabinet decision. As can be clearly seen from the letter marked **P 11** which has conveyed the cabinet decision on 09-08-2016 (upon which the Petitioners have placed reliance) the implementation of the Cabinet decision on 9th August 2016 should necessarily be subjected to the following conditions. The said conditions are mentioned in **P 11** itself as follows.

a) *to grant approval treating this as a matter of policy, to the proposals (I) and (II) in paragraph 03 of the Note;*
b) *to direct the Secretary, Ministry of Law and Order and Southern Development -*
    (i) *to take note of the matters highlighted in the observations of H.E the President and pursue action accordingly, and*
    (ii) *to obtain the concurrence/approval of the relevant authorities prior to implementation of the proposals referred to at (a) above, as indicated in the observations of the Minister of Finance.*

The Affidavit of the 8th Respondent, Nawalage Ariyadasa Cooray - Secretary, National Police Commission sheds some light on the implementation of the relevant Cabinet Decision. He has described the position with regard to implementing the relief recommended in respect of each of the Petitioners after taking into account, the observations received from the 9th Respondent (Inspector General of Police).

The 8th Respondent has produced marked **8 R13**, **8 R14** and **8 R15** respectively, the letters dated 28.09.2016, 10.10.2016 and 26.10.2016 in which the Inspector General of Police has submitted his observations in respect of several of the aforesaid 129 police officers, including the Petitioners.

It is the position of the 8th Respondent that the promotion of the three police officers namely B.D.S.D.S. Senanayake, M.S.J. De Silva and R.F. Sisil De Silva was because

they were not facing any disciplinary proceedings and the dates of their retirement were such that their promotion would not have adversely affected the seniority of the other serving officers.

The 8th Respondent has produced marked **8 R16**, the letters dated 15.09.2016 in which the Inspector General of Police has submitted his observations in respect of some of the aforesaid 129 police officers.

It is the position of the 8th Respondent that the promotion of only the three police officers namely B.D.S.D.S. Senanayake, M.S.J. De Silva and R.F. Sisil De Silva by the National Police Commission was on the above basis and the letters dated 06.10.2016 at **P 13A**, **P 13B** and **P 13C** were sent communicating that decision. It is in those circumstances that the 8th Respondent deny that the Petitioners and the three police officers namely B.D.S.D.S. Senanayake, M.S.J. De Silva and R. F. Sisil De Silva were similarly circumstanced.

The 9th Respondent (Inspector General of Police), in his affidavit, has explained the position with regard to implementing relief recommended in respect of each of the Petitioners by producing the schedule marked **R 4**. Further, the 9th Respondent has explained that the said Cabinet decision on 9th August 2016 must be implemented in such a way that the implementing of the relief recommended by the committee should not affect the seniority of the other serving police officers. This was the observation of the President referred to in the said Cabinet decision. The perusal of the said schedule (**R 4**) clearly shows that wherever possible, the relief recommended for the Petitioners have been implemented subject to the afore-stated conditions. The Petitioners cannot expect more, as the implementation of the Cabinet decision on 9th August 2016 must necessarily be done subject to the aforesaid conditions.

When one peruses the document produced by the Inspector General of Police marked **R 4**, the reasons for implementing relief recommended in respect of the three officers namely B.D.S.D.S. Senanayake, M.S.J. De Silva and R.F. Sisil De Silva are obvious. The relief implemented in respect of the officer B.D.S.D.S. Senanayake was to set aside the vacation of post issued on him, reinstate him on service and retire him with effect from 29-11-1994. The officer M.S.J. De Silva is no longer amongst the living and R.F. Sisil De Silva has retired from service. Thus, in the light of the condition in

the Cabinet decision on 9th August 2016 the implementing of the relief recommended by the committee in respect of the three officers namely B.D.S.D.S. Senanayake, M.S.J. De Silva and R.F. Sisil De Silva has clearly not affected the seniority of the other serving police officers. In the above circumstances, the claim by the Petitioners who are serving Police officers, that they are similarly circumstanced with those who have been promoted namely B.D.S.D.S. Senanayake, M.S.J. De Silva and R.F. Sisil De Silva cannot succeed.

Thus, I conclude that the Petitioners have not been able to prove that the Respondents have infringed the fundamental rights of any of them by promoting the three officers namely B.D.S.D.S. Senanayake, M.S.J. De Silva and R.F. Sisil De Silva as per the Cabinet Decision on 9th August 2016.

Despite the above conclusion, looking at this case from somewhat different perspective, I am prompted to add the following comments also in relation to the promotions of public officers in this country. This is because the Police officers were also basically public officers coming under the purview of the Public Service Commission until the 17th Amendment to the Constitution established the National Police Commission and vested the powers of carrying out functions relating to the appointment, promotion, transfer, disciplinary control and dismissal of police officers other than the Inspector-General of Police, in that Commission. Later, the 20th Amendment to the Constitution repealed Article 155 G which entrusted the aforesaid powers to the National Police Commission bringing back the Police officers again under the purview of the Public Service Commission.

The Public Service Commission was initially established in Sri Lanka by Article 58 of the then existing Constitution of Ceylon. [Ceylon (Constitution) Order in Council 1946 (Chapter 379)]. That Constitution was promulgated as a result of the endeavors of the Soulbury Commission appointed in the years 1944 and 1945 by His Majesty's Government under the chairmanship of the Right Honourable Herwald, Baron Soulbury, O.B.E., M.C., to visit the then Island of Ceylon in order to examine and discuss proposals for constitutional reforms. Thus, it became commonly known as the Soulbury Constitutuion. The country known as Ceylon then, was a member of the British Commonwealth of Nations which had an autonomous state within the British

Empire. Having a common allegiance to the British Crown then was a prominent feature in that Constitution and was compatible with then Dominion Status of Ceylon. Thus, Article 57 of the Soulbury Constitution had expressly provided for the tenure of office of state officers in the following manner.

> *57. Save as otherwise provided in this order, every person holding office under the Crown in respect of the Government of the Island shall hold office during Her Majesty's pleasure.*

However, Article 58(1) of the Ceylon (Constitution) Order in Council 1946, established a Public Service Commission and the said Article read as follows;

> *58. (1) There shall be a Public Service Commission which shall consist of three persons, appointed by the Governor-General, one at least of whom shall be a person who has not, at any time during the period of five years immediately preceding, held any public office or judicial office. The Governor-General shall nominate one of the members of the Commission to be the Chairman*. …..

Article 60 of that Constitution vested the powers of appointment, transfer, dismissal and disciplinary control of public officers in the Public Service Commission. Provisions such as disqualifying the Senators or the Members of Parliament from becoming members of the Public Service Commission,[1] restraining the members of the Public Service Commission from holding any paid office as a servant of the Crown and making them ineligible for subsequent appointment as Public Officers,[2] entitlement of members of the Public Service Commission to hold office for a period of five years from the date of their appointment,[3] the mandatory requirement for the Governor-General to assign a cause when removing any member of the Public Service Commission from his office,[4] the requirement to determine the salary payable to the members of the Public Service Commission by Parliament and the inability to reduce their salaries during their terms of office,[5] were salient features of the Public Service

[1] Article 58 (2) of the Ceylon (Constitution) Order in Council of 1946.
[2] Article 58 (3) of the Ceylon (Constitution) Order in Council of 1946.
[3] Article 58 (4) of the Ceylon (Constitution) Order in Council of 1946.
[4] Article 58 (5) of the Ceylon (Constitution) Order in Council of 1946.
[5] Article 58 (7) of the Ceylon (Constitution) Order in Council of 1946.

Commission under the Soulbury Constitution. Those provisions aimed at maintaining the independence of the Public Service Commission. Thus, right from the inception, the Public Service Commission was an institution meant to be an independent body charged with the powers of appointment, transfer, dismissal and disciplinary control of public officers.

However, the first Republican Constitution (1972) did away with the Public Service Commission and vested the powers of the appointment, transfer, dismissal and disciplinary control of state officers in the Cabinet of Ministers.

Article 106 of the 1972 Constitution read as follows;

> *106. (1) The Cabinet of Ministers shall be responsible for the appointment, transfer, dismissal and disciplinary control of state officers and shall be answerable therefor to the National State Assembly.*
>
> *(2) Subject to the provisions of the Constitution, the Cabinet of Ministers shall have the power of appointment, transfer, dismissal and disciplinary control of all state officers.*
>
> *(3) Subject to the provisions of the Constitution, the Cabinet of Ministers shall provide for and determine all matters relating to state officers including the constitution of state services, the formulation of schemes of recruitment and codes of conduct for state officers, the procedure for the exercise and the delegation of the powers of appointment, transfer, dismissal and disciplinary control of state officers.*
>
> *(4) The Cabinet of Ministers may notwithstanding any delegation of powers as is referred to in this Chapter exercise its powers of appointment, transfer, dismissal and disciplinary control of state officers.*
>
> *(5) No institution administering justice shall have the power or jurisdiction to inquire into, pronounce upon or in any manner call in question any recommendation, order or decision of the Cabinet of Ministers, a Minister, the State Services Advisory Board, the State Services Disciplinary Board, or a state officer, regarding any matter concerning appointments, transfers, dismissals or disciplinary matters of state officers.*

Article 107(1) of the 1972 Constitution expressly provided for the tenure of office of state officers and related powers vested in the National State Assembly in that regard in the following manner;

> 107. (1) Save as otherwise expressly provided by the Constitution, every state officer shall hold office during the pleasure of the President. The National State Assembly may however in respect of a state officer holding office during the pleasure of the President provide otherwise by a law passed by a majority of those present and voting.

Thereafter, the second Republican Constitution (1978) continued to vest the powers of appointment, transfer, dismissal and disciplinary control of public officers in the Cabinet of Ministers. However, there was provision for the Cabinet of Ministers to delegate from time to time, its powers of appointment, transfer, dismissal and disciplinary control of public officers other than Heads of Departments, to the Public Service Commission. Thus, the 1978 Constitution at its inception, re-established the Public Service Commission as a body exercising authority delegated to it by the Cabinet of Ministers.

Article 55 of the 1978 Constitution in its original form was as follows;

> *"55 (1) Subject to the provisions of the Constitution, the appointment, transfer, dismissal and disciplinary control of public officers is hereby vested in the Cabinet of Ministers, and all public officers shall hold office at pleasure.*
> *(2) The Cabinet of Ministers shall not delegate its powers of appointment, transfer, dismissal and disciplinary control in respect of Heads of Departments.*
> *(3) The Cabinet of Ministers may from time to time, delegate its powers of appointment, transfer, dismissal and disciplinary control of other public officers to the Public Service Commission.*
> *Provided that ……."*

Although the original Article 55 of 1978 Constitution chose to continue with the principle that all public officers shall hold office at pleasure,[6] it however made the decisions made by those exercised power under Article 55 amenable to the fundamental rights jurisdiction of the Supreme Court[7] removing hitherto existed bar for any court or institution administering justice to inquire into, pronounce upon or in any manner call in question any such decision. This was a yet another step taken to ensure the correctness of such decisions.

Thereafter, the 17th Amendment to the Constitution which was certified on 03rd October 2001, brought about fundamental changes to the afore-stated original position in the 1978 Constitution. The 17th Amendment to the Constitution repealed the whole of original Chapter IX and substituted it with a new Chapter IX. The changes included the structure of the powers vested in the Cabinet of Ministers in relation to appointment, transfer, dismissal and disciplinary control of public officers. Most importantly, the 17th Amendment to the Constitution transferred the powers of appointment, promotion, transfer, disciplinary control and dismissal of public officers other than the Heads of Department back to the Public Service Commission and abolished the principle that 'all public officers shall hold office at pleasure' which continued to be in the Constitutions of this country from the time of British Colonization period up until the implementation of the 17th Amendment to the Constitution. The Cabinet of Ministers continued to retain the power in relation to appointment, transfer, dismissal and disciplinary control of the Heads of Departments and also retained the power to provide for and determine all matters of policy relating to public officers. The relevant Articles 55 (1), 55(3) and 55(4) introduced by the 17th Amendment to the Constitution read as follows,

> *55 (1) The appointment, promotion, transfer, disciplinary control and dismissal of public officers shall be vested in the Commission.*
>
> *55 (3) Notwithstanding the provisions of paragraph (1) of this Article, the appointment, promotion, transfer, disciplinary control and dismissal of all Heads*

[6] As Article 55(1) of 1978 Constitution stood before the 17th Amendment to the Constitution.
[7] As Article 55(5) of 1978 Constitution stood before the 17th Amendment to the Constitution.

of Departments shall vest in the Cabinet of Ministers, who shall exercise such powers after ascertaining the views of the Commission.

55 (4) Subject to the provisions of the Constitution, the Cabinet of Ministers shall provide for and determine all matters of policy relating to public officers.

Article 55 (5) introduced by the 17th Amendment to the Constitution states that the Public Service Commission will carry out its affairs according to the policies laid down by the Cabinet of Ministers and the Public Service Commission is answerable to the parliament in regard to carrying out its functions.

Article 59 brought in by the 17th Amendment to the Constitution also introduced a procedure to enable any aggrieved party to challenge the decisions made by the Public Service Commission by way of preferring an appeal to the Administrative Appeals Tribunal appointed by the Judicial Service Commission which was given an appellate power to alter, vary or rescind any order or decision made by the Public Service Commission.

The 17th Amendment to the Constitution continued to preserve the fundamental rights jurisdiction of the Supreme Court over the decisions made by the relevant bodies in the following manner;

Article 61A.

Subject to the provisions of paragraphs (1), (2), (3), (4) and (5) of Article 126, no court or tribunal shall have power or jurisdiction to inquire into, or pronounce upon or in any manner call in question any order or decision made by the Commission, a Committee, or any public officer, in pursuance of any power or duty conferred or imposed on such Commission, or delegated to a Committee or public officer, under this Chapter or under any other law.

Another important change that was introduced by the 17th Amendment to the Constitution is the insertion of a new Chapter XVIIIA immediately after Article 155 of the Constitution establishing the National Police Commission by Article 155A thereof and vesting it with powers in relation to the appointment, promotion, transfer, disciplinary control and dismissal of police officers other than the Inspector-General of Police. Article 155G which vested those powers in the National Police Commission was as follows,

155G. (1) (a) The appointment, promotion, transfer, disciplinary control and dismissal of police officers other than the Inspector-General of Police, shall be vested in the Commission. The Commission shall exercise its powers of promotion, transfer, disciplinary control and dismissal in consultation with the Inspector-General of Police.

(b) The Commission shall not in the exercise of its powers under this Article, derogate from the powers and functions assigned to the Provincial Police Service Commissions as and when such Commissions are established under Chapter XVIIA of the Constitution.

(2) The Commission shall establish procedures to entertain and investigate public complaints and complaints of any aggrieved person made against a police officer or the police service, and provide redress in accordance with the provisions of any law enacted by Parliament for such purpose.

(3) The Commission shall provide for and determine all matters regarding police officers, including the formulation of schemes of recruitment and training and the improvement of the efficiency and independence of the police service, the nature and type of the arms, ammunition and other equipment necessary for the use of the National Division and the Provincial Divisions, codes of conduct, and the standards to be followed in making promotions and transfers, as the Commission may from time to time consider necessary or fit.

(4) The Commission shall exercise all such powers and perform all such functions and duties as are vested in it under Appendix I of List I contained in the Ninth Schedule of the Constitution.

However, the 18th Amendment to the Constitution which was certified on 09th September 2010, repealed Article 155G; it also repealed hitherto existed Article 55 and replaced it with new Article 55 which is as follows;

55. (1) The Cabinet of Ministers shall provide for and determine all matters of policy relating to public officers, including policy relating to appointments, promotions, transfers, disciplinary control and dismissal.

(2) The appointment, promotion, transfer, disciplinary control and dismissal of all Heads of Department shall, vest in the Cabinet of Ministers.

(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.

(4) The Commission shall not derogate from the powers and functions of the Provincial Public Service Commissions as are established by law.

(5) The Commission shall be responsible and answerable to Parliament in accordance with the provisions of the Standing Orders of Parliament for the exercise and discharge of its powers and functions. The Commission shall also forward to Parliament in each calendar year, a report of its activities in respect of such year.

That resulted in re-transferring the National Police Commission's powers in relation to the appointment, promotion, transfer, disciplinary control and dismissal of police officers back to the Public Service Commission. This brought the police officers back under the category of public officers coming under the purview of the Public Service Commission. All matters pertaining to the appointment, promotion, transfer, disciplinary control and dismissal of police officers pending before the National Police Commission stood transferred to the Public Service Commission by virtue of section 36(5) of the 18th Amendment to the Constitution.

This also brought the power to provide for and determine all matters of policy relating to police officers back under the Cabinet of Ministers by virtue of Article 55 (1) introduced by the 18th Amendment to the Constitution.

In the instant case, it was in the year 2015 that the then Cabinet of Ministers having considered the Memorandum dated 09-03-2015[8] under the title "To provide relief to those who were victimized for political reasons" submitted by the then Prime Minister, had decided on 08-04-2015, to issue a Public Administration Circular calling for the officers subjected to political victimization who wish to seek relief, to submit their appeals to be considered by a committee comprising of three retired public officers appointed by the Secretary Ministry of Public Administration. As the 18th Amendment to the Constitution came into force with effect from 09th September 2010, the powers

[8] Produced marked **P 1**.

in relation to the appointment, promotion, transfer, disciplinary control and dismissal of public officers including the police officers was with the Public Service Commission and the power to provide for and determine all matters regarding public officers including the police officers, was with the Cabinet of Ministers.

It was in the year 2016 that the Cabinet of Ministers had decided (**8R 11**) to direct the Secretary Ministry of Law and Order and Southern Development to implement the proposals recommended by the Basnayake Committee treating that decision as a matter of Policy. The law had changed by that time as the 19th Amendment to the Constitution came into force with effect from 15th May 2015.

The 19th Amendment to the Constitution re-transferred the powers in relation to the appointment, promotion, transfer, disciplinary control and dismissal of police officers back to the National Police Commission from the hands of the Public Service Commission. It re-introduced an article numbered 155G in the following form;

> *155G. (1) (a) The appointment, promotion transfer, disciplinary control and dismissal of police officers other than the Inspector-General of Police, shall be vested in the Commission. The Commission shall exercise its powers of promotion, transfer, disciplinary control and dismissal in consultation with the InspectorGeneral of Police.*
>
> *(3) The Commission shall, in consultation with the Inspector-General of Police, provide for and determine all matters regarding police officers, including:-*
>
> > *(a) the formulation of schemes of recruitment, promotion and transfers, subject to any policy determined by the Cabinet of Ministers pertaining to the same;*
> >
> > *(b) training and the improvement of the efficiency and independence of the police service;*
> >
> > *(c) the nature and type of the arms, ammunition and other equipment necessary for the use of the National Division and the Provincial Divisions; and*

(d) codes of conduct and disciplinary procedures.

(4) The Commission shall exercise all such powers and discharge and perform all such functions and duties as are vested in it under Appendix I of List I contained in the Ninth Schedule to the Constitution.

Thus, after the 19th Amendment to the Constitution it was the National Police Commission which was charged with the power to provide for and determine all matters regarding police officers, including the formulation of schemes of recruitment and promotion in consultation with the Inspector-General of Police, subject to any policy determined by the Cabinet of Ministers pertaining to the same. This was the legal position existed when the Cabinet of Ministers made the decision contained in **8R 11** on 09-08-2016.

Let me now examine the scope of power that should have been exercised by the Cabinet of Ministers at the relevant time. It is important to bear in mind that the policies the Cabinet of Ministers are empowered to make must be only to lay down mere schemes of promotions in the nature of general rules and regulations and not decisions to promote any individual public or Police officer. On the other hand, any recommendation made by the Cabinet of Ministers to promote individuals cannot be categorized as policy decisions falling under Article 55(1) or 155G 3(a) of the Constitution. This is reflected in the following judicial precedence which interpreted Article 55 as it stood at the times of those relevant judgments.

The case of Abeywickrema Vs. Pathirana,[9] is an election petition where the petitioner in that case challenged the validity of the election of the 1st respondent in that case as a Member of Parliament for Akmeemana electorate. The said petitioner sought a declaration that the election of the said respondent is void in law on the ground that he was a public officer and was therefore disqualified under Article 91 (1) (d) (vii) of the Constitution for election as a Member of Parliament. The said respondent was a principal of a school coming under the Department of Education which meant that he was a public officer. The petitioner in that case argued that although the 1st respondent in that case (school principal) had submitted a letter of resignation from

[9] 1986 (1) Sri L. R. 120.

the said public service position, that letter of resignation was neither submitted nor accepted by the due authority. This was because the 1st respondent in that case (school principal) had tendered his resignation to the Regional Director of Education of the area where he was serving and getting that resignation accepted by the Regional Director who relieved him from his duties; according to the petitioner in that case, the said process did not effectively terminate the services of the said 1st respondent (school principal) as a public officer, to qualify him as a candidate at a parliamentary election. It was on that basis that the said petitioner sought to argue that there had been no valid resignation in fact or in law by the said 1st respondent school principal who was therefore disqualified under the aforementioned provision to be a Member of Parliament as he had continued to hold a public office. Delivering the majority judgment of Court in 1986, Chief Justice Sharvananda interpreting Article 55(4) of 1978 Constitution as it stood before the 17th Amendment to the Constitution, held that the Constitution of 1978 has given a statutory dimension to the Establishments Code and the said 1st respondent (school principal) was bound by section 4 of the Establishments Code to obtain proper acceptance of his resignation. The Chief Justice further holding, that the said letter of resignation did not bring about a valid termination of the said school principal's contract of service because it was neither addressed nor accepted by the Appointing Authority i.e., the Educational Services Committee; and that the Regional Director, Galle is not the proper authority to accept the resignation; went on to state in his judgment the following;

> *"Article 55(4) empowers the Cabinet of Ministers to make rules for all matters relating to public officers, without impinging upon the overriding powers of pleasure recognised under Article 55(1). Matters relating to 'public officer' comprehends all matters relating to employment, which are incidental to employment and form part of the terms and conditions of such employment, such as provisions as to salary, increments, leave, gratuity, pension, and of superannuity, promotion and every termination of employment and removal from service. The power conferred on the Cabinet of Ministers is a power to make rules which are general in their operation though they may be applied to a particular class of public officers. This power is a legislative power and*

this rule making function is for the purpose identified in Article 55(4) of the Constitution as legislative not executive or judicial in character."

His Lordship Justice Wanasundara who was one of the members of the five-judge bench which heard the above case, did not agree with the majority judgment in that case and delivered a dissenting judgment. However, His Lordship Wanasundara J cited the above passage in his judgment in the case of The Public Service United Nurses Union Vs. Montague Jayawickrama, Minister of Public Administration and others.[10] This was because the majority judgment in Abeywickrema 's case which existed at the time was binding on Court.

In that case, the Public Services United Nurses Union (Petitioner) to which the majority of the Government nurses at that time had belonged, struck work demanding an increase in their salaries. The strike was considered illegal because the relevant service was declared an essential service by His Excellency the President under the Emergency (Miscellaneous Provisions and Powers) Regulation No. 3 of 1986. The Government then decided to treat those who struck work as having vacated their posts and took steps to evict those who occupied Government quarters. However, the strike was eventually settled, the notices of vacation of post were withdrawn and those nurses were allowed to resume work without loss of back pay. Subsequently, the Cabinet of Ministers decided to award a special ad hoc benefit of two increments to the nurses who were members of a rival trade union i.e., the Public Services United Nurses Union, who had worked during the entirety of the strike period and one increment to the nurses who reported for duty at various later stages. The petitioner union challenged the said Cabinet decision on the basis that it was a serious infringement of its members' fundamental right of equality guaranteed under Article 12 of the Constitution. His Lordship Justice Wanasundara having noted that an increment in the public service according to the existing rules and regulations has to be earned by a public officer by satisfactory work and conduct during a specified period of time, namely, one year; and any stoppage, postponement or deprivation of an increment has to be in the nature of a penalty consequent to disciplinary action against a public officer; and held that instantly rewarding particular public officers with one or

[10] 1988 1 Sri L. R. 229.

two increments and placing the others at a disadvantage in relation to them, goes against the grain of the existing administrative provisions and the legitimate expectations which public servants entertain based on the principles and policies existing in the Establishments Code and the Administrative Regulations. Justice Wanasundara went on to state in the judgment, the following as well;

> *"When Article 55 of the Constitution vests authority over public affairs in the Cabinet and make it mandatory for the Cabinet to formulate schemes of recruitment, and codes of conduct for public officers, the principles to be followed in making promotions and transfers etc., the Constitution contemplated fair, and uniform provisions in the nature of general rules and regulations and not action that is arbitrary or ad hoc or savouring of bias or discrimination".*[11]

Time and again, this Court has held that the promotions of public servants must be carried out according to the schemes specified by the Government. The seniority of a public servant has always been an important component which is required to be given due weight in such schemes. In the case of A. H. Wickramatunga and three others Vs. H. R. de Silva and fourteen others,[12] the Supreme Court referred to the principles in the International Covenant on Economic, Social and Cultural Rights (ICESCR) and stated as follows;

> "….*[I]n a scheme of promotion based on 'Seniority' and 'Merit', sufficient weightage must always be given to 'Merit' based upon a proper assessment of actual past performance: efficiency, productivity, timeliness, accuracy, initiative, creativity, ability to work with others, co-operation etc. Article 7 of the International Covenant on Economic, Social and Cultural Rights recognizes the right to an "equal opportunity for everyone to be promoted in his employment to an appropriate higher level,* ***subject to no considerations other than those of seniority and competence."*** *[Emphasis Added]*

[11] Supra, at page 237; this case also interpreted Article 55 as it stood before the 17th Amendment to the Constitution.
[12] SC (FR) 551/98; decided on 31-08-2001.

His Lordship Justice Fernando may have thought it fit to refer to ICESCR in the above case because the Democratic Socialist Republic of Sri Lanka has become a state party to the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1980 by way of accession.

In the instant case, the observations of the president referred to in the relevant cabinet decision to preserve the seniority of the serving police officers is in conformity with the above principle. In terms of Article 155 G of the Constitution, the National Police Commission which was vested with the powers relating to promotions of Police officers at the relevant time, was required to act in consultation with the Inspector General of Police. Thus, it was in order for the National Police Commission, to take into consideration, the relevant observations of the Inspector General of Police (9th Respondent). This Court cannot ignore the seniority of the serving police officers and give directions to promote officers who are less senior merely because the political victimization committee had recommended to do so. The Supreme Court cannot be, and should not become, a mere rubber stamp to endorse any such recommendation of a political victimization committee.

The Case of Poojya Mawanane Sominda Thero and thirteen others Vs. V. K. Nanayakkara and eleven others,[13] also stands as a good example to understand the scope of power vested in the Cabinet of Ministers to provide for matters of policy. That case was in relation to an implementation of a Cabinet decision concerning Pirivena Education. The Petitioners in that case were Lecturers attached to the Seethawakapura Pirivena Teacher Training Institute at Avissawella and Coordinators attached to the Provincial Education Offices. They claimed that according to Pirivena Education Act, No. 64 of 1979, the Government assumed the responsibility of assisting Pirivena education to function parallel to education offered by State. In order to recommend inter alia, changes that should be effected to the above Act, the Government appointed a committee in 1994 to submit its recommendations to the Ministry of Education. The said petitioners sought the implementation of the Cabinet decision based on the afore-stated recommendations. The petitioners in that case complained to Court, that the relevant Committee of the Public Service Commission

[13] SC (FR) 146/2003; decided on 15-07-2004.

should have implemented the said policy decisions and the non-implementation of those recommendations had caused a serious violation of their fundamental rights. Her Ladyship Justice Shirani A Bandaranayake,[14] having considered whether the relevant decision taken by the Cabinet of Ministers pertains to a matter of policy coming under the purview of Article 55(4) introduced by the 17th Amendment to the Constitution, stated in her judgment as follows.

> *The Concise Oxford Dictionary refers to a matter of policy as the 'course or general plan of action to be adopted by government, party or a person'. Professor Galligan, on the other hand, defines a decision of policy in the following words (Due Process and Fair Procedures, Clarendon Press, Oxford, 1996, pg. 454),*
>
> *"A decision of policy is one where the authority has to draw on general considerations of a social, economic or ethical kind in deciding an issue, where the decision is likely to affect a range of groups and interests."*
>
> *Accordingly, the general norm in the definition of 'a policy matter' would be for the action taken to be for the common good. As pointed out by Professor Galligan (supra) while interests and claims of individuals and groups are ingredients to be added to the cauldron of policy- making the final decision should reach beyond particular concerns to a broader sense of the interests of all". The necessity for the generalization therefore would be the essential ingredient in defining 'policy' and this is clear as one examines the meaning given to the said word in the Oxford Companion to Law, where it reads thus:*
>
> *"The general consideration which a governing body has in mind in legislating, deciding on a course of action or otherwise acting (David Walker; Clarendon Press Oxford, 1980. pg.965)."*
>
> *Therefore, a policy decision necessarily will have to be applicable in general and cannot be interpreted to include specified persons.*

[14] (Later became Chief Justice).

The Cabinet Memorandum dated 03.09.2001 (1 R3) basically deals with 3 main items. The first item is with regard to the creation of a post designated as Assistant/Deputy Director (Pirivena) for each Provincial Department of Education. The second item refers to the absorption of 8 priests who were holding the positions as Pirivena Coordinators in different provinces. The third item is the upgrading of the ten Lecturers presently attached to the Sudharmarama Pirivena at Avissawella. An examination of the said items would clearly indicate that item 1.1 of the Memorandum clearly deals with a policy matter as it relates in general to the creation of a specific post. The second limb of this item, viz., item 1.2 however refers to the appointment of 8 selected persons and thereby is not in a category which deals with policy matters. This could have been avoided, if there was no special reference to the appointment of 8 persons who were holding positions as Pirivena Co-ordinators. The next item in the Memorandum is not dealing with a policy matter as it clearly refers to the absorption of 10 lecturers who had been serving for a period of over 10 years at the Sudharmarama Pirivena at Avissawella.

In the circumstances, it is apparent that the first item which deals with the creation of a post designated as Assistant/Deputy Director (Pirivena) for each Provincial Department of Education deals with a policy matter and the other two items do not come within the category of policy.

Furthermore, in Black's Law Dictionary a policy is defined: in its 5th edition, as '*The general principles by which a government is guided in its management of public affairs, or the legislature in its measures'* ; and in its 11th edition, as '*A standard course of action that has been officially established by an organization, business, political party, etc.'* Thus, all the above material clearly indicate that a policy decision must be applicable in general as opposed to specific individuals. If a particular policy decision focuses on specific individuals and fails to be applicable in a general context, it will not fall within the ambit of a policy decision.

Therefore, it is apparent that in the instant case, the petitioners cannot rely on the relevant Cabinet Decision to get relief on the basis that their names are included in a

report of a political victimization committee as such a decision cannot be considered as a decision pertaining to a matter of policy for the aforementioned reasons.

I need to mention here a yet another relevant matter. We have a legal system which reasonably protects the citizens' rights including fundamental rights. In such a situation the Petitioners who complain about infringement of their fundamental rights must first show as to why they did not seek an appropriate relief from Court at the time they were politically victimized, if in fact such a victimization had occurred as alleged. On the other hand, if the Petitioners had indeed sought relief from a Court, they should have revealed the details and outcome of such action. The absence of the above explanations, would further vitiate the Petitioners' claim that they were indeed politically victimized. Thus, the Petitioners cannot now complain that their fundamental rights have been violated by the Cabinet of Ministers which anyway did not have power to deal with individual promotions as shown above. This Court cannot directly or indirectly enforce recommendations made solely on political reasons, by implementing recommendations made by a Political Victimization Committee. Such actions would indeed negate the advancement of equal protection of law principle enshrined in Article 12 (1) of the Constitution.

Let me conclude this judgment citing the following passage from the judgment of Her Ladyship Justice Shirani Bandaranayake (as she then was) in the case of Farook Vs Dharmaratne, Chairman, Provincial Public Service Commission, Uva and others.[15]

> *The petitioner's relief sought from this Court is to declare that his transfer as Principal of Pitarathmale No. 1 Tamil Vidyalaya, Haputale and the 6th respondent's transfer as Principal of Sri Razick Fareed Maha Vidyalaya, Bandarawela are null and void. In view of the forgoing analysis of the material placed before this Court the petitioner has no right to be the Principal of Razick Fareed Maha Vidyalaya as he has not got the requisite qualifications. However, the petitioner quite clearly has sought to obtain relief on the basis of unequal treatment. When a person does not possess the required qualifications that is necessary for a particular position, would it be possible for him to obtain relief in terms of a violation of his*

[15] 2005 (1) Sri L. R. 133 at page 140.

fundamental rights on the basis of unequal treatment ? If the answer to this question is in the affirmative, it would mean that Article 12(1) of the Constitution would be applicable even in a situation where there is no violation of the applicable legal procedure or the general practice. The application of Article 12(1) of the Constitution cannot be used for such situations as it provides to an aggrieved person only for the equal protection of the law where the authorities have acted illegally or incorrectly without giving due consideration to the applicable guidelines. Article 12(1) of the Constitution does not provide for any situation where the authorities will have to act illegally. The safeguard retained in Article 12(1) is for the performance of a lawful act and not to be directed to carry out an illegal function. In order to succeed the petitioner must be in a position to place material before this Court that there has been unequal treatment within the framework of a lawful act.

In these circumstances and for the foregoing reasons, The Petitioners are not entitled to succeed with the prayers in this application. I dismiss this application but without costs.

JUDGE OF THE SUPREME COURT

E. A. G. R. AMARASEKARA J

I agree,

JUDGE OF THE SUPREME COURT

A. H. M. D. NAWAZ J

I agree,

JUDGE OF THE SUPREME COURT

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

In the matter of an application under Article 126 of the Constitution of Sri Lanka.

Herath Mudiyanselage Wasantha Anura Kumara of Thammitagama, Nagollagama.

Petitioner

S.C. (FR) Application No: 388/2010

Vs.

1. Headquarters Inspector Channa Abeyratne
   Police Station, Maho.
2. Sub-Inspector of Police Ananda
   Police Station, Maho.
3. Police Sergeant 55008 Asanka
   Police Station, Maho.
4. Police Constable 55037 Navaratne
   Police Station, Maho.
5. Deputy Inspector General of Police
   North Western Province,
   D. I. G's Office, Kurunegala.
6. Mahinda Balasuriya,
   Inspector General of Police,
   Police Headquarters,
   Fort, Colombo 1.
7. The Hon. Attorney General,
   Attorney General's Department,
   Hulftsdorp, Colombo 12.

Respondents

Before:	Buwaneka Aluwihare, PC, J. L.T.B. Dehideniya, J. S. Thurairaja, PC, J.
Counsel:	K. Tiranagama with Mahbooba Rifaideen and Swarnapali Wanigasekera for the Petitioner. Anura Meddegoda, PC, with Nadeesha Kannangara for the 1st Respondent. Induni Punchihewa, SC, for the 2nd – 7th Respondents.
Argued on:	14. 01. 2020
Decided on:	26. 07. 2021

Judgement

Aluwihare PC. J.,

The Petitioner, a tenant cultivator, complained of the violation of his fundamental rights guaranteed under Articles 12 (1), 13 (1) and 13 (2) of the Constitution by the 1st, 2nd, 3rd and 4th Respondents. Leave to proceed was granted for the alleged infringement of Articles 12 (1) and 13 (1) by the said Respondents.

The Version of the Petitioner

(1) The Petitioner is a tenant cultivator of a land called Kolongahamulla Henyaya in Ratmale, Nagollagama. According to the Petitioner, he had cultivated Papaya in an extent of 5 acres. The Petitioner asserts that, on 7th June 2010, after he returned home having worked at his papaya plantation, at around 5.30 pm, Police Sergeant Asanka [the correct name is 'Asoka'], the 3rd Respondent and Police Constable Navaratne, the 4th

Respondent came to his house, and took him into custody, stating that Venerable Bandiyawatte Pannananda Thero of the Nagollagama Raja Maha Viharaya had made a complaint against him, and had brought him to the Maho Police Station, which was about 14 km away from his home. He had been detained at the Police Station until the arrival of 1st Respondent, the Headquarters Inspector [HQI].

(2) According to the Petitioner, the 1st Respondent had arrived at the Police Station at around 11.30 pm and admonished the Petitioner and had warned him; not to step into the papaya plantation hereafter. The 1st Respondent had threatened that he would break the Petitioner's legs and have him jailed for seven-eight months, if he dared to enter the plantation again. The Petitioner claims that he was only allowed to go home around midnight. He had returned home with his uncle Sunil on his motorcycle, who had come to the police station on hearing that the Petitioner had been brought to the police station.

(3) The Petitioner alleges that it was the 1st Respondent who was mainly responsible for his arrest and detention, from about 5.30 pm to 12 midnight, at the Maho Police Station. The Petitioner has tendered two Affidavits in support of his allegation that it was the 1st, 3rd and 4th Respondents who were responsible for his arrest; one, being the Affidavit of the Petitioner's mother, Anulawathie Kumari ('P6') and the other being the Affidavit of a co-worker, Weerasiri Dissanayake ('P7'). Both of them have affirmed that they witnessed the arrest of the Petitioner by the police officers, in the manner alleged by the Petitioner.

(4) The Petitioner's mother states in her Affidavit that, after her son was taken away in a Police Jeep, she went to her brother, Nandasena's house where her other brother Sunil had also been present. She states that she related to them, as to what happened and sought their help. She claims that in response to her plea, her brother Sunil went to the Maho Police Station on his motorcycle and returned with her son late at night. She

states that when dropping off her son, Sunil told them that he secured the Petitioners' release on bail upon the arrival of the H.Q.I. (the 1st Respondent).

(5) Weerasiri Dissanayake, who worked in the Petitioner's papaya plantation states that after work, he accompanied the Petitioner to his house so that he could receive his day's wages. He states that he saw three police officers arrive at the Petitioner's house in a police jeep and that he saw them take the Petitioner with them. He states that the Petitioner's mother then went to Nandasena's house to inform him of what had happened. The Affirmant states that he then stayed at the house till the Petitioner's return. He states that the Petitioner was dropped off by his uncle Sunil around midnight, and that he heard him say that he (Sunil) secured his release on bail.

(6) Although the Petitioner, in his petition, had averred that some damage had been caused to his plantation on the following day, i.e., 8th of June, those events, have no bearing on deciding the issues before us. As such I do not wish to refer to those events here.

The Version of the 1st Respondent

(7) According to the 1st Respondent, on 7th June 2010, at 11.30 am he had left for "Mahawa Jayasumana Pirivena" to put in place security measures, in connection with the visit of the Hon. Prime Minister to the temple on that day. In support of this assertion, he has annexed copies of the relevant "out" and "in" entries made by him in the Daily Information Book [DIB] maintained at the Maho Police Station ['1R2'].

(8) The 1st Respondent's position is that, in the afternoon, whilst the 1st Respondent was on duty, Ven. Bandiyawatte Pangnananda Thero of Nagollagama Raja Maha Viharaya had informed the Maho Police over the telephone that the Petitioner had encroached upon a land belonging

to the said priest and had commenced cultivating the said land. Thereupon, the 1st Respondent had directed the 3rd Respondent to investigate into this complaint and to advise the parties to maintain peace. On the instructions of the 1st Respondent, the 3rd and 4th Respondents had proceeded to the Nagollagama Temple, and the 4th Respondent had recorded a statement from the priest with regard to the complaint he had made against the Petitioner [A copy of the statement of the priest has been annexed marked '1R4']. According to the entry made by the 3rd Respondent at the police station, whilst the statement of the priest was being recorded by the 4th Respondent, he had made observations of the land in question.

(9) After meeting the priest, the 3rd and 4th Respondents had met the Petitioner and informed him about the complaint against him. According to these Respondents, the Petitioner had informed the 3rd and 4th Respondents that he had just returned home from his cultivation and that he would come to the Police station later that day. The 3rd and 4th respondents had advised the Petitioner to do so and had returned to the Police Station. A copy of the notes of investigation of the 3rd and 4th respondents recorded on 7th June 2010, has been produced marked '1R5'.

(10) On the same day the Petitioner had come to the Police Station as undertaken by him and his statement had been recorded by the Police. In his statement, the Petitioner insists that the dispute over the ownership of the land that is being cultivated by him, had already been settled with the true owner of the land on 5th May 2010 and that the Petitioner would be leaving the land in 4 months' time ('1R5').

(11) The 1st Respondent had categorically denied that the Petitioner was arrested and brought to the Police Station. His position is that the Petitioner attended the police station on his own volition. An Affidavit

from the Petitioner's uncle Sunil has been tendered, in order to substantiate the position that the Petitioner went to the Police Station on his own volition ('IR7').

(12) The 1st Respondent claims that the Petitioner had wished to meet him but as he was not at the Police station the Petitioner had opted to wait for the 1st Respondent's return. The 1st Respondent states that when he returned to the Police station at around 10 pm, the Petitioner informed him that the priest had made a further complaint against him. The 1st Respondent states that he advised the Petitioner to maintain peace and to resolve the matter after consulting Mrs. Chandrika Samarasuriya, who according to the Petitioner, had title to the disputed property. The 1st Respondent claims that at no point in time was the Petitioner subjected to unlawful arrest and/or detention, and that the Petitioner on his own volition remained there until the 1st Respondent returned to the Police Station.

(13) Further, the 1st Respondent had denied the allegation that he abused and/or threatened the Petitioner and had stated that, had he conducted himself in the manner alleged by the Petitioner, the Petitioner's uncle Sunil who was present at the time would have witnessed such incident. Sunil, however, had not made reference to any abuse and/or threat by the 1st Respondent, in his Affidavit ['1R6'].

(14) The main form of evidence, in support of the 1st Respondent's version of the incident, emanates from the Affidavit of the Petitioner's uncle, Sunil. He had averred that he along with the Petitioner went to the Police Station on a motorcycle and both of them left the police station around 11.00 pm. Strangely, Sunil is silent on the aspect of the Petitioner being abused and/or threatened by the 1st Respondent. It is pertinent to note that in the counter affidavit filed by the Petitioner, he had failed to explain the discrepancy between his version and the version given by his uncle Sunil, particularly with regard to the arrest of the Petitioner.

Violation of Article 13 (1)

(15) Article 13 (1) of the Constitution stipulates that "*No person shall be arrested except according to procedure established by law. Any person arrested shall b*

(16) *e informed of the reason for his arrest.*" The Petitioner alleges that the 1st Respondent is mainly responsible for the illegal arrest on 7th June 2010, while the 3rd and 4th Respondents were guilty of the same, as they carried out the orders of the 1st Respondent.

(17) In the instant case, the material before this court, to determine whether there has been a transgression of Article 13 (1) is the assertion of the Petitioner, which is supported by 2 Affidavits on the one hand and the assertion of the 1st Respondent supported by an Affidavit [of Sunil] and the relevant excerpts from the Police Information Book ('1R2', '1R3', '1R4' and '1R5') on the other.

Was the Petitioner subjected to an illegal arrest?

(17) Article 13 (1) is comprised of two limbs.

(a) The arrest should be in accordance with the procedure established by law.

(b) The person being arrested shall be informed of the reasons for his arrest.

The above postulates that before the police deprive any person of his or her personal liberty, in the course of discharging what they conceive to be the powers vested in them, the procedure prescribed by law must be strictly adhered to and must not be departed from, to the disadvantage of the person affected.

(18) The phrase 'procedure established by law' refers to the ordinary and well-established rules of the Code of Criminal Procedure Act No.15 of 1979 read with the amendments thereto.

According to Section 23 (1) of the Code of Criminal Procedure Act; *"In making an arrest the person making the same shall actually touch or confine the body of the person to be arrested unless there be a submission to the custody by word or action and shall inform the person to be arrested of the nature of the charge or allegation upon which he is arrested."*

(19) The Petitioner denies that on 7th June 2010, he visited the Maho Police Station on his own volition and asserts that he was arrested by the 3rd and 4th Respondents and taken to the Maho Police Station. The Petitioner further states that when the 3rd and 4th Respondents arrested him, he was informed by them that the priest concerned, had made a complaint against him.

(20) In the instant case, the question arises as to whether the Petitioner was arrested as alleged by him in the first place. The version of the Respondents is that the Petitioner was requested to come to the police station in order to inquire into the complaint made by the priest. The sequence of events averred by the 1st Respondent is as follows;

i. The 1st Respondent maintains that whilst he was on duty at a location outside the police station, he was informed over the phone that the priest concerned had lodged a complaint against the Petitioner.
ii. He gave instructions to the 3rd Respondent to conduct investigations into the said complaint.
iii. The 3rd and 4th Respondents having gone to the Temple, had recorded the statement of the priest. According to the same ['1R4'] the statement had been recorded at 5.40 pm and the officers have returned to the police station at 7.35 pm.
iv. The return entry reveals that the officers had returned to the station after having inspected the land over which the dispute

had arisen and after meeting the Petitioner and instructing him to come to the police station for an inquiry.

v. According to the entry made in CIB at 8.15 pm ['1R5'] the Petitioner 'had appeared at the police station as instructed'. The 3rd Respondent had then proceeded to record the statement of the Petitioner.

vi. This position is supported by Sunil who states in his Affidavit that his nephew [the Petitioner], intimated to him that officers of the Maho police station had requested him to attend the police station.

vii. Sunil, in his Affidavit, states that around 6.00 pm the Petitioner left for the police station [on a motorcycle] and he also went there.

viii. It is common ground that the Petitioner was allowed to return home and the 1st Respondent's version is that the Petitioner had waited at the police station until his arrival at the police station.

(21) Upon consideration of the material placed before court, this court cannot attribute any reason to disregard the version of the Respondents, especially in light of the fact that the Petitioner had not controverted the averments of the affidavit of his uncle, Sunil.

(22) It is to be noted that, as per paragraph 31 of the petition, the Petitioner is seeking an order from this court in the form of a declaration relating to the transgression of his fundamental rights of *"freedom from arbitrary arrest and illegal detention and equality and equal protection of the law…"* in connection with the events of 7th June 2010. Although the petition had referred to a series of subsequent events, those events in my view are not relevant in deciding whether there had been an illegal arrest and/or detention of the Petitioner on 7th June 2010.

(23) This court is mindful of the fact that the burden of establishing the alleged violations is squarely on the Petitioner. The duty of the police is to investigate

offences using the lawful powers vested with them. In the instant case, there in fact was a complaint against the Petitioner and when one considers the totality of the facts, this court cannot say with certainty that the Petitioner was arrested as alleged by him. Going by the notes of investigation, his statement relating to the complaint made by the priest had been recorded sometime after 8.00 pm. According to Sunil, he and the Petitioner had left the police station around 11.00 pm. According to the 1st Respondent, he had not been at the police station when these investigative steps were taken at the police station and the Petitioner had remained at the station on his own volition, wanting to meet the 1st Respondent. This position of the 1st Respondent cannot be rejected either.

(24) In the circumstances, this court is required to give its mind as to whether the Petitioner has discharged the burden of establishing the alleged violations under Article 12 (1) and Article 13 (1) of the Constitution.

(25) As his Lordship Justice Amerasinghe observed, in the case of **Samanthilaka v. Ernest Perera and Others** 1990 1 SLR 318, where leave to proceed was granted for the alleged violation of Article 13 (1) of the Constitution among others; *"Being serious allegations of misconduct on the part of an agent of the State-the police-I looked with caution for a high degree of probability in deciding which of the facts alleged had been established."* (at page 320)

(26) This court has consistently held that the burden is on the person who alleges the transgression of his fundamental rights, to establish the violations alleged, with a high degree of probability. Upon a careful consideration of the affidavits and examination of the other material filed in this case, on behalf of both the Petitioner and the Respondents together with the analysis of the material by the learned counsel who represented the parties, I find the Petitioner had failed to establish the transgressions alleged, to a degree of probability required by law, in fundamental rights applications.

(27) Considering the above, I hold that the Petitioner has failed to establish that the Respondents have infringed his fundamental rights enshrined in Articles 12 and 13 (1) of the Constitution and accordingly this application is dismissed.

In the circumstances of the case, I do not order costs.

Application 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

Janidhu Charuka Daham
Seneviratne,
No. 4A, Sapumal Mawatha,
Sirimal Uyana,
Ratmalana.
Petitioner

SC (FR) APPLICATION NO: 402/2015

Vs.

1. Sub Inspector Nelumdeniya,
   Police Station,
   Mount Lavinia.
2. Officer in Charge,
   Special Crimes Investigation Unit,
   Police Station,
   Mount Lavinia.
3. Chief Inspector Chanaka
   Iddamalgoda,
   Head Quarters Inspector,
   Police Station,
   Mount Lavinia.
4. N.K. Illangakoon,
   Inspector General of Police,
   Police Headquarters,
   Colombo 01.

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

Before: P. Padman Surasena, J.
Janak De Silva, J.
Mahinda Samayawardhena, J.

Counsel: Shantha Jayawardena for the Petitioner.
Sudath Jayasundara for the 1st Respondent.
Ganga Wakishta Arachchi, S.S.C., for the Attorney General.

Argued on: 02.03.2021

Decided on: 21.05.2021

Mahinda Samayawardhena, J.

The Petitioner filed this application under Article 126 of the Constitution seeking *inter alia* a declaration that his fundamental rights guaranteed under Articles 11 and/or 12(1) and/or 13(1) and/or 13(2) and/or 13(5) of the Constitution were infringed by the 1st to 3rd Respondents; compensation in a sum of Rs. 1 million from the State and Rs. 3 million from the 1st Respondent; and a direction to the 5th Respondent Attorney-General to institute criminal proceedings under the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act, No. 22 of 1994, against the 1st Respondent and the other police officers liable for the infringement of the Petitioner's fundamental rights under Article 11 of the Constitution.

The Petitioner's complaint is that he was subjected to torture, cruel, inhuman and degrading treatment by the 1st Respondent and two others whilst he was under arrest and detained in the police cell of the Mount Lavinia police station.

This Court granted leave to proceed on the alleged violation of the Petitioner's fundamental rights guaranteed under Article 11 of the Constitution by the 1st Respondent.

Article 5 of the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations in 1948 states: "*No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment.*"

The International Covenant on Civil and Political Rights (ICCPR) adopted by the General Assembly of the United Nations in 1966 transformed the rights set out in the Universal Declaration of Human Rights into treaty provisions. Sri Lanka acceded to the ICCPR on 11.06.1980. Article 7 of the ICCPR provides: "*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.*"

Fundamental rights were first declared and recognised in Sri Lanka in the Constitution of 1972. Article 18(1)(b) in Chapter VI under "Fundamental Rights and Freedoms" of the 1972 Constitution declared: "*In the Republic of Sri Lanka – no person shall be deprived of life, liberty or security of person except in accordance with the law.*" Although there was no express provision guaranteeing freedom from torture, cruel, inhuman or degrading treatment or punishment, these were deemed to be included in the said Article. However, this Article was subject to Article 18(2) and (3) which read as follows:

> *18(2) The exercise and operation of the fundamental rights and freedoms provided in this Chapter shall be subject to such restrictions as the law prescribes in the interests of national unity and integrity, national security, national economy, public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others or giving effect to the Principles of State Policy set out in section 16(3).*
>
> *(3) All existing law shall operate notwithstanding any inconsistency with the provisions of subsection (1) of this section.*

Article 11 of the 1978 Constitution, which falls within the Chapter dealing with "Fundamental Rights", reads as follows:

> *No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.*

It is significant to note that Article 11 of the 1978 Constitution is an entrenched provision with no restrictions whatsoever. The application of this Article cannot be relaxed even in the interest of national security.

On 10.12.1984, the General Assembly of the United Nations adopted the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment. This Convention against torture entered into force on 26.06.1987. Sri Lanka acceded to this Convention on 03.01.1994, and the Convention entered into force in Sri Lanka on 02.02.1994. This Convention requires signatory parties to take measures to end

torture within their territorial jurisdiction and to criminalise all acts of torture.

In Article 1 of this Convention against Torture, the term "torture" is defined in the following manner:

> *1. 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.*
>
> *2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.*

Article 2 thereof reads as follows:

> *2(1) Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.*
>
> *(2) No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability*

or any other public emergency, may be invoked as a justification of torture.

(3) An order from a superior officer or a public authority may not be invoked as a justification of torture.

The Parliament of Sri Lanka enacted the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment Act, No. 22 of 1994 to give effect to this Convention. In the interpretation section of the Act, "torture" is defined in the identical manner as it is defined in Article 1 of the Convention against torture.

"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 instigation of, or with the consent or acquiescence of, a public officer or other person acting in an official capacity.

What acts constitute "torture or cruel, inhuman or degrading treatment or punishment" will depend on the facts and circumstances of each individual case.

The Petitioner in the present application was 32 years old when he was arrested by officers of the Mount Lavinia police station on 17.09.2015 around 5.00 p.m. He was entering his residence after returning from work. The Petitioner says he was informed by the police that he would have to be produced before the Magistrate before 5.30 p.m. on that day. At the time, he was the Country Manager (Sri Lanka) for the National Tertiary Education Consortium, which is based in New Zealand. The arrest was consequent to a warrant issued by the Mount Lavinia Magistrate upon a bigamy charge based on a complaint made by his former wife. There had been matrimonial disputes between him and his former wife which ended up in a divorce, but there had been an ongoing dispute for the custody and maintenance of their child.

Since he was arrested upon returning from work, the Petitioner was clad in formal attire. After he was taken to the police station, he was locked up in the police cell. The police officers who arrested him signed off from their duties for the day at 6.00 p.m. and the 1st Respondent, SI Nelundeniya, assumed duties as the officer in charge of the night shift.

The 1st Respondent in his statement of objections says he heard someone from the cell yelling that he wants to meet the Head Quarters Inspector (HQI) CI Iddamalgoda. Although the 1st

Respondent says this person was screaming obscenities at that time, I am unable to accept it. According to paragraph 10(h) of the statement of objections of the 1st Respondent, the Petitioner had demanded that he be taken before the HQI "*to tell your HQI to keep me outside the cell.*"

The 1st Respondent admits in his statement of objections that the Petitioner was "*dressed in a white long sleeve shirt, black trousers and shoes*". He says he "*ignored the Petitioner's utterances and did politely request the Petitioner to remove his shoes as it is imperative for any person who has been put into a cell to remain bare feet [according to Police Department regulations]*" as shoes can be used "*to assault a third party within or outside the cell.*"

At paragraph 10 (j)-(l) of the Statement of Objections, the 1st Respondent recounts what happened when he made that "*polite request*":

> *The Petitioner suddenly grabbed me by my collar as I was standing next to the cell and had attempted to kick me through the bars of the cell. As the Petitioner was still holding onto my collar and to steady myself I held on to the bars of the cell when the Petitioner bit hard the second finger of my left hand which was badly lacerated. Thereafter I managed to obtain the key to the cell from Police Sergeant Saman and opened the cell to remove the Petitioner's shoes. The Petitioner suddenly lunged forward struck and or assaulted me on the chest. The police constable Herath had to intervene to get the 1st Respondent freed.*

Thereafter, according to the 1st Respondent, he left the police station seeking medical attention. He does not speak a single word about how the Petitioner sustained injuries whilst in the cell.

To recap, according to the 1st Respondent, the Petitioner, while inside the cell, held the 1st Respondent (who was outside the cell) by the collar through the iron bars and attempted to assault him and bit his finger. Is this probable? For me, it is not.

The 1st Respondent did not tender an affidavit from PC Herath who seems to be an eyewitness to this incident. Instead, he tendered two statements – R4 and R5 – from two suspects who were at the police station.

R4 – a statement given by a female suspect who was under arrest – contradicts this story when she *inter alia* says (translated):

> *The 1st Respondent first told the Petitioner to remove his shoes from outside the cell and then went inside the cell and told the Petitioner to remove his shoes. Thereafter, there was a noise from inside the cell and then the 1st Respondent came out of the cell complaining that his finger was bitten by the Petitioner.*

The 1st Respondent at paragraph 8 of his written submission dated 15.02.2021 tells a different story. There he says that when the Petitioner held him by the collar and bit his finger through the iron bars of the cell, he

> *advised the officers who were present to go into the cell and to remove his [Petitioner's] shoes. When officers entered the cell the Petitioner had engaged in a fisticuff with them.*

The 1st Respondent did not tender affidavits from these "officers".

The Petitioner's version of events, as stated in the petition, is that when he requested that he be produced before the 3rd Respondent HQI, the 1st Respondent became incensed. The Petitioner may not have made his request politely; he may well have demanded to be produced before the HQI who was in charge of the police station to tell his side of the story to get him released from police custody. At that point, according to the Petitioner, the 1st Respondent entered the cell using abusive language and began assaulting the Petitioner. In the process, the Petitioner says the 1st Respondent held him in a head-lock position and attempted to strangle him. Unable to breathe, the Petitioner says he bit the finger of the 1st Respondent to release himself. Thereafter, the 1st Respondent summoned two persons dressed in civilian clothing into the cell and all three assaulted the Petitioner severely. The Petitioner does not know the names of those two persons. They have not been made parties to the case.

The 1st Respondent in his statement of objections did not say that he "*advised the officers who were present to go into the cell and to remove his shoes*" and "*when officers entered the cell the Petitioner had engaged in a fisticuff with them.*" That is because if he did, he would have been compelled to name the other officers involved in assaulting the Petitioner.

In the written submissions, the 1st Respondent attempts to implicate the other two persons (referred to by the Petitioner) as being responsible for the assault of the Petitioner inside the cell. In paragraph 12 of the written submission the 1st Respondent says:

> *Further the admission by the Petitioner that he was attacked by two others inside the cell, whom he cannot identify further substantiates the position that it was not the Respondent who was involved in attacking him.*

Then in paragraph 15 of the written submission, the 1st Respondent admits that he did not use excessive force to control the situation, suggesting that some amount of force was in fact used.

> *Further it is evident that the provocation was sought by the Petitioner and not the Respondent in any event Respondent had refrained from using any excessive force on the Petitioner.*

At the stage of filing written submissions, the 1st Respondent at least admits that the Petitioner was assaulted inside the cell.

I am more than satisfied that the 1st Respondent together with two other police officers whom the Petitioner does not identify by name assaulted the Petitioner inside the cell.

What is the nature of the injuries sustained by the Petitioner?

Before exploring the nature of the injuries sustained by him, let me first consider the injury caused to the finger of the 1st Respondent, which the Petitioner admits he inflicted in self-defence to release himself from strangulation. There are no

medical reports tendered by the 1st Respondent regarding the extent of the injury or treatment taken. The 1st Respondent produced only a Medico-Legal Examination Form marked R7, not a Medico-Legal Report (MLR), wherein non-grievous laceration is noted under injuries. The report does not even state where the alleged laceration was. The incident took place on 17.09.2015. According to R7, the Judicial Medical Officer (JMO) examined the 1st Respondent on 19.09.2015 at 10.00 a.m.

On the other hand, the Petitioner sustained multiple injuries from this incident. The Petitioner states in his petition that around 9.00 p.m. on 17.09.2015, an Attorney-at-Law retained by his mother came to the Mount Lavinia police station and upon seeing his condition, requested the Mount Lavinia police to admit him to hospital.

According to the Bed Head Ticket (BHT) sent by the Director of the National Hospital of Colombo to this Court, the Petitioner was admitted to the National Hospital at 2.35 a.m. on 18.09.2015 and was seen by a doctor at 3.00 a.m. On admission, he had visible injuries. The BHT *inter alia* states "*cleaning & dressing [the wound/s]*", and "*tetanus toxoid*". The MO/ENT further identifies "*traumatic perforation [ruptured eardrum] + bleeding*" in the left ear. Thereafter, the Petitioner was seen by an MO/ENT at 10.45 a.m., and "*traumatic perforation – blood clot*" in the left ear is recorded. On 19.09.2015, the Petitioner was seen by a VS [Visiting Surgeon] in ward 17 who records: "*He has got a L/TM [left tympanic membrane] perforation with blood on the TM. PTA shows L/conduction impairment.*"

On the same day, the Petitioner was seen by the JMO. The MLR states under injuries:

1. *Laceration measuring 3 cm situated over the right cheek.*
2. *Patient had complained of reduced hearing over the left ear. He was seen by ENT doctor and noted left ear traumatic perforation and associated with reduced conduction of left ear.*
3. *Tenderness noted over back of left shoulder and back of left upper chest.*

The second injury listed above is classified as a "grievous injury".

Thereafter, the Magistrate had visited the hospital and remanded the Petitioner, and the Petitioner was transferred to the Prison Hospital on 19.09.2015.

The report sent to this Court by the Chief Medical Officer of the Prison Hospital *inter alia* says:

> *According to history records at Prison Hospital, there were multiple contusions over the face and body and blood clot at left ear.*

The Petitioner tendered several documents along with his counter affidavit to show that he sought medical advice from various doctors for body pain and suffering.

The Police force is responsible for *inter alia* enforcing the law, maintaining public order and safety. Hence there is a special responsibility on the police to uphold and protect the fundamental rights enshrined in the Constitution. To say the least, assaulting a person in police custody is a cowardly act,

not a heroic act. A person in police custody is at the mercy of the police.

Learned Senior State Counsel for the 5th Respondent Attorney-General states in her brief written submission: "subsequent to leave being granted, the 1st Respondent was represented by private counsel"; pursuant to a disciplinary inquiry held upon a complaint made by the Petitioner to the Inspector General of Police, "the 1st Respondent had been discharged"; proceedings have been instituted against the Petitioner in the Magistrate's Court of Mount Lavinia "for behaving in an unruly manner and for obstructing the Respondents from the performance of their duties"; and "there has been no violation of the fundamental rights of the Petitioner by the State." Learned Senior State Counsel seems to be making a vague attempt to absolve the State from liability, whilst also indirectly condoning the assault when she says that the 1st Respondent was discharged at the disciplinary inquiry.

The protection afforded by Article 126 of the Constitution is against the infringement of fundamental rights by the State, i.e. by "executive or administrative action", through the instrumentalities and agencies of the State. The State includes every repository of State power. If the act complained of has been committed under colour of law or office by the State official, the State is liable. The relief granted against the violation of fundamental rights is principally against the State and not against the individual miscreant, notwithstanding the latter may also be held responsible in this process. *(Mariadas Raj v. Attorney-General [1983] 2 Sri LR 461, Velmurugu v. Attorney-General [1981] 1 Sri LR 406 at 422-430, Vivienne Goonewardena*

v. Perera [1983] 1 Sri LR 305, Rahuma Umma v. Berty Premalal Dissanayae [1996] 2 Sri LR 293, Piyasena v. Associated Newspapers of Ceylon Ltd [2006] 3 Sri LR 113)

In *Sudath Silva v. Kodituwakku [1987] 2 Sri LR 119*, the Supreme Court took the view that where the Petitioner establishes that he was tortured while in police custody, the State is liable although it was not established which officer inflicted the injuries. The Supreme Court condemned torture under police custody in the strongest possible terms at 126-127:

> *Article 11 of our Constitution mandates that no person shall be subjected to torture, or to cruel, inhuman or degrading treatment or punishment. It prohibits every person from inflicting torturesome, cruel or inhuman treatment on another. It is an absolute fundamental right subject to no restrictions or limitations whatsoever. Every person in this country, be he a criminal or not, is entitled to this right to the fullest content of its guarantee. 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 endeavour 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.

The case at hand is not a difficult one. I hold that the Petitioner has succeeded in establishing the infringement of his fundamental rights guaranteed under Article 11 of the Constitution.

On a consideration of the totality of the facts and circumstances of this case, I direct that the 1st Respondent shall pay the Petitioner a sum of Rs. 150,000 as compensation and another Rs. 25,000 as costs of the application. I direct the State to pay the Petitioner a sum of Rs. 25,000 as compensation. All payments shall be made within one calendar month from today.

Judge of the Supreme Court

P. Padman Surasena, J.
I agree.

Judge of the Supreme Court

Janak De Silva, J.
I 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) 404/16

1. Hapuhinne Karunadhipathi Divaratne Wasala Mudiyanselage Janaka Bandara Hapuhinna,
   No. 128/7, Kalugala Road,
   Katugastota.

2. Liyana Arachchige Ravi Samantha Kosala,
   C10, Police Quarters,
   Courts Road,
   Gampaha.

3. Pradeep Lakshman Wettasinghe,
   No. 327/33,
   Sethsiri Uyana,
   Ganemulla Road,
   Kadawatha.

4. Gammadde Thandakkarage Ramyasiri Bokkawaladeniya,
   Midigama,
   Ahangama.

5. Jayakody Arachchcige Thushitha Jayakody,
   No. 109/3, Kumbaloluwa,

Veyangoda.

6. Harischandrage Madawa Atula
   Lewangama,
   Gonna, Kohilegedara,
   Pothuhera.

7. Ranasingha Arachchcige Samantha
   Kumara,
   Rathupaskatiya,
   Diyakobala
   Bibila.

8. Zainul Abdeen Haleelur Rahman,
   No. 88/A, Al Mannar Road,
   Maruthamunai – 2

9. Nilmini Nihal Jayasiri Samararaja,
   Karandawa, Kuratihena
   Hettipola.

PETITIONERS

1. K. W. E. Karaliyadda,
   Chairman,
   National Police Commission.

2. Ashoka Wijethilaka,
   Member,
   National Police Commission.

3. Savithree Wijesekara,
   Member,

National Police Commission.

4. Y. L. M. Zawahir,
   Member,
   National Police Commission.

5. Gamini Nawarathne,
   Member,
   National Police Commission.

6. Tilak Collure,
   Member,
   National Police Commission.

7. G. Jeyakumar,
   Member,
   National Police Commission.

8. Secretary,
   National Police Commission.
   All of whom at
   the Office of the National Police
   Commission,
   Block No. 9, BMICH Premises,
   Baudhaloka Mawatha,
   Colombo 07.

9. Inspector General of Police,
   Police Headquarters,
   Colombo 01.

9A. C. D. Wickramarathne,

Acting Inspector General of Police,

Police Headquarters,

Colombo 01.

10. Secretary,
Ministry of Public Administration
Local Government and Democratic
Governance,
Independence Square,
Colombo 07.

10A. Secretary,
Ministry of Public Services, Provincial
Councils and Local Government,
Independence Square,
Colombo 07.

11. Secretary,
Ministry of Law and Order and Southern
Development,
Floor – 13, 'Sethsiripaya',
(Stage 11),
Battaramulla.

11A. Secretary
Ministry of Defence,
No. 15/5,
Baladaksha Mawatha,
Colombo 03.

12. Hon. Sagala Rathnayaka,
(Former) Minister of Law and Order and
Southern Development,

Ministry of Law and Order and Southern Development,
Floor – 13, 'Sethsiripaya',
(Stage 11),
Battaramulla.

12A. Minister of Defence,
Ministry of Defence,
No. 15/5, Baladaksha Mawatha,
Colombo 03.

13. Secretary to the Cabinet of Ministers,
Cabinet Office,
The Republic Building,
Colombo 01.

14. Hon. Attorney General,
Attorney Generals Department,
Colombo 12.

RESPONDENTS

Before: **P PADMAN SURASENA J**

E. A. G. R. AMARASEKARA J

A. H. M. D. NAWAZ J

Counsel: Harsha Fernando with Chamith Senanayake, Yohan Cooray and Ruven Weerasinghe instructed by J. Talgaswattage for the Petitioners.

Rajiv Goonetilleke, SSC for the Hon. Attorney General.

Argued on: 22-03-2021

Decided on: 16-12-2021

P Padman Surasena J

Petitioners are police officers claiming to have been subjected to various acts of victimization based on political and other grounds.

In 2015, the then Cabinet of Ministers, having considered the Memorandum dated 09-03-2015, under the title "To provide relief to those who were victimized for political reasons", submitted by the then Prime Minister, decided on 08-04-2015 to issue a Public Administration Circular to provide a reasonable period of time for those officers, if any, who have been subjected to political victimization and who wish to seek relief, but not yet submitted their appeals, to submit their appeals. The Cabinet of Ministers also decided to authorize the Secretary Ministry of Public Administration to appoint an official committee comprising of three retired public officers who had served in the capacity of Additional Secretary or any other similar or higher post to examine the said appeals and make recommendations. The Petitioners have produced the said Cabinet Memorandum dated 09-03-2015 marked **P 1** and the letter dated 05-04-2015 communicating the said Cabinet decision marked **P 2**.

As authorized by the said cabinet decision, the Secretary Ministry of Public Administration had issued the Public Administration circular No. 09/2015 dated 17-04-2015, calling for appeals to be submitted to the Ministry of Public Administration by 05-05-2015. The Petitioners have produced the said Public Administration circular No. 09/2015 marked **P 3**.

The Petitioners as well as the 9th Respondent in their respective affidavits have referred to few more events that had taken place since the issuance of (**P 3**) up to the time of submitting the Cabinet Memorandum dated 06-04-2016 marked **P 9** which will be referred to in the next paragraph. However, they are now history as far as this application is concerned and hence need not be referred to in this judgment.

After the said events, at one point of time, it had come to light that the committees appointed to consider appeals as per the Public Administration circular No. 09/2015 (**P 3**) had made conflicting recommendations in respect of some officers. Then the Minister of Law and Order and Southern Development, by the Cabinet memorandum dated 06-04-2016, sought Cabinet approval to appoint a new three member committee comprising of an Additional Secretary of the Ministry of Public administration and Management, Additional Secretary of the Ministry of Law and Order

and Southern Development and a Senior Deputy Inspector General of Police to reconsider and make recommendations on the appeals of police officers who were subjected to political victimization. The Petitioners have produced the said Cabinet Memorandum dated 06-04-2016 marked **P 9**.

Subsequent to the said committee recommending relief for 129 Police officers, the Cabinet of Ministers having considered the Note to the Cabinet forwarded by the Prime Minster dated 26-07-2016 as well as the observations of the President and the Minister of Finance, decided by its decision on 9th August 2016, to direct the Secretary Ministry of Law and Order and Southern Development, to implement the proposals recommended in the afore-said Note to the Cabinet forwarded by the Prime Minister subject to the conditions set out in the said Cabinet decision. The 9th Respondent has produced the said Cabinet decision on 9th August 2016 marked **9 R1** and the aforesaid observations of the President marked **9 R2**. The Petitioners have produced the letter dated 11-08-2016 marked **P 11** which has conveyed the cabinet decision dated 09-08-2016 which also contains an extract of the relevant Cabinet decision.

The Petitioners have produced the list containing 129 Police Officers approved by the Cabinet of Ministers for granting of relief, marked **P 12**. This is the list prepared by a committee comprising of Ms. B. M. M. M. Basnayake [Additional Secretary Ministry of Public Administration and Management], Neil Hapuhinna [Additional Secretary Ministry of Law and Order and Southern Development] and Ravi Wijegunawardene [(Senior Deputy Inspector General of Police (North Central and North Western Province)]. The Petitioners state that their names are also included in the said list as recommended for relief.

The Petitioners state that while awaiting the implementation of the afore-stated Cabinet Decision (**9R 1**) they were made aware of the promotion of only three officers from the said list of 129. The Petitioners have produced the copies of the letters dated 06.10.2016 marked respectively **P 13A**, **P 13B** and **P 13C** by which the promotions of the said three officers namely B.D.S.D.S. Senanayake, M.S.J. De Silva and R.F. Sisil De Silva have been implemented.

The Petitioners complain that the Petitioners and the above named B.D.S.D.S. Senanayake, M.S.J. De Silva and R.F. Sisil De Silva are similarly circumstanced and therefore the non-implementation of the Cabinet decision (**9 R1**) in respect of the

Petitioners by the National Police Commission and/or the Inspector General of Police is discriminatory and hence amounts to an unequal treatment violating the fundamental Rights of Petitioners guaranteed under Article 12 (1) of the Constitution.

The Petitioners have submitted that the Cabinet decision (**9 R1**) sought to be implemented by this application should be uniformly applied to all officers named in the list marked **P12**, except those that have disciplinary findings against them. It is in that backdrop that the Petitioners in this application have prayed inter alia, for the following relief in their petition.

a) *Declare that the Petitioners' Fundamental Rights enshrined in Article 12 (1) of the Constitution, have been violated and/or are subject to continuing infringement by one or more of the Respondents due to non-implementation of the recommendations in **P 12** read with **P 11** with regard to the Petitioners;*
b) *Declare that the Petitioners are eligible to be promoted as per the Cabinet decision marked **P 11** read with **P 12**;*
c) *Direct the 1st -7th, 8th, 9th, 10th, and 11th Respondents to give effect to **P 11** and **P 12** forthwith without discriminating and grant the promotions and appointments to the Petitioners as recommended by **P 12**.*

In the instant case, the Court has granted leave to proceed under Article 12(1) of the Constitution. The complaint made by the petitioners is that the petitioners are similarly circumstanced with those who have been promoted namely B.D.S.D.S. Senanayake, M.S.J. De Silva and R.F. Sisil De Silva.

Thus, I would examine whether the promotions of B.D.S.D.S. Senanayake, M.S.J. De Silva and R.F. Sisil De Silva have been made discriminating the Petitioners thereby infringing their fundamental rights guaranteed under Article 12(1) of the Constitution.

At the outset, one must bear in mind that according to the case advanced by the Petitioners, the promotions of the Petitioners or B.D.S.D.S. Senanayake, M.S.J. De Silva and R.F. Sisil De Silva or any other officer in the given instance is possible only under the terms of the relevant Cabinet decision. As can be clearly seen from the letter marked **P 11** which has conveyed the Cabinet decision on 09-08-2016 (upon which the Petitioners have placed reliance) the implementation of the Cabinet Decision on 9th August 2016 should necessarily be subjected to the following conditions. The said conditions are mentioned in **P 11** itself as follows.

a) to grant approval treating this as a matter of policy, to the proposals (I) and (II) in paragraph 03 of the Note;

b) to direct the Secretary, Ministry of Law and Order and Southern Development -

(i) to take note of the matters highlighted in the observations of H.E the President and pursue action accordingly, and

(ii) to obtain the concurrence/approval of the relevant authorities prior to implementation of the proposals referred to at (a) above, as indicated in the observations of the Minister of Finance.

The 9th Respondent (Inspector General of Police), in his affidavit,[1] has explained the position with regard to implementing relief recommended in respect of each of the nine Petitioners. Indeed, the documents produced by him marked **9 R3 (I)** to **9 R3 (IX)** clearly show that the relief recommended for all the nine Petitioners have been implemented subject to the afore-stated conditions. The Petitioners cannot expect more, as the implementation of the Cabinet decision on 9th August 2016 must necessarily be done subject to the aforesaid conditions. The 9th Respondent has produced the observations of the President referred to in the relevant Cabinet decision on 9th August 2016 marked **9 R 2** which clearly shows that the said Cabinet decision on 9th August 2016 must be implemented in such a way that the implementing of the relief recommended by the committee should not affect the seniority of other serving police officers.

The 9th Respondent, has also explained the position with regard to implementing relief recommended in respect of the three officers namely B.D.S.D.S. Senanayake, M.S.J. De Silva and R.F. Sisil De Silva. When one peruses the document produced by the Acting Inspector General of Police marked **9 R 4 A**, the reasons for implementing relief recommended in respect of the three officers namely B.D.S.D.S. Senanayake, M.S.J. De Silva and R.F. Sisil De Silva are obvious. The relief implemented in respect of the officer B.D.S.D.S. Senanayake was to set aside the vacation of post issued on him, reinstate him on service and retire him with effect from 29-11-1994. The officer M.S.J. De Silva is no longer amongst the living and R.F. Sisil De Silva has retired from service. Thus, in the light of the condition in the Cabinet decision on 9th August 2016

[1] It is the 9A Respondent (Acting Inspector General of Police) who had submitted the affidavit.

(**9 R 2**) the implementing of the relief recommended by the committee in respect of the three officers namely B.D.S.D.S. Senanayake, M.S.J. De Silva and R.F. Sisil De Silva has clearly not affected the seniority of the other serving police officers. In the above circumstances, the claim by the Petitioners who are serving Police officers, that they are similarly circumstanced with those who have been promoted namely B.D.S.D.S. Senanayake, M.S.J. De Silva and R.F. Sisil De Silva cannot succeed.

Thus, I conclude that the Petitioners have not been able to prove that the Respondents have infringed the fundamental rights of any of them by promoting the three officers namely B.D.S.D.S. Senanayake, M.S.J. De Silva and R.F. Sisil De Silva as per the Cabinet Decision on 9th August 2016.

Despite the above conclusions, looking at this case from somewhat different perspective, I am prompted to add the following comments also in relation to the promotions of public officers in this country. This is because the Police officers were also basically public officers coming under the purview of the Public Service Commission until the 17th Amendment to the Constitution established the National Police Commission and vested the powers of carrying out functions relating to the appointment, promotion, transfer, disciplinary control and dismissal of police officers other than the Inspector-General of Police, in that Commission. Later, the 20th Amendment to the Constitution repealed Article 155 G which entrusted the aforesaid powers in the National Police Commission bringing back the Police officers again under the purview of the Public Service Commission.

The Public Service Commission was initially established in Sri Lanka by Article 58 of the then existing Constitution of Ceylon. [Ceylon (Constitution) Order in Council 1946 (Chapter 379)]. That Constitution was promulgated as a result of the endeavors of the Soulbury Commission appointed in the years 1944 and 1945 by His Majesty's Government under the chairmanship of the Right Honourable Herwald, Baron Soulbury, O.B.E., M.C., to visit the then Island of Ceylon in order to examine and discuss proposals for constitutional reforms. Thus, it became commonly known as the Soulbury Constitutuion. The country known as Ceylon then, was a member of the British Commonwealth of Nations which had an autonomous state within the British Empire. Having a common allegiance to the British Crown then was a prominent feature in that Constitution and was compatible with then Dominion Status of Ceylon.

Thus, Article 57 of the Soulbury Constitution expressly provided for the tenure of office of state officers in the following manner.

> *57. Save as otherwise provided in this order, every person holding office under the Crown in respect of the Government of the Island shall hold office during Her Majesty's pleasure.*

However, Article 58(1) of the Ceylon (Constitution) Order in Council of 1946 established a Public Service Commission and the said Article read as follows;

> *58. (1) There shall be a Public Service Commission which shall consist of three persons, appointed by the Governor-General, one at least of whom shall be a person who has not, at any time during the period of five years immediately preceding, held any public office or judicial office. The Governor-General shall nominate one of the members of the Commission to be the Chairman*. …..

Article 60 of that Constitution vested the powers of the appointment, transfer, dismissal and disciplinary control of public officers in the Public Service Commission. Provisions such as disqualifying the Senators or the Members of Parliament from becoming members of the Public Service Commission,[2] restraining the members of the Public Service Commission from holding any paid office as a servant of the Crown and making them ineligible for subsequent appointment as Public Officers,[3] entitlement of members of the Public Service Commission to hold office for a period of five years from the date of their appointment,[4] the mandatory requirement for the Governor-General to assign cause when removing any member of the Public Service Commission from his office,[5] the requirement to determine the salary payable to the members of the Public Service Commission by Parliament and the inability to reduce their salaries during their terms of office,[6] were salient features of the Public Service Commission under the Soulbury Constitution. Those provisions aimed at maintaining the independence of the Public Service Commission. Thus, right from the inception, the Public Service Commission was an institution meant to be an independent body

[2] Article 58 (2) of the Ceylon (Constitution) Order in Council of 1946.
[3] Article 58 (3) of the Ceylon (Constitution) Order in Council of 1946.
[4] Article 58 (4) of the Ceylon (Constitution) Order in Council of 1946.
[5] Article 58 (5) of the Ceylon (Constitution) Order in Council of 1946.
[6] Article 58 (7) of the Ceylon (Constitution) Order in Council of 1946.

charged with the power to exercise the appointments, transfers, dismissals and also the disciplinary control of public officers.

However, the first Republican Constitution (1972) did away with the Public Service Commission and vested the powers of the appointment, transfer, dismissal and disciplinary control of state officers in the Cabinet of Ministers.

Article 106 of the Constitution (1972) read as follows;

> *106. (1) The Cabinet of Ministers shall be responsible for the appointment, transfer, dismissal and disciplinary control of state officers and shall be answerable therefor to the National State Assembly.*
>
> *(2) Subject to the provisions of the Constitution, the Cabinet of Ministers shall have the power of appointment, transfer, dismissal and disciplinary control of all state officers.*
>
> *(3) Subject to the provisions of the Constitution, the Cabinet of Ministers shall provide for and determine all matters relating to state officers including the constitution of state services, the formulation of schemes of recruitment and codes of conduct for state officers, the procedure for the exercise and the delegation of the powers of appointment, transfer, dismissal and disciplinary control of state officers.*
>
> *(4) The Cabinet of Ministers may notwithstanding any delegation of powers as is referred to in this Chapter exercise its powers of appointment, transfer, dismissal and disciplinary control of state officers.*
>
> *(5) No institution administering justice shall have the power or jurisdiction to inquire into, pronounce upon or in any manner call in question any recommendation, order or decision of the Cabinet of Ministers, a Minister, the State Services Advisory Board, the State Services Disciplinary Board, or a state officer, regarding any matter concerning appointments, transfers, dismissals or disciplinary matters of state officers.*

Article 107 of the 1972 Constitution expressly provided for the tenure of office of state officers and related powers vested in the National State Assembly in that regard in the following manner.

> 107. (1) Save as otherwise expressly provided by the Constitution, every state officer shall hold office during the pleasure of the President. The National State Assembly may however in respect of a state officer holding office during the pleasure of the President provide otherwise by a law passed by a majority of those present and voting. ….

Thereafter, the second Republican Constitution (1978) continued to vest the appointment, transfer, dismissal and disciplinary control of public officers in the Cabinet of Ministers. However, there was provision for the Cabinet of Ministers to delegate from time to time, its powers of appointment, transfer, dismissal and disciplinary control of other public officers to the Public Service Commission thus re-establishing the Public Service Commission as a body which exercised authority delegated to it by the Cabinet of Ministers.

Article 55 of the Constitution (1978) in its original form was as follows;

> *"55 (1) Subject to the provisions of the Constitution, the appointment, transfer, dismissal and disciplinary control of public officers is hereby vested in the Cabinet of Ministers, and all public officers shall hold office at pleasure.*
> *(2) The Cabinet of Ministers shall not delegate its powers of appointment, transfer, dismissal and disciplinary control in respect of Heads of Departments.*
> *(3) The Cabinet of Ministers may from time to time, delegate its powers of appointment, transfer, dismissal and disciplinary control of other public officers to the Public Service Commission.*
> *Provided that ……."*

Although the original Article 55 of 1978 Constitution chose to continue with the principle that all public officers shall hold office at pleasure[7] it however made the decisions made by those exercised power under Article 55 amenable to the fundamental rights jurisdiction of the Supreme Court[8] removing hitherto existed principle that no court or institution administering justice shall have the power or jurisdiction to inquire into, pronounce upon or in any manner call in question any such

[7] As Article 55(1) of 1978 Constitution stood before the 17th Amendment to the Constitution.
[8] As Article 55(5) of 1978 Constitution stood before the 17th Amendment to the Constitution.

decision. This was a yet another step taken to ensure the correctness of such decisions.

Thereafter, the 17th Amendment to the Constitution which was certified on 03rd October 2001, brought about fundamental changes to the afore-stated original position in the 1978 Constitution. The 17th Amendment to the Constitution repealed the whole of original Chapter IX and substituted it with a new Chapter IX. The changes include the structure of the powers vested in the Cabinet of Ministers in relation to appointment, transfer, dismissal and disciplinary control of public officers. Most importantly, the 17th Amendment to the Constitution transferred the powers of appointment, promotion, transfer, disciplinary control and dismissal of public officers other than the Heads of Department back to the Public Service Commission and abolished the principle that 'all public officers shall hold office at pleasure' which continued to be in the Constitutions of this country from the time of British Colonization period up until the implementation of the 17th Amendment to the Constitution. The Cabinet of Ministers continued to retain the power in relation to appointment, transfer, dismissal and disciplinary control of the Heads of Departments and also retained the power to provide for and determine all matters of policy relating to public officers. The relevant Articles 55 (1), 55(3) and 55(4) introduced by the 17th Amendment to the Constitution read as follows,

> *55 (1) The appointment, promotion, transfer, disciplinary control and dismissal of public officers shall be vested in the Commission.*
>
> *55 (3) Notwithstanding the provisions of paragraph (1) of this Article, the appointment, promotion, transfer, disciplinary control and dismissal of all Heads of Departments shall vest in the Cabinet of Ministers, who shall exercise such powers after ascertaining the views of the Commission.*
>
> *55 (4) Subject to the provisions of the Constitution, the Cabinet of Ministers shall provide for and determine all matters of policy relating to public officers.*

Article 55 (5) introduced by the 17th Amendment to the Constitution states that the Public Service Commission will carry out its affairs according to the policies laid down by the Cabinet of Ministers and the Public Service Commission is answerable to the parliament in regard to carrying out its functions.

Article 59 brought in by the 17th Amendment to the Constitution also introduced a procedure to enable any aggrieved party to challenge the decisions made by the Commission by way of preferring an appeal to the Administrative Appeals Tribunal appointed by the Judicial Service Commission which was given the power to alter, vary or rescind any order or decision made by the Commission (in an appeal).

The 17th Amendment to the Constitution continued to preserve the fundamental rights jurisdiction of the Supreme Court in the following manner.

Article 61A.

> *Subject to the provisions of paragraphs (1), (2), (3), (4) and (5) of Article 126, no court or tribunal shall have power or jurisdiction to inquire into, or pronounce upon or in any manner call in question any order or decision made by the Commission, a Committee, or any public officer, in pursuance of any power or duty conferred or imposed on such Commission, or delegated to a Committee or public officer, under this Chapter or under any other law.*

Another important change that was introduced by the 17th Amendment to the Constitution is the formation of the National Police Commission under Article 155A and vesting it with powers in relation to the appointment, promotion, transfer, disciplinary control and dismissal of police officers other than the Inspector-General of Police. Article 155G which vested those powers in the National Police Commission is as follows,

> *155G. (1) (a) The appointment, promotion, transfer, disciplinary control and dismissal of police officers other than the Inspector-General of Police, shall be vested in the Commission. The Commission shall exercise its powers of promotion, transfer, disciplinary control and dismissal in consultation with the Inspector-General of Police.*
>
> *(b) The Commission shall not in the exercise of its powers under this Article, derogate from the powers and functions assigned to the Provincial Police Service Commissions as and when such Commissions are established under Chapter XVIIA of the Constitution.*
>
> *(2) The Commission shall establish procedures to entertain and investigate public complaints and complaints of any aggrieved person made against a police officer or the police service, and provide redress in accordance with the provisions of any law enacted by Parliament for such purpose.*

(3) The Commission shall provide for and determine all matters regarding police officers, including the formulation of schemes of recruitment and training and the improvement of the efficiency and independence of the poilce service, the nature and type of the arms, ammunition and other equipment necessary for the use of the National Division and the Provincial Divisions, codes of conduct, and the standards to be followed in making promotions and transfers, as the Commission may from time to time consider necessary or fit.

(4) The Commission shall exercise all such powers and perform all such functions and duties as are vested in it under Appendix I of List I contained in the Ninth Schedule of the Constitution.

However, the 18th Amendment to the Constitution which was certified on 09th September 2010, repealed Article 155G; it also repealed hitherto existed Article 55 and replaced it with new Article 55 which is as follows;

55. (1) The Cabinet of Ministers shall provide for and determine all matters of policy relating to public officers, including policy relating to appointments, promotions, transfers, disciplinary control and dismissal.

(2) The appointment, promotion, transfer, disciplinary control and dismissal of all Heads of Department shall, vest in the Cabinet of Ministers.

(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.

(4) The Commission shall not derogate from the powers and functions of the Provincial Public Service Commissions as are established by law.

(5) The Commission shall be responsible and answerable to Parliament in accordance with the provisions of the Standing Orders of Parliament for the exercise and discharge of its powers and functions. The Commission shall also forward to Parliament in each calendar year, a report of its activities in respect of such year.

That resulted in re-transferring the National Police Commission's powers in relation to the appointment, promotion, transfer, disciplinary control and dismissal of police officers back to the Public Service Commission. This brought the police officers back

under the category of public officers coming under the purview of the Public Service Commission. All matters pertaining to the appointment, promotion, transfer, disciplinary control and dismissal of police officers pending before the National Police Commission stood transferred to the Public Service Commission by virtue of section 36(5) of the 18th Amendment to the Constitution.

This also brought the power to provide for and determine all matters of policy relating to police officers back under the Cabinet of Ministers by virtue of Article 55 (1) introduced by the 18th Amendment to the Constitution.

In the instant case, it was in the year 2015 that the then Cabinet of Ministers having considered the Memorandum dated 09-03-2015[9] under the title "To provide relief to those who were victimized for political reasons" submitted by the then Prime Minister, had decided on 08-04-2015, to issue a Public Administration Circular calling for the officers subjected to political victimization who wish to seek relief, to submit their appeals to be considered by a committee comprising of three retired public officers appointed by the Secretary Ministry of Public Administration. As the 18th Amendment to the Constitution came into force with effect from 09th September 2010, the powers in relation to the appointment, promotion, transfer, disciplinary control and dismissal of public officers including the police officers was with the Public Service Commission and the power to provide for and determine all matters regarding public officers including the police officers, was with the Cabinet of Ministers.

It was in the year 2016 that the Cabinet of Ministers had decided (**9R 1**) to direct the Secretary Ministry of Law and Order and Southern Development to implement the proposals recommended by the Basnayake Committee treating that decision as a matter of Policy. The law had changed by that time as the 19th Amendment to the Constitution came into force with effect from 15th May 2015.

The 19th Amendment to the Constitution re-transferred the powers in relation to the appointment, promotion, transfer, disciplinary control and dismissal of police officers back to the National Police Commission from the hands of the Public Service Commission. It re-introduced an article numbered 155G in the following form;

[9] Produced marked **P 1**.

155G. (1) (a) The appointment, promotion transfer, disciplinary control and dismissal of police officers other than the Inspector-General of Police, shall be vested in the Commission. The Commission shall exercise its powers of promotion, transfer, disciplinary control and dismissal in consultation with the Inspector General of Police.

(3) The Commission shall, in consultation with the Inspector-General of Police, provide for and determine all matters regarding police officers, including:-

(a) the formulation of schemes of recruitment, promotion and transfers, subject to any policy determined by the Cabinet of Ministers pertaining to the same;

(b) training and the improvement of the efficiency and independence of the police service;

(c) the nature and type of the arms, ammunition and other equipment necessary for the use of the National Division and the Provincial Divisions; and

(d) codes of conduct and disciplinary procedures.

(4) The Commission shall exercise all such powers and discharge and perform all such functions and duties as are vested in it under Appendix I of List I contained in the Ninth Schedule to the Constitution.

Thus, after the 19th Amendment to the Constitution it was the National Police Commission which was charged with the power to provide for and determine all matters regarding police officers, including the formulation of schemes of recruitment and promotion in consultation with the Inspector-General of Police, subject to any policy determined by the Cabinet of Ministers pertaining to the same. This was the legal position existed when the Cabinet of Ministers made the decision contained in **9R 1** on 09-08-2016.

Let me now examine the scope of power that should have been exercised by the Cabinet of Ministers at the relevant time. It is important to bear in mind that the policies the Cabinet of Ministers are empowered to make must be only to lay down mere schemes of promotions in the nature of general rules and regulations and not

decisions to promote any individual public or Police officer. On the other hand, any recommendation made by the Cabinet of Ministers to promote individuals cannot be categorized as policy decisions falling under Article 55(1) or 155G 3(a) of the Constitution. This is reflected in the following judicial precedence which interpreted Article 55 as it had stood at the times of those relevant judgments.

The case of Abeywickrema Vs. Pathirana,[10] is an election petition where the petitioner in that case challenged the validity of the election of the 1st respondent in that case as a Member of Parliament for Akmeemana electorate. The said petitioner sought a declaration that the election of the said respondent is void in law on the ground that he was a public officer and was therefore disqualified under Article 91 (1) (d) (vii) of the Constitution for election as a Member of Parliament. The said respondent was a principal of a school coming under the Department of Education which meant that he was a public officer. The petitioner in that case argued that although the 1st respondent in that case (school principal) had submitted a letter of resignation from the said public service position, that letter of resignation was neither submitted nor accepted by the due authority. This was because the 1st respondent in that case (school principal) had tendered his resignation to the Regional Director of Education of the area where he was serving and getting that resignation accepted by the Regional Director who relieved him from his duties; according to the petitioner in that case, the said process did not effectively terminate the services of the said 1st respondent (school principal) as a public officer, to qualify him as a candidate at a parliamentary election. It was on that basis that the said petitioner sought to argue that there had been no valid resignation in fact or in law by the said 1st respondent school principal who was therefore disqualified under the aforementioned provision to be a Member of Parliament as he had continued to hold a public office. Delivering the majority judgment of Court in 1986, Chief Justice Sharvananda interpreting Article 55(4) of 1978 Constitution as it stood before the 17th Amendment to the Constitution, held that the Constitution of 1978 has given a statutory dimension to the Establishments Code and the said 1st respondent (school principal) was bound by section 4 of the Establishments Code to obtain proper acceptance of his resignation. The Chief Justice further holding, that the said letter of resignation did not bring about a valid termination of the said school principal's contract of service because it was

[10] 1986 (1) Sri L. R. 120.

neither addressed nor accepted by the Appointing Authority i.e., the Educational Services Committee; and that the Regional Director, Galle is not the proper authority to accept the resignation; went on to state in his judgment the following;

> *"Article 55(4) empowers the Cabinet of Ministers to make rules for all matters relating to public officers, without impinging upon the overriding powers of pleasure recognised under Article 55(1). Matters relating to 'public officer' comprehends all matters relating to employment, which are incidental to employment and form part of the terms and conditions of such employment, such as provisions as to salary, increments, leave, gratuity, pension, and of superannuity, promotion and every termination of employment and removal from service. The power conferred on the Cabinet of Ministers is a power to make rules which are general in their operation though they may be applied to a particular class of public officers. This power is a legislative power and this rule making function is for the purpose identified in Article 55(4) of the Constitution as legislative not executive or judicial in character."*

His Lordship Justice Wanasundara who was one of the members of the five-judge bench which heard the above case, did not agree with the majority judgment in that case and delivered a dissenting judgment. However, His Lordship Wanasundara J cited the above passage in his judgment in the case of The Public Service United Nurses Union Vs. Montague Jayawickrama, Minister of Public Administration and others.[11] This was because the majority judgment in Abeywickrema 's case which existed at the time was binding on Court.

In that case, the Public Services United Nurses Union (Petitioner) to which the majority of the Government nurses at that time had belonged, struck work demanding an increase in their salaries. The strike was considered illegal because the relevant service was declared an essential service by His Excellency the President under the Emergency (Miscellaneous Provisions and Powers) Regulation No. 3 of 1986. The Government then decided to treat those who struck work as having vacated their posts and took steps to evict those who occupied Government quarters. However, the strike was eventually settled, the notices of vacation of post were withdrawn and those nurses were allowed to resume work without loss of back pay. Subsequently, the

[11] 1988 1 Sri L. R. 229.

Cabinet of Ministers decided to award a special ad hoc benefit of two increments to the nurses who were members of a rival trade union i.e., the Public Services United Nurses Union, who had worked during the entirety of the strike period and one increment to the nurses who reported for duty at various later stages. The petitioner union challenged the said Cabinet decision on the basis that it was a serious infringement of its members' fundamental right of equality guaranteed under Article 12 of the Constitution. His Lordship Justice Wanasundara having noted that an increment in the public service according to the existing rules and regulations has to be earned by a public officer by satisfactory work and conduct during a specified period of time, namely, one year; and any stoppage, postponement or deprivation of an increment has to be in the nature of a penalty consequent to disciplinary action against a public officer; and held that instantly rewarding particular public officers with one or two increments and placing the others at a disadvantage in relation to them, goes against the grain of the existing administrative provisions and the legitimate expectations which public servants entertain based on the principles and policies existing in the Establishments Code and the Administrative Regulations. Justice Wanasundara went on to state in the judgment, the following as well;

> *"When Article 55 of the Constitution vests authority over public affairs in the Cabinet and make it mandatory for the Cabinet to formulate schemes of recruitment, and codes of conduct for public officers, the principles to be followed in making promotions and transfers etc., the Constitution contemplated fair, and uniform provisions in the nature of general rules and regulations and not action that is arbitrary or ad hoc or savouring of bias or discrimination".*[12]

Time and again, this Court has held that the promotions of public servants must be carried out according to the schemes specified by the Government. The seniority of a public servant has always been an important component which is required to be given due weight in such schemes. In the case of A. H. Wickramatunga and three others Vs. H. R. de Silva and fourteen others,[13] the Supreme Court referred to the principles

[12] Supra, at page 237; this case also interpreted Article 55 as it stood before the 17th Amendment to the Constitution.
[13] SC (FR) 551/98; decided on 31-08-2001.

in the International Covenant on Economic, Social and Cultural Rights (ICESCR) and stated as follows;

> *"….[I]n a scheme of promotion based on 'Seniority' and 'Merit', sufficient weightage must always be given to 'Merit' based upon a proper assessment of actual past performance: efficiency, productivity, timeliness, accuracy, initiative, creativity, ability to work with others, co-operation etc. Article 7 of the International Covenant on Economic, Social and Cultural Rights recognizes the right to an "equal opportunity for everyone to be promoted in his employment to an appropriate higher level,* ***subject to no considerations other than those of seniority and competence."*** *[Emphasis Added]*

His Lordship Justice Fernando may have thought it fit to refer to ICESCR in the above case because the Democratic Socialist Republic of Sri Lanka has become a state party to the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1980 by way of accession.

In the instant case, the observations of the president (**9R2**), referred to in the relevant cabinet decision to preserve the seniority of the serving police officers is in conformity with the above principle. In terms of Article 155 G of the Constitution, the National Police Commission which was vested with the powers relating to promotions of Police officers at the relevant time, was required to act in consultation with the Inspector General of Police. Thus, it was in order for the National Police Commission, to take into consideration, the relevant observations of the Inspector General of Police. This Court cannot ignore the seniority of the serving police officers and give directions to promote officers who are less senior merely because the political victimization committee had recommended to do so. The Supreme Court cannot be, and should not become, a mere rubber stamp to endorse any such recommendation of a political victimization committee.

The Case of Poojya Mawanane Sominda Thero and thirteen others Vs. V. K. Nanayakkara and eleven others,[14] also stands as a good example to understand the scope of power vested in the Cabinet of Ministers to provide for matters of policy. That

[14] SC (FR) 146/2003; decided on 15-07-2004.

case was in relation to an implementation of a Cabinet decision concerning Pirivena Education. The Petitioners in that case were Lecturers attached to the Seethawakapura Pirivena Teacher Training Institute at Avissawella and Coordinators attached to the Provincial Education Offices. They claimed that according to Pirivena Education Act, No. 64 of 1979, the Government assumed the responsibility of assisting Pirivena education to function parallel to education offered by State. In order to recommend inter alia, changes that should be effected to the above Act, the Government appointed a committee in 1994 to submit its recommendations to the Ministry of Education. The said petitioners sought the implementation of the Cabinet decision based on the afore-stated recommendations. The petitioners in that case complained to Court, that the relevant Committee of the Public Service Commission should have implemented the said policy decisions and the non-implementation of those recommendations had caused a serious violation of their fundamental rights. Her Ladyship Justice Shirani A Bandaranayake,[15] having considered whether the relevant decision taken by the Cabinet of Ministers pertains to a matter of policy coming under the purview of Article 55(4) introduced by the 17th Amendment to the Constitution, stated in her judgment as follows.

> *The Concise Oxford Dictionary refers to a matter of policy as the 'course or general plan of action to be adopted by government, party or a person'. Professor Galligan, on the other hand, defines a decision of policy in the following words (Due Process and Fair Procedures, Clarendon Press, Oxford, 1996, pg. 454),*
>
> *"A decision of policy is one where the authority has to draw on general considerations of a social, economic or ethical kind in deciding an issue, where the decision is likely to affect a range of groups and interests."*
>
> *Accordingly, the general norm in the definition of 'a policy matter' would be for the action taken to be for the common good. As pointed out by Professor Galligan (supra) while interests and claims of individuals and groups are ingredients to be added to the cauldron of policy- making the final decision should reach beyond particular concerns to a broader sense of the interests of all". The necessity for the generalization therefore would be the essential*

[15] (Later became Chief Justice).

ingredient in defining 'policy' and this is clear as one examines the meaning given to the said word in the Oxford Companion to Law, where it reads thus:

"The general consideration which a governing body has in mind in legislating, deciding on a course of action or otherwise acting (David Walker; Clarendon Press Oxford, 1980. pg.965)."

Therefore, a policy decision necessarily will have to be applicable in general and cannot be interpreted to include specified persons.

The Cabinet Memorandum dated 03.09.2001 (1 R3) basically deals with 3 main items. The first item is with regard to the creation of a post designated as Assistant/Deputy Director (Pirivena) for each Provincial Department of Education. The second item refers to the absorption of 8 priests who were holding the positions as Pirivena Coordinators in different provinces. The third item is the upgrading of the ten Lecturers presently attached to the Sudharmarama Pirivena at Avissawella. An examination of the said items would clearly indicate that item 1.1 of the Memorandum clearly deals with a policy matter as it relates in general to the creation of a specific post. The second limb of this item, viz., item 1.2 however refers to the appointment of 8 selected persons and thereby is not in a category which deals with policy matters. This could have been avoided, if there was no special reference to the appointment of 8 persons who were holding positions as Pirivena Co-ordinators. The next item in the Memorandum is not dealing with a policy matter as it clearly refers to the absorption of 10 lecturers who had been serving for a period of over 10 years at the Sudharmarama Pirivena at Avissawella.

In the circumstances, it is apparent that the first item which deals with the creation of a post designated as Assistant/Deputy Director (Pirivena) for each Provincial Department of Education deals with a policy matter and the other two items do not come within the category of policy.

Furthermore, in Black's Law Dictionary a policy is defined: in its 5th edition, as '*The general principles by which a government is guided in its management of public affairs, or the legislature in its measures'* ; and in its 11th edition, as '*A standard course of action that has been officially established by an organization, business, political party,*

etc.´ Thus, all the above material clearly indicate that a policy decision must be applicable in general as opposed to specific individuals. If a particular policy decision focuses on specific individuals and fails to be applicable in a general context, it will not fall within the ambit of a policy decision.

Therefore, it is apparent that in the instant case, the petitioners cannot rely on the relevant Cabinet Decision to get relief on the basis that their names are included in a report of a political victimization committee as such a decision cannot be considered as a decision pertaining to a matter of policy for the aforementioned reasons.

I need to mention here yet another relevant matter. We have a legal system which reasonably protects the citizens' rights including fundamental rights. In such a situation the Petitioners who complain about infringement of their fundamental rights must first show as to why they did not seek an appropriate relief from Court at the time they were politically victimized, if in fact such a victimization had occurred as alleged. On the other hand, if the Petitioners had indeed sought relief from a Court, they should have revealed the details and outcome of such action. The absence of the above explanations, would further vitiate the Petitioners' claim that they were indeed politically victimized. Thus, the Petitioners cannot now complain that their fundamental rights have been violated by the Cabinet of Ministers which anyway did not have power to deal with individual promotions as shown above. This Court cannot directly or indirectly enforce recommendations made solely on political reasons, by implementing recommendations made by a Political Victimization Committee. Such actions would indeed negate the advancement of equal protection of law principle enshrined in Article 12 (1) of the Constitution.

Let me conclude this judgment citing the following passage from the judgment of Her Ladyship Justice Shirani Bandaranayake (as she then was) in the case of Farook Vs Dharmaratne, Chairman, Provincial Public Service Commission, Uva and others.[16]

> *The petitioner's relief sought from this Court is to declare that his transfer as Principal of Pitarathmale No. 1 Tamil Vidyalaya, Haputale and the 6th respondent's transfer as Principal of Sri Razick Fareed Maha Vidyalaya, Bandarawela are null and void. In view of the forgoing analysis of the*

[16] 2005 (1) Sri L. R. 133 at page 140.

material placed before this Court the petitioner has no right to be the Principal of Razick Fareed Maha Vidyalaya as he has not got the requisite qualifications. However, the petitioner quite clearly has sought to obtain relief on the basis of unequal treatment. When a person does not possess the required qualifications that is necessary for a particular position, would it be possible for him to obtain relief in terms of a violation of his fundamental rights on the basis of unequal treatment ? If the answer to this question is in the affirmative, it would mean that Article 12(1) of the Constitution would be applicable even in a situation where there is no violation of the applicable legal procedure or the general practice. The application of Article 12(1) of the Constitution cannot be used for such situations as it provides to an aggrieved person only for the equal protection of the law where the authorities have acted illegally or incorrectly without giving due consideration to the applicable guidelines. Article 12(1) of the Constitution does not provide for any situation where the authorities will have to act illegally. The safeguard retained in Article 12(1) is for the performance of a lawful act and not to be directed to carry out an illegal function. In order to succeed the petitioner must be in a position to place material before this Court that there has been unequal treatment within the framework of a lawful act.

In these circumstances and for the foregoing reasons, The Petitioners are not entitled to succeed with the prayers in this application. I dismiss this application but without costs.

JUDGE OF THE SUPREME COURT

E. A. G. R. AMARASEKARA J

I agree,

JUDGE OF THE SUPREME COURT

A. H. M. D. NAWAZ J

I 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 to be read with Article 17 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC. FR Application No. 418/2015

D.B.D Rajapakshe
"Prashakthi"
Ratmalwala

Petitioner

Vs.

1. Mr. Y. Abdul Majeed
   The Director General of Irrigation.
   Department of Irrigation,
   No.230, Bauddhaloka Mawatha,
   Colombo 07.

1(a) Mr.S.S.L. Weerasinghe
   The Director General of Irrigation.
   Department of Irrigation,
   No.230, Bauddhaloka Mawatha,
   Colombo 07.

1(b) Mr. S. Mohanaraja
   The Director General of Irrigation.
   Department of Irrigation,
   No.230, Bauddhaloka Mawatha,
   Colombo 07.

1(c) Eng.K.D.N. Siriwardana
   The Director General of Irrigation.

   Department of Irrigation,

No.230, Bauddhaloka Mawatha,

Colombo 07.

2. The Secretary

The Ministry of Irrigation and Water

Resource Management,

No. 500, T.B. Jayah Mawatha.

Colombo10.

3. The Secretary

The Ministry of Public Administration

and Management,
Independence Square,
Colombo 07.

4. The Director Establishment
The Ministry of Public Administration
and Management,
Independence Square.
Colombo 07.

5. The Director General
Department of Management Services,
Ministry of Finance,
Colombo 01.

6. Mr. Dharmasena Dissanayake
The Chairman.

7. Mr. A. Salam Abdul Waid
Member

8. Mr. D. Shirantha Wijayathilaka
Member

9. Mr. Prathap Ramanujan
Member

10. Mrs. Jegarasasingam
    Member

11. Mr. Santhi Nihal Senevirathne
    Member

12. Mr. S. Ranagge

    Member

13. Mr. D.L. Mendis

    Member

14. Mr. Sarath Jayathilaka

    Member

    6th to 14th Respondents of

    Public Service Commission,

    No.177, Nawala Road, Narahenpita,

    Colombo 05.

15. Secretary,

    Public Service Commission,

    No.177, Nawala Road, Narahenpita,

    Colombo 05.

16. The Regional Director of Irrigation,

    The office of the Regional Director,

    Irrigation Department,

    P.O. Box 44, Kurunegala.

17. Honourable Attorney General

Attorney General's Department,

Colombo 12.

Respondents

Before: Sisira. J. de Abrew J

Murdu Fernando PCJ

Gamini Amarasekara J

Counsel: Rasika Dissanayake with Chandrasiri Wanigapura, Dinuka Cooray and

Shabeer Hussain for the Petitioner

Rajiv Goonatilake SSC for the Attorney General

Written Submissions
tendered on: 6.3.2020 by the Petitioner
15.5.2020 by the Respondents
Argued on : 24.9.2020

Decided on : 12.2.2021

Sisira.J.de Abrew J

The Petitioner, by her petition filed in this court, alleges that her Fundamental Rights guaranteed by Articles 12(1), 12(2), and 14(1)(g) of the Constitution have been violated by the Respondents. This court by its order dated 13.1.2016, granted leave to proceed for alleged violation of Articles 12(1) and 14(1)(g) of the Constitution. The case of the Petitioner may be briefly summarized as follows. The Petitioner who passed the GCE (Ordinary Level) with five distinctions in the year 2000 and the GCE (Advanced Level) with two credit passes and one simple pass in the year 2003, was appointed as Management Assistant in the Department of

Irrigation on contract basis with effect from 21.5.2008 by letter signed by the 1st Respondent dated 7.5.2008. This letter dated 7.5.2008 is annexed to the Petition marked as P3. Thereafter her services were extended till 31.12.2014 by letters marked P4(i) to P4(vi). Thereafter, the Petitioner, by letter dated 17.11.2014 marked as P8, was appointed by the 1st Respondent to the post of clerk with effect from 24.10.2014 acting in terms of Circular No.25/2014 dated 12.11.2014 marked P6. The Petitioner states that she has fulfilled the requirements stated in the said Circular. After the Petitioner assumed duties as a clerk, she was paid salaries from January 2015 to August 2015 on the salary scale stated in the said letter of appointment marked P8 dated 17.11.2014. Her salary scale was, according to P8, is as follows.

MN1-2006-A. Rs 13,120 – 10x145 – 11x170 -10x240 – 10x320 – 22040.

However, by letter (marked P11) issued by the 1st Respondent in August 2015 (the date is not stated in the said letter), the Petitioner's appointment to the post of clerk was cancelled by the1st Respondent with effect from 17.11.2014 which is the date of the letter of appointment marked P8. The letter of cancelling the Petitioner's appointment was handed over to the Petitioner by letter dated 8.9.2015 marked P12. Thus, she was not permitted to report for duty with effect from 8.9.2015. The Petitioner challenges both P11 and P12 and moves to quash the said letters.

The learned Senior State Counsel (SSC) contended that the Petitioner was not entitled to be appointed to the post of clerk in terms of Circular No.25/2014 dated 12.11.2014 marked P6 since the said Circular (P6) had authorized to appoint Management Assistants to the permanent cadre only if they (Management Assistants) were drawing the salary scale of MN1. The learned SSC contended that the Petitioner was not on the salary scale of MN1 but on the salary scale of MN2.

The Petitioner, as Management Assistant on contract basis, was drawing a salary of Rs.13,990 which, according to R3 produced by the 1st Respondent, is MN2. R3 is a document which indicates the salary scale of MN2. The salary scale of MN1 according to P8, is Rs.13,120. The learned SSC contended that the Petitioner was not entitled to be appointed to the permanent cadre since she was drawing the salary scale of MN2. According to the contention of the learned SSC, if the Petitioner was drawing a salary of Rs.13,120/-, she was entitled to be appointed to the permanent cadre. The difference of the salary was only (13,990 – 13,120) Rs.870/-. In fact, the Petitioner was drawing a higher salary than MN1 scale. Assuming without conceding that the Petitioner was not entitled to be appointed to the post of clerk (the permanent cadre) in terms of Circular No.25/2014 dated 12.11.2014 marked P6, who appointed the Petitioner to the post of clerk (permanent cadre)? It is the Director General of Irrigation (the 1st Respondent) who appointed the Petitioner to the permanent cadre acting on behalf of the Government. Then as contended by the learned SSC if it is a mistake, whose mistake was it? It was the mistake of 1st Respondent who acted on behalf of the Government. The Petitioner cannot be and should not be penalized for the mistake committed by the 1st Respondent. It is an accepted principle in law that no man is permitted to take advantage of his own mistake. This view is supported by the observation made by His Lordship Justice Sansoni in the case of Kanapathipillai Vs Meerasaibo 58 NLR page41 at page 43 wherein His Lordship observed thus *"no man is allowed to take advantage of his wrong."* In the present case, the Petitioner's appointment to the post of clerk (permanent cadre) was cancelled on the basis of an alleged mistake committed by the Director General of Irrigation (the 1st Respondent) who acted on behalf of the Government. On this ground alone this

court should quash the letters marked P11 and P12. Further there is no any allegation that the Petitioner committed any wrongful act.

The other matter that I would like to consider is whether the Petitioner had a legitimate expectation in continuing in the permanent cadre of the Government Service until her age of retirement. I now advert to this question. The Petitioner was appointed to the post of clerk with effect from 24.10.2014 by the Director General of Irrigation (the 1st Respondent) by his letter dated 17.11.2014 (P8). The letter of appointment (P8) states that this post is permanent and pensionable. Her salary was Rs.13,120/-. The Government paid her salary (Rs.13,120/-) on the basis that she has been appointed to the post of clerk for eight months and remitted Rs.870/- monthly to the W&OP. This is established by her salary slips marked as P10(i) to P10(viii). The Petitioner gave up her post of Management Assistant on contract basis when she was appointed to the new post. Presently, the Petitioner has lost her earlier post of Management Assistant and her new post of clerk. The Petitioner faces this situation due to the action of the 1st Respondent. When I consider all the above matters, I ask the question whether the Petitioner had a legitimate expectation of continuing in the permanent cadre of the Government Service. In this connection I would like to consider certain judicial decisions. In the case of Dayaratne and Others Vs Minister of Health [1999] 1SLR 393 this court observed the following facts.

> *By notification in the Gazette dated 10.05.1996 the Ministry of Health called for applications from persons desirous of following a course of training leading to the award of the certificate of competency as Assistant Medical Officers. Fifteen petitioners who were eligible for enrolment to follow the course of training applied in response to the notification and sat a competitive examination conducted on 27.12.1996; and they were so placed*

on the results of the examination as to be qualified to follow the course of training. According to the scheme published in the Gazette, the next step was the holding of an interview to check the qualifications, meaning the checking of (1) the birth certificate, (2) evidence of citizenship, and (3) certificates relating to educational qualifications. That interview was not held. Then, on 18.12.1997 the Secretary, Government Medical Officers' Association (GMOA) informed the Minister of Health and Indigenous Medicine that they desired the provision of employment to medical graduates and saw no justification 'to restart the AMP training course'; and that their members 'would not participate in any component of the training programme'. Whereupon, on 11.03.1998 the Minister sought cabinet approval to fill the existing and future vacancies in the cadre of Assistant Medical Practitioners with Medical Graduates and to offer the petitioners the option of following the course for paramedical services/Public Health Inspectors, if they so desire; and by a circular letter dated 20.08.1998, the petitioners were invited to apply for training as Pharmacists, Medical Laboratory Technologists and Public Health Inspectors. The requisite qualifications for such training and the course subjects are less than what are required for the AMP course. Besides, persons serving in Para Medical Services and as Public Health Inspectors are not eligible to seek registration under the Medical Ordinance to practise medicine and surgery whilst Assistant Medical Practitioners are eligible to seek such registration, subject to certain conditions.

This court held as follows. *"On the facts of the case, the petitioners had a legitimate expectation that they would, upon satisfying prescribed conditions, be provided with a course of training for the examination leading to the award of the*

certificate of competency as Assistant Medical Practitioners. The decision effecting a change of policy which destroyed the expectation of the petitioners did not depend upon considerations of public interest. In deciding upon the conflicting interests of Graduate Medical Officers and Assistant Medical Practitioners, the 1st, 2nd and 3rd respondents (the Minister, his Secretary and the Deputy Director General Administration, respectively) considered the views of the GMOA and yielded to their pressure. Neither the views of the Assistant Medical Practitioners nor those of the petitioners were sought. Hence, rights of the petitioners guaranteed by Article 12 (1) of the Constitution were violated." At page 413, this court whilst holding that the fundamental rights of the petitioners guaranteed by Article 12 (1) of the Constitution have been violated made the following observation. *"It is the duty of this Court to safeguard the rights and privileges, as well as interests "deserving of protection such as those based on legitimate expectations, of individuals."*

In the case of Sirimal and Others Vs Board of Directors of the Co-operative Wholesale Establishment and Others [2003] 2 SLR 23 this court observed the following facts.

> *"The petitioners complained that the 1st respondent ('The CWE") did in violation of their rights under Article 12(1) of the Constitution stopped extension of their services beyond 55 years and purported to retire them from 31.7.2002, by circular dated 21.6.2002(P6). The previous circular dated 14.11.1995(P5) provided for granting of annual extension from 55 until 60 as in the case of the public sector under Chapter V section 5 of the Establishments Code. The reasons given for the new policy decision were:*
>
> *(a) Redundant labour force*

(b) Heavy losses; and

(c) Reorganization of the CWE to make it a profit making organization.

The applications of all petitioners except Nos. 19 and 20 were recommended by the Service Extension Committee; and no application was sent to the Ministry for decision. The previous practice was to grant annual extension up to 60 years except where medical or disciplinary grounds existed.

This court held as follows.

1. The optional age of retirement in the CWE had been 55 years of age with a right to seek extension up to 60 years of age as in the public sector. The impugned circular seeks to make retirement compulsory at 55 years.

2. The petitioner had a legitimate expectation of receiving extension up to 60 years except where medical or disciplinary grounds were present.

In Surangani Marapana Vs Bank of Ceylon [1997] 3 SLR 156 this court observed the following facts.

"The petitioner had an unblemished record of 25 years of service at the Bank of Ceylon. She was fully qualified and had received special training in Banking Law and practice and allied subjects in London, Italy and Singapore. She was the Chief Legal Office of the Bank from 1.11.88 during which period she had enhanced the efficiency and streamlined the functions of the Legal Department. As she was to reach the age of 55 years on 27.11.96 she applied to the Bank on 25.5.96 for an extension of service for an initial period of one year. Her application was recommended by the

Personnel Department in its draft Board Minute, under exceptional circumstances. The Board of Directors took four months to decide on the application and after lapse of a further month, the petitioner was informed on 22.10.96 that her application had been rejected and she would be retired from 27.11.96. Officers who were of a comparable grade had been granted extensions. But she was refused for no reason. The Board failed to submit to Court its decision. The Chairman of the Bank stated in his affidavit that the refusal to extend her services was done bona fide and unanimously after a careful evaluation of her application and the need of the Bank to increase the efficiency of its Legal Department."

This court at page 171 held as follows.

"The decision of the Board of Directors not to grant the extension of service sought by the petitioner was arbitrary, capricious, unreasonable and unfair. It was also undoubtedly discriminatory, as the bank has not been evenhanded in the exercise of its discretion in respect of the petitioner. The impugned decision is, therefore, violative of 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." At page 172 the court made the following observation. *"As the petitioner has succeeded in her application, I direct the 1st respondent to restore her to the post of Chief Legal Officer forthwith, for a period of one year from 27.11.96, together with all back wages and other remuneration."*

In Pinnawala Vs Sri Lanka Insurance Corporation [1997] 3 SLR 85, this court observed the following facts. *"The petitioners' application for the third extension of his services after he had reached 55 years of age was refused by the employer company on the ground that he was found wanting in the discharge of his duties."*

This court at page 92 held that *the 1st respondent is a 'governmental agency or instrumentality' and the impugned act properly falls within the meaning of the expression 'executive or administrative action' in Article 126 of the Constitution. The petitioner is accordingly entitled to a declaration that the fundamental right guaranteed to him under Article 12(1) has been infringed".*

Considering all the aforementioned matters, I hold that the Petitioner had a legitimate expectation to continue in the permanent cadre of Government Service until the date of her retirement.

Article 12(1) of the Constitution states as follows. *"All persons are equal before the law and are entitled to the equal protection of the law."*

Article 14 (1) (g) of the Constitution 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;"*

Considering all the above matters, I hold that the Petitioner's fundamental rights guaranteed by Article 12(1) and 14(1)(g) of the Constitution have been violated by the Director General of Irrigation (the 1st Respondent) who acted on behalf of the Government. For the above reasons, I quash the letter issued by the 1st Respondent dated August 2015 marked P11 (the letter does not indicate a date) cancelling the Petitioner's appointment and the letter of the 1st Respondent dated 8.9.2015 marked P12 relating to the Petitioner. For the aforementioned reasons, I hold that the Petitioner is entitled to be in the permanent cadre of Government Service on conditions stipulated in her letter of appointment dated 17.11.2014 marked P8 from 24.10.2014. I direct the Director General of Irrigation to permit the Petitioner to continue in the permanent cadre of Government Service on conditions stipulated in

her letter of appointment dated 17.11.2014 marked P8 from the day that she was stopped from reporting for duty. The Petitioner is entitled to receive her salary as stipulated in her letter of appointment dated 17.11.2014 marked P8 and all other remunerations from the date of appointment to the post of clerk. The 1st Respondent is also directed to pay her back wages and other remunerations from the date that she was stopped from reporting for duty. The present Director General of Irrigation is directed to implement the directions given in this judgment within two months from the date of this judgment. I grant a sum of Rs.50,000/- as compensation. The 1st Respondent should pay the aforementioned compensation from the State funds. The Registrar of this court is directed to send a certified copy of this judgment to the Director General of Irrigation.

Judge of the Supreme Court.

Murdu Fernando 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 in terms of Article 126 read with Article 17 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

S C (F R) 449/2017

1. Jayamuni Anuradha Nilmini Vijesekara,
   "Mihinish"
   259/1/2B, Rassapana Road,
   Ihala Bomiriya,
   Kaduwela.

PETITIONER

-Vs-

1. Sumedha Thushanga,
   Police Constable,
   Peiliyagoda Police Station,
   Peliyagoda.

2. Indika Priyadharshana,
   Police Constable,
   Peiliyagoda Police Station,
   Peliyagoda.

3. Chanaka Rukman,
   Police Constable,
   Peiliyagoda Police Station,
   Peliyagoda.

4. Ajith Jayalal,
   Police Constable,

Peiliyagoda Police Station,
Peliyagoda.

5. Lahiru Roshan,
Police Constable,
Peiliyagoda Police Station,
Peliyagoda.

6. Senior Superintendent of Police (SSP),
Western Province,
Colombo 01

7. Hon. Attorney-General,
Attorney General's Department,
Hulftsdorp Street,
Colombo 12.

RESPONDENTS

Before: **P. PADMAN SURASENA J**

JANAK DE SILVA J

M. A. SAMAYAWARDHENA J

Counsel: Lakshan Dias with Miss Maneesha Kumarasinghe for the Petitioner.

Amila Palliyage with Ms. Nihara Randeniya and Ms. Sandeepani Wijesooriya and Mr. Daminde De Alwis and Ms. Ruwanthi Doralagoda for the 1st to 3rd Respondent.

Sunjith Senanayake with Saranga Perera instructed by Upul Dissanayake for the 4th and 5th Respondents.

Argued on : 02-03-2021

Decided on : 14-07-2021

P. Padman Surasena J

The Petitioner is the wife of Chadik Shyaman Wickramarachchi who is alleged to have died while in Police custody. Chadik Shyaman is a father of two children, a seven-year-old son and a daughter of one month at the time of his death. The Petitioner and her husband Chadik Shyaman were living with the Petitioner's father, her mother, two of her aforesaid children at Mihinsha, 259/1/2B, Rassapana Road, Ihala Bombiriya, Kaduwela since year 2000 as their permanent residence.

Around 4.00 am on 25-02-2017 the 1st to 5th Respondents had come to their residence, arrested said Chadik Shyaman and taken him to Peliyagoda Police Station. The Petitioner who was also present at the time of the said arrest, had identified the 1st to 5th Respondents as police officers who had come from Peliyagoda Police Station. According to the Petitioner, Chadik Shyaman was clad in a blue short and a green shirt, when he left home on that day with the 1st to 5th Respondents. When inquired as to the reasons for taking him to the police station the 1st to 5th Respondents had stated that they wanted to record a statement from Chadik Shyaman.

Around 9.00 am on 25-02-2017, the Petitioner had gone to her husband's house in order to visit Peliyagoda Police Station. It was at that time she was informed that her husband had died and the body was lying at the Colombo General Hospital.

The Petitioner, her husband's father and a friend Wasanath had then gone to Sapugaskanda Police Station from where they were taken to Peliyagoda Police Station around 11.20 am on 25-02-2017. There, one high ranking police officer had explained to the Petitioner; that Chadik Shyaman was arrested in connection with a robbery of a car and jewelry in Kelaniya and Bandarawatte; that her husband had fallen sick, suffering from a wheezing attack when his statement was recorded; and that he was admitted to the hospital. The Petitioner states that this briefing is manifestly false in view of the findings in the postmortem report. The Petitioner has complained that the 1st to 5th Respondents had taken her husband into custody only to be killed when under the police custody.

It is in this backdrop that the Petitioner has prayed inter alia for the following relief.

a. *Declare that the action of the 1st to 5th Respondents have violated her husband's fundamental rights guaranteed under Articles 11, 12 (1), 13 (1), 13 (2) and 13 (3) of the Constitution, and subsequently the Petitioner and her two children have been victimized due to such violations;*

b. *Order the Hon. Attorney General to indict the 1st to 5th Respondents in the High Court for the offence of causing torture and cruel, inhuman or degrading treatment punishable under Act No. 22 of 1994;*
c. *Order the Registrar of the Supreme Court to call for a progress report from the Chairman of the National Police Commission of Sri Lanka regarding the investigation carried out on the complaint made by the Petitioner;*
d. *Grant compensation of Rs. 50,000,000 (Rupees Fifty Million) for the Petitioner for the violation of her husband's fundamental rights guaranteed under Articles 11, 12 (1), 13 (1), 13 (2) and 13 (3) of the Constitution.*

This Court on 10-01-2019, having heard the submissions of the learned counsel for the Petitioner and the submissions of the learned counsel for the Respondents, had granted leave to proceed only in respect of the alleged violations of Articles 11 and 12(1) of the Constitution against the 1st to 5th Respondents.

It would be opportune at the outset, to turn to the position taken up by the Hon. Attorney General in this case. The Hon. Attorney General has informed Court that a disciplinary action was initiated against the 1st to 5th Respondents by the Senior Superintendent of Police Gunathileka upon the directions of the Senior Deputy Inspector General Western Province (Crimes and Traffic). Upon the conclusion of the preliminary inquiry, a charge sheet was served on the 1st to 5th Respondents in order to conduct a formal disciplinary inquiry against them.

In addition to the aforesaid formal disciplinary inquiry, an Assistant Superintendent of Police on the instructions of Superintendent of Police Kelaniya, had conducted investigations pertaining to the death of the husband of the Petitioner in police custody. Upon the conclusion of the said investigation, the police had forwarded the relevant material pertaining to the said investigation to the Hon. Attorney General who had directed to file charges against the 1st to 5th Respondents for an offence punishable under section 296 of the Penal Code and conduct a non-summary inquiry in the relevant Magistrate's Court. After the conclusion of the said non summary inquiry, the case was again referred to the Hon. Attorney General who thereafter having considered the available material had taken steps to indict the 1st to 5th Respondents under section 2(4) of the Convention Against Torture and Other Cruel Inhuman, Degrading Treatment or Punishment Act No. 22 of 1994 in the High Court of Colombo. The High Court of Colombo has reportedly fixed this case (case No. HC 155/2019) for trial.

At the time of the argument the learned counsel for the Petitioner in view of the actions taken by the state to indict the 1st to 5th Respondents, did not press for the afore-said relief prayed under (c) and (d). Indeed, I am satisfied that the Petitioner has already received relief she had expected from those two prayers. Therefore, I would not focus on the said prayers in this judgment.

The 1st to 5th Respondents have filed a joint affidavit and a statement of objections. The 1st to 5th Respondents have admitted that police officers attached to Peliyagoda Police Station had gone and arrested the Petitioner's husband on 25-02-2017 in respect of an incident of committing a robbery of a vehicle using a firearm with another suspect named Isuru Sandaruwan. The 1st to 5th Respondents have also stated that there was no necessity to break open any door as alleged by the Petitioner as an old person in the house opened the door to enable the arrest of the Petitioner's husband. The 1st to 5th Respondents also state that the family members of Chadik Shyaman and his wife (the Petitioner) were also there at the time of arrest who had informed that Chadik Shyaman was frequently suffering from wheeze. They further state that the family members also gave an inhaler along with some capsules and medicine to Chadik Shyaman who inhaled from the inhaler and also took one capsule just after his arrest. Although not specifically admitted that they arrested the Petitioner's husband, it can be reasonably inferred from several averments in the joint affidavit filed by the 1st to 5th Respondents that they were the members of the team of police officers responsible for the arrest and bringing Chadik Shyaman to Peliyagoda Police Station. They have not denied that they were the members of the said team. It must be borne in mind that this Court had not granted leave for the Petitioner to proceed with infringements under Article 13(1) of the Constitution. Therefore, I would not venture into consider the legality of the arrest of the Petitioner's husband.

The 1st to 5th Respondents had not taken up a position in their affidavit that they had handed over the Petitioner's husband to the police station or to any other officer after his arrest. If the 1st to 5th Respondents had handed over the Petitioner's husband to any other police officer, it is the 1st to 5th Respondents who should have known it best. Thus, in the absence of such position being taken up by the 1st to 5th Respondents, I would henceforth proceed on the basis that the Petitioner's husband continued to be in the custody of the 1st to 5th Respondents until the occurrence of the events which led to his death.

It is the position of the 1st to 5th Respondents that the Petitioner's husband is a person who was suffering from wheeze, fell ill due to that illness and was admitted to the hospital later

on. However, they have failed to produce copies of any note containing any entry made in that regard, in any of the Information Books maintained at the relevant Police Station.

Although the 1st to 5th Respondents have denied assaulting the Petitioner's husband, all what they have stated in their affidavit and the statement of objections is that; the Petitioner's husband was arrested; a statement was recorded; he fell ill; he was admitted to the hospital; and he died.

A postmortem examination of the body of the Petitioner's husband had been conducted at 10.00 am on 26-02-2017 by the Consultant Judicial Medical Officer - Colombo. The Consultant Judicial Medical Officer had observed twenty-eight external injuries on the body of the Petitioner's husband. The Petitioner has produced the aforementioned Post Mortem Report marked **P-7**. The Consultant Judicial Medical Officer had set out the said external injuries in the said Post Mortem Report in the following manner under the heading signs of recent injury.

SIGNS OF RECENT INJURY

1. *There is a 0.5 cm faint abrasion in the left frontal eminence area.*
2. *There is a 0.5 cm faint abrasion in the left forehead which is situated 1 cm above the lateral end of the left eyebrow.*
3. *There is a 2x1 cm abraded contusion in the left malar eminence area.*
4. *There are retrain marks with an imprint abrasion along with contusions similar to hand cuffs in both wrist areas.*
5. *There is a 4 cm obliquely oriented scratch abrasion above the manubrium sternum area.*
6. *There is a 3 cm obliquely oriented scratch abrasion in the medial end of the right clavicle.*
7. *There is a 1 cm abrasion in the posterior aspect of the right forearm situated 6 cm below the right elbow.*
8. *There is a 2x1 cm abrasion in the lateral aspect of the right elbow area.*
9. *There is a 5x4 cm purple contusion in the palmer aspect of the right hand.*
10. *There are two focal abrasions in the left anterior shin (0.5 cm each). One is placed in the upper third and the other in the mid third of the left shin.*

11. *There is a 2.5 x 1 cm abrasion in the lateral aspect of the right knee.*

12. *There is a 1 cm abraded contusion in the upper third of the right anterior shin.*

13. *There is a pre cervical vertebral haemorrhage with a 4th to 5th cervical spine fracture.*

The following injuries were seen after reflection of the skin. They are not isolated injuries but described as groups for easy reference. Therefore, the numbering of them does not accurately reflect the exact number of injuries.

14. *There are diffuse and extensive deep muscle contusions in the entire posterior aspect of the left forearm. There are overlapping tram line contusions within the diffuse contusion. There is a 2x1 cm focal abrasion on the skin in the upper third of the posterior aspect of the left forearm.*

15. *There are diffuse and extensive deep muscle contusions extending from the top of the left shoulder to the left elbow diffusely distributed in the postero-lateral aspect. There are overlapping tram line contusions within the diffuse contusion.*

16. *There are diffuse and extensive deep muscle contusions extending from the tip of the right shoulder towards the posterior middle third of the right upper arm.*

17. *There are contusions of the dorsal aspect of the right hand.*

18. *There are contusions of the dorsal aspect of the left hand.*

19. *There are contusions of the palmar aspect of the right hand.*

20. *There are contusions of the palmar aspect of the right.*

21. *There are diffuse and extensive deep muscle contusions extending from the lateral aspect of the left hip which extends downwards in an area of 25x30 cm which also extend anteriorly and posteriorly. There are overlapping tram line contusions within the diffuse contusions. The left inguinal area and just below it is spared.*

22. *There are diffuse and extensive deep muscle contusions extending from the lateral aspect of the right upper thigh which extends downwards in an area of 30x35 cm which extends anteriorly and posteriorly. There are overlapping tram line contusions within the diffuse contusion.*

23. *There are contusions of the right calf area.*

24. *There are contusions of the left calf area.*

25. *There are diffuse and extensive deep muscle contusions in the entire back of the torso spearing the recessed areas of the back of the chest horizontally along the mid line and lumbar area. There are overlapping multiple tram line contusions within the diffuse contusions. The left inguinal area is overlapping multiple tram line contusions within the diffuse contusions. The left inguinal area and just below it is spared. The exact length of the tram line contusions cannot be measured due to their overlap. The width of tram line contusions measure about 4.5 cm (with central pallor of 1.5 cm and marginal contusions of 1.5 cm each=4.5 cm).*

26. *There are diffuse and extensive deep muscle contusions in the entire gluteal regions. They extend up to the lower third of the back of both thigh areas.*

27. *There is a faint 4.5x10 cm somewhat horizontally oriented soft tissue contusion in the exterior abdomen just below the level of the umbilicus.*

28. *There are contusions of the sole of both feet.*

The Consultant Judicial Medical Officer has described these injuries as signs of recent injuries and identified the injury pattern as one commonly seen in torture. According to the Post Mortem Report, the cause of death is Hypovolemia due to multiple defuse and extensive muscle and soft tissue contusions caused by blunt force trauma on the body.

Further, the Consultant Judicial Medical Officer had observed sand on the head, head hair, neck and torso of the body of the Petitioner's husband. This supports the averment in the petition in which the Petitioner has stated that she identified her husband's body; the body was without a shirt on it; and she had observed sand on her husband's body. It must be remembered that the 1st to 5th Respondents have stated that there was no necessity to break open any door as an old person in the house opened the door to facilitate the arrest of the Petitioner's husband. The 1st to 5th Respondents do not take up any position even to suggest any instance of any resistance by the Petitioner's husband or any attempt to escape from custody or any struggle with any other during the period in their custody since his arrest at about 4.00 am in the morning of 25-02-2017. Indeed, the Petitioner's husband had been in the custody of the 1st to 5th Respondents only for few hours as the Post Mortem Report indicates that the death had occurred at 9.06 am on 25-02-2017. The said time duration could be estimated to be approximately 05 hours. As per the 1st to 5th Respondents' position, the said five hours would include the time during which the Petitioner's husband fell ill due to 'wheezing attack'. The position of the Petitioner in this regard is also compatible with this

finding as she has stated in her petition that it was around 9.00 am on 25-02-2017 that she was informed that her husband had died and the body was lying at Colombo General Hospital.

The next question is as to how the Petitioner's husband who was in the custody of the 1st to 5th Respondents could have sustained these injuries. All what the Petitioner knew about this and in fact has stated in the petition is the fact of the arrest of her husband; him being taken to Peliyagoda Police Station; his death while in police custody; and thereafter seeing his body in the hospital.

One would not need more evidence than the above list of external injuries on the body of the Petitioner's husband along with the opinion of the consultant Judicial Medical Officer to conclude that somebody had used blunt force trauma on the Petitioner's husband. The 1st to 5th Respondents were obliged in law to keep the Petitioner's husband in their safe custody as long as they kept him in their custody as a suspect pending further investigations. The 1st to 5th Respondents have not explained as to how the Petitioner's husband who was in their custody had sustained not one or two but twenty-eight injuries listed above. Thus, in the absence of any explanation by the 1st to 5th Respondents, the only irresistible conclusion is that the 1st to 5th Respondents had used blunt force trauma on the Petitioner's husband while in their custody after his arrest and that had brought him a considerable number of injuries on his body. There is no other inference possible in the above circumstances. As regards the death, it is clear from the findings of the Post Mortem Examination, that the Petitioner's husband's death was not due to a wheezing attack. Nor have the 1st to 5th Respondents established that he was admitted to the hospital on that sickness. The Post Mortem Report is clear that the cause of death is due to extensive muscle and soft tissue contusions caused by blunt force trauma.

In the case of Sriyani Silva Vs. Iddamalgoda, Officer-in-Charge, Police Station Paiyagala and others,[1] His Lordship Justice Mark Fernando, held that Article 13(4) impliedly recognized the right to life at least in the sense of mere existence, as distinct from the quality of life which can only be deprived of, by a court order and that Article 11 (read with Article 13(4)), recognizes a right not to deprive a citizen of his life whether by way of punishment or otherwise. His Lordship went on to hold that the jurisdiction conferred by the Constitution on this Court for the sole purpose of protecting fundamental rights against executive action must be deemed to have conferred all that is reasonably necessary for this Court to protect the said rights effectively.

[1] 2003 (2) SLR 63.

Moreover, Justice Mark Fernando in that case, also held that the lawful heirs and/or dependents are entitled to institute proceedings under Article 126(2) read with Article 17 in respect of the infringement of the afore-said fundamental rights.

In these circumstances and for the foregoing reasons, I hold that the 1st to 5th Respondents have infringed the fundamental rights of the Petitioner's husband Chadik Shyaman Wickramarachchi guaranteed under Article 11 and 12(1) of the Constitution.

I award a sum of Rs 1,000,000, as compensation, of which a sum of Rs 750,000 shall be paid by the State and Rs 50,000 each by the 1st to 5th Respondents personally. The amount of money ordered as compensation must be paid within four months from the date of the pronouncement of this judgment.

Out of the sum of Rs. 1,000,000/= (one Million) awarded as compensation, a sum of Rs. 500,000/= shall be invested in the names of the two children in equal shares in a state bank. The Petitioner is entitled to the balance Rs. 500,000/= The Registrar must ensure the distribution/investment of compensation ordered.

JUDGE OF THE SUPREME COURT

JANAK DE SILVA J

I agree,

JUDGE OF THE SUPREME COURT

M. A. SAMAYAWARDHENA J

I 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.

Peduru Arachchige Janaka Pushpakumara
(LL 27759),
No.29, Sisil Uyana,
Panamura Road,
Thelbaduara,
Embilipitiya.

Petitioner

S.C.(F.R.) Application No: 452/2011

Vs.

1. Director General,
   (Electric and Electronic Division)
   Sri Lanka Navy Headquarters,
   Colombo 01.

2. Director General,
   (Personnel and Training)
   Sri Lanka Navy Headquarters,
   Colombo 01.

3. Commander of the Navy,
   Sri Lanka Navy Headquarters,
   Colombo 01.

4. Lieutenant Commander T.R.
   Dahanayake,
   Sri Lanka Navy Headquarters,
   Colombo 01.

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

Respondents

Before: P. Padman Surasena, J.
Janak De Silva, J.
Mahinda Samayawardhena, J.

Counsel: Saliya Pieris PC with Susil Wanigapura for the Petitioner.
Anusha Jayatilleke SSC for the Respondents.

Argued On: 02.03.2021

Decided On: 06.07.2021

Janak De Silva J.

The Petitioner was a Leading Electrical Mate in the Sri Lanka Navy. He was enlisted on 27th May 1998.

According to Regulation 7 of the Seaman's Enlistment and Service Regulations 1950 promulgated by the Minister of Defence in terms of section 161 of the Navy Act No. 34 of 1950 as amended, the period of original enlistment of a seaman is twelve years.

In terms of Regulation 8, a seaman, may, before the expiry of the period of his original enlistment, be re-engaged for service in the Regular Naval Force for a further period of not exceeding twenty years.

The Sri Lanka Navy issued a message dated 24th September 2009 (P5) ordering all the seamen who were enlisted as 82nd and 83rd intakes to apply for the re—engagement to the Regular Naval Force before the expiry of their initial service period of twelve years.

The Petitioner belonged to the 83rd intake and hence applied for re-engagement by application dated 26th December 2009 (P6). Although he did not receive any reply to the application, he continued to serve in the Regular Naval Force for another one year and four months after his initial service period was completed on 27th May 2010. However, he was not given any promotions and salary increments during this period.

Since there was no response to his application to be re-engaged, the Petitioner preferred an appeal to the 3rd Respondent by letter dated 25th April 2011 (P7) to allow him to participate in the medical tests to re-engage in the services.

On 29th August 2011, the Petitioner received a letter sent by the Navy Head Quarters (P8) by which he was informed that he has been discharged with effect from 1st September 2011 in terms of Regulation 15(1)(v) of the Seaman's Enlistment and Service Regulations 1950 which reads:

> "15(1) The Commander of the Navy may discharge a seaman –
>
> (v) who has completed his engagement, that is to say, the period of original enlistment or the period of re-engagement; …"

The Petitioner contends that the discharge from the Sri Lanka Navy and the refusal to re-engage him is arbitrary, unreasonable and discriminatory and violates the fundamental rights of the Petitioner enshrined in Article 12(1) of the Constitution.

Regulation 15(1) of the Seaman's Enlistment and Service Regulations 1950 specifies several instances where a seaman may be discharged by the Commander of the Navy. This appears to give a discretion to the Commander of the Navy. Regulation 15(1)(v) applies in the event of a seaman who has completed his engagement.

However, when it comes to the decision of re-engagement, Regulation 10 of the Seaman's Enlistment and Service Regulations 1950 provides the criteria to be considered. It reads:

> "10. (1) An extension of service in the Regular Naval force beyond the period of original enlistment referred to in Regulation 7, may be allowed to a seaman who –
>
> (a) Is efficient, well-behaved and recommended by his Commanding Officer, and

(b) Who has passed a medical test to the satisfaction of the Commander of the Navy"

The Respondents have not taken up the position that the Petitioner has failed to meet these criteria. They simply contend that the decision to re-engage a seaman after he has completed his original enlistment period is purely discretionary and not as of right and that no reasons have to be adduced where a seaman is discharged after completing such period of service. No reasons have been tendered to Court by the Respondents as to why the application of the Petitioner to be re-engaged was refused.

It appears that in terms of Regulation 10, there is discretion vested in the Commander of the Sri Lanka Navy to re-engage a seaman even though he fulfills the criteria set out therein.

However, every discretionary power has limits. There is no such thing as unfettered discretion. Unfettered discretion is anathema to the rule of law on which our Constitution is founded [*Visuvalingam and Others v. Liyanage and Others* (1983) 1 Sri.L.R. 203 at 236; *Premachandra v. Major Montague Jayawikrema and Another* (1994) 2 Sri.L.R. 90 at 102].

In deciding whether the Commander of the Navy has acted within the limits of the law in exercising his discretion, it is important to ascertain the reasons for his decision. While I reserve my position on whether there is a general duty on an administrative body to provide reasons for its decision, I have no hesitation in holding that once the fundamental rights jurisdiction of this Court is invoked, the decision-maker owes a duty to the Court to disclose the reasons for his decision. Even where no reasons have been given to the affected party, the departmental

file must contain the reasons for the impugned decision. Where no such reasons have been recorded, the only conclusion the Court can draw is that the decision was taken devoid of any reasons and is hence arbitrary.

No doubt every breach of the law does not amount to a denial of the protection of the law. As Fernando J. held in *Jayawardena v. Dharani Wijayatilake, Secretary, Ministry of Justice and Constitutional Affairs and Others* [(2001) 1 Sri.L.R. 132 at 158]:

> "In my view, while each and every breach of the law does not amount to a denial of the protection of the law, yet some fundamental breaches of the law will result in denying the protection of the law."

Nevertheless, where an administrative body fails to disclose to Court the reasons for the exercise of discretionary power, that is a violation of the rule of law. It results in a fundamental breach of the law and a denial of the equal protection of the law. There may be narrow exceptions to the above principle on grounds such as national security. I reserve my position on the existence of any exceptions to this rule.

For the foregoing reasons, I declare that the decision contained in P8 is arbitrary and unreasonable and that the fundamental rights of the Petitioner guaranteed by Article 12(1) of the Constitution has been infringed by the 3rd Respondent by discharging him with effect from 1st September 2011 in terms of Regulation 15(1)(v) of the Seaman's Enlistment and Service Regulations 1950.

I further declare that the decision to discharge the Petitioner from the Sri Lanka Navy as reflected in P8 is of no force or avail in law.

I direct the State to pay a sum of Rs. 50,000/= as compensation to the Petitioner for the violation of his fundamental right guaranteed by Article 12(1) of the Constitution.

I further direct the 3rd Respondent to consider the application made by the Petitioner for re-engagement by application dated 26th December 2009 (P6) in terms of Regulation 10 of the Seaman's Enlistment and Service Regulations 1950 and take a decision according to law.

Judge of the Supreme Court

Mahinda Samayawardhena J.

I agree.

Judge of the Supreme Court

P. Padman Surasena J.

I have had the benefit of reading in draft form, the judgment of His Lordship Justice Janak De Silva who has set out the necessary facts pertaining to this case in his judgment.

As has been mentioned, it is the position of the respondents that the decision to re-engage a seaman at the end of the first enlistment period, is purely discretionary. It is because of the said 'pure discretion' that the respondents have taken up the position that no reasons need to be given when the Commander of

Sri Lanka Navy, decides in his discretion not to re-engage the petitioner for a second period.

If the above position is correct, no reasons need be given when the Commander of Sri Lanka Navy, decides in his discretion to re-engage any other seaman for a second period. The question then arises as to whether the Petitioner has been afforded an equal protection of law guaranteed under Article 12 (1) as against those who were allowed by the Commander of Sri Lanka Navy to re-engage for a second period. This can only be ascertained by comparing/considering, the reasons for such permission to re-engage some seamen as against the reasons for refusal to re-engage some other seamen. Therefore, in this instance the Commander of Sri Lanka Navy ought to have given reasons for his decision not to re-engage the petitioner for a second period.

Thus, the respondents have failed to satisfy the Court that the Petitioner has been afforded the equal protection of law guaranteed under Article 12 (1) of the Constitution. In the above circumstances, I conclude that the respondents, have infringed the fundamental rights of the Petitioner guaranteed under Article 12 (1). For those reasons, I agree with the relief set out in the judgment of His Lordship Justice Janak De Silva.

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.

SC FR 531/2012

Lakshika Dilani Kulathunga,
No.06, 1st Lane Galpotta Road,
Koswatte.

Petitioner

Vs.

1. Sisira,
Officer in Charge
Community Police Unit
police station
Kottawa.

2. Upali
Sub Inspector of Police
Acting Officer in Charge
police station
Kottawa.

3. Mr. Saliya de Silva
Senior Superintendent of Police
Nugegoda
Office of the Senior Superintend of Police
Mirihana.

4. Senapathi
Assistant Superintendent of Police
Homagama South
Office of the Assistant Superintend of Police
Homagama.

5. Inspector General of Police,
Sri Lanka Police Headquarters
Colombo 12.

6. Honorable Attorney General
Department of the Attorney General,
Colombo 12.

Respondents

Before	:	Jayantha Jayasuriya, PC, CJ Mahinda Samayawardhena, J Arjuna Obeyesekere, J.
Counsel	:	Upul Kumarapperuma with Ms. Udumbara Dasanayake, Ms. Radha Kuruwitabandara and Mr Shelly Gunaratne for the Petitioner. Nuwan Kodikara for the 1st and 2nd Respondents. G. Wakishta Arachchi SSC for Hon. Attorney General.
Written Submissions	:	04.10.2021 by the Petitioner
Filed on		27.09.2021 by the 1st and 2nd Respondents
Argued on	:	09.08.2021
Decided on	:	06.12.2021

Jayantha Jayasuriya, PC, CJ

The petitioner, a mother of a seven year old child at the time of the alleged incident has invoked the jurisdiction of this Court in terms of Article 126 of the Constitution. This Court has granted leave to proceed against 1st and 2nd respondents for the alleged infringements under Article 11, 12(1) and 13(1) of the Constitution.

1st and the 2nd respondents are named in the petition as Sisira, Officer in Charge, Community Police Unit, police station, Kottawa and Upali, Sub Inspector of Police, Acting Officer in Charge, police station Kottawa, respectively. Both these respondents filed objections and were

represented by Counsel. The 1st respondent in his affidavit dated 31st January 2013 identifies himself as "Kolom Muhandiramge Sisira", acting as a Development Assistant attached to Kottawa police station. The 2nd respondent in his affidavit dated 31st January 2013 identifies himself as "Dissanayake Mudiyanselage Upali Senerath Dissanayake", and admits that he was the Acting Officer in Charge of the Kottawa police station at the relevant time.

According to the petitioner, on or around 09th August 2012, around 5.00 pm she received a telephone call on her mobile phone. The said call had been originated from a mobile phone. The caller who identified himself as an officer attached to Kottawa police station had informed that the brother of the petitioner had been admitted to hospital after meeting with an accident. However, when the petitioner inquired about the condition of the brother, the caller proceeded to inquire in turn from the petitioner details such as places the brother frequently visits, the family background and his place of abode; without disclosing the condition of the person who was claimed to have been admitted to the hospital. Furthermore, the petitioner had been asked to come to Kottawa police station without proceeding to the hospital. At the same time, a relative of the petitioner had called and informed that she also received a telephone call from an officer attached to Kottawa police station asking for details of the petitioner's brother having informed that he had been hospitalized due to an accident. Simultaneously, the brother of the petitioner also had contacted her and informed that he had not met with an accident.

Having received this information, the petitioner had asked the caller who identified himself as an officer attached to the Kottawa police station as to the reason why she was questioned on the details of the brother. At that time the caller had asked her to come over to police station before 6.00 pm to get information about the brother. Despite the petitioner informed her difficulties to come over to the police station that evening, the caller had insisted that she should come over to the police station by 6.00 pm and any failure to do so would cause difficulties to her brother as well as to her family. The petitioner thereafter through fear, proceeded to the police station despite having had to pick her child from a child care centre by 5.30 pm. Her husband had been engaged with some prior business related commitments. At the police station the 1st respondent had identified himself as the person who called the petitioner.

When inquired, the 1st respondent had informed that a complaint of harassment had been made against the brother of the petitioner and demanded that he be produced forthwith. The petitioner's request for time till the following day had been denied and had been threatened with detention at the police station until the brother is produced. The 1st respondent had threatened

“මල්ලී පොලිසියට අරගෙන එනකල් අපි යන්න දෙන්නේ නැහැ. දන්නවනේ මේක පොලිසිය. මල්ලීව ගෙනාවේ නැත්නම් පස්සේ හුඟක් කරදර වෙන්න වෙයි.” Furthermore, the petitioner claims that she was subjected to humiliation and harassment due to the abusive conduct of a group of people who were present at the police station in the presence of the 1st respondent. The 1st respondent had demanded that the petitioner join with the said group of persons to go in search of her brother, in the police jeep. The petitioner claims that the 2nd respondent was present at the police station when these incidents took place.

While the aforesaid events were in progress, an attorney-at-law related to the petitioner arrived at the police station after being informed by the relative who informed the petitioner over the phone regarding the telephone call she received from the police station. When the said attorney-at-law inquired for the reason for the arrest and detention of the petitioner at the police station, respondents had claimed that the petitioner was at the police station on her own volition. When inquired whether there is any complaint against the petitioner, two respondents had said that there is no such complaint. Thereafter, the said attorney-at-law had taken the petitioner away from the Police station. At that stage the 2nd respondent is alleged to have remarked “පොලිසියට පාර්ටි දාගෙන එන එවුන්ගේ අඬු කඩලා දාන්න ඕනි. තවම කවුරුත් දන්නේ නැහැ පොලිසියේ තරම”. An affidavit of the said Attorney-at-Law is marked P3 and produced along with the petition and affidavit of the petitioner.

The 1st respondent admits that he was attached to the Kottawa police station and was acting as a Development Assistant. He further admits that he has no authority to arrest or detain any person but his duty was to refer complaints to inquiring police officers at the police station. This respondent sets out the details of a complaint received at the police station on 08.08.2012 relating to a receipt of nuisance telephone calls by a female person. In her complaint she had provided the number of the telephone from which these calls had originated. Furthermore, she had named the person whom the aforesaid telephone number belonged to. The 1st respondent thereafter explains that the said person denied making such nuisance calls and took up the position that his phone was handed over to a third party for repairs. The 1st respondent claims that he used a detailed telephone bill handed over by the said person (marked 1R6) and started calling different numbers recorded therein randomly. It is through this process he claims that he obtained the telephone number of the petitioner and thereafter called her to obtain further details about her brother, who is suspected to have made alleged nuisance calls.

However, it is pertinent to observe at this stage, that only one statement, among the material he had produced before this Court, predates the events relating to this application (ie the initial complaint marked 1R3). Two other statements (1R4 and 1R5) had been made on 10.08.2012 (the following day of the incident). None of these statements contain any material implicating the brother of the petitioner. It is the statements that had been recorded much later, namely on 25.09.2012, which reveals material implicating the brother of the petitioner; the statement marked 1R7 (the statement of the person in whose name the phone number used to make nuisance calls is registered) and another statement recorded on the same day (25 September 2012) reveal such material.

The 2nd respondent, admits that he was the Acting Officer in Charge of Kottawa police station at the relevant time. He further affirms that the 1st respondent was attached to Kottawa police station as a Development Assistant and the duty assigned to him was to "refer complaints to inquiring officers in the police station". Furthermore, the 1st respondent did not have any authority to arrest or detain a person, as affirmed by the 2nd respondent.

The 2nd respondent denies that he was present at the police station at the time the petitioner came over there, but says that he returned to the police station when the petitioner and the complainant were about to leave. However, he admits that it was in his presence, the 1st respondent informed the Attorney-at-Law, that the petitioner came over to the police station on her own and that she is waiting for the arrival of her brother. This respondent denies that they followed the petitioner and the attorney-at-law and made any utterance.

The 2nd respondent who also produced the information book extracts containing the statements recorded in relation to the complaint made two days prior to the principal incident relating to this application, marked 2R3, 2R4, 2R5 and 2R7 (which were produced marked 1R3, 1R4, 1R5 and 1R7 by the 1st respondent), affirms that he directed the 1st respondent to *"refer (this) matter for inquiry".*

When considering the material presented before this court by the two respondents, it is clear that the 1st respondent, who was attached to the police station in the capacity of a 'Development Assistant' did not have any authority to conduct investigations. The duty assigned to him was to *refer any complaints to officers who have the authority to conduct investigations.* However, the material presented before this court by the petitioner and the two respondents reveal that the 1st respondent had stepped outside the legal bounds of authority and had actively got involved in the investigation, to which he had no legal authority. It is difficult to comprehend, on what authority

he actively got involved in the investigation by contacting possible witnesses and suspects over the phone and questioning them on matters relating to the investigation. Even if the petitioner voluntarily came over to the police station as claimed by the 1st respondent, on what basis did he provide his personal phone number asking her to contact him when she reaches the police station? It appears that the 1st respondent arrogated to himself powers of a police officer and had got involved in the investigation, for reasons best known to him. He had acted arbitrarily, outside the scope of authority.

The 2nd respondent was the acting officer-in-charge of the Kottawa police station. In ***Ukwatta v Marasinghe and others*** [2011 BLR 120 at 129] this court had observed,

> "*Under the procedure established by law for the administration and discharge of duties of a police station, regulations have been gazetted under the Police Ordinance and the Code of Criminal Procedure Act and officer-in-charge of a police station is the Chief administrative officer. He is in charge of the entire police station and is personally responsible for over all functions of the police station"*

It is pertinent to note, section 55 of the Police Ordinance empowers the Inspector General of Police to "frame orders and regulations for the observance of the police officers". Paragraph 2 of Part I–Preamble of such Departmental Order No A3 – which sets out the 'duties of officers in charge of stations' reads,

> *"You are now in a position in which you are responsible for the efficient carrying on of their duties by all under you. You are responsible for their health, for their recreation, and comfort and* ***for their good behaviour and discipline****"* (emphasis added)

Furthermore, paragraph 6 of Order no. A3 reads,

> *"The creation and maintenance of discipline are among your most important duties. You must insist that your orders and the orders of those empowered to make orders are obeyed immediately without argument or hesitation and with cheerfulness and energy"*
>
> *"Never pass any lapse from duty, however trivial, without taking notice of it"*
>
> *"Drop hard on slackness, disobedience and slovenliness"*

The 2nd respondent, under whose direction, control and supervision the 1st respondent performed duties, fail to explain on what basis and under whose authority the 1st respondent got himself

involved in this investigation without confining himself to his duty of referring the complaint to inquiring officers at the police station. Furthermore, the 2nd respondent fails to explain the administrative mechanisms or any meaningful measures placed at the police station to ensure that the 1st respondent would not abuse his position as a Development Assistant and get involved in investigations. Nor there is any material placed before this court to establish that the 2nd respondent as the Officer-in-Charge of the station took any steps to inquire from the 1st respondent the reasons for his involvement in the investigation without any lawful authority. He neither denies any knowledge on this aspect. He just affirms that the 1st respondent's duty is to *'refer complaints to inquiring officers in the police station"*, but admits that in his presence it was the 1st respondent who explained the petitioner the details on the complaint relating to alleged incident of harassment. Furthermore, the 2nd respondent admits that it was the 1st respondent who informed the attorney-at-law who visited the police station to verify the information that the petitioner had been arrested and detained at the police station, that the petitioner voluntarily came over to the police station in response to the complaint made against her brother. Nor there is any material placed before this court to establish that the 2nd respondent as the Officer-in-Charge of the station took any steps to investigate the 1st respondent's unlawful conduct after he came to know of the same. The 2nd respondent had not only failed to prevent the arbitrary conduct but also had failed to investigate such conduct of his subordinate. When all these circumstances are taken together, it is reasonable to infer that there was tacit approval of the 2nd respondent in regard to the role the 1st respondent played in the investigation relating to the alleged incident of harassment.

Though it is repetitive, it is important to observe, that none of the statements recorded prior to the 25th September 2012, reveal any material linking the brother of the Petitioner to the alleged incident of harassment on which the first information was received on the 08th September 2012. No complaint had been made naming the brother of the petitioner as a suspect. It is also pertinent to note that the three reports filed by the Officer in Charge of the Kottawa police station in the Magistrates Court of Homagama in case B 1890/12 also reveal that it was in November 2012, police sought notice on the brother of the petitioner. The initial report filed on 10.08.2012 – the day after the incident relating to this application occurred - names a different person on whom the complainant entertained suspicion. Furthermore, it is pertinent to observe that the statement of S.K.Basnayake, a relative of the complainant (at page 3 of the IB extracts produced by the two respondents) reveal that their presence at the police station in the evening of the 09th, was due to a telephone call received from Kottawa police. According to him they had been asked

to come over to the police station as the suspect party is due to come over there. Therefore, the meeting of the petitioner and the other group of people at the police station is not a coincidence.

When all these factors are taken together with the personal interest the 1st respondent had developed in this matter and the manner in which the 2nd respondent had conducted himself despite being the acting Officer in Charge of the police station, I am of the view, that the petitioner has proved, on a balance of probability, that the alleged incidents did in fact take place in the manner described by the petitioner as opposed to the position taken up by the two respondents. In my view, the conduct of the two respondents, as revealed through the material placed before this Court is arbitrary and unlawful.

I am further of the view that securing the presence of a person at a police station through deception or through fear of harm to use as a hostage for the securing the presence of a possible suspect, without using due process of law by adhering to the relevant provisions of law which enables the securing the presence of a suspect for an investigation, is not only arbitrary but unlawful too. Any administrative or executive action tainted with such conduct warrants deterrent sanctions.

Article 12 (1) of the Constitution guarantees equality before law and equal protection of the law. This court in its' Full Bench decision in ***Sampanthan et. al. v Attorney-General et. al.*** (SC FR 351-356 & 358-361/19, SC minutes dated 13th December 2018) citing with approval jurisprudence developed in ***Jayanetti v Land Reform Commission*** [1984 2 SLR 172] and ***Shanmugam Sivarajah v OIC Terrorist Investigation Division and others*** [SC FR 15/2010 SC Minutes of 27.07.2017] held that the right guaranteed under Article 12(1) of the Constitution encompasses protection of 'Rule of Law' too.

Maintenance of Law and Order forms an integral part of protecting Rule of Law and the Police Force as the organ that is entrusted with tasks such as investigation of crimes, apprehension and prosecution of offenders carries a heavy burden to ensure that the powers vested on its officers are not arbitrarily or discriminately exercised. Such exercise of arbitrary or discriminatory power by officers of the Police Force will result in break down of law and order and would pose a serious threat to Rule of Law. In ***Sudath Silva v Kodithuwakku*** [1987 2 SLR 119 at 126] in examining an alleged violation of Article 11, it was observed,

> *"……. 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 in any circumstance."

This Court in ***Sampanthan*** (supra), citing with approval the jurisprudence in ***Chandrasena v Kulathunga and Others*** [1992 2 SLR 327], ***Premawathie v Fowzie and Others*** [1998 2 SLR 373], ***Pinnawala v Sri Lanka Insurance Corporation and Others*** [1997 3 SLR 85], ***Sangadasa Silva v Anuruddha Ratwatte and Others*** [1998 1 SLR 350], ***Karunadasa v Unique Gem Stones Ltd and Others*** [1997 1 SLR 256] and ***Kavirathne and Others v Pushpakumara and Others*** [SC FR 29/2012 SC Minutes of 25.06.2012] held that Article 12(1) of the Constitution guarantees protection against arbitrary exercise of power.

As I have already discussed herein before, the conduct of the 1st and the 2nd respondents is arbitrary and unlawful. Through such conduct the Right to equal protection of Law guaranteed to the petitioner has been breached.

Article 13(1) of the Constitution reads, "no person shall be arrested except according to procedure established by law". This Article guarantees a protection against arbitrary arrest. In ***Namasivayam v Gunawardena*** [1989 1 SLR 394] this court held that actual use of force is not necessary to constitute a breach of Article 13(1) but even a threat of force to procure the presence of a person is sufficient. Furthermore, it was held that the deprivation of the liberty to go wherever a person feels, results in an arrest. In ***Namasivayam*** (supra at 401-402) the Court held,

"The liberty of an individual is a matter of great constitutional importance. This liberty should not be interfered with, whatever the status of that individual be, arbitrarily or without legal justification."

In ***Piyasiri v Fernando*** [1988 1 SLR 173 at 183] this court held,

"....Custody does not today, necessarily import the meaning of confinement but has been extended to mean ***lack of freedom of movement brought about not only by detention but also by threatened coercion, the existence of which can be inferred from the surrounding circumstances****"* (emphasis added).

Material presented before this court reveal that the respondents secured the presence of a the petitioner at the police station by instilling fear of harm and thereafter threatened to detain her at

the police station until the brother is produced. Furthermore, the petitioner was asked to join with the police team to go in search of the brother.

In ***Lakshman de Silva v Officer in Charge Kiribathgoda Police*** [SC FR 9/2011, SC Minutes of 03.03.2017, at p 12] observed,

> *"Detention of the spouse or a family member or a relative of a suspect merely to compel or to induce a suspect to surrender to the police cannot be a reasonable reason for the Peace Officer to arrest and detain such a person in police custody under section 32(1)(b) of the Criminal Procedure Code. The arrest and detention of a spouse or a family member or any other relative of a suspect by a peace officer must be condemned and discouraged by Courts of law in this Country".*

Based on the facts as revealed in the instant matter, I have no difficulty to find that the petitioner's right guaranteed under Article 13(1) also had been breached.

On the question whether the petitioner's right guaranteed under Article 11 had been breached or not, the petitioner does not allege any kind of physical assault. In this regard, it is pertinent to observe that this Court had held that the protection guaranteed under Article 11 encompasses a protection from psychological trauma, psychological suffering, psychological injury and severe mental pain or suffering too. [***W.M.K.De Silva v Chairman Ceylon Fertilizer Corporation*** 1989 2 SLR 393; ***Channa Peiris and others v Attorney-General*** 1994 1 SLR 1; ***Adhikary v Amerasinghe*** 2003 1 SLR 270; ***Puwakketiyage Sajith Suranga v Prasad et al*** SC FR 527/2011, SC minutes dated 22.07.2016]. However, in the context of an alleged breach of Article 11 of the Constitution it is also important to note that a high degree of certainty is required for the court to hold a violation of Article 11. In ***Channa Peris*** (supra at 107) it was held,

> *".... having regard to the nature and gravity of the issue, a high degree of certainity is required before the balance of probability might be said to tilt in favour of a petitioner endeavouring to discharge his burden of proving that he was subjected to torture or to cruel, inhuman or degrading treatment or punishment; and unless the petitioner has adduced sufficient evidence to satisfy the Court that an act in violation of Article 11 took place, it will not make a declaration that Article 11 of the Constitution did take place".*

In ***W.M.K.De Silva*** (supra at 401) His Lordship Justice Jameel observed,

> *".....ill-treatment per se, whether physical or mental, is not enough; a very high degree of mal-treatment is required"*

to constitute a violation of Article 11. His Lordship Amarasinghe J, further elaborating on this matter in ***Kumarasena v Sub-Inspector Shriyantha et al*** [SC FR 257/93, SC minutes of 23.5.1994] observed,

> *"The assessment of whether a person has been subjected to treatment violative of Article 11 depends on the nature of the act or acts complained of in the circumstances in which they were committed. (See W.R.K. de Silva v. Chairman, Ceylon Fertilizer Corporation (1987) 2 SLR 393,*[W.M.K. de Silva v. Chairman, Ceylon Fertilizer Corporation (1989) 2 SLR 393] *Fernando v. Silva and others S.C. Application 7/89 S.C. Minutes 3 May 1991). In the circumstances of this case the suffering occasioned was of an aggravated kind and attained the required level of severity to be taken cognizance of as a violation of Article 11 of the Constitution. The words and actions taken together would have aroused intense feelings of anguish that were capable of humiliating and debasing the Petitioner. I therefore declare that Article 11 of the Constitution was violated by the subjection of the Petitioner to degrading treatment."*

Her Ladyship Justice Bandaranayake, in ***Adikary*** (supra at 275) having considered ***W.M.K.De Silva*** (supra) and ***Kumarasena*** (supra) observed,

> *"…… the test which has been applied by our Courts is that whether the attack on the victim is physical or psychological, irrespective of the fact that, a violation of Article 11 would depend on the circumstances of each case."*

When all the material presented before this court by the petitioner is considered, I am of the view that the material available is insufficient to hold that there had been a violation of Article 11.

For the reasons set out above, I hold that the petitioner has established that rights guaranteed to her under Articles 12(1) and 13(1) had been infringed. Therefore, I grant the petitioner a

declaration that her fundamental rights guaranteed under Articles 12(1) and 13(1) of the Constitution have been infringed by the 1st and 2nd respondents.

I order the 1st and 2nd respondents to personally pay to the petitioner rupees one hundred thousand (Rs 100,000/-) each, within three months of today.

Chief Justice

Mahinda Samayawardhena, J

I agree.

Judge of the Supreme Court

Arjuna Obeyesekere, J.

I 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

J. A. Saman Kumara,
Kajugaha Koratuwa,
Walgama North,
Matara.

Petitioner

SC /FR/ Application No. 591/2008

Vs,

1. General Manager,
   Sri Lanka Government Railways,
   Railway Headquarters,
   Colombo 10.

2. Secretary,
   Ministry of Transport,
   D.R. Wijewardena Mawatha,
   Colombo 10.

3. Operating Superintendent,
   Operating Superintendent Office,
   Sri Lanka Railways,
   Colombo 10.

4. Transportation Superintendent (Colombo)
   Transportation Superintendent's Office,
   Sri Lanka Government Railway,
   Colombo 10.

5. Ceylon Station Masters' Union,
   No. 01, Railway Passage,
   Sri Lanka Government Railway,
   Colombo 10.

6. Transportation Superintendent (Nawalapitiya)
   Divisional Transportation Superintendents' Office,
   Sri Lanka Government Railway,
   Nawalapitiya.

7. Secretary,
   National Salaries and Cadre Commission,
   Room No. 2G10, BMICH,
   Bauddaloka Mawatha,
   Colombo 07.

7A. Secretary,
   National Pay Commission,
   Room No. 2G10, BMICH,
   Bauddaloka Mawatha,
   Colombo 07.

7B. Secretary,
   National Salaries and Cadre Commission,
   Room No. 2G10, BMICH,
   Bauddaloka Mawatha,
   Colombo 07.

8. Secretary,
   Ministry of Finance,
   Colombo 01.

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

Respondents

Before: **Hon. Justice B.P. Aluwihare PC**
Hon. Justice Vijith K. Malalgoda PC
Hon. Justice E.A.G.R. Amarasekara

Counsel: Thanuka Nandasiri for the Petitioner,

Ms. Anusha Jayathilleka, SSC, for the 1st ,2nd, 7B, 8th and 9th Respondents

Argued on: 23.07.2020

Judgment on: 01.04.2021

Vijith K. Malalgoda PC J

The petitioner who faced an examination for the post of Station Master, Class II of the Sri Lanka Government Railways which was held on 06th November 1999 was successful in the said examination and was informed by the 1st Respondent by letter dated 8th March 2001 to be present to obtain the letter of appointment. Accordingly, the Petitioner was issued with a letter of appointment dated 2nd April 2001 appointing him to the post of Station Master of Railways (Class II) and posted him to Maradana Railway Station from that date. (P-3)

According to the Petitioner, as per the said letter of appointment he was placed on, an annual Basic Salary of Rs. 57, 120/- and was entitled to earn seven increments of Rs. 1320/- and ten increments of Rs. 1560/-. As per the letter dated 21st July 2004 (P-6) he was confirmed in service as a Grade II Station Master of the Sir Lanka Railways with effect from 2nd April 2001. (from the date of 1st appointment)

Petitioner's complaint of the violation of his Fundamental Rights guaranteed under Article 12 (1) of the Constitution is based on a directive issued by the Secretary of the National Salaries and Cadre Commission by letter dated 30th August 2006 to the 1st Respondent, (P-8) which resulted;

a) His demotion to Grade III of the Station Master's Service without any rational or any reason or any reasonable basis
b) Him being placed on the salary scale applicable to the Grade III of the Station Masters' Service
c) Him being treated differently from other Station Masters similarly circumstanced;

In the said circumstances the Petitioner had further prayed to quash the above letter date 30th August 2006 bearing No; NSCC/2/7/6.

In support of his contention the Petitioner has further submitted that,

a) A meeting was held between the National Salaries and Cadre Commission, the Ceylon Station Masters Union and an organization named Train Control Union which is not registered as a Trade Union under the Trade Union Act, on 22nd August 2006

b) The said meeting was held in order to implement the provisions of the Public Administration Circular 06/2006 (P-7) and at the said meeting it was agreed for the establishment of a new grade in the Station Masters Cadre as Grade III and to "absorb the existing Grade II officers to the said Grade III"

c) Subsequent to the said meeting the impugned document P-8 was issued and in the said letter the following reference was made with regard to Grade II Station Masters;

   i) Salaries of the Station Masters among the Grade II, who has passed the 1st and 2nd Efficiency Bar Examination and who have over 10 years of satisfactory service as at 01.01.2006 should be adjusted at the 12th step of the MN 3-2006 salary code.

   ii) Salaries of the Station Masters among the Grade II who has passed the 1st and 2nd Efficiency Bar Examination and who have less than 10 years and over 6 years of satisfactory service as at 01.01.2006 should be adjusted at the 12th step of MN 3-2006 salary code but the said category of station Masters shall not be entitled to earn further increments until they pass the examination as specified in the new service minute.

d) However, there is no reference to the Station Masters who have satisfactory service in the Sri Lanka Railways for less than 6 years as at 01.01.2006 such as the Petitioner, and when he received his salary conversion based on Public Administration Circular 6/2006 (P-7) the Petitioner had realized that he was placed in Grade III of the Station Masters Cadre of Sri Lanka Railways and the salary conversion was based on the salary step entitled to a Grade III officer

e) The Petitioner whilst claiming that he has been demoted to Grade III from Grade II of the Station Masters Cadre of Sri Lanka Railways had lodged a complaint with the Human Rights Commission and also made an appeal to rectify the above position to the 1st Respondent as well as to the salaries and Cadre Commission.

f) In support of his claim that he had been differently treated in violation of Article 12 (1) of the Constitution, the Petitioner further submitted that, the Officers similarly circumstanced as the Petitioner in Nawalapitiya Division, continued to be in Grade II of the Station Masters Cadre of Sri Lanka Railways and their salaries too have been adjusted accordingly.

As observed by me, the Petitioner had relied upon two main grounds in establishing his allegation before this court. Petitioner firstly contended that he had been differently treated among similarly circumstanced officers in the Grade II Station Masters Cadre of Sri Lanka Railways

His second argument was that he had been arbitrarily demoted to Grade III of the Station Masters Cadre of Sri Lanka Railways.

In response to the 1st ground the Petitioner had relied upon, the 1st Respondent in his objections tendered before this court had submitted that,

> "Whilst denying the averments contained in paragraph 18 of the said affidavit, I state that the Divisional Transportation Superintendent of Nawalapitiya had inadvertently placed the Class II Station Masters (prior to P.A. Circular 6/2006) on a higher step on the new salary scale which was rectified when it was brought to the notice of my predecessor and any overpayment made to the said Station Masters have been recovered by way of surcharge."

When the above position taken up by the 1st Respondent is considered along with the position the Petitioner had further taken up in the counter objections dated 2nd May 2014 to the effect that;

> "Answering the averments contained in paragraph 16 of the affidavit of the 1st Respondent I only admit that the Station Masters in the Nawalapitiya Transportation Division have been subsequently demoted to the Class III and placed in the same salary step and certain amount of money had been recovered from their salary considering that they have been overpaid"

it is clear that the complaint made by the Petitioner with regard to similarly circumstanced Station Masters in Nawalapitiya Division is an isolated incident which cannot be taken as a ground before this court.

As admitted by both parties before this court, the Public Administration Circular 06 of 2006 which introduced the structure for the future Public Service by introducing new salary structures, required to restructure each service, including Sri Lanka Railways to make it equal with the other all island services. As further admitted by the Petitioner, National Salaries and Cadre Commission has had consultations with the stake holders when implementing the provisions of the said circular which needed specific instructions with regard to each service, since the main circular (P. A. Circular 6 /2006) does not refer to each service in detail.

As submitted by the Respondents, there was a necessity to have consultations with the stake holders when implementing the provisions of the above circular within Sri Lanka Railways since the circular recommended to expand each and every service into three grades including the recruitment grade and with regard to Station Masters' Service which comprised only two grades needed to be expended in to three grades.

As further observed by this court, by Circular 6/2006, the salary structure for Station Masters' Service had been identified under MN 3 category and what is to be further clarified is the different points that the Station Masters of each grade are to be placed on.

As admitted by both parties, subsequent to the consultation with the stake holders, P-8 was issued deciding the above points but there was no requirement to identify a starting point to the recruitment grade which will be the Grade III of the Station Masters Service. In the said circumstances, I see no merit in the argument by the Petitioner that there is no reference in P-8 with regard to the Station Masters who have satisfactory Service for less than Six years.

However, the ground that was raised before us, "whether the Petitioner was arbitrarily demoted to Grade III" and thereby it violates the legitimate expectation of the Petitioner, needs to be looked into by this court.

The question of Arbitrariness was discussed by *Bhagwati J* in the case of ***E. P. Royappa Vs. State of Tamilnadu 1974 AIR 555, 1974 SCR (2) 348*** in the following terms;

> "From a positive 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 that it is unequal both according to political logic and Constitutional Law and is therefore violative of Article 14"

When considering the right to equality guaranteed under Article 12 of our Constitution, our courts too have followed the above doctrine even in the absence of any evidence that some other person similarly circumstanced was treated differently but the threshold expected from the Petitioner in establishing the violation (in the instant case the act of Arbitrariness) was at a very high degree.

This position was discussed in the case of ***Jayasinghe Vs. The Attorney General and Others [1994] 2 Sri LR 74 at 88*** by *Fernando J* as follows;

> "It is not enough for the Petitioner to show that he has been denied the protection of law. He must also show that he has been denied equal protection that he was treated less favourably than others similarly situated. Since the Petitioner has not produced any evidence of the delay in similar cases, it is contended on behalf of the 2nd Respondent (relying on *Perera Vs. Jayawickrema*) that the Petitioner has failed to prove this essential ingredient, I doubt whether that decision must be regarded as laying down an inflexible principle of universal application; the facts of each case must be considered. If an employee alleges a denial of equal protection because he was compelled to participate in a disciplinary inquiry without ever being told that the charges against him were, would a court demand evidence to prove at least one other contrary instance? I think not."

However, when considering the arguments the Petitioner advanced before us it appears that the Petitioner never contended to challenge the provisions of Public Administration Circular 6 of 2006 as unreasonable or arbitrary. As submitted by the Petitioner, he was aware of the discussion the National Salaries and Cadre Commission had with the Ceylon Station Masters Union and another unregistered Trade Union on 22nd August in order to implement the Public Administration Circular 06 of 2006 and that "both parties agreed for the establishment of a new grade in the Station Masters Cadre as Grade III."

Moreover, neither the Petitioner nor the Trade Union which represents the Petitioner challenged the provisions of Public Administration Circular 6 of 2006 which introduced the creation of a new grade as Grade III in the Station Masters Cadre even after the outcome of the of the said meeting was conveyed to the 1st Respondent by the National Salaries and Cadre Commission on 30th August 2007.

In these circumstances, it is very much clear,

a) That the Petitioner was belonged to the recruitment grade (i.e., Grade II) of the Station Master's Cadre at the time Public Administration Circular 6 of 2006 was issued
b) That there were only two Grades in the Station Masters Cadre i.e., Grades I and II including the recruitment grade, prevailed at that time.
c) That by the said Public Administration Circular 6 of 2006, introduced the Government Policy on the Public Service and in the said Policy it was recommended that in the Public Sector, every service should have three grades including the recruitment grade

d) That after a meeting with the stake holder a scheme was prepared as to how the three-tier service was going to be implemented and that was conveyed to the 1st Respondent by letter dated 30th August (P-8)

e) That the 1st Respondent carried out the said guidelines and implemented P. A. Circular 6/2006 by introducing three-tier Station Masters' Service keeping the Petitioner who has had satisfactory service less than six years at the initial step of MN 3-2006 which is the scale identified for the Station Masters' Service by the said circular.

f) Those who had passed the 1st and 2nd Efficiency Bar Examination and more than six years and ten years satisfactory service were kept at different steps of the same scale but some of them (those who had more than six years) had to fulfill further requirements to obtain further increments.

(in other words, to get into Grade II under the new service minute based on Public Administration Circular 6/2006)

Therefore, the Petitioner who has not completed the necessary requirements, was placed on the recruiting grade which was earlier the Grade II but now it is Grade III. What is important to be mindful at this stage is, that the Petitioner who had less than six years of satisfactory service in the recruiting grade will have to be continued in the same recruiting grade until he fulfills the requirements to be eligible for the next level.

In the case of ***Madawalagama V. Director of Irrigation and Others SC FR 317/2010 Bar Association Law Report 2012, 112 at 116*****,** *Shirani Bandaranayake CJ* had observed;

> "Equality does not mean that identical rules of law should be applicable to all persons. What it postulates is that equals should be treated equally and that equality treatment be given equal circumstances. This means that the legislature is entitled to make reasonable classification for purposes of legislation and thereafter treat all those who belong to one group equally on the basis that the said group falls into one separate class"

In the case of ***Ferdinandis and Anothers V. Ariruppola and Others SC FR 117/2011,*** **Bar Association Law Report 2012, 169 at 173** the Supreme Court held;

> "Reasonable classification cannot be rejected as a violation of Article 12 (1) of the Constitution, if it is a valid classification that is not arbitrary. It is necessary to satisfy two conditions for such a classification to be valid

i. The classification must be founded on an intelligible differentia which distinguish persons that are grouped in from others who are left out of the group; and

ii. That the differentia must bear a reasonable or a rational relation to the objects and effects to be achieved"

As already observed by this court, the Petitioner who had less than 6 years of satisfactory service in the Station Master Grade II Cadre which is the recruiting grade prior to the implementation of Public Administration Circular 6 of 2006, has been kept at the same "recruiting grade" which is Grade III in the new Station Master Cadre of Sri Lanka Railways. It was further observed that MN3 scale had been identified as the salary scale for the Station Master Service by the Circular 06 of 2006, and when implementing the said Circular, Station Masters who had passed the efficiency bar examination and completed more than 10 years satisfactory service, Station Masters who had passed the efficiency bar examination and completed more than 6 years and less than 10 years satisfactory service and Station Masters who had less than 6 years satisfactory service had been placed separately in the said scale at different salary steps.

The Petitioner has not complained, that the Petitioner or any other person similarly circumstanced had been placed at a different salary scale other than the scales referred to in P-8, except in the instance where some officers similarly circumstanced continued to be in Grade II which was rectified subsequently.

In these circumstances it is clear that the classification made in this case is based on the years of satisfactory service the Petitioner has served in the Station Masters Service. Such classification cannot be rejected and therefore would satisfy the requirements of equal treatment

In the said circumstances, it is clear to this court that the Petitioner who belonged to the recruitment Grade prior to P-7 (Public Administration Circular 6/2006) and P-8 (letter dated 30th August 2006) and who does not belong to either category of (i) and (ii) referred to above in this judgment should be placed in Grade III of the Station Masters Cadre until he fulfills the necessary criteria as referred to in P-8 and thus placing the Petitioner in Grade III of the Station Master Cadre is neither a demotion to him nor an arbitrary act of the Respondents.

For the foregoing reasons I hold that the Petitioner before this court had failed to establish that the issuance of P-8 by the 7th Respondent and the implementation of the guidelines as per P-8 by

the 1st Respondent or any other Respondents, is in violation of the Petitioner's Fundamental Rights guaranteed under Article 12 (1) of the Constitution.

I make no order with regard to the costs.

Application is dismissed/ No costs.

Judge of the Supreme Court

Justice B.P. Aluwihare 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 under and in terms of Articles 17 and 126 of the Constitution of the Republic of Sri Lanka.

Gayani Amitha Wickramasekara,
"Dhampalle Gedara"
Welpitiya,
Weligama.

Petitioner

SC(FR) Application No:257/16

Vs.

1. Dharmasena Dissanayake,
   Chairman,
   Public Service Commission.
2. Salam Abdul Waid,
   Member,
   Public Service Commission.
3. D. Shiranthi Wijayatilaka,
   Member,
   Public Service Commission.
4. Dr. Prathap Ramanujam,
   Member,
   Public Service Commission.
5. V. Jegarasasingam,
   Member,
   Public Service Commission.
6. Santi Nihal Seneviratne,
   Member,
   Public Service Commission.
7. S.Ranugge,
   Member,
   Public Service Commission.

8. D.L. Mendis,
   Member,
   Public Service Commission.

9. Sarath Jayathilaka,
   Member,
   Public Service Commission.

10. H.M.G. Senevirathne,
    Secretary,
    Public Service Commission.

    1st to 10th Respondents are of
    No:177, Nawala Road,
    Narahenpita, Colombo 05.

11. Mr. J.J. Ratnasiri,
    Secretary,
    Ministry of Public Administration
    And Management,
    Independence Square,
    Colombo 07.

12. Ms. K.V.P.M.J. Gamage,
    Director General of Combined
    Services,
    Ministry of Public Administration
    And Management,
    Independence Square,
    Colombo 07.

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

Respondents

Before: Jayantha Jayasuriya PC CJ.,
Murdu N.B. Fernando, PC J. and
S. Thurairaja, PC J.

Counsel: Chandana Prematilake for the Petitioner

Rajiv Goonetilleke Senior State Counsel for the Respondents

Argued on: 13.01.2020

Decided on: 05.11.2021

Murdu N.B. Fernando, PC J.

The Petitioner came before this Court in August 2016, alleging that the Respondents have violated and are continuously violating 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 and the fundamental right to freedom of occupation encompassed in Article 14(1) (g) of the Constitution.

The Petitioner's main grievance was the non-appointment of the Petitioner to supra grade of the Public Management Assistants Service and the failure of the Respondents to act in accordance with the relevant rules and regulations.

This Court in October 2016, granted the Petitioner leave to proceed on the alleged violation of Article 12(1) of the Constitution.

At the time of institution of the instant application, the Petitioner was a grade I officer of the Public Management Assistants Service ("PMAS") which was established encompassing clerical and other allied services in the public sector.

Public Management Assistants Service, is governed by a service minute and in terms of the said service minute, the promotions to supra grade of PMAS is based upon two avenues, a limited competitive examination and a merit based promotion scheme.

The Petitioner's grievance before this Court is in respect of the **Limited Competitive Examination of 2013** and more specifically with regard to the non-appointment of the Petitioner to the supra grade of PMAS, when admittedly vacancies exist in the supra grade.

The learned Senior State Counsel, representing the Respondents, did not deny the existence of vacancies, consequent to the finalization of the limited competitive examination of 2013.

The matter in dispute between the parties is the specific number of vacancies or the unfilled cadre vacancies existing in the supra grade at a given time.

The Petitioner's contention is that there were twelve vacancies to be filled at the time the appointments were made, whereas the Respondents position is that there were only six positions and a considered decision was made by the Public Service Commission not to fill the said six approved cadre positions, from the results of the limited competition examination of 2013.

Prior to examining the submissions of the parties pertaining to the vacancies and the requirement of filling the said cadre positions, I wish to advert to certain facts, which I consider important to understand the issue before us for determination.

In terms of the service minute of PMAS, appointments to the supra grade is made on the results of a limited competitive examination. The candidates who satisfy the basic qualifications are appointed to the posts available or to the approved posts, consequent to been successful at a written test and verification of their qualifications by an interview board.

Thus, there is a written test conducted by the department of examinations and an interview process to examine the certification.

The number of approved posts belonging to the respective grades of PMAS is referred to in the service minute. The time frame of holding of the examination would depend on the existing vacancies.

In the instant matter, applications were called by the Public Service Commission for the **limited competitive examination of 2013** for promotions to the supra grade of PMAS, in terms of the service minute, by a gazette notification published in October 2013.

Though applications for the said examination were called in the year 2013, and the Petitioner tendered an application for the aforesaid examination, the first component of the selection process, the written test was held only on 15th March, 2015.

At the written test [consisting of five papers], the Petitioner obtained 305 marks from a total of 500 marks.

Based upon the existing vacancies in the Public Management Assistants Service, **100 posts of the supra grade** were to be filled on the results of the aforesaid competitive examination.

Thus, the first hundred candidates who had scored the highest marks at the written test were to be called for the interview at which only verification of documents were to take place.

Based upon the above criteria the department of examinations had to forward a list comprising of 100 names. Since there were multiple candidates who had obtained the cut-off mark, all the candidates who obtained the cut-off mark 306, were included in the list of names. Thus, a list of 101 names were tendered by the department of examinations of candidates who obtained the highest marks at the written test.

The Petitioner and eight others who obtained 305 marks, [the next best mark at the written test] were not included in the aforesaid list of 101 names and the Petitioner had no qualms with regard to the said selection. Hence, the 1st component of the limited competitive examination is not challenged before this Court.

The next component of the selection process was the interview and the aforesaid 101 candidates were called for the interview. It was held in December 2015, and out of the 101 candidates called, only 94 candidates presented themselves at the interview and the said 94 candidates were promoted to supra grade with effect from the date of the written test, 15th March 2015.

Thus, from the 101 approved vacancies ear-marked to be filled, 94 posts were filled. Seven posts were not filled. Hence, seven vacancies of the supra grade were left unfilled.

This decision of the Public Service Commission brought in many appeals and representations by unsuccessful candidates requesting filling of the said vacancies.

Thus, the Public Service Commission, by letter dated 08th June, 2016 [document tendered to this Court, by the Respondent together with the motion dated 14th August, 2017] made order to permit one candidate [who was on maternity leave] to face the interview. The Public Service Commission also made a direction not to fill the remaining six posts, since there were nine candidates, [including the Petitioner] who had obtained 305 marks, [the next best mark at the written test] vying for the said six posts. These vacancies were to be filled, when the limited competitive examination was next held was the order made by the Public Service Commission.

The Petitioner does not challenge this position either. However, the contention of the Petitioner is that there were twelve vacancies. i.e., the six vacancies the Public Service Commission left unfilled plus another six vacancies ("additional six vacancies"), that arose consequent to the resignation of six other candidates. Hence, the Petitioner argues, the Petitioner who obtained 305 marks is entitled to one such vacancy in the supra grade.

The submission of the Petitioner with regard to the said additional six vacancies is that six out of the 94 candidates promoted to supra grade, subsequently tendered their resignation from the PMAS and joined Sri Lanka Administrative Service which resulted in an additional six vacancies being opened-up in the supra grade.

It is observed, that parallel to the aforementioned *limited competitive examination for promotions to the supra grade of PMAS* in the year 2013, applications were also called for another *limited competitive examination to recruit applicants for grade III of the Sri Lanka Administrative Service ("SLAS").* Some of the candidates applied for both posts and were successful at both examinations.

The contention of the Petitioner is that the appointments to SLAS was with effect from 09th November, 2015 a date prior to the day in which interviews for supra grade of PMAS was held, in the month of December 2015.The Petitioner further submits, that out of the persons who applied for both posts and were recruited to SLAS, two did not present themselves at the PMAS supra grade interview, whereas six others faced the interview and were successful and appointed to supra grade of the PMAS as well.

Thus, the Petitioner puts forwards an argument that since the six candidates who were appointed to the supra grade, have now tendered their resignation from PMAS, that the said six posts should also be opened to be filled by the unsuccessful candidates who faced the limited competitive examination for promotions to supra grade of PMAS.

In order to substantiate its argument, the Petitioner mainly relies upon **Clause 14** of the gazette notice calling for applications to the supra grade.

Clause 14 reads as follows:

> *"Appointment of any candidate shall be cancelled, if he/she* ***refuses to assume duties at the respective office****. At such*

occasions vacancies will be filled by calling other candidates in the order of marks." (emphasis added)

Hence, the learned Counsel for the Petitioner submits, in view of the resignation of the candidates [upon being recruited to SLAS] cancellation of such appointments in the supra grade of PMAS took place and hence, the said situation falls within the four corners of the aforesaid Clause 14. Therefore, it was contended, that such vacancies should be filled by calling the candidates in the order of marks. Further, it was contended since the Petitioner obtained 305 marks at the written test, one mark below the cut off mark 306, that the Petitioner should be appointed to the supra grade and the said appointment should also be back dated to fall in line with the other 94 candidates, i.e., with effect from 15th March, 2015.

I have considered the above submission pertaining to Cause 14 and am not inclined to accept the argument put forward by the learned Counsel for the Petitioner, for the below mentioned reasons.

Firstly,

Clause 14 speaks of **candidates failing to assume duties at the respective office which would create a vacancy**. In the instant matter, vacancies were only created when the said six candidates having accepted office with effect from 15th March, 2015 tendered their resignation effective from 09th November, 2015. Therefore, it is quite clear, that the said six candidates accepted the appointments and hence, there were no vacancies as at that date i.e., 15th March, 2015 as contended by the Petitioner. Moreover, the said six candidates in my view, *did not refuse to assume duties at the respective office*, and as such the situation contemplated in Clause 14 does not kick-in with regard to the instant application. Accepting the appointment and then resigning on a subsequent date cannot be equated to *refusing to take up an appointment as referred to in Clause 14*. Hence, Clause 14 has no applicability to the matter in issue.

Secondly,

The post was advertised and applications for supra grade were called in **October 2013, based upon the vacancies existing as at that date in the PMAS.** The vacancies the Petitioner relies upon admittedly took place on 09th November, 2015.

Thus, in my view, the vacancies that arose subsequent to the day of the gazette in October 2013, will not get caught up under this gazette notification. Hence, Clause 14 which speaks of filling of vacancies by calling other candidates in the order of merit has no applicability to the instant situation.

It is also observed, that there is no document produced by the Petitioner to substantiate the exact date of appointment of the six persons to the SLAS. Is it by letter dated 09th November, 2015 to be effective from 09th November, 2015? Were the appointments made on a subsequent date and backdated to the said date? If so, can the Petitioner justify the contention with regard to the effective date of the six vacancies, on the material and documents produced before Court?

In my view, on the said ground too, the Petitioner's argument fails. The inability of the Petitioner to produce evidence pertaining to the exact date on which the appointments to the SLAS was made, resulted in paucity of material before Court to determine the veracity of the Petitioner's assertion. This fact becomes more significant in view of Petitioner's own document produced as P13A. By the said document its amply clear, that the appointments to the supra grade of PMAS, was communicated by a letter dated 29th April, 2016 whereas, the said appointment was back dated approximately by one year i.e., to 15th March,2015 the day on which the written test was held.

The Petitioner finally contended, that by back dating the appointments, the six candidates were able to receive the arrears of salary in the supra grade for a period of six months from March 2015 till November 2015 and further argued that such conduct is irregular and illegal and would amount to obtaining a monetary gain at the expense of the State.

In my view the said contention too, does not stand to reason as the Establishment Code, permits backdating of promotions subject to certain conditions.

Chapter II of the Establishment Code regulates the recruitment procedure and appointment of public officers. Section 1:9 refers to the date of the appointment to be either the date of appointment referred to in the letter of appointment or the date of assuming of duties in accordance with the provisions therein. Section 1:10 states ante-dating of an appointment should not take place without the approval of the relevant authority and

Section 1:10:2 indicates, for ante-dating an appointment, there should be a substantial vacancy in the relevant post. However, in view of Section 1:11:2 a post cannot be ante-dated to a date prior to the competitive examination. In the instant matter the appointments were ante-dated to the date of the written exam being the 1st component of the competitive examination. Hence, in my view ante-dating of the appointments or backdating of promotion have taken place in accordance with the provisions laid down in the Establishment Code.

Section 6 of Chapter II, refers to conditions to be satisfied when an appointment or a promotion is to be made. Having financial provision for such appointment is one such pre-condition. Similarity backdating of promotions would entail payment of arrears among other benefits, unless otherwise directed. In the instant matter, the successful candidates, without exception were entitled to the arrears of salary, stemming from such backdating. Hence payment of arrears of salary was also in accordance with the provisions of the Establishment Code.

The Petitioners grievance appears to be in the event a public officer who belong on one *joins another service in the public sector he should not be given a back dated promotion in the service to which he belonged nor paid arrears of salary from the date of the back dated appointment.* However, it is observed that the Establishment Code makes provision for an officer who is entitled to a due promotion, to be granted such promotion even in instances in which such a person is not in service, retired or deceased as provided for in Section 6:2 of Chapter. It of the Establishment Code, the provided promotion is a grade to grade promotion. In the instant matter, promotes are still in service. They have neither retired nor deceased six of the promotees only joined the Sri Lanka Administrative Service of the public sector.

Further the impugned promotion is a grade to grade promotion [i.e., grade I to supra grade in the PMAS] and the promotions are with regard to substantial vacancies in the PMAS.

Hence, I am of the view that the Establishment Code provides for back dating of appointments, which would intern entitle appointees to receive a financial benefit, by way of arrears of salary, and acceptance of such arrears of salary, is not irregular or illegal as contended by the Petitioner.

Moreover, in the instant application, the promotions granted were grade to grade promotions and falls clearly within the purview and provisions of the Establishment Code as discussed earlier. The Establishment Code has statutory flavor and force.

This Court, in the and mark judgement of **Abeywickrama v Pathirana and others [1986]1 Sri LR 120** and in **Public Service United Nurses Union v Minister of Public Administration and others [1988] 1 Sri LR 229,** analysed in depth the provisions of the present and past Constitutions and held that the Establishment Code has statutory force.

This ratio has been endorsed and followed in many judgments of this Court. In a recent judgement of this Court, it was re-echoed that it is trite law that the Establishment Code by virtue of its constitutional origin acquires statutory force, subject however to the reservation that it is not inconsistent with any other provision of the Constitution. [see. **Locomotive Assistants Union v Abeywickrama SC/FR 29/2018 SC minutes dated 16-07-2020]**

As discussed earlier, the limited competitive examination for promotions to supra grade in PMAS and recruitment to grade III of SLAS were called in the year 2013. However, in both instances the process of selection was finalized only in 2015/2016. The delay in the selection process cannot be attributable to the recipients of the promotion and as laid down in the Establishment Code, the selectees should enjoy the fruits of their promotion.

Thus, backdating of the impugned appointment with regard to the 94 recipients, including the six candidates, based upon the provisions of the Establishment Code, in my view cannot be deemed unjust or unlawful as contended by the Petitioner. Moreover, payment of arrears of salary to the said promotees, including the six promotees who joined SCAS at a subsequent date will not amount to the said appointees enjoying a monetary gain at the expense of the State either, as vehemently argued by the Petitioner.

Therefore, I see no reason to deprive the said six candidates of the promotion they received to supra grade of the PMAS with effect from 15th March, 2015 based upon the arguments formulated by the Petitioner.

Further, I see no merit in the contention of the Petitioner, with regard to Clause 14 of the gazette notification and or to declare the afore discussed six posts to be considered

as *additional vacancies* and or that there were twelve vacancies in the offing and not six as submitted by the Respondents. Furthermore, I see no reason or justification to direct that one such vacancy be filled by the Petitioner who obtained 305 marks at the written test.

In any event, the said six candidates whose promotions the Petitioner moves to deprive have not been brought before Court by the Petitioner. The conduct of the Petitioner in not bringing the necessary parties before Court should also be considered in determining this application.

I would pause at this juncture, to consider the submissions made on behalf of the Respondents.

The learned Senior State Counsel re-iterated that there were only six vacancies and submitted to Court that the decision by the Public Service Commission to leave the six posts of the supra grade **unfilled,** in view of the candidates not presenting themselves at the interview, was a well-considered and a reasonable decision. The learned Counsel also submitted that the said decision to leave the said vacancies as it is, is neither irrational or arbitrary, especially in the context, where nine persons with equal marks, were vying for the said six posts. Further, it was submitted that in any event, Clause 16 of the gazette notification calling for applications for the supra grade permitted such a course of action.

Clause 16 reads as follows:

> "*The Public Service Commission reserves the right to refrain from filling some or all of the vacancies and also to decide on matters not provided for in respect of these regulations."*

I have considered the said submissions in the context of the service minute and observe that according to the said minute of the PMAS, the total approved posts of supra grade stands at 782. The recruitment to the said grade is twofold. Limited category and open category and the ratio is 30% for limited category and 70% for open category. The methodology of recruitment to the supra grade is laid down by way of rules and regulations and is administered under the direction of the Public Service Commission by the Ministry of Public Administration, all of whom are Respondents to this application. It is also observed that the limited competitive examination as the word denotes, is a competitive

examination limited to the officers of the particular service and is not open to the public at large.

Thus, I am of the view that the decision of the Public Service Commission not to fill the six vacancies is a reasonable and a *bonafide* decision and made well within its ambit and power.

I would also wish to consider, whether such decision of the Public Service Commission is arbitrary, irrational or unwarranted, as contended by the Petitioner.

This Court in the case of **Karunathilaka and another v Jayalath de Silva and others [2003] 1 Sri LR 35** observed as follows:

> "*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.*** *Article 12(1) of the Constitution, which governs the principles of equality, approves actions which has a reasonable basis for the decision and this Court has not been hesitant to accept those as purely valid decisions." (pages 41 and 42)* (emphasis added)

Similarly, in the case of **Wickramasinghe v Ceylon Petroleum Corporation and others [2001] 2 Sri LR 409** having discussed the positive connotation reasonableness as opposed to the negative connotation arbitrariness, this Court observed, that if the actions of the Respondents are reasonable, then such decision would not amount to be an arbitrary decision.

In the instant application the decision of the 1st to 9th Respondents, i.e., the Public Service Commission, not to fill six posts of the supra grade, based upon the results of the 2013 examination, I consider to be a reasonable decision arrived at, taking into consideration the facts and circumstances of the matter in issue. It does not offend the principles of reasonableness and fair play and is not procedurally flawed. Hence, it cannot be termed arbitrary and/or unwarranted and/or manifestly irrational as contended by the Petitioner.

Similarly, I see no merit in the argument of the Petitioner, that there are twelve vacancies and that the Petitioner is entitled to be appointed to one such vacancy. Thus, I reject the argument of the Petitioner pertaining to the *six additional vacancies.* Further, I determine that the six posts left unfilled upon the direction of the Public Service Commission, is a reasonable and a *bonafide* decision made for good, valid and justifiable reasons.

Hence, I hold that the Petitioner has not been discriminated by the Respondents in any manner whatsoever or that similarly circumstanced persons have been treated differently by the Respondents. Thus, I see no ground or reason to appoint the Petitioner to one of the said vacant posts of the supra grade of the PMAS as prayed for by the Petitioner.

In the aforesaid circumstances and for reasons adumbrated herein, I hold that the Petitioner's fundamental right to equality before the law and equal protection of the law enshrined in Article 12(1) of the Constitution has not been infringed by the Respondents.

The application of the Petitioner is therefore dismissed. I make no order as to costs.

Application is dismissed.

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 for Leave to Appeal against the Judgment of the Provincial High Court of Sabaragamuwa Province Holden at Rathnapura dated 27.06.2019 under Section 5C of the High Court of the Province (Special Provisions) Act No. 19 of 1990 as amended by Act No.54 of 2006.

Suriya Arachchige Inoka Udayangani,
Pebottuwa, Ratnapura.

Plaintiff

SC/HCCA/LA 303/2019
SP/HCCA/RAT/75/2018/FA
DC Ratnapura Case No. 23168/L

Vs,

Kombu Mudiyanselage Thanuja Dilhani,
Near the School, Pebottuwa, Ratnapura.

Defendant

And then

Suriya Arachchige Inoka Udayangani,
Pebottuwa, Ratnapura.

Plaintiff-Appellant

Vs.

Kombu Mudiyanselage Thanuja Dilhani,
Near the School, Pebottuwa, Ratnapura.

Defendant-Respondent

And Now Between

Kombu Mudiyanselage Thanuja Dilhani,

Near the School, Pebottuwa, Ratnapura.

Defendant-Respondent-Petitioner

Vs,

Suriya Arachchige Inoka Udayangani,

Pebottuwa, Ratnapura.

Plaintiff-Appellant-Respondent

Before: Justice Vijith K. Malalgoda, PC

Justice S. Thurairaja, PC,

Justice E. A. G. R. Amarasekara

Counsel: Tharanga Edirisinghe with Nilusha Silva for the Defendant-Respondent-Petitioner

Seevali Amitirigala, PC, with Pathum Wijepala for the Plaintiff-Appellant-Respondent

Argued on: 29.07.2021

Order on: 17.12.2021

Vijith K. Malalgoda PC J

The Defendant Respondent Petitioner (herein after referred to as the Defendant-Petitioner) being dissatisfied with the Judgment delivered by the Provincial High Court of the Sabaragamuwa Province holden at Ratnapura, had filed the instant Application before this court seeking Leave to Appeal. The

matter was fixed to support for leave, and notice was issued on the Plaintiff-Appellant-Respondent (herein after referred to as the Plaintiff Respondent) for 26th September 2019.

On the said day, both parties were represented by Counsel, but the learned Counsel for the Petitioner without moving to support the matter for leave, made an application to file fresh papers, since the papers before Court were incomplete. The said application was objected to, by the Plaintiff-Respondent but the Court permitted tendering fresh papers, subject to objections by the Plaintiff-Respondent.

On 17th October 2019, the Plaintiff-Respondent tendered the statement of objection raising a preliminary objection under Rule (2) and Rule (6) of the Supreme Court Rules 1990 with regard to the maintainability of the instant application and by this order I will be considering the said preliminary objection raised by the Plaintiff-Respondent.

As reveled before us, the Plaintiff-Respondent instituted an action before the District Court of Ratnapura against the Defendant-Petitioner seeking a declaration that the Plaintiff-Respondent is the State land grantee of the land described in the 1st schedule of the Plaint and to eject the Defendant and all under him from the said portion of land and grant damages in a sum of Rs. 50,000 with cost for litigation. The Defendant-Petitioner sought dismissal with a cross claim of Rs. 50,000 with cost for litigation when filing the answer.

The trial proceeded *interparte* with one admission, eleven and eight issues raised on behalf of the Plaintiff-Respondent and Defendant-Appellant respectively and at the conclusion of the trial, the learned District Judge delivered the Judgment by dismissing the Plaintiff's action as well as the counter claim by the Defendant-Respondent.

Being aggrieved by the said Judgment, Plaintiff-Respondent appealed to the Provincial High Court of the Sabaragamuwa Province holden at Ratnapura in terms of Section 154(1) of the Civil Procedure Code read with Section 5A of the High Court of Provinces (Special Provisions) Act No. 19 of 1990 (as amended).

The Judges of Provincial High Court of the Sabaragamuwa Province holden in Ratnapura, by way of their Judgment dated 27.06.2019 allowed the Appeal and set aside the Judgment dated 04.04.2018 by the District Judge of Ratnapura. The said Judgment of the Provincial High Court of the Sabaragamuwa Province holden at Ratnapura was challenged by the Defendant-Petitioner in the instant application.

Among the other questions of law raised for the consideration of this Court for the purpose of granting leave and the final determination, the Defendant-Petitioner had also raised the following questions of law before us,

I) Has the Respondent failed to prove Deeds marked as P2 and P3 in accordance with Section 68 of the Evidence Ordinance thus failed to prove his title to the land in dispute?

II) Have the Deeds marked P2 and P3 not been compiled with the requirements of the Section 162 of the Land Development Ordinance?

III) Has the Respondent failed to prove that she has obtained the prior consent of the Government Agent before the execution of the Deeds marked as P2 and P3?

IV) Has the High Court of Civil Appeal erred in law making a finding that letter marked as P10 in the trial implies that the Divisional Secretory had given prior consent for the execution of Deeds marked as P2 and P3 without examining, the contents of the letter marked as P10?

As observed by me, when allowing the appeal before them, the Judges of the Provincial High Court had considered the evidence placed before the District Court and the documents produced including P2, P3 and P10 referred to in the questions of law as above.

When raising the above questions of law, challenging the decision of the Provincial High Court, the Defendant-Petitioner had heavily relied on the evidence led before the District Court, including the oral testimony of the witness called by the Plaintiff-Respondent and the documents relied by them.

In the light of the position taken by the Defendant-Petitioner referred to above, I will now consider the preliminary objection raised by the Plaintiff-Respondent.

When raising the objection on behalf of the Plaintiff Respondent it was submitted that, material documents have not been annexed with the Application filed before the Supreme Court and as a result, the Defendant-Petitioner has violated Rules (2) and (6) of the Supreme Court Rules 1990, which are mandatory and requires compliance by a petitioner who is invoking the Jurisdiction of the Supreme Court.

The learned President's Counsel for the Plaintiff Respondent had further submitted that;

a) The Defendant-Petitioner has not reserved any right to file additional papers, neither have the Petitioner given reasons for non-compliance
b) The Defendant-Petitioner failed to adduce any reasons for the default and for the failure to exercise due diligence to obtain such documents
c) From the application made on behalf of the Defendant-Petitioner on 26.09.2019 to file fresh papers, it is clear that the Defendant-Petitioner admits the non-compliance referred to above.

In the light of the above submissions, the Plaintiff-Respondent argued that without examining and analysing the evidence, the Supreme Court will not be in a position to answer the questions of law set out in the Petition filed before this Court or even to determine whether there is a *prima facie* case warranting the grant of Leave to Appeal, which has been made out and moved for the dismissal for the application for non-compliance with Rules 2 and 6 of the Supreme Court Rules 1990.

In this regard the Plaintiff-Respondent heavily relied on the Judgment by this court in ***D. S. Aron Senerath Vs. Manager Moray Estate and another SC SPL LA 231/2015*** SC minute 19.01.2017.

As observed by me, Part I of the Supreme Court Rules 1990 refers to three types of applications. Category A of Part I refers to applications filed before Supreme Court for obtaining Special Leave in order to proceed before the Supreme Court (Rule 2-18). According to Rules 6 and 7, what can be challenged before the Supreme Court by way of a Special Leave to Appeal application is an order, judgment, decrees or sentence made by the Court of Appeal, while Category B of Part I refers to applications filed before the Supreme Court with leave obtained from the Court of Appeal (Rules 19-27) and Category C of Part I refers to all other appeals as referred to in Rule 28 (1) of the Supreme Court Rule 1990 which reads as follows;

Rule 28 (1) 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 form an order, judgment, decree or sentence of the Court of Appeal or any other court or tribunal.

The Amendment Act No. 54 of 2006 to the High Court of Provinces (Special Provisions) Act No. 19 of 1990 made specific provisions with regard to the civil appellate and revisionary jurisdiction, by taking away the jurisdiction of the Court of Appeal with regard to the appellate and revisionary jurisdiction

in respect of judgments, decrees, and orders delivered and made by any District Court or a Family Court and transferring the said power to the High Court established by Article 154P of the Constitution for a Province.

The new Section introduced as 5C to the amending Act, made provisions with regard to the next level of the appellate jurisdiction and granted the same to the Supreme Court as follows;

5C (1) An appeal shall lie directly to the Supreme Court from any judgment, decree or order pronounced or entered by a High Court established by Article 154 P of the Constitution in the exercise of its jurisdiction granted by Section 5A of this Act, with leave of the Supreme Court first and had obtained. The leave requested for shall be granted by the Supreme Court where in its opinion the matter involves a substantial question of law or is, a matter fit for review by such Court.

The question of whether the Supreme Court Rules are applicable for Leave to Appeal applications filed before the Supreme Court, challenging the Judgment delivered by the High Court established by Article 154P of the Constitution for a Province, was considered in the case of ***Priyanthi Chandrika Jinadasa V. Pathma Hemamali and 4 others SC (HC) CALA 99/2008 {2011] 1 Sri LR 337***, with regard to an objection raised under Rule (7) of the Supreme Court Rules 1990.

In the said case Dr. Shirani Bandaranayake CJ had observed at page 341 the following;

> "The Supreme Court Rules of 1990, deal with many matters pertaining to appeals, applications stay of proceedings and applications under Article 126 of the Constitution.
>
> Part 1 of the said Rules, refers to three types of applications dealing with leave, which includes Special Leave to Appeal, Leave to Appeal and other appeals. Rule (7) which is under the

> category of applications for Special Leave to Appeal from the judgments of the Court of Appeal clearly states that such an application should be made within six weeks of the impugned judgment…..
>
> ……. It is however to be born in mind that the said Rule (7) deals only with applications for Special Leave to Appeal from the Judgments of the Court of Appeal and the present application for Leave to Appeal is from a judgment from the Civil Appellate High Court of the Western Province holden at Gampaha.
>
> As stated, earlier Categories B and C of Part I of the Supreme Court Rules, 1990 deal with Leave to Appeal and other Appeals, respectively. Whist the category of Leave to Appeal deals with instances where Court of Appeal had granted leave to appeal to Supreme Court, other Appeals refer to all other appeals to the Supreme Court from an order, judgment, decree or sentence of the Court Appeal or any other Court or Tribunal. Thus, it is evident that the present, application for Leave to Appeal from the Judgment of the High of the Western Province (Civil Appeal) holden at Gampaha would come under the said Category C ……
>
> It is therefore not correct to state that there are no rules made by the Supreme Court that would be applicable to applications for leave to appeal form the High Court of the Provinces to the Supreme Court."

When considering the matters referred to above, I do agree with the view taken by Her Ladyship, that Category C of the Part I of the Supreme Court Rules 1990 govern the Leave to Appeal applications made under Section 5C of the High Court of Provinces amendment Act from the Provincial High Courts.

In the said circumstances the Rules that should be applicable are not Rules (2) or (6) of the Supreme Court Rules 1990 but it is Rule 28 of the Supreme Court Rules 1990.

The procedure that should be followed in an application filed under Rule 28 is explained under Sub-Rules (2) and (3) as follows;

28 (2) Every such appeal shall be upon a petition in that behalf lodged at the Registry by the Appellant, containing a plain and concise statement of the facts and the grounds of the objection to the order, judgment, decree or sentence appealed against, set forth in consecutively numbered paragraphs, and specifying the relief claimed. Such petition shall be typewritten, printed or lithographed on suitable paper, with margin on the left side, and shall contain the full title and number of the proceedings in the Court of Appeal or such other court or tribunal, and the full title of the appeal. such appeal shall be allotted a number by the Registrar.

(3) The Appellant shall tender with his petition of appeal a notice of appeal in the prescribed form, together with such number of copies of the petition of appeal and the notice of appeal as is required for service on the respondents and himself, and three additional copies, and shall also tender the required number of stamped addressed envelopes for the service of notice on the respondents by registered post.

In addition to the above, Rule 28 (7) provides that "the provisions of Rule 27 shall apply "*mutatis mutandis* to such appeals." Rules 27 in Category B provides for the preparation of briefs at the Registry in a matter the parties have come before the Supreme Court with leave obtained from the Court of Appeal, and the responsibility of the parties in the said process. Rule 27 (4) which provides

for the identification of necessary documents that should be made available in the appeal brief reads as follows,

27 (4) Upon the date fixed in terms of sub-rule (1) the Registrar shall, after consulting the parties present, determine what document should be included in the record. As far as possible, the briefs used in the Court of Appeal shall be used for the appeal. In any event, the Registrar shall endeavour to exclude from the record all documents (more particularly such as are purely formal) that are not relevant to the subject-matter of the appeal, and generally, to reduce the bulk of the record as far as practicable, taking special care to avoid the duplication of documents and the unnecessary repetition of headings and other formal parts of documents. The decision of the Registrar as to the exclusion of any document or part thereof shall be final, but any party dissatisfied therewith shall be entitled to require the matter to be submitted to a single judge sitting in Chambers for review. The preparation of the record shall be the duty of the Registrar, who shall prepare as many copies as are required for the Court and the parties. Before the preparation of a copy of the record for any party, such party shall there for such fee as may be determined in accordance with the rules made in that behalf.

However, since neither Rule 27 nor Rule 28 contains any provision in the lines of Rules 2 and 6, the question arises whether the Petitioner is free to invoke the appellate jurisdiction of the Supreme Court against the impugned judgment without submitting the basic needs identified in the said rules.

When raising the preliminary objection based on Rules (2) and (6) of the Supreme Court Rules 1990, Plaintiff- Respondent took up the position that the Leave to Appeal application filed before this court

is incomplete and the material documents that were relied on by the Defendant-Petitioner was not before the Court, and is a violation under the above rules. Since both, Rules (2) and (6) as well as Rules 28 (2) and (3) refers to the procedure that should be followed when filing two types of applications before this court, it is more appropriate for me to first consider the requirements under Rules (2) and (6) above in order to ascertain whether the said requirements are embodied in Rule (28) or whether the said requirements are basic requirement that should be followed by any Petitioner who invoke the jurisdiction of this court under category A or C.

Rule (2) and Rule (6) of the Supreme Court Rules 1990 reads as follows;

Rule (2); Every application for special leave to appeal to the Supreme Court shall be made by a petition in that behalf lodged at the, Registry, together with affidavits and documents in support thereof as prescribed by rule 6, and 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 tiled;

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 obtains 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.

Rule 6; Where any such application contains allegations of fact which cannot be verified by reference to the judgment or order of the Court of Appeal in respect of which special leave to appeal is sought, the petitioner shall annex in support of such allegations an affidavit or other relevant document (including any relevant portion of the record of the Court of Appeal or of the original court or tribunal). Such affidavit may be sworn to or affirmed by the petitioner, his instructing attorney at law, or his recognized agent, 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 ground for such behalf be set forth in such affidavit.

Rule 2 provides for the basic requirement that should fulfilled by a Petitioner who comes before the Supreme Court in a Special leave to Appeal application challenging a judgment or order made by the Court of Appeal. This includes submitting the petition, affidavit, copy of the judgment or order challenged before the Supreme Court and the documents in support thereof as prescribed in Rule 6. Proviso to Rule 2 require the party who comes before the Supreme Court to provide reasons for the failure by the said party to provide the affidavit, documents along with the petition filed before the Supreme Court or reserve the right to provide.

Rule 6 explains the additional documents that need to be filed when the judgment or order that is challenged, before the Supreme Court itself is insufficient to established an allegation before the Supreme Court.

However, as per Rule 28 (2), the petition filed before the Supreme Court should contain plain and concise statement of facts and grounds for the objection to the order, judgment, decree or sentence appealed against, specifying the relief claimed. The requirements as identified in Rule 2, the need to submit an affidavit, copy of the order, judgment challenged and the other documents as per Rule 6 or any other provisions similar to the above is not found in Rule 28 (2), but it only requires, that the petition shall contain full title and number of the proceedings.

Apart from the above, Rules 28 (2) and (3) has identified the manner in which the Petition should be printed and tendered at the registry.

As already observed in this judgment, the High Court of Provinces (Special Provisions) amendment Act No. 54 of 2006 gave jurisdiction to the High Court of Provinces with regard to the appellate and revisionary jurisdiction in respect of judgments, decrees and orders delivered or made by the District Court or Family Court. An appeal shall lie directly to the Supreme Court with regard to a judgment, decree or order pronounced or entered by the said High Court in appeal, with leave from the Supreme Court first obtained on a substantial question of law or on a matter fit for review by the Supreme Court.

Prior to the said amendment, appellate and revisionary jurisdiction in respect of judgments, decrees and orders by the District Court and the Family Court was with the Court of Appeal under the provisions of the Civil Procedure Code and the Judicature Act.

When special leave is sought from the Supreme Court against an order or judgment by the Court of Appeal, the party which is dissatisfied with the said order or judgment was responsible to fulfill the requirements as identified in Category A in part I of the Supreme Court Rules 1990 including Rules 2 and 6.

However direct applications for Leave to Appeal from the High Court to the Supreme Court came into being only following the amendments brought to the High Court of Provinces (Special Provisions) Act by its amendment 54 of 2006.

The question that was before the Supreme Court in the case of ***Priyanthi Chandrika Jinadasa Vs. Pathma Hemamali and 4 others*** *(supra)* was whether Rule 7 which fixed the time limit a party could come before the Supreme Court by way of a Special Leave to Appeal application would bind the Petitioner in a Leave to Appeal application filed challenging the judgment of the Civil Appellate High Court made under Section 5A of the High Court of Provinces (Special Provisions) Amendment Act No. 54 of 2006.

When deciding 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, Her Ladyship Dr. Shirani Bandaranayake observed;

> "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 of 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 the said circumstances it is clear that, when parties come before this court seeking leave to appeal against an order or judgment of the Provincial High Court of the Provinces, the Supreme Court expected the said party to comply with the mandatory requirements with regard to Special Leave,

identified under Category A of Part I of the Supreme Court Rules 1990, even if the said requirement is not identified under Category C of Part I of the Supreme Court Rules 1990.

The nature of the requirements identified under Rules 2 and 6 were discussed in the case of ***D.S. Aron Senarath Vs. The Manager Moray Estate Maskeliya and another (Supra)*** by *Priyasath Dep PC J* (as he then was) as follows;

> "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 non-compliance.
>
> In terms of Rule 2 of the Supreme Court Rule 1990 the Petitioner could be excused only if it is proved that he had exercised due diligence to obtain the documents and the default was due to circumstances beyond his control, but not otherwise, that he shall be deemed to have complied with the provisions of this Rule.
>
> I uphold the first preliminary objection raised by the Respondents that the Petitioner had failed to file material documents and violate Rules 2 and 6 of the Supreme Court Rule 1990"

In the light of the position this court has taken with regard to the mandatory nature of Rules 2 and 6 I will now proceed to examine the factual matrix of the instant matter. As mentioned prior, the Defendant-Appellant among the other questions of law, had raised several questions of law based on the evidence and the documents that was placed before the District Court including the documents produced marked P-2, P-3 and P-10. In his Petition filed before this Court the Petitioner

had produced marked ‘X’ and ‘Y’, the proceedings before the provincial High Court of Ratnapura and the Judgment of the said Court dated 27. 06.2019 respectively.

However, the documents the Defendant-Petitioner has tendered marked ‘X’ did not contain the proceedings before the District Court, documents tendered before the District Court including P-2, P-3 and P-10. As further revealed before this Court, the Defendant-Petitioner has neither reserved any right to file additional documents nor have they adduced any reasons for the default for the failure to exercise due diligence in obtaining such document. The only explanation provided by the Defendant-Petitioner before this court was that she had acted on the certificate made by the Registrar of the Provincial High Court of Ratnapura appeared on page 110 of document ‘X’ to the effect “පිටු අංක 01-110 දක්වා ඉහතින් සඳහන් වන්නේ රත්නපුර සිවිල් අභියාචනාධිකරණයේ අංක 75/ 2018FA අංක නඩුවේ තීන්දුව හැර සම්පූර්ණ නඩුවාර්තාවේ සත්‍ය ඡායා පිටපතක් බව මෙයින් සහතික කරමි.”, but when going through the petition filed by her including the questions of law raised on behalf of her, it appears that she had referred, both to the proceedings before the District Court and the documents tendered before the District Court which clearly indicates the failure on the part of the Petitioner to exercise due diligence when tendering papers before this Court.

In the said circumstances, I uphold the preliminary objection raised by the Plaintiff-Respondent.

The Application is Dismissed. No costs.

Judge of the Supreme Court

Justice S. Thurairaja, PC,

I agree,

Judge of the Supreme Court

Justice E. A. G. R. Amarasekara

I agree,

Judge of the Supreme Court

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

In matter of an application for Leave to Appeal from the Order of the High Court of the Western Province holden in Colombo.

In the matter of

Green Lanka Shipping Limited
Green Lanka Tower,
46/46, Nawam Mawatha,
Colombo 02.

S.C Leave to Appeal No: SC/HC/LA/40/2018
High Court No: HC (Civil) 49/2016(CO)

Evergreen Marine Corporation (Taiwan) Limited
No.166, Sec 2,
Mingsheng East Road,
Taipei 104, Taiwan,
Republic of China.

Petitioner

AND NOW

Green Lanka Shipping Limited
Green Lanka Tower,
46/46, Nawam Mawatha,
Colombo 02.

Company Ordered to be Wound Up - Petitioner

VS

1. **Evergreen Marine Corporation (Taiwan) Limited**
No.166, Sec 2,
Mingsheng East Road,
Taipei 104, Taiwan,
Republic of China.

Petitioner- Respondent

2. **Mercantile Investments & Finance PLC**
No. 236, Galle Road,
Colombo 03.

Creditor- Respondent

3. **G.J David**
SJMS Associates,
Chartered Accountants,
Level 03,
No.11, Castle Lane,
Colombo 04.

Liquidator- Respondent

Before: Jayantha Jayasuriya PC CJ.,
Vijith K. Malalgoda, PC J. and
Murdu N.B. Fernando, PC J.

Counsel: S.A. Parathalingam PC with Nishkan Parathalingam, Ms. Olivia Thomas instructed by Anoma Goonethilake for the Company Ordered to be Wound up - Petitioner.

Suren de Silva instructed by D.L and F de Saram for the Petitioner- Respondent.

Harsha Amarasekara P.C. with Kanchana Peiris instructed by Paul Ratnayake Associates for the Creditor – Respondent.

Nihal Fernando P.C. with Rohan Dunuwille and Anushka Weerakon instructed by Thivanka Pussewela for the Liquidator – Respondent.

Argued on: 12.06.2019, 22.11.2019 and 18.12.2019.

Decided on: 21.10.2021

Murdu N.B. Fernando, PC. J.

This Leave to Appeal Application arises from an Order of the High Court of the Western Province, exercising Civil (Commercial) jurisdiction, holden in Colombo ("the High Court") dated 29th March, 2018.

By the said Order, the learned judge of the High Court, revoked its earlier Order dated 22nd February, 2018 and re-issued notice on the liquidator in terms of the relevant rules, in a winding-up application filed in the High Court under the Companies Act No 07 of 2007 ("Companies Act").

Being aggrieved by the said High Court Order, *Green Lanka Shipping Limited,* **the Company Ordered to be Wound up- Petitioner,** came before this Court on 17th April, 2018 in a Leave to Appeal Application and moved for Leave to Appeal and to set aside the Order dated 29th March, 2018 and also to grant and issue interim relief to stay and suspend the said Order pending the determination of this application.

In the Leave to Appeal Application filed before this Court, the Company Ordered to be wound up - Petitioner, Green Lanka Shipping Limited ("Green Lanka Ltd"), named three parties as Respondents. They are;

(i) *Evergreen Marine Corporation (Taiwan) Limited*, the **Petitioner – Respondent;**

(ii) *Mercantile Investments and Finance Limited,* the **Creditor- Respondent;** and

(iii) *G. J. David of SJMS Associates, the* **Liquidator- Respondent.**

When this Application for Leave to Appeal was taken up before this Court on 12th June, 2019 the learned Counsel for the Petitioner- Respondent and the learned Presidents' Counsel appearing for the Creditor- Respondent and Liquidator- Respondent (collectively referred to as the "Respondents") raised a number of preliminary objections and moved that the Leave to Appeal Application be dismissed *in limine.*

The said preliminary objections are as follows: -

(i) there is no valid proxy granted on behalf of the Petitioner (Green Lanka Limited) filed of record;

(ii) the affidavit filed in support of the petition filed of record cannot be acted upon, since the deponent is not a director of the Petitioner Company, Green Lanka Ltd.; and

(iii) the Leave to Appeal Application filed is defective, since all parties who were represented at the High Court, have not been made parties to the application filed in this Court.

Having heard all the parties before this Court with regard to the above preliminary objections and also having considered the written submissions filed of record, I wish to advert to certain facts, *albeit* brief, relevant to this application prior to considering the said preliminary objections.

01. In the year 2002, Evergreen Marine Corporation (Taiwan) Limited ("Evergreen Ltd") the Petitioner–Respondent before this Court, appointed the Petitioner, Green Lanka Ltd as its local shipping agent to provide shipping services to its vessels sailing under the name of "Evergreen Lines" by way of an agency agreement.

02. This agency relationship continued between the parties for a number of years and Green Lanka Ltd owed a substantial sum of money to the principal, Evergreen Ltd. In the year 2016, there were discussions between the parties with regard to the

outstanding sum and a mechanism was arrived at for settlement of the monies due. However, Green Lanka Ltd failed to adhere to the said terms.

03. On 21st September 2016, Evergreen Ltd moved the High Court by virtue of Section 270 (e) of the Companies Act for an Order of winding-up of Green Lanka Ltd.

04. The High Court, in terms of the Companies Winding-up Rules of 1939 ("winding-up rules") made order and appointed a "provisional liquidator" and issued notice on the party sought to be wound-up.

05. The company sought to be wound- up, Green Lanka Ltd filed papers opposing the winding-up application. Certain other parties too, intervened in this application.

06. The Court inquired into this matter and on 29th January, 2018 the learned High Court judge, made Order permitting the winding-up of Green Lanka Ltd. The Court also appointed the provisional liquidator as the liquidator of the Company Ordered to be wound-up, Green Lanka Ltd and the case was re-fixed for 13th March, 2018.

07. On 08th February, 2018 consequent to the aforesaid Order of the High Court, Evergreen Ltd tendered notices to be served on the liquidator in terms of Rule 17 and 19 of the winding-up rules and the Court issued the said notices on the liquidator on 19th February, 2018.

08. On 21st February, 2018 Green Lanka Ltd being aggrieved by the winding- up Order, tendered a notice of appeal to the High Court.

09. **Upon tender of the notice of appeal, the learned High Court judge re-called the notices issued on the liquidator** SJMS Associates. This Order dated 22nd February 2018 minuted in the journal entry was made three days after the initial direction to issue notice on the liquidator.

10. When the case was called before the High Court on the next date, 13th March, 2018

- It was submitted on behalf of Evergreen Ltd that lodging of an appeal does not automatically stay the proceedings before the High Court and the process of winding-up should go on, unless it is stayed by an Order of a Superior Court;

- The submission of Green Lanka Ltd was that the Order made by the learned High Court judge to re-call the notices issued on the liquidator cannot be challenged before the High Court itself;

- In response Evergreen Ltd contended that if an order has been made *per incuriam,* then that order can be challenged before the very same court.

11. Intervening parties also made submissions and the learned judge called for written submissions and fixed the matter for Order on 29th March, 2018.

12. On the said date the High Court **made Order to re-issue notice on the liquidator** in terms of Rule 17 and 19 and called for the liquidator's report.

13. The learned High Court judge in his Order stated as follows:

"60. Taking into consideration all those matters, I am of the view that the ***Order made in journal entry on 22.02.2018 was made due to an inadvertence*** *without affording the parties to present their arguments and without considering the subsequent Divisional Bench decision of the Court of Appeal and Winding- up Rules, the rationale of which would have made the Order made on 22.02.2018 different from what it was.*

61. For those reasons, I hold that this Court ***has inherent power to revoke the Order made inadvertently on 22.02.2018*** *in the said journal entry, and I am now correcting the said Order made, by re-issuing the notices submitted by the Petitioner in terms of Rule 17 and 19 of the Companies Winding- up Rules." (emphasis added)*

14. Being aggrieved by the aforesaid Order dated 29th March, 2018, Green Lanka Ltd came before this Court in a Leave to Appeal Application and that is the matter that is now before us for determination.

15. Independent to this application, the final appeal lodged by Green Lanka Ltd against the Order of winding-up dated 29th January, 2018 too, is before this Court for determination.

If I may summarize;

- Evergreen Ltd, moved the High Court to obtain an order to wind-up Green Lanka Ltd, its local shipping agent;

- The High Court on 29th January, 2018 allowed the application, made the winding-up Order and directed notices be issued on the liquidator;

- Evergreen Ltd tendered the requisite notices to be served on the liquidator and the High Court issued the notices on the liquidator;

- Green Lanka Ltd filed notice of appeal against the Order of winding up and the learned High Court judge *ex-mere motu* re-called the notices served on the liquidator;

- Upon representations made and hearing all parties, the learned High Court judge, by its Order dated 29th March, 2018 revoked its earlier Order and re-issued notice on the liquidator.

Having referred to the factual matrix of the instant matter, let me now move onto consider the Leave to Appeal Application before this Court for determination.

The Respondents raised three preliminary objections and moved that this Application be rejected at the threshold itself.

The grounds urged by the Respondents are;

i. validity of the proxy filed in the Supreme Court;

ii. validity of the affidavit filed in support of the Leave to Appeal application; and

iii. necessary parties not being named in the Leave to Appeal application.

Thus, this Court would now examine the said preliminary objections.

(i) There is no valid proxy filed on behalf of Green Lanka Ltd in the Supreme Court.

The contention of the learned Counsel for Evergreen Ltd, the parent shipping company with regard to the objection on proxy, was twofold.

Firstly;

-that the proxy filed in the Supreme Court with a motion by the Company Ordered to be wound up - Green Lanka Ltd together with the petition and affidavit seeking Leave to Appeal, is not the proxy of the Petitioner, Green Lanka Ltd but of an individual by the name of Don Kushani Nanyakkara and issued by her in her personal capacity;

- this proxy is the only proxy filed of record and it indicates that Don Kushani Nanayakkara being a director of Green Lanka Ltd has nominated D. Shanika Samarawickrama Attorney-at-Law, *to be her registered Attorney- at- Law and to appear for her and in her name and behalf*, before the Supreme Court;

- that the Petitioner Company Ordered to be wound up - Green Lanka Ltd has not granted a proxy to Shanika Samarawickrama Attorney-at-Law or to any other Attorney-at-Law to appear on its behalf and or to sign and file petition or any other documents on behalf of the Petitioner;

- that although Kushani Nanayakkara in the proxy filed, calls herself a director of Green Lanka Ltd and a frank of Green Lanka Ltd is placed on the proxy, that itself does not make the proxy, a proxy of Green Lanka Ltd; and

- the petition filed of record subscribed by Shanika Samarawickrama Attorney-at-Law, thus, cannot be construed as a petition of the Company Ordered to be wound-up, Green Lanka Ltd.

Secondly,

Since the petition filed before this Court has not been duly subscribed by the party aggrieved Green Lanka Ltd or its registered attorney, that in terms of Section 757 (1) of the Civil Procedure Code, there is no valid petition before this Court.

The learned Presidents' Counsel for the Creditor- Respondent and the Liquidator-Respondent associated themselves with the submissions made on behalf of Evergreen Ltd. The Respondents relied on the case of **Gordon Frazer and Co. Ltd. v Jean Marie Losio and Martin Wenzel [1984] 2 SLR 85,** to substantiate that the proxy was defective.

The Court of Appeal in the said case observed as follows:

> *"…**in the absence of the corporate seal, the proxy granted to […] does not authorize […] to appear for the defendants, but only for Losio and Wenzel in their personal capacities.** But Losio and Wenzel are no parties to the action filed against the three defendant companies and have no status in law to participate in the proceedings. It was therefore not open to them to have appeared in the action and have had the interim injunction against the defendants, suspended, or to have taken steps for the issue of the Order Nisi on the plaintiff. The orders made by the learned judge in this respect are consequently made per incuriam and are null and void."* (page 90) (emphasis added)

Responding to the aforesaid submissions, the learned President's Counsel for Green Lanka Ltd put forward many contentions.

Firstly, the Respondents intention in raising the preliminary objections were primarily to delay the determination of the Leave to Appeal Application and the objection pertaining to the validity of proxy is misconceived as at the date the preliminary objection was raised, the impugned proxy had been revoked and replaced by the proxy of Anoma Goonetilleke Attorney-at-Law.

It was also contended that the arguments of the Respondents are substantially stretched and strained and had been made ignoring facts of this Application and that by the impugned proxy, it is the *Petitioner Green Lanka Ltd, through its director Kushani Nanayakkara* that authorized Shanika Samarawickrama Attorney-at-Law to act on behalf of the company and not Kushani Nanayakkara in her personal capacity as submitted by the Respondents.

With regard to the **Gordon Frazer** case, the learned Counsel for Green Lanka Ltd contended, it has no bearing to the facts of this case and moreover that defects and obscurities in proxies are curable. Thus it was argued, that in view of the proxy granted to Anoma Goonetilleke Attorney-at-Law, even if there was a defect in the proxy granted to Shanika Samarawickrama Attorney-at-Law, it is now cured by the new proxy.

The learned Counsel also contended that non-filling of a proxy would have no effect on the validity of proceedings and to substantiate this argument, relied on the case **S.P. Gunatilake v S.P. Sunil Ekanayake [2010] 2 SLR 191,** where Chief Justice J.A.N de Silva observed:

> *"the aforementioned facts…. provides a sufficiently strong indication that the substituted plaintiff had at all material times granted…. the authority to appear and make applications on behalf of him,* ***despite the substituted plaintiff not filing a proxy*** *as an overt manifestation of the granting of such authority……"*
> *(page 204)* (emphasis added)

Prior to considering the aforesaid arguments put forward by the parties with regard to the validity of the proxy, I wish to examine the revocation papers and the new proxy filed in these proceedings. The contention of the learned Counsel for Evergreen Ltd was that Green Lanka Ltd willfully suppressed matters from Court, being very well aware that at the time the *jurisdiction of this Court was invoked, there was no proxy filed of record on behalf of Green Lanka Ltd.* He drew the attention of Court to the following facts, as reflected in the record before Court.

Revocation of Proxy

On 23.05.2019, a motion was tendered together with two revocation papers, one by Kushani Nanayakkara and the other on behalf of Green Lanka Shipping Ltd dated 25.04.2019 and 30.04.2019 respectively. Both were signed by Kushani Nanayakkara one in her personal capacity and the other as a director of Green Lanka Ltd.

In the revocation paper where Kushani Nanyakkara revokes proxy in her personal capacity, Shanika Samarawickrama Attorney-at-Law has signed agreeing to the cancellation of the proxy. The other revocation paper filed on behalf of Green Lanka Ltd does not bear the signature of Shanika Samarawickrama Attorney-at-Law consenting to the cancellation of the proxy.

Thus, the contention put forward was that this clearly indicates that Shanika Samarawickrama Attorney- at- Law was not appointed as the registered attorney of Green Lanka Ltd by Green Lanka Ltd and there was no reason or necessity for Shanika Samarawickrama Attorney-at-Law to consent for the cancellation of the said proxy.

New Proxy

On 23-05-2019 together with the two revocation papers, a new proxy was tendered to Court. It was dated 30.04.2019. By the said proxy Green Lanka Ltd appointed Anoma Goonetilleke Attorney-at-Law as its registered attorney. It does not bear a corporate seal nor

was it notarially executed or executed in the presence of two witnesses. It bears only one signature i.e. of Kushani Nanayakkara and a rubber frank 'director of Green Lanka Ltd'.

It also does not bear the signature of Anoma Goonetilleke Attorney-at-Law nor an endorsement of acceptance of the appointment by the registered attorney.

Hence it was contended, that Green Lanka Ltd did not authorize this appointment and also that Kushani Nanayakkara as a director did not have the capacity to authorize or grant a proxy to Anoma Goonetilleke Attorney-at-Law and thus, the said proxy too was defective. It was also contended that in any event, Green Lanka Ltd, did not seek permission of Court either to cure the defective proxy granted to Shanika Samarawickrama Attorney-at-Law or to file a new proxy, prior to filing the revocation papers and the new proxy.

This Court has carefully examined the record before Court, the proxy filed in April 2018, i.e. at the time of invocation of jurisdiction, the two revocation papers and the new proxy filed in May 2019.

The Court observes that the impugned proxy, by which Shanika Samarawickrama Attorney-at-Law was authorized to appear and to take necessary steps in the Supreme Court is dated 16th February, 2018. It was tendered to Court together with the Leave to Appeal Application dated 17th April, 2018. Thus, it is pertinent to note that this proxy has been authorized by the person therein, forty one days prior to the impugned Order of the High Court dated 29th March, 2018 when there was no grievance or a reason to be canvassed before the Supreme Court.

The impugned proxy, does not refer to a case number nor the parties to the application. It only bears the signature of Kushani Nanayakkara. The wording of the proxy which is in the first person clearly indicates, it is filed in the personal capacity of Kushani Nanayakkara and not on behalf of Green Lanka Ltd, the Petitioner before this Court.

The Court also observes the stark difference and the disparity in the impugned proxy filed by the Petitioner before this Court and the proxy filed in the High Court on 28th October, 2016 and briefed to this Court. The proxy filed in the High Court specifically refers to the case number and clearly and precisely state that it is the proxy of Green Lanka Ltd. It has the

company seal affixed therein witnessed by two directors, namely, Brahakmanalage Genevieve Norma Nanayakkara and Don Kushani Nanayakkara as required by the Articles of Association.

The learned Counsel for Green Lanka Ltd did not offer any explanation with regard to the antedating of the impugned proxy filed in this Court. No reasons were given as to why permission of Court was not obtained to cure the defect of the proxy if there was any, or to file a new proxy. The journal entries indicate, that when this matter was mentioned before this Court on 30.08.2018, 04.12.2018 and 01.03.2019, the learned Counsel appearing for Green Lanka Ltd was instructed by Shanika Samarawickrama Attorney-at-Law whom it is alleged, was not duly appointed as a registered attorney by the Petitioner, Green Lanka Ltd.

Hence, having regard to the aforesaid facts and circumstances, especially the semantics of the impugned proxy and the absence of a company seal, whilst appreciating that in the interim of the proxies filed in the High Court and this Court, there was an Order of winding-up made by the High Court, I am inclined to accept that the proxy filed in the Supreme Court by Kushani Nanayakkara, only authorizes Shanika Samarawickrama Attorney-at-Law, to appear for Kushani Nanayakara in her personal capacity. Admittedly, Kushani Nanayakkara is not a party to these proceedings and has no status in law to participate in these proceedings.

Though Kushani Nanayakkara's signature appears in the proxy and there is a rubber frank placed in the proxy with the wording 'Green Lanka Ltd.' and 'director', that itself in my view, will not authorize or empower Kushani Nanayakkara to act for and on behalf of the Company Ordered to be wound-up Green Lanka Ltd or Green Lanka Ltd to act through Kushani Nanayakkara. Hence, my considered view is that Kushani Nanayakkara acts in her personal capacity and cannot authorize Shanika Samarawickrama Attorney-at- Law to represent Green Lanka Ltd. before the Supreme Court. In any event, the impugned proxy is antedated. It does not refer to a specific case by its number or by the names of the parties and thus is defective.

The rules and procedures governing Company Law lays down intricate details, pertaining to rights and duties of companies and its directors. Winding-up rules envisage the mechanism to be followed with regard to a company sought to be and or ordered to be wound-

up. It also lays down the steps a liquidator should follow in the event of a winding-up of a company. I do not wish to go into details pertaining to these issues.

Suffice is to state, in the absence of any cogent reason, document or material before this Court in terms of the law to establish that Green Lanka Ltd authorized or is represented by Kushani Nanayakkara, that Kushani Nanayakkara cannot authorize Shanika Samarawikrama Attorney-at-Law or any other Attorney-at-Law to represent Green Lanka Ltd before the Supreme Court. Thus, it is evident that by the impugned proxy Shanika Samarawickrama Attorney-at-Law was authorized only to represent Kushani Nanayakkara in her personal capacity.

The case of **Gordon Frazer** referred to earlier, in my view is of a similar context. The Court of Appeal in the said case held, when an action is instituted against a company and proxy is filled without a corporate seal, the proxy does not authorize the Attorney-at-Law to represent the company but only to represent the signatories in their personal capacity and the said persons have no right on behalf of the company to participate or move for orders of court.

In the instant case, the Leave to Appeal Application has been subscribed by Shanika Samarawickrama Attorney-at-Law, who as discussed earlier was not authorized by Green Lanka Ltd to act for and on its behalf. The only proxy filed together with the petition and affidavit, at the time of invocation of the jurisdiction of this Court by Green Lanka Ltd was the proxy given by Kushani Nanayakkara who is not a party to this application. Thus, when Green Lanka Ltd filed the Leave to Appeal Application before this Court, there appears to be no valid proxy filed on behalf of Green Lanka Ltd.

The alternate position taken up by the Petitioner before this Court was that presently, there is a new proxy filed of record on behalf of Green Lanka Ltd. As discussed earlier, that too, bears no corporate seal and has only one signature and has not been executed in terms of the governing rules.

We note that filing of the new proxy had been done without obtaining permission of Court. Similarly, two revocation papers have also been filed by Kushani Nanayakkara, in her

personal capacity and on behalf of Green Lanka Ltd., and the reason for filling two revocation papers have not been explained to this Court.

In my view, the alternate contention of the Petitioner that the semantics of the proxy granted to Shanika Samarawickrama Attorney-at-Law is immaterial since there is a new proxy filed of record cannot be accepted. It is not justifiable either, for the reason that documentation filed should be in accordance with the law and the rules of court, at the time of invocation of the jurisdiction of court, which is clearly not the position in the instant matter.

The next issue, I wish to examine is the contention that non-filling of a proxy would not affect the validity of proceedings. The learned Counsel relied on the observations made by this Court in the case of **Gunetilleke v Ekanayake** (supra) to submit, that even when there was a total failure to file proxy, this Court accepted the validity of the proceedings.

The observations made by this Court in the aforementioned case in my view, can be clearly distinguished from the instant application. In the said case, the Attorney-at-Law who initially appeared for the plaintiff, upon the plaintiff's death moved for substitution and obtained an order of substitution and continued to appear for the substituted plaintiff, but failed to file a proxy on his behalf. The case continued and judgement was entered for the substituted plaintiff. The aggrieved party filed an appeal on the ground that the judgement was null and void as there was no valid proxy filed of record and it was upheld by the Civil Appellate High Court. The said decision was set aside in appeal by this Court, upon the basis that the circumstances of the said case clearly provided a strong indication that the substituted plaintiff had granted the Attorney-at-Law authority to appear on his behalf and filing of proxy though belated, ratified the appearance and validated all proceedings. In the said case, the emphasis was on the fact that the party concerned i.e. the substituted plaintiff, impliedly granted authority to the Attorney-at-Law to appear on its behalf by its conduct. Hence, in my view the said case too, has no bearing to the matter before us and can be distinguished.

The Petitioner's next point of argument was that a defective proxy can be cured. It is not in dispute that in a series of cases, this Court has held that a defective proxy can be cured. In the case of **Tea Small Factories Ltd v Weragoda and another (1994) 3 SLR 353** the word

'Ltd' was left out from the name of the company. In the case of **Distilleries Company Ltd v Kariyawasam and others [2001] 3 SLR 119** the appellation 'consultant', was used together with the name of the registered attorney in the proxy. In both instances, the Court held the proxy to be defective but permitted the defect to be cured and corrected.

The facts in the aforesaid cases, vastly differ from the instant application and no parallel can be drawn. Thus, in my view the proposition that a defective proxy can be cured, *ipso facto* cannot be applied to the instant application.

In the matter before us, the validity of the proxy filed was raised at the threshold when the application was taken up for granting of Leave to Appeal and the challenge pertained to the commencement or the invocation of the jurisdiction of this Court itself. Thus, by mere correction of a defect in the proxy, the Petitioner cannot cure the fundamental flaw in the invocation of jurisdiction.

In the instant case, the flaw or the omission goes to the root of the issue. Did Green Lanka Ltd authorize Kushani Nanayakkara to act on behalf of Green Lanka Ltd? Or was she acting in her personal capacity? If so, was the proxy a legally valid document to be filed with the Leave to Appeal Application? If not, was the consent and authority of the Petitioner obtained to subscribe to the Leave to Appeal Application filed? If not, was there a valid application before this Court?

In my view, the defect *perse* is not a superficial flaw or an error or omission that can be corrected by filing a new proxy. The main issue before Court is whether the Attorney-at-Law referred to in the impugned proxy had the authority to perform what was done on behalf of the client therein, on the strength of the proxy filed. In my view, the Petitioner has failed to establish this fundamental issue.

In the said circumstances, for reasons more fully adumbrated herein, I see merit in the submissions made by the Respondents to sustain the objection, that there is no valid proxy filed before Court pertaining to the Leave to Appeal Application of Green Lanka Ltd, the Petitioner before this Court.

Hence, the preliminary objection raised before this Court pertaining to the validity of proxy is upheld.

(ii) There is no valid affidavit filed in support of the Leave to Appeal Application.

The contention of the learned Counsel for Evergreen Ltd was that the affidavit filed before this Court dated 17th April, 2018 together with the Leave to Appeal Application cannot be considered a valid affidavit, since the deponent therein Kushani Nanayakkara was not a director of the Petitioner Company, Green Lanka Ltd at the material time.

The position of the Petitioner Company, Green Lanka Ltd was that Kushani Nanayakkara, was a director of Green Lanka Ltd on 17th April, 2018.

Both parties relied on the below mentioned documents in the record [tendered to the High Court] to substantiate their positions.

(i) an extract from the books of the Registrar General of Companies (page 277 of the record) which indicate that Kushani Nanayakkara resigned as a director of Green Lanka Ltd on 08-07-2016. Thus, the contention of the Respondents was that she was not a director at the relevant time.

The above extract from the Registrar's Books also indicate that three other directors (i.e. a total of four) resigned on the same day and two others were appointed. [The relevant form pertaining to the new appointment is also available in the record].

(ii) a preliminary report of the provisional liquidator (page 422 of the record) where it states that Kushani Nanayakkara is a director among six others. Thus, the contention of the Petitioner was that she was a director at the relevant time.

The Court considered the said documents. It is observed that the provisional liquidator has prepared the preliminary report based upon the material tendered by the company secretary of Green Lanka Ltd itself. It is also noted that by the said report, the provisional liquidator has

sought a direction of Court for assistance and co-operation of directors, on the basis that such assistance and co-operation is lacking and in the absence of same it makes it difficult to investigate the matters of the Company Ordered to be wound-up Green Lanka Ltd.

It is also observed that the Petitioner did not counter the position of the Respondents that at the relevant time Kushani Nanayakkara was not a director of Green Lanka Ltd by presenting independent evidence or contemporaneous documents maintained by Green Lanka Ltd and merely relied upon the preliminary report of the provisional liquidator filed in the High Court.

In the aforesaid circumstances and in view of paucity of material with regard to the composition of the board of directors of Green Lanka Ltd, I am of the view that the preliminary objection pertaining to Kushani Nanayakkara being a director of Green Lanka Ltd at the material time, is a disputed fact.

Hence, I refrain from answering the said preliminary objection raised before this Court.

(iii) The Leave to Appeal Application is defective, since the necessary parties are not before Court.

This is the third and final preliminary objection raised before this Court. The contention of the Respondents was that a number of parties entered an appearance and participated at the inquiry before the High Court and such parties are necessary parties to this application. Therefore, the Respondents pleaded that leaving out such parties from these proceedings would amount to a violation of Rule 28(5) of the Supreme Court Rules, 1990 and upon the said basis moved that this application be rejected *in limine.*

The Respondents also contended that the Petitioner only named three parties, i.e. Ever Green Ltd the company which sought the winding-up of Green Lanka Ltd, SJM Associates the liquidator appointed by Court and *one of the creditors* namely, Mercantile Investment and Finance Ltd as Respondents and brought to the attention of this Court, that subsequent to the High Court re-calling the notices issued on the liquidator [and impliedly staying the process of liquidation], written submissions were called from all parties and even parties who filed

written submissions before the High Court [including Aitken Spence Group of Companies and Sri Lanka Port Authority] were not made parties to the instant application.

The Respondents strenuously argued that the requirement for necessary parties is mandated by the Supreme Court Rules and the failure to comply with these Rules would prove fatal to the application and relied on the ratio decidendi of this Court in **Illangakoon v Anula Kumarihamy SC/HCCA/LA 277/2011 - S.C.Minutes 05-04-2013** and **Leelananda Silva v Chandrawathi Wijesekera SC/HCCA/LA 449/2014 - S.C.Minutes 30-09-2016** to substantiate its position.

Countering the said submissions, the Learned President's Counsel for the Petitioner contended, the scope of the present application does not require all participating parties to be included as party-respondents and drew a distinction between a party and a creditor. It was also contended that this application is a winding-up application and not a regular action and hence it is not necessary to name all creditors as it would be a cumbersome process and would cause immense injustice to a petitioner and would negate the intention of the drafters of the Companies Act in so far as winding-up is concerned. It was also submitted that in any event, no action or application should be dismissed for failure to add a defendant or a respondent and such a failure is merely a procedural irregularity which can be cured. The learned Counsel relied upon the judgments of this Court in **Chandrani v De Fonseka and Others (2011) B.L.R 153** and **Wilson v Kusumawathie and Others (2015) B.L.R 49** to substantiate its argument.

In the said backdrop, this Court would now examine the applicability of Rule 28(5) of the Supreme Court Rules, 1990. It reads as follows:

> "In every such petition of appeal and notice of appeal, there shall be named as defendants, all parties in whose favour the judgement or order complaint against was delivered or adversely to whom such appeal is preferred, or **whose interests may be adversely affected by the success of the appeal**, and the names

and present addresses of the appellant and the defendant shall be set out in full" (emphasis added)

At this stage, it is relevant to note that the applicability of Supreme Court Rules, 1990 were examined by this Court exhaustively in the landmark case, **Sudath Rohana and another v Mohamed Zeena and another [2011] 2 SLR 134** and this Court held, that the Rules pertaining to appeals from the High Courts of the Provinces were governed by Section C of Part I of the Supreme Court Rules, 1990.

In **Jinadasa v Hemamalie and others [2011] 1 SLR 337**, this Court held that the Supreme Court Rules, 1990 is also applicable to Leave to Appeal Applications stemming from the Orders of the High Courts of the Provinces.

Thus, undisputedly Rule 28(5) which falls within Section C of Part I of the Supreme Court Rules, is applicable to the instant Leave to Appeal Application.

Rule 28(5) of the Supreme Court Rules, 1990 makes provision pertaining to naming of parties as defendants. It refers to three instances of naming defendants or respondents in an Appeal or Leave to Appeal Application. The first instance being all parties in whose favour an Order is delivered. The second instance is all the parties, adversely to whom such appeal is preferred and thirdly **all the parties whose interests may be adversely affected by the success of the appeal.** The Rule spells out **all such parties should be made parties before this Court.** Hence, it is clearly seen that any party whose interests may be affected by the success of the appeal, should be made parties before this Court and they are deemed to be the necessary parties.

Winding-up applications are unique in its nature and character and are filed in terms of the Companies Act and are governed by winding-up rules. The principal parties to a winding-up application are, the party who initiates the application and the company whose winding-up is sought. In the instant matter, it will be Evergreen Ltd and Green Lanka Ltd.

However, in this application, the *Petitioner Green Lanka Ltd* in addition to Evergreen Ltd *named the liquidator and one of the creditors as Respondents*. The rest of the creditors

were not brought before this Court. The only explanation tendered by Green Lanka Ltd for such selective naming of Respondents was that the impugned Order referred to only the said parties. Upon perusal of the record before Court, it amply demonstrates there were many intervening parties who were represented before the High Court. An Order of this Court would adversely affect the interests of the said parties. Moreover, some of the intervening parties have even filed written submissions with regard to the matter in issue i.e. re-calling of notices issued on the liquidator by the High Court which impliedly stayed the winding up process begun and thus had an impact and effect on the interests of such parties.

Hence, I am inclined to accept, that the Petitioner selectively named the Respondents before this Court and intentionally left out certain other parties from these proceedings upon the wrongful premise that the said parties did not fully take part at the inquiry.

The alternate contention put forward by the Petitioner was that not naming certain parties as Respondents is an omission or procedural irregularity which can be cured. In my view, selective naming of Respondents cannot be construed as an omission or a procedural irregularity, which can be subsequently cured.

This brings me to the next matter to be determined. Were the parties not brought before this Court, necessary parties to this application?

It is not in doubt that the High Court permitted the winding-up of Green Lanka Ltd and appointed a liquidator to get into the shoes of the company. The duty of the liquidator is to receive all dues, make calls on all monies due, collate and distribute funds in accordance with the law.

However, with the re-calling of notices issued on the liquidator, the process of liquidation was impliedly stayed and it affected the interests of all creditors and contributories. By re-issuing of the notices on the liquidator [which is the impugned order] the status of the liquidator was re-instated and the liquidator was free to perform its duties.

By this Leave to Appeal application, the Petitioner is challenging the said re-issue of notice on the liquidator and re-instating the status-quo of the liquidator to perform its duties.

In my view, if the Petitioner succeeds before this Court, it would adversely affect the interests of all the intervening parties. Hence, I see, merit in the submissions of the Respondents that the intervening parties are necessary parties and should have been made parties to this application.

Furthermore, Rule 28(5) as discussed earlier, clearly states that **all parties whose interests may be adversely affected** by the success of the appeal, should be made parties before this Court. Thus, naming only one creditor as a Respondent to this application, for the reason it was the said creditor who *fully took part at the inquiry*, in my view will not suffice. In any event, the record bears out that other creditors too, have *fully participated* at the inquiry and the Petitioner has failed to give a cogent reason for exclusion of such parties from these proceedings. Hence, it is apparent that the Petitioner has failed to bring all necessary parties before this Court and thus, violated Rule 28(5) of the Supreme Court Rules.

I would pause at this juncture to refer to a few cases, where Supreme Court Rules and specifically Rule 28(5) was examined by this Court.

In the case of **Ibrahim v Nadarajah [1991] 1 SLR 131** this Court considered Rule 4 and 28 of the Supreme Court Rules, 1978 which is identical to Rule 28(5) of the present Supreme Court Rules, 1990 and held that failure to comply with the requirements of Rule 4 is necessarily fatal.

In **Senanayake v Attorney General and another [2010] 1 SLR 149**, a case which considered Supreme Court Rules, 1990 this Court held that Rule 4 and 28(5) require that all parties who may be adversely affected by the appeal should be made parties to such appeal and the failure to do so was fatal.

In **Attanayake v Commissioner General of Elections [2011] 1 SLR 220**, this Court held, that where there in non-compliance with a mandatory rule of the Supreme Court Rules, serious consideration should be given for such non-compliance, since non-compliance would lead to erosion of well-established court procedure followed by our Courts through several decades.

In a recent case **Leelananda Silva v Chandrawathie Wijesekera** (supra), this Court after a critical examination of cases pertaining to Supreme Court Rules held, that all parties who may be affected by an appeal must be named as Respondents in the Petition of Appeal and be given due notice in accordance with the Rules and the failure to do so, renders the appeal liable for rejection.

Prasanna Jayawardena J., in the above referred judgement, went onto observe as follows;

> "Rule 28(5) of the Supreme Court Rules, 1990 is simply a crystallization into procedural law of the inviolable *audi alteram partem* requirement of the substantive law. Therefore, this rule must be complied with, must be enforced and violations of this rule will be liable to rigorous penalties." (at page 20)

Thus, it is observed, that this Court has time and time again, unreservedly held that Rule 28(5) is mandatory in nature and is designed to ensure due and proper dispensation of justice by this Court. This rationale, in my view equally applies to all appeals and applications filed before this Court, irrespective of it stemming from a regular action or a special procedure.

Hence, my considered opinion is that, the instant application which is pivoted on an Order made to re-issue notice on a liquidator in terms of the winding-up rules, falls fairly and squarely within the said ambit and must imperatively be governed by the Supreme Court Rules, 1990 and especially Rule 28(5).

Moreover, in the instant application, it is noted that parties were named consciously and left out also by design. Thus, in my view, the Petitioner cannot now avail of the defense of error or omission nor can the Petitioner at this stage seek the indulgence of Court to permit the Petitioner to cure the *procedural irregularity* as was contended by the Petitioner before this Court.

Admittedly, the Petitioner did not name all the creditors as party-respondents to this application. In my view, such process offends and violates Rule 28(5) of the Supreme Court

Rules,1990 which require all parties whose interests may be adversely affected by the success of the appeal to be made parties before this Court.

In the said aforesaid circumstances, I uphold the third preliminary objection raised before this Court, that necessary parties have not been named in the instant Leave to Appeal Application filed before the Supreme Court and the said failure renders the Leave to Appeal Application defective and liable for rejection.

In concluding, for reasons morefully adumbrated in this Order, I sustain the 1st and 3rd preliminary objections raised before this Court by the Respondents. The Leave to Appeal Application filed by the Company Ordered to be Wound Up- Petitioner, Green Lanka Shipping Limited dated 17th April, 2018 is thus rejected and dismissed *in limine*.

I make no order as to costs.

The Leave to Appeal Application is dismissed.

Judge of the Supreme Court

Jayantha Jayasuriya PC, CJ.

I agree

Chief Justice

Vijith K. Malalgoda PC, J.

I agree

Judge of the Supreme Court

IN THE SUPREME COURT OF THE

DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application for Leave to Appeal under Section 31DD of the Industrial Disputes Act No. 43 of 1950 (as amended) from the final order dated 13th March 2020 of High Court of Colombo, in the application bearing No. HC/ALT/06/2018

SC/HC/LA/50/2020

High Court case No: HC/ALT/06/2018

Labour Tribunal case No: Add/1/34/2012

Kaluappu Hannadi Lalith Priyantha

58/5, Nellammahara Road,

Godagamuwa,

Maharagama.

APPLICANT

Vs.

Asia Broadcasting Corporation (Private) Limited

Level 35 and 37, East Tower,

World Trade Center,

Colombo 01.

RESPONDENT

AND BETWEEN

Asia Broadcasting Corporation (Private) Limited

Level 35 and 37, East Tower,

World Trade Center,

Colombo 01.

RESPONDENT-APPELLANT

Vs.

Kaluappu Hannadi Lalith Priyantha

58/5, Nellammahara Road,

Godagamuwa,

Maharagama.

APPLICANT-RESPONDENT

AND NOW BETWEEN

Asia Broadcasting Corporation (Private) Limited

Level 35 and 37, East Tower,

World Trade Center,

Colombo 01.

RESPONDENT-APPELLANT-PETITIONER

-Vs-

Kaluappu Hannadi Lalith Priyantha

58/5, Nellammahara Road,

Godagamuwa,

Maharagama.

APPLICANT-RESPONDENT-RESPONDENT

Before: P PADMAN SURASENA J

YASANTHA KODAGODA PC J

JANAK DE SILVA J

Counsel: Manoj Bandara with Thidas Herath and Ms. Thamali Wijekoon instructed by Sudath Perera Associates for the Respondent-Appellant-Petitioner.

Sanjeewa Ranaweera with Aruna de Silva instructed by Malaka Palliyaguruge for the Applicant-Respondent-Respondent

Argued on: 09 – 03 - 2021

Decided on: 07 - 07 - 2021

P Padman Surasena J

The Applicant-Respondent-Respondent, filed an application in the Labour Tribunal complaining that his service was unfairly terminated by the Respondent-Appellant-Petitioner. He accordingly sought reinstatement with back wages, promotions and other benefits or alternatively a reasonable compensation.

The learned President of the Labour Tribunal, after inquiry, delivered her order dated 03-01-2018, awarding compensation to the Applicant-Respondent-Respondent holding that the termination of the service of the Applicant-Respondent-Respondent was unjustifiable.

Aggrieved by the above decision, the Respondent-Appellant-Petitioner filed an appeal in the Provincial High Court of Western Province holden in Colombo.

The Provincial High Court, after argument of the said appeal, by its judgment dated 13-03-2020 affirmed the order of the learned President of the Labour Tribunal and dismissed the appeal subject to a cost of Rs. 10,000/=. The Provincial High Court held that it has no basis to interfere with the order of the Labour Tribunal.

Being aggrieved by the judgment of the Provincial High Court, the Respondent-Appellant-Petitioner, by his Petition dated 17-07-2020 seeks Leave to Appeal from this Court.

When this matter was taken up for support before this Court on 09-03-2021, the learned Counsel for the Applicant-Respondent-Respondent raised a preliminary objection against the maintainability of this application on the basis that the application of the Respondent-Appellant-Petitioner has been filed out of time provided by Rule 7 of the Supreme Court Rules. The said Rule reads as follows.

"Every such application shall be made within six weeks of the order, judgement, decree or sentence of the Court of Appeal in respect of which special leave to appeal is sought."

Thus, it was the submission of the learned Counsel for the Applicant-Respondent-Respondent that the instant application for leave to appeal was filed (on 17-07-2020), after the lapse of the stipulated period of six weeks from the date of the judgment against leave to appeal is sought. (i.e., as per Rule 7 of the Supreme Court Rules 1990).

The counter argument advanced by the learned counsel for the Respondent Appellant Petitioner is that Rule 7 of the Supreme Court Rules has no application to the instant application as it is an application for 'Leave to Appeal' from a judgment of the Provincial High Court. It is his position that Rule 7 only applies to applications for 'Special Leave to Appeal' from any judgment of the Court of Appeal.

Thus, the pivotal issue to be decided in this case at this point, is the question whether the period of six weeks prescribed in Rule 7 of the Supreme Court Rules 1990 applies to the instant application which is an application to seek leave to appeal to the Supreme Court, from a judgment of the Provincial High Court, filed under section 31 DD of the Industrial Disputes Act No. 43 of 1950 (as amended).

The rules of this Court presently in force is 'Supreme Court Rules 1990'. These Rules are set out in Gazette No. 665/32 dated 7th June 1991. In its wider scope, the Supreme Court Rules 1990 deals with procedures pertaining to several types of matters. These are categorized under four parts. Part I has three sections named A, B and C. Section

A in Part I deals with applications seeking Special Leave to Appeal to appeal from judgments of the Court of Appeal. Section B in Part I deals with instances where the Court of Appeal has granted Leave to Appeal.

Section C in Part I deals with all the other appeals. Rule 28 (1) which is found in this section (Section C in Part I) states thus;

"Save as otherwise specifically provided by or under any law passed by Parliament, the provisions of this rule shall apply to all other appeals to the Supreme Court from an order, judgment decree or sentence of the Court of Appeal or <u>any other Court or tribunal</u>.[1]

As the instant application is an application filed under section 31 DD of the Industrial Disputes Act No. 43 of 1950 (as amended), to seek leave to appeal to Supreme Court from a judgment of the Provincial High Court, it is clear that it must fall under Section C in Part I which deals with the 'other appeals'. It cannot fall under section A in Part I as it is not an application seeking Special Leave to Appeal from a judgment of the Court of Appeal. It also cannot fall under section B in Part I as it is not an instance where the Court of Appeal has granted Leave to Appeal.

For the sake of completely producing the scheme of the Supreme Court Rules 1990, I would briefly set out the subjects dealt with, under the other parts as well, in the said rules. Part II of the Supreme Court Rules 1990 deals with the General Provisions Regarding Appeals and Applications. Part III of the said Rules deals with Stay of Proceedings. Newly added Part III A of the said Rules deals with Applications to which Public Officers are Respondents. Part IV of the said Rules deals with applications under Article 126 of the Constitution.

One must remember that at the time the Supreme Court promulgated the Supreme Court Rules 1990, Provincial High Court was not in existence. The Court of Appeal was the major channel through which the appeals came to the Supreme Court at that time. That was by way of Special Leave to Appeal Applications. That is the reason as to why the Supreme Court Rules 1990 was designed in that way.

[1] Emphasis added.

However, with the promulgation of the 13th Amendment to the Constitution which was certified on 14-11-1987, the Provincial High Courts with appellate powers were established in the country. It was thereafter, that the Parliament enacted High Court of Provinces (Special Provisions) Act No. 19 of 1990 and then Act No. 54 of 2006 which enabled the Provincial High Court to hear Appeals from the lower Courts. It was those two Acts which enabled any party aggrieved by a judgment pronounced by the Provincial High Court exercising its appellate jurisdiction, to appeal to the Supreme Court after obtaining leave. As the Supreme Court has not made any specific rules to regulate this category of appeals, these appeals would fall under the category of 'other appeals' in the existing Supreme Court Rules 1990.

However, one will not observe any specific time limit for preferring appeals under Section C in Part I which deals with this category, namely 'other appeals'. Despite the absence of any rule prescribing the period within which an aggrieved party may prefer such an appeal to the Supreme Court, this Court on several occasions, has adopted the six weeks period mentioned in Rule 7 of the Supreme Court Rules 1990 as the time limit for such appeals. I would henceforth advert to some of those occasions.

Tea Small Factories Ltd. Vs Weragoda and another.[2] is an appeal filed in the Supreme Court challenging the validity of the judgment pronounced by the Provincial High court in the exercise of its appellate powers in respect of an order pronounced by the Labour Tribunal. One of the grounds upon which the relevant appeal before the Supreme Court was resisted, was the fact that the relevant Petition of Appeal in that case had been filed out of time. Thus, that was an instance where this Court had to decide the time limit within which such appeal should have been filed.

The learned Counsel who appeared for the 1st respondent in that case, relied on Rule 7 of the Supreme Court Rules 1990 and submitted that the application for special leave to appeal in that case was filed on 24.09.92, after the lapse of the period prescribed by the said rule, namely six weeks of the judgment in respect of which special leave to appeal was sought.

[2] 1994 (3) SLR 353.

The learned Counsel who appeared for the appellant in that case sought to counter the above argument stating; that Rule 7 relied upon by the respondent in that case, applies only to the applications for special leave to appeal from a judgment of the Court of Appeal; that the judgment which is the subject of the said appeal is a judgment of the High Court; that such appeals to the Supreme Court (specially provided by s.31 DD of the Industrial Disputes Act as amended by Act No. 32 of 1990) are governed by Rule 28 of the Supreme Court Rules; and that neither the section 31 DD nor Rule 28 of the Supreme Court Rules provides for the period within which an aggrieved party may appeal to the Supreme Court.

Although, neither the section 31 DD nor Rule 28 of the Supreme Court Rules provides for the period within which an aggrieved party may appeal to the Supreme Court, this Court applied the provisions in Rule 7 and proceeded to calculate 6 weeks from the date, the Provincial High Court pronounced the judgment impugned in that appeal. Thus, despite the presence of the phrase "… within six weeks of the order, judgement, decree or sentence of the Court of Appeal[3]…" in Rule 7, this Court chose to apply the provisions in Rule 7 to the said appeal which is an appeal filed against the judgment pronounced by the Provincial High court.

In the case of Mahaweli Authority of Sri Lanka Vs United Agency Construction (Pvt) Ltd.[4] the relevant arbitral award had been made in favour of the respondent in that case. The said respondent therefore applied to the High Court for enforcement of the said arbitral award. The High Court allowed the enforcement of the arbitral award. The Petitioner in that application then made the application seeking leave to appeal to appeal to the Supreme Court against the order of the High Court allowing the enforcement of the arbitral award.

The Respondent in that application raised a preliminary objection to the maintainability of that application on the basis that the said application had been filed out of time prescribed by law. To counter the said preliminary objection, the petitioner in that case contended that the Supreme Court has not made any rules under section 43 of the Arbitration Act and therefore, there is no rule prescribing the period within which

[3] Emphasis added.
[4] 2002 (1) SLR 8.

an application for leave to appeal should be filed in the Supreme Court. He therefore contended that any such application for leave to appeal could be filed in the Supreme Court within a reasonable period and the Supreme Court should entertain such application.

Learned counsel for the Petitioner in that case further submitted that Rule 7 which only referred to applications for special leave from judgments or orders of the Court of Appeal had no applicability to applications for leave to appeal under section 37 (2) of the Arbitration Act.

His Lordship Justice Edussuriya, upholding the preliminary objection of time bar raised by the said respondent, stated as follows.

"The rules provide for a party seeking leave to appeal from a judgment or order of the Court of Appeal to the Supreme Court to apply to the Court of Appeal for such leave on a substantial question of law within twenty-one (21) days since the Court of Appeal must make an order on such an application within twenty-one days or as set out in the proviso to Rule 23 (5) and that if no order is made within that period the application for leave is deemed to have been refused.

According to the rules a party may apply directly to the Supreme Court for special leave to appeal within a period of forty-two (42) days of the judgment or order of the Court of Appeal. So that it is seen that in providing for a period of forty-two days for presenting an application for special leave the Supreme Court has allowed a party who has been unsuccessful in his application for leave to appeal in the Court of Appeal a further period of twenty-one days within which an application for special leave can be made.

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. In this context, also relevant, would be the question as to whether, in a situation where the appealable period from the Court

of Appeal to the Supreme Court is forty-two days, it is conceivable that the appealable period from the High Court to the Supreme Court should be longer? If so, by how many days?

For the above-mentioned reasons I hold that the period of fifty-five days from the date of the order of the High Court taken by the petitioner to file his application for leave to appeal cannot be considered to be a reasonable period and therefore uphold the preliminary objection raised by the learned counsel for the respondent. I, accordingly, reject this application for leave to appeal."

In George Steuart & Company Limited Vs. Lankem Tea and Rubber Plantation Ltd,[5] the arbitral tribunal had made an award against the petitioner in that application. The respondent in that application applied to the High Court for enforcement of the said arbitral award under section 31 (1) of the Arbitration Act. The High Court held that the said respondent is entitled to recover the sum of money as awarded by the arbitral tribunal. The Petitioner in that application then sought leave to appeal to appeal to the Supreme Court against the order of the High Court allowing the enforcement of the arbitral award.

The Respondent in that application raised a preliminary objection to the maintainability of that application on the basis that the said application had been filed out of time prescribed by law. The learned President's Counsel who appeared for the respondent in that case relied on the decision in the case of Mahaweli Authority of Sri Lanka.[6] The learned President's Counsel who appeared for the Petitioner in that case sought to argue that the said decision[7] is a decision made per incuriam.

Her Ladyship Justice Shirani Bandaranayake in rejecting the argument of the learned President's Counsel for the Petitioner in that case, stated as follows.

"It is to be remembered that direct applications for leave to appeal from the High Court to the Supreme Court came in to being only after the 13th amendment to the Constitution was enacted providing for the establishment of High Courts of Provinces.

[5] 2004 (1) SLR at page 246.
[6] Supra.
[7] The decision in the case of Mahaweli Authority of Sri Lanka.

Prior to the enactment of the Arbitration Act and the establishment of the High Courts of the Provinces, leave to appeal applications from the Court of Appeal to the Supreme Court followed the procedure laid down in terms of the Rules of the Supreme Court. Accordingly when a leave to appeal application is made to the Supreme Court, Rule 19(3) provides that it may be made in terms of Rule 7 of the Supreme Court Rules 1990. Rule 7 is in the following terms.

*"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)."*

When 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 applications to the Supreme Court. Consequently such an application would have to be filed within 42 days from the date of the award."

Samantha Kumara Vs Manohari,[8] is an instance where the Respondent in that application had claimed maintenance from the Appellant in that case, for the child born out of wedlock. The Magistrate had ordered the said Respondent to pay a sum of Rs. 750 per month as maintenance for the child. Being aggrieved by that order the appellant in that case, had appealed to the High Court under Article 154 P of the Constitution read with section 14 of the Maintenance Act No. 37 of 1999. The High Court had dismissed the appeal. The Appellant thereafter sought from the High Court, leave to appeal to the Supreme Court in terms of section 14(2) of Act No. 37 of 1999 read with section 9 of Act No. 19 of 1990. The High Court granted leave on 06.06.2005. After leave to appeal to the Supreme Court has been granted by the High Court on 06.06.2005 the appellant, on 13.06.2005, has filed a petition of appeal addressed to the Supreme Court in the Registry of the High Court. One of the preliminary objections raised by the Respondent in that case, is that the Petitioner in that case, after the High Court had granted leave, had not filed the petition of appeal within the time as per the Rules.

[8] 2006 (2) SLR 57.

This Court applied the provision in Rule 7 of the Supreme Court Rules 1990, in holding that the 42 days is the time frame for an appeal to be filed when the High Court grants leave to appeal, in respect of a decision made by such High Court in an appeal preferred to it under the Maintenance Act.

His Lordship Justice Raja Fernando in his judgment stated as follows.

"The present Appeal is neither with special leave from the Supreme Court nor with leave of the Court of Appeal but with leave from the High Court. Therefore the instant appeal clearly falls into the category of other appeals and hence rules in Part 1C dealing with other appeals would apply.

The position of the Appellant that there are no rules governing appeals from the Provincial High Court to the Supreme Court is therefore incorrect.

An appeal to the Supreme Court from an order of the Provincial High Court can be either with the leave of the Provincial High Court or with special leave obtained from the Supreme Court upon a refusal of leave by the High Court.

If the appeal is with leave of the High Court, then Supreme Court rules under Part 1C (other appeals) shall apply; if the appeal is with special leave of the Supreme Court then Supreme Court rules under Part 1A (special leave to appeal) shall apply mutatis mutandis since Rule 2 relates to every application for special leave to appeal....."

As regards the procedure in the instant case the rules applicable to other Appeals in Part 1C of the Supreme Court rules shall apply.

A question arises in fixing the time within which the Appeal is to be filed in the Supreme Court for the reason that the Rules are silent on the matter.

In determining the time for an aggrieved party to lodge an application for special leave to the Supreme Court where no time is fixed either in the statute or the rules; this Court has in the case of Tea Small Holders Limited vs. Weragoda[9] and in the case of Mahaweli Authority of Sri Lanka vs. United Agency Construction (Pvt.) Ltd.[10] held that the Petitioner should make his application within a reasonable time, and relying on

[9] Supra.
[10] Supra.

the time period prescribed in the rules for similar applications has held that 42 days is reasonable time.

Following the same reasoning I am of the view that the time frame for a petitioner to file an appeal should be 42 days from the date leave to appeal is granted by the High Court."

The case of Priyanthi Chandrika Jinadasa Vs Pathma Hemamali and four others,[11] is an application for leave to appeal filed in this Court, seeking leave to appeal against a judgment of the Provincial High Court exercising civil appellate jurisdiction. The respondents in that case raised a preliminary objection to the maintainability of the case on the basis that the said application had been filed 06 weeks after the date of the impugned judgment.

The petitioner took up the position that the time limit of six weeks would not be applicable to that application since that is an application for leave to appeal from the judgment of the High Court. The petitioner contended that since there are no Rules specifying a time limit for applications for leave to appeal from the judgment of the Provincial High Courts exercising civil appellate jurisdiction, the concept that applications must be filed within 'a reasonable time' (as opposed to six weeks' time) must be adopted.

Having considered the relevant arguments, Her Ladyship Dr. Shirani Bandaranayake CJ stated the following, when holding that the said application falls under section C in Part I of Supreme Court Rules.

"In terms of Rule 7, it is quite clear that any application for special leave to appeal should be made within six weeks from the order, judgment, decree or sentence of the Court of Appeal on which such leave is sought.

It is however to be borne in mind that the said Rule 7 deals only with applications for special leave to appeal from the judgments of the Court of Appeal and the present application for leave to appeal is from a judgment of the Civil Appellate High Court of the Western Province holden at Gampaha.

[11] 2011 (1) SLR 337.

As stated earlier categories B and C of Part I of the Supreme Court Rules, 1990 deal with leave to appeal and other appeals, respectively. Whilst the category of leave to appeal deals with instances, where Court of Appeal had granted leave to appeal to the Supreme Court, other appeals refer 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. Thus, it is evident that the present application for leave to appeal from the judgment of the High Court of the Western Province (Civil Appeal) holden at Gampaha would come under the said category C. …."

Her Ladyship Dr. Shirani Bandaranayake CJ then proceeded to consider whether such an application must be filed within six weeks from the impugned judgment, as per Rule 7 of the Supreme Court Rules 1990. The following excerpt from Her Ladyship's judgment would be relevant.

"Direct applications for leave to appeal from the High Court to the Supreme Court came into being only after the establishment of High Courts of the Provinces. Until such time, according to the procedure that prevailed, such applications were preferred from the order, judgment, decree or sentence of the Court of Appeal. In such circumstances, if the Court of Appeal had not granted leave to appeal, an application could be made to the Supreme Court for special leave to appeal. Rules 19 and 20 of the Supreme Court Rules refer to this position and Rule 20(3) in particular, deals with the time frame in such applications. The said Rule 20(3) is as follows:

"Where the Court of Appeal does not grant or refuses to grant leave to appeal, an application for special leave to appeal to the Supreme Court may be made in terms of Rule 7."

Rule 7 clearly states 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.

Accordingly it is quite clear that a litigant, who is dissatisfied with the decree of a criminal matter, which had come before the High Courts (Civil Appellate) of the Provinces would have to prefer an application before the Supreme Court within six (6) weeks of the order, judgment, decree or sentence in question."

In Karunawathie Wickremasinghe Samaranayake v Ranjani Warnakulasuriya,[12] the only question arose was whether that application which sought leave to appeal from a judgment of the Provincial High Court exercising civil appellate jurisdiction, had been lodged out of permissible time. This was because the respondent in that case raised a preliminary objection in regard to the maintainability of that case on the basis that the said application had not been filed within "06 weeks" (42 days) specified in Rule 7 of the Supreme Court Rules 1990.

The petitioner took up the position that the time limit of six weeks, specified in Rule 7, which is in Section A in Part I of the Supreme Court Rules 1990, has no application to an application seeking leave to appeal made under section 5 C (1) of the High Court of the Provinces (Special Provisions) Act No. 54 of 2006, as the Supreme Court has not made any rule dealing expressly with the time limit for applications for leave to appeal from the High Court of the Province exercising civil appellate jurisdiction.

His Lordship Justice Saleem Marsoof PC having referred to the relevant previous decisions of this Court, stated as follows.

"Accordingly in the light of the reasoning adopted in the aforementioned decisions of this Court, I am inclined to hold that an application for leave to appeal filed in the Supreme Court from an order of a High Court of the Province exercising civil jurisdiction has to be filed within six weeks of the pronouncement of the order or judgement appealed from, irrespective of whether it is considered to fall within Part I-A or Part I-C of the Supreme Court Rules."

In the case of Board of Investment of Sri Lanka Vs. Million Garment (Pvt) Ltd,[13] the Supreme Court was called upon to decide on the time limit for filing applications for leave to appeal under Section 37(2) of the Arbitration Act. The learned counsel who appeared for the respondent in that case, raised a preliminary objection stating that the application for leave to appeal was time-barred as the judgment of the High Court was pronounced on 14th May 2012, and the application for leave to appeal was lodged in the registry of this Court on 26th June 2012 (on the forty-third day after the pronouncement of the impugned judgment). He therefore argued that the petitioner

[12] SC HC/CA/LA No. 137/2010, decided on 04-10-2012.
[13] SC/HC/LA/58/2012, decided on 24-10-2014.

in that case had filed the said application for leave to appeal outside the time limit prescribed by law, for filing of such applications. His Lordship Justice Saleem Marsoof PC, having considered; firstly, the fact that section 37(2) of the Arbitration Act which confers the right to invoke the appellate jurisdiction of this Court by way of an application for leave to appeal, does not specify any time limit for the lodging of the application seeking leave to appeal; and secondly, the fact that no rules have so far been made by this Court in terms of Section 43(a) of the Arbitration Act prescribing any period of time within which any application for leave to appeal against any order, judgment or decree of the High Court may be lodged; stated as follows.

"….The application filed by the Petitioner is of course for leave to appeal against a decision of the High Court, and It is in these circumstances that learned President's Counsel for the Respondent has submitted that despite the absence of any express provision in the Arbitration Act or any rule made under Section 43(a) of the said Act, it would be reasonable to regard the six weeks period that is prescribed in Rule 7 of the Supreme Court Rules, 1990 for the filing of an application seeking special leave to appeal against an order or judgment of the Court of Appeal as being applicable to any application seeking leave to appeal under Section 37(2) of the Arbitration Act. Learned President's Counsel has referred to the decisions of this Court in Tea Small Factories Ltd. v Weragoda (1994) 3 SLR 353, Mahaweli Authority of Sri Lanka v United Agency Construction (2002) 1 SLR 8, George Stuart & Co. Ltd. v Lankem Tea & Rubber Plantations Ltd. (2004) 1 SLR 246 Priyanthi Chandrika Jinadasa v Pathma Hemamali (2011) 1 SLR 337, and Karunawathie Wickremesinghe Samaranayake v Ranjanie Warnakulasuriya SC HC/CA/LA No. 137/2010 SC Minutes of 4.10.2012 (unreported) in support of his submission that the application of the Petitioner in the instance case is time-barred."

Thus, in the instant case, notwithstanding the fact that the instant application for leave to appeal from the judgment of the Provincial High Court would come under section C in Part I namely 'Other Appeals', the provisions in Rule 7 of the Supreme Court Rules 1990 would apply to decide the time frame within which such an application must be filed before this Court.

The judgment, of the Provincial High Court in respect of which leave to appeal is sought, was delivered on 13-03-2020. The instant application seeking leave to appeal

from the said judgment of the Provincial High Court, has been filed on 17-07-2020. However, as per the Supreme Court (Temporary Provisions) Rules 2020,[14] the period beginning from 16-03-2020 and ending on 18-05- 2020 shall not be taken into account in computing the period of six weeks referred to in the afore-said rule 7. Accordingly, when the period from 16-03-2020 to 18-05-2020 is excluded, the Respondent-Appellant-Petitioner has filed the instant application on the 62nd day from the date of the judgment of the Provincial High Court in respect of which leave to appeal is sought. Thus, the submission of the learned Counsel for the Applicant-Respondent-Respondent that the instant application for leave to appeal has been filed after the lapse of the stipulated period of six weeks, from the date of the judgment is entitled to succeed.

Therefore, I uphold the Preliminary Objection raised by the learned Counsel for the Applicant-Respondent-Respondent. I refuse the application seeking leave to appeal. The application must stand dismissed.

JUDGE OF THE SUPREME COURT

YASANTHA KODAGODA PC J

I agree,

JUDGE OF THE SUPREME COURT

JANAK DE SILVA J

I agree,

JUDGE OF THE SUPREME COURT

[14] Published in the Gazette Extraordinary No. 2174/4, dated 06-05-2020.

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 37(2) of the Arbitration Act No. 11 of 1995.

Colombo Business School Limited,

No. 282, Galle Road, Colombo 03.

Claimant

-VS-

SC/HC/LA No. 69/2018

HC/ARB/87/2013

Sri Lanka Tea Board,

No. 574, Galle Road, Colombo 03.

Respondent

AND

Colombo Business School Limited,

No. 282, Galle Road, Colombo 03.

Claimant – Petitioner

-VS-

Sri Lanka Tea Board,

No. 574, Galle Road, Colombo 03.

Respondent – Respondent

AND NOW BETWEEN

Colombo Business School Limited,

No. 282, Galle Road, Colombo 03.

Claimant – Petitioner – Petitioner

-VS-

Sri Lanka Tea Board,

No. 574, Galle Road, Colombo 03.

Respondent – Respondent – Respondent

Hon. Attorney General,

Attorney Generals' Department,

Colombo 12.

2nd Respondent

Before: Vijith K. Malalgoda, PC. J.,

Murdu N.B.Fernando, PC. J. and

P. P. Surasena J.

Counsel: Dr.Jayatissa de Costa PC with Malka Danette for the Claimant – Petitioner – Petitioner.

Nirmalan Wigneswaran SSC, for the 1st Respondent – Respondent – Respondent and the 2nd Respondent Hon. Attorney General.

Argued on: 15-03-2019

Decided on: 25 -01-2021

Murdu N.B. Fernando, PC. J.

This is an action filed in terms of Section 37(2) of the Arbitration Act No. 11 of 1995.The Claimant-Petitioner-Petitioner by Petition dated 26-06-2018 filed in this Court moved among other relief, for granting of Leave to Appeal in respect of a judgement dated 18-05-2018 of the High Court of Colombo and for setting aside of the said judgement.

When this application was taken up for support, the learned Senior State Counsel representing the 1st Respondent-Respondent-Respondent raised the following preliminary objections;

i. The Petitioner has failed to comply with Rule 28(3) of the Supreme Court Rules; and
ii. The Petition is time barred.

Prior to examining the said objections, I wish to refer to certain facts and material *albeit* brief, which in my view is relevant to understand the nature of this Leave to Appeal application.

01. The Claimant-Petitioner-Petitioner ("the Claimant/ Petitioner") and the 1st Respondent-Respondent-Respondent ("the Respondent") entered into an indenture of lease, pertaining to a premises owned by the Claimant, which instrument provided inter-alia to refer any disagreement or difference or dispute arising under and on terms of the said Agreement for Arbitration in accordance with the provisions of the Arbitration Act No. 11 of 1995 ("the Act").

02. Consequent to arising of certain disputes between the parties, the Claimant invoked the Arbitration Clause and the matter was referred to Arbitration. The Arbitration Tribunal inquired into the dispute and an Award was made by the Tribunal dated 14-11-2012 in favour of the Claimant. This is the genesis of this Appeal before this Court.

03. The Claimant thereafter filed an application before the High Court of Colombo ("High Court") for the Enforcement of the Award under Section 31 of the Act and the Respondent filed an application to set aside the said Award in terms of Section 32 of the Act.

04. The learned Judge of the High Court consolidated the said two applications and after hearing the parties, by judgement dated 18-05-2018 dismissed the application of the Claimant for Enforcement of the Award on a technicality and the application for setting aside the Arbitration Award considering the merits therein.

05. Being aggrieved by the said judgement, the Claimant (naming itself the 'Claimant-Petitioner-Appellant') tendered a Petition and affidavit together with documents and by way of a motion dated 26-06-2018 moved this Court to accept the said papers and file it of record and to fix the matter for support on three given dates.

06. On 03-07-2018 a Judge of this Court sitting in chambers, made Order as follows,

"Petitioner is directed to tender notices and move for leave".

07. Thereafter, by way of a motion dated 25-07-2018 the Claimant, submitted notices together with petition, affidavit, documents and stamped envelopes to be dispatched to the 'Petitioner-Respondent-Respondent' and moved Court to accept the said documents and file it of record and to fix the matter for support once again giving three days.

08. On 01-08-2018 the learned judge sitting in chambers made Order as follows,

"Support on 12-09-2018 and serve notices".

09. On 07-09-2018 a caveat was filed in terms of the Supreme Court Rules by the Attorney-at-Law for the 1st Respondent-Respondent-Respondent and the 2nd Respondent, Hon. Attorney General.

10. Thereafter, this matter was taken up for support and the learned Senior State Counsel moved to discharge the 2nd Respondent from the proceedings as the matter in issue was a commercial transaction and the Hon. Attorney General was not a party to the said Arbitration. This Court accordingly made Order discharging the 2nd Respondent from these proceedings.

Having referred to the factual matrix of this application, let me now move onto the two preliminary objections raised before this Court.

Firstly, the failure to comply with Rule 28(3) of the Supreme Court Rules of 1990 ("the SC Rules"), and

Secondly, the Petition being time barred by virtue of Rule 7 of the SC Rules, when considering the date upon which notices to be issued to the Respondents were tendered to Court by the Claimant.

Rule 28(3) of the SC Rules reads as follows:-

> "The **Appellant shall tender with his petition of appeal, a notice of appeal** in the prescribed form, together with such number of copies of the petition of appeal and the notice of appeal **as is required for service on the Respondents** and himself and three additional copies and shall also tender the required number of stamped envelopes for the service of notice on the Respondents by registered post". (emphasis mine)

In this application, it is not in dispute that the Claimant on 26-06-2018 did not tender with his Petition of Appeal, to this Court, the notice of appeal and the necessary number of copies for service of notice on the Respondents. The learned Judge sitting in chambers, having examined the documents tendered, categorically directed the Petitioner to tender notices and move for leave. The Petitioner by way of a motion dated 25-07-2018, tendered the notices and moved that it be served on the Respondents and also moved to support for Leave to Appeal. Thus, it is apparent on the face of the record and it is undisputed that the relevant papers required to be served on the Respondents were not tendered to this Court by the Petitioner together with the Petition of Appeal initially on 26-06-2018, but were tendered only on 25-07-2018.

Before examining the legal consequences of Rule 28(3) of the SC Rules, I wish to look at Rule 7 of the SC Rules.

Rule 7 reads as follows: -

> "Every such application shall be made within six weeks of the order, judgement, decree or sentence of the Court of Appeal in respect of which special leave to appeal is sought."

In this instant application, the impugned judgement of the High Court was delivered on 18-05-2018. The Petition of Appeal together with the relevant notices to be served on the Respondents in terms of Rule 28(3) were filed before this Court only on 25-07-2018 approximately ten weeks after the delivery of the High Court judgement.

The preliminary objection raised by the learned Senior State Counsel for the Respondent was that the application filed before this Court was not accompanied by the necessary documents and when considering the date the documents were tendered to Court the application was time barred. The learned Senior State Counsel in his submissions before this Court, relied on the judgements of:

- **A.H.M. Fowzie and others v. Vehicles Lanka (Pvt) Ltd. [2008] 1 SLR 23;**
- **Woodman Exports (Pvt) Ltd. v. Commissioner General of Labour and others 2012 (BLR) 238;** and

- **Udaya Shantha v. Jeevan Kumaratunga and others 2012 (BLR) 129**

to substantiate his position that the Leave to Appeal application should be dismissed *in limine* for non-compliance with SC Rules.

The Claimant in his written submissions filed before this Court counters the contention of the Respondent on two grounds.

Firstly, that the Leave to Appeal application was filed within the stipulated time i.e. 42 days or six weeks, although the notices were not tendered to be sent to the Respondents at the time of filing of the Leave to Appeal application and relies upon the observations of this Court in the cases of:

- **Kirwanthe and Another v. Navarathne and Another [1990] 2 SLR 393;**
- **Rasheed Ali v. Mohamed Ali and Others [1981] 2 SLR 262;** and
- **Nayar v. Tharik Ameen [2000] 3 SLR 103,**

to contend that this is a fit matter for the Court to use its discretionary power and overrule the objections raised.

Secondly, in view of the nature of the matter in dispute i.e. an Arbitration Award, technical objections should not stand in the way in achieving justice and relies on the judgement in **Kristley (Pvt) Ltd. v. State Timber Corporation [2002] 1 SLR 225** to support his contention.

Having referred to the submissions made on behalf of the parties *albeit* brief, I would move to consider the 1st preliminary objection raised before this Court pertaining to failure to comply with Rule 28(3) of the SC Rules.

Rule 28 comprises of 7 sub rules and is the sole Rule in Section C of Part I of the SC Rules. This section lays down the procedure pertaining to 'other appeals', whereas Sections A and B of Part I lays down the procedure pertaining to Special Leave to Appeal and Leave to Appeal applications springing forth from the Court of Appeal.

This Court has in many an instant, considered the impact of the High Court of the Provinces (Special Provisions) Act No 19 of 1990, Act No 10 of 1996 and Act No. 24 of 2006 and has quite categorically held, that when an appeal from the High Court of the Provinces is made to the Supreme Court, whether it be a direct appeal, a leave to appeal or a special leave to appeal

application, the procedure that ought to be followed is the procedure laid down in the Supreme Court Rules and especially the procedure envisaged by Rule 28(1) of the SC Rules of 1990.

In the unreported judgements of this Court, viz,

- **Rambanda v. Peoples' Bank SC/SPL/LA 229/11 – S.C. minutes of 17-07-2014;** and
- **Aaron Senarath v. The Manager, Moray Estate SC/SPL/LA 231/2015 – S.C. minutes of 19-01-2017,**

Priyasath Dep, J. (as he then was) discussed succinctly the change or the shift of the forum jurisdiction, when considering the above stated provisions of the High Court of the Provinces (Special Provisions) Act viz-a-viz the applications filed under the Industrial Disputes (Amendment) Act No. 32 of 1990.

In **Sudath Rohana and Another v. Zeena and Another 2011 (BLR) 277,** Shirani Bandaranayake, J. (as she then was) at page 280 stated as follows,

> "Rule 28 accordingly deals with the procedure that has to be followed when filing an application against the judgement of a High Court of the Province established under and in terms of Article 154 P of the Constitution. Similar to Rule 8(3), Rule 28(3) refers to the necessity of tendering notices to the Registrar."

Discussing in detail the provisions of Rule 28(3), 27(3) and 8(3), this Court held that the purpose of the said Rule is to ensure that all necessary parties are properly notified of the matter before Court, so that all parties could participate at the hearing.

In **Sudath Rohana case** referred to above, Petition of Appeal was filed in the Registry but the Petitioner failed to tender the notices to be served to the Respondents. Nevertheless, the Petitioner served the said documents directly on the Respondents and a preliminary objection was raised by the Respondent that, Rule 28(3) had not been complied with.

This Court upheld the preliminary objection and dismissed the Petition and observed;

> "When there is non-compliance with a mandatory rule, such as Rule 28(3) there is no doubt that this would lead to serious erosion of well-established Court procedures maintained by our Courts, throughout several decades and therefore the failure to comply with Rule 28(3) of the Supreme Court Rules would necessarily be fatal."

In the instant case, the Petitioner did not challenge the proposition in respect of the applicability of SC Rules to Leave to Appeal applications from the High Court, nor did the Petitioner challenge the allegation that he did not and thus failed to tender the relevant notices together with the Petition of Appeal to be served on the Respondents. The record unequivocally bears the direction of the learned Judge sitting in chambers who made Order,

"Petitioner is directed to tender notices and move for leave."

Hence in my view, it is undisputed that the **Petitioner did not tender with his Petition of Appeal, a notice of Appeal** as contemplated by Rule 28(3) required for service on the Respondents and himself and thus breached the said Rule by non-compliance of the Rule at the time of lodging of the Application.

In such a situation what should the Court do?

Dismiss the petition for non-compliance under the provisions of the SC Rules or permit a Petitioner to cure the said defect and proceed with the Application? In other words, is non-compliance a mere technicality to be excused or a mandatory provision that ought to be followed and the failure to follow, would render disastrous consequences to the Petitioner?

This Court has time and again considered this issue and held on numerous occasions the mandatory nature of this Rule.

I do not wish to wade across the multitude of cases where the effect of the non-compliance of Rule 8(3), which is the corresponding Rule in Section A of Part I of the SC Rules of 1990, to Rule 28(3) referred to earlier, has been considered and analyzed by this Court.

However, I wish to refer to the three cases the learned Senior State Counsel relied upon viz, **Vehicle Lanka case, Woodsman case and Udaya Shantha case (supra)**.

In **Vehicle Lanka Case** and **Woodman Case** this Court considered Rule 8(3) and Rule 40 of the SC Rules and held that when it is quite clear that Rule 8(3) has not been complied with by tendering the necessary documents at the point of lodging of an application and Rule 40 has not been complied with by moving for variation or an extension of time as required by Rule 8(3), then in such an instance when an objection is raised upon the basis of non-compliance with a mandatory Rule, such objection cannot be considered as a mere technical objection. The Court went on to hold that such kind of non-compliance would lead to serious erosion of well-established Court procedure and dismissed the Application.

In **Udaya Shantha case** too, this Court whilst re-iterating the purpose of Rule 8(3) i.e. to ensure all necessary parties are properly notified and could participate at the hearing, considered the impact of Rule 40 and held though a motion was filed after many months of lodging the application and an extension of time was sought and notices tendered, that such procedure cannot be considered as being in compliance with Rule 40, since a single Judge sitting in chambers as laid down in Rule 40, did not make a direction for extension of time to tender notices to Court. In the said case it was opined by Shirani Bandaranayake. C.J, that the procedure laid down by way of Supreme Court Rules, made under and in terms of Article 136 of the Constitution cannot be easily disregarded.

In the above mentioned three cases, it is observed that the contention of the respective Petitioners was that although late, the Petitioners have discharged the requirement of Rule 8(3) and hence 'substantially complied' with the SC Rules. In the said cases, submissions were made based upon the observations of this Court in **Kiriwanthe case (supra**) by Mark Fernando, J., and Kulatunga. J., *"that consequences of non-compliance is a matter falling within the discretion of Court to be exercised after considering the nature of default as well as the explanation in the context of the object of the rule"*; and *"that Courts should be guarded against mere technicalities that stand in the way of Courts doing justice and should bear in mind the need to keep the channel of procedure open for justice to flow freely and smoothly."*

In the instant application before us too, the Petitioner relies upon **Kiriwanthe case,** as well as **Rasheed Ali case** and **Nayar case (supra)** to contend that 'the Petitioner has substantially

complied' with Rule 28(3) and thus, this is an appropriate case for non-compliance of the Rule to be excused as the initial non-compliance was subsequently cured and corrected.

If I may summarize the submissions of the Petitioner and the Respondent made in the instant application, the Respondent relies on the series of cases in which the Court held that Rule 8(3) is a mandatory Rule and non-compliance of such a Rule will be fatal and the Petitioner contends that the Court should exercise its discretion in this instance and excuse the non-compliance of Rule 28(3) and permit the Petitioner to proceed with this application.

However, prior to considering the submissions of the learned Presidents' Counsel for the Petitioner, that this is a fit case for this Court to exercise its discretion and excuse the non-compliance of Rule 28 (3), for the simple reason, that this is an application arising under the Arbitration Act, I would pause for a moment, and consider the recent jurisprudence of this Court with regard to Supreme Court Rules, its effects, its compliance and mandatory nature.

The first case I wish to consider is **Rohitha Peiris v. Doreen Peiris 2015 Vol XXI BLR 101**.

In the said case, the Petitioner filed the Petition of Appeal, affidavit and annexed documents in the Registry within the stipulated six weeks, but the notices together with the stamps and envelopes to be served on the Respondents were tendered to the Supreme Court Registry, 24 days after filing of the Petition of Appeal. Hence, until the said notices were tendered no steps were taken to serve notices by the Registry, nor did the Petitioner serve the papers directly on the Respondents.

Thus, this Court held that the **'entire process' of filing of the Petition of Appeal, affidavit and documents and the notices to be served on the Respondent became complete outside the appealable six weeks period** and therefore, it was abundantly clear that the Petitioner has failed to invoke the jurisdiction of this Court in the manner provided by Rule 8 of the SC Rules.

The Court also considered the observations made in **Fowzie case (supra)** with regard to Rule 8(3) , 8(5) and also Rule 40 and held, if the Petitioner was in need of further time to comply with Rule 8(3), an application ought to have been made immediately after filing the Leave of Appeal application and considering the totality of the circumstances, went onto hold that the

Petitioner has failed to comply with Rule 8(3) and when an objection is raised with regard to non-compliance of SC Rules, made in terms of the provisions of the Constitution, **that it is not possible for a Court to exercise its discretion in favour of the Petitioner.**

In the said case, it is observed that Sripavan, J. (as he then was) considered the context and the object of Rule 8(3), which in all fours is compatible with Rule 28(3), as well as the circumstances of the default, admittedly, 'inadvertence' and held, that the Petitioner has failed to explain to the satisfaction of Court, reasons why the Petitioner could not tender the notices for service on the Respondent at the stage of filing of the petition and further opined that in **an appropriate case, even if non-compliance had not been explained, that the Court has a discretion to make an order, having considered the need to maintain the discipline of the law.**

The facts in the instant application are similar to the facts in **Peiris case** referred to above. In the instant case, though the Petition of Appeal was filed within the six weeks period as contemplated by Rule 7 of the SC Rules, the '**entire process of lodging a Leave to Appeal application' was completed far beyond the six weeks period**. No application was made under Rule 40 for an extension of time nor were the papers served on the Respondent direct. The record bears out very clearly, that notices were tendered for service on the Respondent 28 days after lodging of the Petition of Appeal and the Petitioner did not challenge the said position. The only submission made by the Petitioner before this Court, is to exercise its discretion in favour of the Petitioner and reject the preliminary objection raised by the Respondent. Thus, it is manifestly clear that the Petitioner failed to invoke the jurisdiction of this Court in the manner specified in the Supreme Court Rules.

The next case I wish to consider is a recent judgement of this Court, **Nestle Lanka PLC v. Gamini Rajapakse SC/HC/LA/54/18 – S.C. minutes of 30-09-2020**, wherein Jayantha Jayasuriya PC. CJ, in an illuminating judgement pertaining to Rule 2, 6, 8 and 34 of SC Rules, 1990 and specifically Rule 8 observed thus,

> "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. The object of this Rule is to ensure that the Respondent is given sufficient time and opportunity to prepare himself to contest the matter without undue delay [ ] the object of this Rule can be frustrated if the Petitioner fails to provide all necessary material."

In the aforesaid **Nestle case** pertaining to a Labour Tribunal appeal, the Petitioner did not submit certain documents annexed to the Petition of Appeal at the time of tendering of the Petition of Appeal to this Court which resulted in the said documents not being served on the Respondents. The Petitioner's failure to serve the said material on the Respondent and the Petitioners' contention that the inability to obtain same was due to circumstances beyond its control was considered by Court **as not exercising due diligence as contemplated by Rule 34 of the SC Rules.** Hence, the Court held that the Petitioner was unable to satisfy Court, that it exercised due diligence and thus upheld the preliminary objection raised by the Respondent in respect of Rule 2 & 8 and dismissed the Petition for Leave to Appeal, upon the ground of non-compliance of the said SC Rules.

From the *ratio decidendi* of the above referred two cases, **Peiris Case** and **Nestle Case,** it is seen, that this Court whilst upholding the mandatory nature Rule 8 (3) of the SC Rules examined and considered the said Rule 8(3), in the light of the discretionary power of Court and also the exercise of due diligence by a defaulting party.

Corollary to the above, it is observed that this Court in the following instances, have considered the 'unique circumstances' pertaining to a particular case and used its discretionary power and have made Order overruling the preliminary objections raised with regard to non-compliance of SC Rules.

The first case I wish to refer to is **Menike v. Bandara SC/App /172/2011 - S.C. minutes of 22-01-2014**

In this case, Rule 30 pertaining to filing of written submissions was the contentious issue in which the Court held, that the delay of filling of written submissions will not prejudice parties and the case should be decided on merit and not stifled by technicalities and thus overruled the preliminary objection raised before Court.

Similarly, in **Sirisena v. Gunawardena – SC/SPL/LA 133/15 – S.C. minutes of 02-08-2017,** Rule 8(3) was considered by this Court. In the said case the Petitioner failed to file the Notice of Appeal, together with the Petition of Appeal. However, within 7 days of lodging the Appeal the said Notices were filed. The Respondent raised a preliminary Objection pertaining to non-compliance of Rule 8(3) and this Court overruled the said objection and held the late filing to be 'substantial compliance' in view of the intervening holidays and in the light of the discretion permitted by Rule 40 for this Court to grant further time to file papers under Rule 8(3). The Court further held, that Supreme Court Rules should be considered as a whole and not in isolation.

Likewise, in **Wijesinghe v. Tenderlea Farm (Pvt) Ltd. – SC/SPL/LA 159/17 – S.C. minutes of 17-09-2020** a preliminary objection was raised pertaining to non-compliance of Rule 2, 6 and 10. The failure to annex the pleadings filed in the High Court, which was the specific objection raised was considered by this Court to be 'not a material breach' of the Rules, for the reason that the Labour Tribunal brief and the High Court Judgement filed of record was considered sufficient to determine the appeal. Thus, the Court observed that there was 'substantial compliance' and 'no prejudice was caused' to the parties and overruled the preliminary objection.

Further, the Court went onto hold, that non-compliance with SC Rules does not necessarily result in depriving a party seeking redress from this Court and that the Court has a discretion and referred to the oft quoted dicta of Mark Fernando J., in **Kiriwanthe case**, *"that law does not require or permit an automatic dismissal of an application of a party in default".*

Thus it could be seen, corollary to instances in which a preliminary objection was upheld like in **Peiris case**, even in instances in which it was overruled viz **Sirisena case,** discretionary power of Court has played a major role in determining matters pertaining to Rule 8(3) of the Supreme Court Rules.

This brings me to the next issue I wish to consider.

Should the Court exercise its discretion in favour of the Petitioner in the instant application and excuse the non-compliance with Rules 28(3) of the SC Rules.

The learned Counsel for the Petitioner in his written submissions filed before this Court, strenuously argued that the discretion should be used in favour of the Petitioner in view of the fact that a great injustice would be perpetrated on the Petitioner. He also submitted that if not, an undue advantage would accrue to the Respondent since the High Court unfairly dismissed the application of the Claimant for enforcement of an Arbitration Award on a mere technicality. The Petitioner relied upon the following observations of Mark Fernando, J., in **Kristley case (supra)** to substantiate his contention.

> "The Claimant should have been given an opportunity to tender duly certified copies, interpreting "accompany" in section 31(2) purposively and widely [ ] Undoubtedly, section 31(2) is mandatory, but not to the extent that one opportunity, and one opportunity only, will be allowed for compliance."

However, it is observed that in **Kristley case**, this Court considered the merits of the application viz-a-viz the Arbitration Act and its mandatory provisions and made Order accordingly. In the said case, no preliminary objections were raised with regard to the maintainability of the Appeal for non-compliance of a SC Rule, unlike in the instant case and thus in my view, the aforesaid observation made in respect of to the Arbitration Act as well as the said case can be distinguished from the instant case before us, in which is the mandatory nature of Rule 28(3) of the Supreme Court Rules is the matter to be determined.

At this juncture, I wish to refer to another judgement of this Court in respect of an Arbitration Award, **George Stuart & Co. Ltd. v. Lankem Tea Rubber Plantations Ltd. [2004] 1 SLR 246.**

In the said case, the Petitioner filed a Leave to Appeal application before this Court, being aggrieved by an Order made by the High Court in terms of the Arbitration Act and a preliminary objection was raised by the Respondent that the application filed was out of time and thus time barred and therefore should be rejected *in limine*. This Court whilst upholding the preliminary objection observed as follows:

> "When no provision is made in the relevant Act specifying the time frame in which an application for leave to appeal is 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 applications to the Supreme Court. Consequently, such an application would have to be filed withing 42 days from the date of the Award."

Hence, there is no dispute that in respect of High Court Appeals and Leave to Appeal applications made in terms of the Arbitration Act, the time frame to file an application is 42 days and the procedure to be followed is SC Rules. An aggrieved party of a High Court Order, pertaining to an enforcement or setting aside of an Arbitration Award should in my view, pass this threshold and file relevant papers, for this Court to consider, whether Leave to Appeal should be granted or not.

There is no special mechanism this Court should follow with regard to appeals against Arbitration Awards merely because the subject matter is capable of settlement by Arbitration; which is an accepted alternative dispute resolution process and an Arbitration Award is brought before Court only for enforcement or for setting aside of such an Award. Hence, I see no merit in the submission of the learned President's Counsel for the Petitioner, that matters pertaining to Arbitration Appeals should be viewed at from a vantage position merely because of its unique nature or that it is in an 'Arbitration process'. In my view, it should not be the only decisive factor for this Court to exercise its discretion in granting relief to the Petitioner, who has admittedly, not complied with Rule 28(3) of the SC Rules.

Whatever maybe the genesis of an application, filed before this Court for Leave to Appeal or Special Leave, either from the Court of Appeal or from the High Court of the Provinces, in my view the procedure laid down in the SC Rules is the same and should be stringently adhered to and zealously followed.

In the instant case, the learned Senior State Counsel, raised a second objection, that the Petition is time barred, when considering the date upon which the notices to be served on the Respondents were in fact tendered to the Registry. This objection in my view is interwoven with the objection raised pertaining to Rule 28(3) and should not be considered in isolation. It should be considered and viewed taking a holistic approach in arriving at a determination.

As discussed earlier, Sripavan, J., in the **Peiris case,** categorically held that the **'entire process'** of filing of the Leave to Appeal application became complete only when the Petition of Appeal, affidavit, documents and the notices to be served on the Respondents were tendered and filed of record and thus, in the said case, the said date of tender of notices was outside the appealable period and hence, upheld the preliminary objection raised by the Respondent pertaining to non-compliance of SC Rule 8(3).

In the instant appeal too as aptly seen from the record it is undisputed that the notices were not tendered to the Registry by the Petitioner to be served on the Respondent together with the Petition of Appeal at the time of lodging of the Appeal, as contemplated by Rule 28(3). Thus, the **'entire process'** of lodging the application for **Leave to Appeal** by filing the Petition of Appeal, affidavit, documents and the notices to be served to the Respondents were completed after the 42nd day and thus, beyond the sixth week in which an appeal from an Order or Judgement of the High Court should be filed in the Supreme Court. Hence, I hold that the Petitioner has failed to act in compliance with Rule 28(3) of the SC Rules.

In the aforesaid circumstances, I am of the view that the Petitioner not only failed to exercise due diligence but also failed to pass the threshold condition in lodging a Leave to Appeal application and for the said reason, this Court cannot condone the failure of the Petitioner to comply with Rule 28(3) of the SC Rules.

Hence, for the reasons adumbrated above, this Court cannot exercise its discretion in favour of the Petitioner and excuse the Petitioner of its non-compliance of Rule 28(3) of the Supreme Court Rules of 1990.

Thus, I uphold the preliminary objection raised on behalf of the Respondent and dismiss the Leave to Appeal application filed by the Petitioner before this Court. However, I order no costs.

Leave to Appeal application is dismissed.

Judge of the Supreme Court

Vijith K. Malalgoda PC, J.

I agree

Judge of the Supreme Court

P.P. Surasena J.

I agree

Judge of the Supreme Court

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

Ruwa Anouka De Silva,
No. 79/14,
Dr. C.W.W. Kannangara
Mawatha,
Colombo 07.
Plaintiff

SC LA NO: SC/HCCA/LA/36/2021
HCCA COLOMBO NO: WP/HCCA/COL/31/2019 (F)
DC COLOMBO NO: DDV/155/2017

Vs.

Saman Karl Jayasinghe,
No. 3, Park Avenue,
Borella, Colombo 08.
Presently at
1201, Canal Street Apt. 362,
New Orleans, LA 70112,
United States of America.
Defendant

AND BETWEEN

Saman Karl Jayasinghe,
No. 3, Park Avenue,
Borella, Colombo 08.
Presently at

1201, Canal Street Apt. 362,
New Orleans, LA 70112,
United States of America.
Defendant-Petitioner

Vs.

Ruwa Anouka De Silva,
No. 79/14,
Dr. C.W.W. Kannangara
Mawatha,
Colombo 07.
Plaintiff-Respondent

Registrar General,
Registrar General's Department,
No. 234/A3,
Denzil Kobbekaduwa Mawatha,
Battaramulla.
Respondent

AND BETWEEN

Saman Karl Jayasinghe,
No. 3, Park Avenue,
Borella, Colombo 08.
Presently at
1201, Canal Street Apt. 362,
New Orleans, LA 70112,
United States of America.
Defendant-Petitioner-Petitioner

Vs.

Ruwa Anouka De Silva,
No. 79/14,
Dr. C.W.W. Kannangara
Mawatha,
Colombo 07.
Plaintiff-Respondent-Respondent

AND NOW BETWEEN

Saman Karl Jayasinghe,
No. 3, Park Avenue,
Borella,
Colombo 08.
Presently at
1201, Canal Street Apt. 362,
New Orleans, LA 70112,
United States of America.
Defendant-Petitioner-Appellant-Petitioner

Vs.

Ruwa Anouka De Silva,
No. 79/14,
Dr. C.W.W. Kannangara
Mawatha,
Colombo 07.
Plaintiff-Respondent-Respondent-Respondent

Before: Buwaneka Aluwihare, P.C., J.
Achala Wengappuli, J.
Mahinda Samayawardhena, J.

Counsel: Anura Meddegoda, P.C., with Mihirini Perera and Nadeesha Kannangara for the Defendant-Petitioner-Appellant-Petitioner.

Palitha Kumarasinghe, P.C., with Sugath Caldera, Niran Anketell, Vasanthakumar Niles and Chathurika Gunasekara for the Plaintiff-Respondent-Respondent-Respondent.

Argued on : 06.08.2021

Written submissions:

by the Defendant-Petitioner-Appellant-Petitioner on 13.08.2021.

by the Plaintiff-Respondent-Respondent-Respondent on 11.08.2021.

Decided on: 15.10.2021

Mahinda Samayawardhena, J.

The respondent wife instituted this action against the petitioner husband in the District Court seeking a divorce, the custody of their child and financial support. Summons was reportedly served on the petitioner through the Ministry of Justice as he is resident in the United States of America. The case was taken up for *ex parte* trial and judgment entered for the respondent. The decree *nisi* was reportedly served on the petitioner and the decree absolute entered. The petitioner made an application

under section 86(2) of the Civil Procedure Code to vacate the *ex parte* judgment on the basis that neither summons nor decree *nisi* was served on him. After inquiry the District Court refused the application of the petitioner. On appeal the High Court affirmed it by judgment dated 25.11.2020. The petitioner filed this leave to appeal application on 07.01.2021 against the judgment of the High Court. By motion dated 07.01.2021, the Attorney-at-Law for the petitioner suggested 08.03.2021, 29.03.2021 and 31.03.2021 to list the application for support for leave and further moved court to issue notice on the respondent.

However in the said motion the Attorney-at-Law for the petitioner stated as follows:

> *I tender herewith the original petition, affidavit (scanned copy) and document annexed thereto marked B and the signed proxy (scanned copy) in proof of my appointment as registered Attorney-at-Law for the petitioner-petitioner-appellant-petitioner abovenamed and 5 copies of the above together with notices and stamped envelops and respectfully move that the same be accepted and filed of record.*
>
> *I respectfully move that Your Lordships Court be pleased to grant permission to tender the original affidavit, proxy, documents marked A and B to be filed of record as soon as it is practicable to do so.*

In this motion the Attorney-at-Law for the petitioner admits the petitioner did not tender:

(a) the original proxy

(b) the original affidavit in support of the petition
(c) the document purportedly marked A, which is the appeal brief, and
(d) a certified copy of the document marked B, which is the judgment appealed from.

Having admitted that the application is incomplete, can the petitioner sensibly move court to fix the matter for support for leave to appeal? How can the petitioner support for leave without the appeal brief when he seeks leave to appeal on the basis that he was not served with summons and decree *nisi*, which is a mixed question of fact and law if not a pure question of fact. There cannot be any dispute that the appeal brief purportedly marked A in the petition is a material document to support this application.

Rule 2 of the Supreme Court Rules 1990 *inter alia* states:

> *Every application for special leave to appeal to the Supreme Court shall be made by a petition in that behalf lodged at the Registry together with affidavits and documents in support thereof as prescribed by Rule 6, and a certified copy or uncertified copy of the judgment or order in respect of which leave to appeal is sought.*

What are the affidavits and documents prescribed by Rule 6?

> *Where any such application contains allegations of fact which cannot be verified by reference to the judgment or order of the Court of Appeal in respect of which special leave to appeal is sought, the petitioner shall annex in support of such allegations an affidavit or other relevant*

> *document (including any relevant portion of the record of the Court of Appeal or of the original court or tribunal).*

There was no valid affidavit nor a copy of the District Court or High Court case record when the petitioner lodged the application for leave to appeal at the Registry of the Supreme Court.

Rule 8(1) states:

> *Upon an application for special leave to appeal being lodged in the Registry of the Supreme Court, the Registrar shall forthwith give notice by registered post of such application to each of the respondents in the manner hereinafter set out. There shall be attached to the notice a copy of the petition, a copy of the judgment against which the application for special leave to appeal is preferred and copies of affidavits and annexures filed therewith.*

It is not a bare notice that shall be served on the respondent but notice with a copy of the petition, and affidavits and annexures filed therewith.

The proper service of notice on the respondent through the Registrar of the Supreme Court is the duty of the petitioner. Once notice is issued by the Registrar, the duty is cast upon the petitioner by Rule 8(5) to attend at the Registry to verify whether notice has been returned undelivered and if so to take further steps to serve notice on the respondent.

As the original proxy, affidavit and annexures were undertaken to be produced as soon as it was practicable to do so, and since without those documents there was no point in issuing bare

notice on the respondent and fixing the application for support, the Judge made order in chambers on 05.02.2021 directing the petitioner to tender all marked documents and the memorandum and thereafter move for support.

Although the judgment of the High Court was delivered on 25.11.2020, the application for leave to appeal was filed on 07.01.2021, and this court on 05.02.2021 made order to tender all marked documents and then move to support for leave, the petitioner did not tender (a) the original proxy, (b) the original affidavit, (c) appeal brief purportedly marked A, (d) a certified copy the High Court judgment marked B and (e) complete notice to be served on the respondent. The matter was left in abeyance.

It is against this background that the respondent filed a motion dated 28.07.2021 with notice to the petitioner seeking to dismiss the petitioner's application for leave to appeal *in limine* on the basis that the petitioner who is resident in the United States of America is intentionally refusing to take steps to prosecute the leave to appeal application in order to delay the finality of the matrimonial action.

This motion was supported in open court by learned President's Counsel for the respondent and learned President's Counsel for the petitioner made reply submissions.

According to paragraph 34 of the petition, the reason for the inability to file documents with the petition was the COVID-19 pandemic, imposition of quarantine curfew and lockdown in the Keselwatta police area.

Rule 2 permits the petitioner to tender documents later, but he must show his *bona fides* and satisfy the court that he exercised

due diligence to secure the documents and any failure was beyond his control.

> *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.*

Was there quarantine curfew and lockdown from 25.11.2020 (the date of the High Court judgment) until 07.01.2021 (the date the petition was filed) preventing the petitioner from obtaining a certified copy of the appeal brief? Is there any proof that the petitioner at least applied for a certified copy of the appeal brief? Has the petitioner explained why he could not tender the original proxy and the original affidavit along with the petition? The answers are in the negative.

Let us assume the COVID-19 pandemic, imposition of quarantine curfew and lockdown in the Keselwatta police area prevented the petitioner from obtaining marked documents at the time of filing the application. Was there due diligence on the part of the petitioner to obtain those documents after the filing of this application on 07.01.2021?

When this motion was supported seeking dismissal of the petitioner's application nearly seven months after the filing of the application for leave to appeal, the petitioner had still not tendered the original proxy, original affidavit, memorandum and marked documents which he undertook to produce as soon as possible. The High Court and this court were not closed for

seven months. There was no quarantine curfew or lockdown for seven months. This is not the only leave to appeal application filed during this period. The contumacious conduct of the petitioner is conspicuous.

This court has in an array of decisions[1] repeatedly emphasised the importance of due compliance with the Supreme Court Rules and the consequences of non-compliance. Non-compliance with the Supreme Court Rules results in dismissal of the application *in limine* without going into the merits.

I acknowledge that cases should not be thrown away on technicalities without going into the merits unless they go to the root of the matter. Such an attitude will erode the confidence placed in the justice system by those who come to court seeking redress. But this is not a mere technicality.

I am also sensitive to the fact that the Rules setting out procedure have been made to facilitate the due administration of justice and not to thwart it. For the effective and efficient administration of justice, both substantive law and procedural law must co-exist. Substantive law aims at the ends which the administration of justice seeks to achieve while procedural law aims at the means by which those ends can be achieved. Without procedural law in place, substantive law will be illusory.

No acceptable reason has been adduced by the petitioner to satisfy the court that he exercised due diligence in attempting to

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[1] Tissa Attanayake v. Commissioner General of Elections [2011] 1 Sri LR 220, Sudath Rohana v. Mohomad Zeena [2011] 2 Sri LR 134, Rohitha Peiris v. Doreen Peiris [2015] BLR 101, Nestle Lanka PLC v. Bodiyawatte (SC/HC/LA/54/2018 – SC Minutes of 30.09.2020), Aaron Senerath v. The Manager, Moray Estate, Maskeliya (SC/SPL/LA/231/2015 – SC Minutes of 19.01.2017), Colombo Business School Limited v. Sri Lanka Tea Board (SC/HC/LA/69/2018 – SC Minutes of 25.01.2021)

obtain marked documents and tender the original proxy, original affidavit and memorandum for nearly seven months. As I stated earlier, even at the time of the respondent supporting the motion for dismissal of the petitioner's application, there was no complete leave to appeal application before court.

The losing party shall not be allowed to abuse the process of court to prevent the winning party from enjoying the fruits of his or her victory.

In my view, the petitioner failed to exercise due diligence in prosecuting this application for leave to appeal and failed to comply with Rule 2 read with Rule 6, and Rule 8(1) read with Rule 8(3) of the Supreme Court Rules 1990. I dismiss the application *in limine*.

Judge of the Supreme Court

Buwaneka Aluwihare, P.C., J.
I agree.

Judge of the Supreme Court

Achala Wengappuli, J.
I agree.

Judge of the Supreme Court

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

In the matter of an Application for Leave to Appeal, under and in terms of Section 5C of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990, as amended by Act No. 54 of 2006, from the Judgment of the High Court of Civil Appeal of the Western Province (Holden in Colombo), dated 11. 01. 2017, in case bearing No. WP/HCCA/COL.27/2015 (RA).

SC (HCCA) LA Application No. 51/2017

WP/HCCA/COL27/2015 (RA).

DC (COLOMBO) CASE No. 75942/TAX

P. M. Dissanayake,
Deputy Commissioner,
Unit 14,
Department of Inland Revenue,
Colombo 02.

Complainant

Vs.

Gifuulanka Motors (Pvt.) Limited,
No. 50/2, Vijaya Road,
Gampaha.

Respondent

And Between

Gifuulanka Motors (Pvt.) Limited,
No. 50/2, Vijaya Road,
Gampaha.

Respondent-Petitioner

Vs.

P. M. Dissanayake,
Deputy Commissioner,
Unit 14,
Department of Inland Revenue,
Colombo 02.

Complainant-Respondent

Kalyani Dahanayake,
Commissioner General of Inland Revenue,
Department of Inland Revenue,
Sir Chittampalam A. Gardiner Mawatha,
Colombo 02.

Respondent

And Now Between

Gifuulanka Motors (Pvt.) Limited,
No. 50/2, Vijaya Road,
Gampaha.

Respondent-Petitioner-Petitioner

Vs.

P. M. Dissanayake,
Deputy Commissioner,
Unit 14,
Department of Inland Revenue,
Colombo 02.

Complainant-Respondent-Respondent

Ivan Dissanayake,
Commissioner General of Inland Revenue,
Department of Inland Revenue,

Sir Chittampalam A. Gardiner
Mawatha,
Colombo 02.

Respondent-Respondents

Before: Buwaneka Aluwihare, PC. J.
V. K. Malalgoda, PC. J.
E. A. G. R. Amarasekara J.

Counsel: Nilshantha Sirimanna for Respondent-Petitioner-Petitioner.

M. Corea DSG for Complainant-Respondent-Respondent.

Argued on: 29. 11. 2019

Order on: 27. 07. 2021

Aluwihare PC. J.,

The Respondent-Petitioner-Petitioner [hereinafter the Petitioner] moved this court by way of an application for Leave to Appeal against the judgment of the High Court of Civil Appeals dated 11. 01. 2017. Having heard the Learned Counsel for the Petitioner in support of this application as well as the Learned Deputy Solicitor General for the Complainant-Respondent-Respondent [hereinafter the Complainant] and the Respondent-Respondent, we wish to make following order.

The gravamen of the Petitioner's Application is that the Civil Appellate High Court had erred by failing to consider and adjudicate on the central issue raised by the

Petitioner that, the District Court of Colombo has ***no jurisdiction*** to order the recovery of Value Added Tax [hereinafter VAT] in terms of Section 43(1) of the Value Added Tax Act No. 14 of 2002 [hereinafter referred to as the VAT Act].

As time and again the jurisdiction of the District Court, regarding tax matters, has been the ground for appeals, we consider it appropriate to clarify the current position so as to clear all doubts and prevent such litigations in the future

The Complainant, sought to recover defaulted VAT, filed in the District Court of Colombo, 'Tax in Default Certificate' dated 28. 01. 2011 against the Petitioner, a limited liability company. The defaulted taxes amounted to; VAT liability amounting to Rs. 7,251,676/- and Economic Service Charge (ESC) liability amounting to Rs. 131,423/- a sum of Rs. 7,383,099/- in total.

Among several matters, the Petitioner in particular has raised the issue as to whether the District Court of Colombo is vested with the jurisdiction to entertain an application for the recovery of VAT under the provisions of the VAT Act.
In subparagraphs (a), (b) and (c) of Paragraph 30 of the petition, the Petitioner has raised the following questions of law;

(a) *Did the Hon. Civil Appellate High Court of Colombo err by failing to duly and properly consider and adjudicate upon the Petitioner's contention that the District Court of Colombo had no jurisdiction in law to entertain and /or order, inter alia, recovery of VAT under Section 43(1) of the VAT Act No.14 of 2002, in respect of any Certificate of default filed in the said Court and/or by failing to appreciate that the said lack of jurisdiction was patent in nature, in the particular circumstances.*

(b) *Did the Hon. Civil Appellate High Court of Colombo err by failing to appreciate/find that Section 60 of the Judicature Act No. 2 of 1978 did not vest*

any power /authority in the relevant Minister to concurrently/additionally vest by Regulation [as published in the Government Gazette Notification, bearing No.1380/17, dated 16/02/2005] a jurisdiction/power in the District Court to recover VAT in default under Section 43 (1) of the VAT Act No. 14 of 2002, when evidently the said power had specifically vested with the Parliament exclusively in the Magistrate's Court and therefore, the recovery of VAT under Section 43 (1) of the VAT Act in the District Court of Colombo under the said purported Tax in Default certificate, was clearly illegal and void?

(c) Did the Hon. Civil Appellate High Court of Colombo err by totally failing to appreciate that the said purported Tax in Default Certificate was clearly filed in and/or addressed to the wrong Court, and was therefore, flawed/ misconceived and liable to be dismissed, and no attempt whatsoever was made by the Respondents to rectify and/or amend the said error.

Jurisdiction of the District Court of Colombo relating to matters under the VAT Act

Chapter VIII of the VAT Act deals with recovery of tax and Section 43 of that chapter, refers to proceedings for recovery [of tax] before a magistrate. In terms of the said provision, the Commissioner General is empowered to issue a certificate containing the particulars of such tax in default, to a magistrate having jurisdiction in the division in which, such place of business or residence of the defaulter is situate.

In the year 1979, the Minister of Justice, by virtue of the powers vested in him under section 61 of the Judicature Act No. 2 of 1978 [hereinafter the Judicature Act], read with Section 5 (1) of the said Act, *inter alia*, designated the District Court of Colombo to try and adjudicate on all matters under the Inland Revenue Act No. 4 of 1963 [Gazette No. 43/4 dated 2nd July 1979].

The above Gazette was amended in the year 2005 [Gazette No.1380/7 dated 16. 02. 2005]. The Minister, acting under the aforesaid powers, designated the District Court of Colombo **to try and adjudicate on all matters** under the VAT Act No.14 of 2002.

It should to be noted that the validity of the Gazettes aforesaid has not been challenged when promulgated and has been in force since1979 and 2005 respectively. On the other hand, the original jurisdiction vested with the magistrate's court in terms of the provisions of the VAT Act, continues to remain in force. As such, the District Court of Colombo has island wide jurisdiction concurrent with that of the magistrate's court of the relevant division, over matters relating to recovery of VAT. As observed by the Court of Appeal in the case of **Costa v. Deputy Commissioner of Inland Revenue** [1986 Sri Lanka Tax Cases Vol. IV 268 at 270]

> "*… **for all matters referred to in the regulation** the District Court of Colombo has island wide jurisdiction. This jurisdiction is concurrent with that of the several Magistrate's Courts throughout the island, in the matter of proceedings for the recovery of taxes, by imposing the amount as a fine with power to impose a term of imprisonment in default."* (Emphasis added.)

The preamble to the Judicature Act, spelling out the legislative intent, states, that it is *"An Act to…… define the jurisdiction of and to regulate the procedure in and before such courts…."* and Section 61 of the Judicature Act vests the Minister with the power to make regulations for carrying out or giving effect to the principles and provisions of the Judicature Act. Section 60 of the Judicature Act clearly vests the Minister with the power to nominate a court or courts anywhere in Sri Lanka to hear and determine such categories of civil or criminal proceedings or any other matters, by regulation notwithstanding anything to the contrary, in any other written law. This court wishes to observe that the Gazettes referred to, have not by any means taken away the powers, the Parliament has vested, with the magistrate's court to deal with recovery of taxes, but has only complemented that jurisdiction by vesting similar powers with the District Court of Colombo as well.

This court also notes that in terms of Section 19 of the Judicature Act, District Courts are empowered, in the exercise of their jurisdiction, to impose fines, penalties and forfeitures over persons. As such, we do not envisage that the District Court encountering any difficulty in the enforcement of its orders in relation to the matters in question.

In the circumstances, we are of the view that there is no merit in the application to grant leave to proceed on the questions of law referred to in (a) and (b) above.

The learned Counsel for the Petitioner also submitted that the Tax in Default Certificate was addressed to the magistrate's Court and not to the District Court and thereby is flawed and/or misconceived and liable to be dismissed for that reason. It is well-settled that an exercise of a power will be referrable to a jurisdiction which confers validity upon it and not to a jurisdiction under which it will be nugatory. This principle has been applied even to cases where a Statute which confers no power has been quoted as authority for a particular act, as there was in force another Statute which conferred that power [See **L. C. H. Peiris v. Commissioner of Inland Revenue** 65 NLR 457]. Similarly, this principle should apply to instances where the jurisdiction had been correctly invoked, but in doing so, the forum is wrongly stated.

The Deputy Commissioner of Inland Revenue had correctly invoked the jurisdiction of the District Court of Colombo and had used a printed form No.101G (new) where the word 'magistrate' is printed, to issue the Tax in Default Certificate.

Furthermore, the Civil Appellate High Court could have relied on the proviso to Article 138 (1) of the Constitution, which states, *"Provided that no judgement, decree or order of any court shall be revised or varies on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasion a failure of justice."*

There is no material before this court to arrive at a finding that the rights of the Petitioner were prejudiced in any way due to the aforesaid defect and we see no merit in the argument, to grant leave to appeal on the said question of law as well.

Accordingly, leave to appeal is refused and the application is dismissed.

Application Dismissed

Judge of the Supreme Court

V. K. Malalgoda, PC. J.

I agree.

Judge of the Supreme Court

E. A. G. R. Amarasekara, J.

I agree.

Judge of the Supreme Court

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

SC/HCCA/LA/119/2015
PHC Appeal NO;
WP/HCCA/KT/4/2005(F)
D.C Kalutara Case No. 6377/P

Hettige Don Thilakaratne of
Dodamulla, Galapatha.

Plaintiff

Vs.

1. Kumarapattiyage Don Allis Pieris of
   Panapitiya, Waskaduwa
2. Bamunuge Premawathie
3. Amarathungage Don Siriwardena
4. Kahawalage Nandawathie
5. Amarathungage Don Lionel
6. Hettige Don Allis Singho
   All of,
   Dodamulla, Galapatha.
7. Ariyapala Wilbert Amarathunga of
   Paraduwa, Galapatha.
8. Amarathungage Dona Pyaseeli
9. Amarathungage Don Karunasena
10. Amarathungage Don Cyril Buddhadasa
11. Amarathungage Don Chandradasa
12. Amarathungage Don Tissa
13. Amarathungage Don Gamini
14. Amarathungage Dona Susila Khanthi
15. Amarathungage Dona Jayanthi
16. Hettige Don Lilson
17. Amarathungage Dona Masilin Nona
18. Amarathungage Dona Karunawathie
19. Amarathungage Dona Wimalawathie
20. Amarathungage Don Carolis

21. Mallika Amarathunga
22. Lambert Amarathunga
23. Leelaratne Amarathunga
24. Pattiyawatage Henry Perera
    All of Dodamulla, Galapatha.

Defendants

AND BETWEEN

Hettige Don Thilakaratne of
Dodamulla, Galapatha.

Plaintiff – Appellant

Vs.

1. Kumara Pattiyage Don Allis Pieris of
   Panapitiya, Waskaduwa. (Deceased)

1A. Kumarapattige Hemasiri Pieris of,
"Sunil Paya", Panapitiya, Waskaduwa
And others,
2. Bamunuge Premawathie
3. Amarathungage Don Siriwardena
4. Kahawalage Nandawathie (Deceased)

4A & 5. Amarathungage Don Lionel (Deceased)

4B & 5A. Gamatige Dona Leelawathie

6. Hettige Don Allis Singho,
   All of Dodamulla, Galapatha.
7. Ariyapala Wilbert Amarathunga of
   Paraduwa, Galapatha (Deceased)
8. Amarathungage Dona Piyaseeli
9. Amarathungage Don Karunasena
10. Amarathungage Don Cyril Buddhadasa
11. Amarathungage Don Chandradasa
12. Amarathungage Don Tissa
13. Amarathungage Don Gamini
14. Amarathungage Dona Susila Kanthi

15. Amarathungage Dona Jayanthi
16. Hettige Don Lilson
17. Amarathungage Dona Masilin Nona
    (Deceased)
18. Amarathungage Dona Karunawathie
19. Amarathungage Dona Wimalawathie
20. Amarathungage Don Carolis
21. Mallika Amarathunga
22. Lambert Amarathunga
23. Leelaratne Amarathunga
24. Pattiyawatage Henry Perera
    All of Dodamulla, Galapatha.

Defendant – Respondents

AND NOW BETWEEN

2. Bamunuge Premawathie
4. Kahawalage Nandawathie (Deceased)
4A & 5. Amarathungage Don Lionel
    (Deceased)
4B & 5A. Gamatige Dona Leelawathie
    Both of Dodamulla, Galapatha.
8. Amarathungage Dona Piyaseeli
   Dodamulla, Galapatha.
   Now at, “Chandanie”,
   Panapitiya, Waskaduwa.
9. Amarathungage Don Karunasena
10. Amarathungage Don Cyril Buddadhasa
11. Amarathungage Don Chandradasa
12. Amarathungage Don Tissa
    All of Dodamulla, Galapatha.
14. Amarathungage Dona Susila Kanthi
    Dodamulla, Galapatha.
    Now at, “Anusha Stores”,
    Panapitiya, Waskaduwa. (Deceased)

14A. Liyana Arachchige Don Noel Ranjith
No. 893,
Panapitiya, Waskaduwa.
15. Amarathungage Dona Jayanthi
Dodamulla, Galapatha.
Now at, Temple Road,
Panapitiya, Waskaduwa.
18. Amarathungage Dona Karunawathie
19. Amarathungage Dona Wimalawathie
20. Amarathungage Don Carolis
All of Dodamulla, Galapatha.

Defendant – Respondent – Petitioners

Vs.

Hettige Don Thilakaratne of,
Dodamulla, Galapatha

Plaintiff – Appellant- Respondent

3. Amarathungage Don Siriwardena
6. Hettige Don Allis Singho
22. Lambert Amarathunga
23. Leelarathne Amarathunga
24. Pattiyawattage Henry Perera
All of Dodamulla, Galapatha.

Defendant – Respondent- Respondents

Before : L. T. B. Dehideniya J,

S. Thurairaja, PC J,

E. A. G. R. Amarasekara J

Counsel : J. A. J. Udawatte with Anuradha Pannamperuma and Ganga Wanigarathne for the 2nd, 4B, 5A, 8th to 12th, 14th, 15th, 18th to 20th Defendant – Respondent – Petitioners.

Athula Perera with Poorni Rupasinghe and Dimithri Wijesinghe for the Plaintiff – Appellant – Respondent.

Argued on : 13.11.2019

Decided on : 21.10.2021

E A G R Amarasekara, J.

Plaintiff – Appellant – Respondent (hereinafter sometimes referred to as the Plaintiff) instituted an action in the District Court of Kalutara by plaint dated 27.07.1997 praying for partitioning of the land called "Laulugahawatte Kebella" described in the schedule to the plaint amongst the Plaintiff (1157/2160 shares), 1st defendant (90/2160 shares), 2nd to 3rd defendants (504/2160 shares) and 4th to 5th defendants (121/2160 shares). Learned District Judge by his judgment dismissed the action filed by the Plaintiff. Being aggrieved, the Plaintiff preferred an appeal to the Civil Appellate High Court and by the judgment dated 12.02.2015, the learned High Court Judges held in favour of the Plaintiff and decided to partition the said land allotting shares to the Plaintiff and the 6th Defendant giving them 1208/2160 shares and 71/2160 shares respectively and leaving 881/2160 shares unallotted. The present application before this court is a leave to appeal application filed by the 2nd, 4(B)& 5(A), 8th to 12th, 14th, 15th, 18th to 20th Defendant – Respondent – Petitioners (hereinafter referred to as the Defendant – Petitioners) aggrieved by the said judgment of the Civil Appellate High Court.

When this matter was taken up for support for leave to appeal before this court on 12.02.2016, learned counsel for the Plaintiff raised a preliminary objection to

the effect that all the parties named in the Civil Appellate High Court are not cited as parties in the leave to appeal application and it is violative of Rule 4 and 28(5) of the Supreme Court Rules 1990. Thus, the parties were directed to file written submissions in this regard within two months from that date. However, it can be seen that the Plaintiff who took up the preliminary objection did not file written submissions within the given time even though the Defendant Petitioners filed their written submissions as per the said direction. Inquiry on the preliminary objection was rescheduled on many occasions due to various reasons and on behalf of the Plaintiff, written submissions have been tendered later on 07.11.2018. It should be noted that in these written submissions filed on behalf of the Plaintiff, the Plaintiff has later taken up the position that the Defendant Petitioners have violated the provisions in Rule 28(2) and 28(5) of the Supreme Court Rules 1990. Thus, it appears that the Plaintiff has taken up the position that the present application is violative of Rule 28(2) for the first time through these written submissions filed after the Defendant Petitioners' written submissions, for which the Defendant Petitioners did not have any opportunity to address the court through their written submissions. This court originally directed to file written submissions and fixed the matter for inquiry on the preliminary objection raised on 12.02.2016 which objections did not contain any objection under Rule 28(2). Nevertheless, parties had the opportunity to make their oral submissions during the inquiry held on 13.11.2019. As the preliminary objections are based on three different supreme court rules, namely Rule 4, 28(2) and 28(5) of the Supreme Court Rules 1990, this court has to consider those Rules and see whether this application is violative of the stipulations made therein by those Rules.

Rule 4

The aforesaid Rule comes under the Part I A of the Supreme Court Rules made in relation to special leave to appeal applications and the present application is not a special leave to appeal application but a leave to appeal application made against the judgment of the Civil appellate High Court of Kalutara in terms of Section 5C of the High Court of the provinces (Special Provisions) (Amendment Act) no.54 of 2006.

Even though there are certain Rules made under the heading "Leave to Appeal" in the aforementioned Supreme Court Rules from Rule 19 to 27 under Part 1 B, they appear to be the rules relevant to appeals from the Court of Appeal where leave has been granted by the Court of Appeal. Hence the Rules relevant to the appeals from Civil Appellate High Courts or the High Court of the Provinces exercising civil appellate jurisdiction are the Rules that fall under Part 1 C of the said Supreme Court Rules under the topic 'Other Appeals'. In **L.A. Sudath Rohana and another Vs. Mohamed Cassim Mohamed Zeena and another S.C.H.C.C.A.L.A No.111/2010 (S. C. Minutes of 14.07.2010),** Dr. Shirani A. Bandaranayake, J. (as she then was) held as follows;

"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 1 of the Supreme Court Rules are described in Rule 28(1) which is as follows:

> *'Save as otherwise specifically provided by or under any law passed by Parliament, the provisions of this rule shall apply to all other appeals to the Supreme Court from an order, judgment, decree or sentence of the Court of Appeal or any other Court or tribunal.'*

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 establishing 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 Court of the Provinces."

Even in the case of **Jumburegoda Gamage Lakshman Jinadasa Vs Pilitthu Wasam Gallage Pathma Hemamali and others S.C.H.C.C.A.L.A No. 99/2008 (S.C. Minutes of 8.11.2010)**, this Court re-iterated that an application for leave to appeal from

the judgment of the High Court of the Provinces, would fall within Section C of Part I and not Section A of Part I of the said Supreme Court Rules.[1]

Thus, it is clear that Rule 4 has no relevance to the present application before this Court other than its similarity to Rule 28(5) which Rule will be discussed later on in this order.

Rule 28(2) and Rule 28 (5)

As said before the Plaintiff has raised a preliminary objection through his belated written submissions based on Rule 28(2) found in the Supreme Court Rules 1990. The said Rule 28 (2) reads as follows;

"*Every such appeal shall be upon a petition in that behalf lodged at the Registry by the appellant, containing a plain and concise statement of the facts and the grounds of the objection to the order, judgment, decree or sentence appealed against, set forth in consecutively numbered paragraphs, and specifying the relief claimed. Such petition shall be typewritten, printed or lithographed on suitable paper, with a margin on the left side, and* ***shall contain the full title and number of the proceedings in the Court of Appeal*** *or such other Court or tribunal,* ***and full title of the appeal.*** *Such appeal shall be allotted a number by the Registrar."*

The objection based on Rule 28(2) is that the full title of the leave to appeal application made to this court is defective.

The aforesaid Rule 28(5) reads as follows;

"*In every such petition of appeal and notice of appeal,* ***there shall be named as respondents, all parties in whose favour the judgment or order complained against was delivered, or adversely to whom such appeal is preferred, or whose interests may be adversely affected by the success of the appeal****, and the names and present addresses of the appellant and the respondents shall be set out in full."*

The objection based on Rule 28(5) is that some of the parties in the lower court who are necessary parties to this appeal were not made Respondents to the present application.

[1] Also see **Illangakoon Mudiyanselage Gnanathilaka Illangakoon Vs Anula Kumarihamy S.C.H.C.C.A.LA. 277/11, S.C. Minutes dated 05.04.2013** which refers to these judgments.

The objections based on aforesaid Rules 28(2) and (5) will be considered together as both these objections relates to the constitution of the caption of the present application.

In this regard, now I would consider the nomenclature of the parties in the different parts of the caption of the petition to this application. Page 1-3 of the petition and up to the words "AND BETWEEN" at the beginning of the 4th page of the petition contains the first part of the caption which represents the caption of the original court. It contains the name of the Plaintiff in the original court and the names of the 1st-24th Defendants in the original court. It appears that there is no allegation that there is any error in this part of the caption.

From the words "AND BETWEEN" on the 4th page of the petition up to the words "AND NOW BETWEEN" on the 7th page of the petition contains the second part of the caption which is apparently included to indicate the caption or the parties in the appeal made to the Civil Appellate High Court Kalutara. In that part the Plaintiff has been named as the Plaintiff Appellant as he was the appellant before the Civil Appellate High Court and that part contains 24 slots to name Defendant Respondents out of whom 4th and 5th Defendant Respondents appears to be deceased and substituted as 4B and 5A Defendant Respondents. However, 1st, 7th, 16th and 17th Defendant Respondents have been named there as deceased Respondents but without naming any substituted parties on behalf of them. (However, after the direction given by this court to file an amended caption after allowing the application to substitute for 14A Defendant Respondent, other than adding 14A Defendant Respondent, the Petitioners have tendered an amended caption adding 1A Defendant Respondent to this second Part of the caption without any order to bring in 1A Defendant Respondent to the caption who was not in the caption in the petition.)

As per the journal entries dated 22.10.2012 and 05.02.2013 in the document marked 'B', it appears that substitution for 7th, 23rd and 24th defendants have taken place before the Civil Appellate High Court. Such substitutions are not reflected in the aforesaid second part of the caption to this court. However, when one looks at the Petition of Appeal in the appeal made to the Court of Appeal filed by the Plaintiff, who raises this objection in this court, it can be observed that he himself has not mentioned 1st, 7th ,16th, and 17th Defendants as respondents to

the said petition of appeal- vide pages 6 and 7 of the appeal brief of the court below marked as 'A'. As per the endorsement made by the Registrar at the end of 'A' it is certified that it is a true copy of the case record of Kalutara District Court Case No. P/6377 and Kalutara Civil Appeal High Court Case No.4/5. However, this certified case record marked "A" does not contain the written submissions and proxies filed by the parties, minutes made by the judges in the Civil Appellate High Court or the judgment delivered by the Learned High Court Judges. The brief contains three more sets of documents marked 'B', 'C', and 'D'. D is the certified copy of the judgment delivered by the learned High Court Judges. At the end of the document marked as 'C', it is certified that it is a true copy of the written submission filed by the Defendant before the Civil Appellate High Court- (In fact the title to the said written submissions states that it is the submissions for 2nd to 5th and 8th to 20th Defendants. However, the notice of appeal filed for that appeal found at page 1 of "A" indicates that 4th, 5th 13th, 16th and 17th defendants were dead). At the end of document marked 'B', the registrar has endorsed that it is a true copy of the journal entries annexed to, and the written submissions tendered by the Defendants in the appeal brief no. 4/5(F) when in fact it is the written submissions tendered by the Plaintiff to the Civil Appellate High Court case record. Hence, it appears that the said certifications are inaccurate and there is no certification by a registrar of the Civil Appellate High Court to indicate that the documents found in this brief contains the complete case record of the Civil Appellate High Court. What is available in the brief is some piecemeal certification of different parts of the lower court case records with some inaccuracies as indicated above. In this backdrop, it should be also noted that even though the journal entry dated 2014.04.24 in the set of documents marked 'B' states that an amended caption was tendered by the Plaintiff's attorney-at-law after the substitution for 4A and 5th defendants were done on 24.03.2014, the said amended caption cannot be found among the documents tendered to this court. Thus, whether any deficiency found in the aforesaid second part of the caption to this court is a reflection of the errors in the said amended caption tendered by the Plaintiff himself, who raises this objection, or not, cannot be decided at this moment. If it is an error caused due to an error made by the plaintiff in the lower court, he should not be allowed to capitalize on it by raising preliminary objections with regard to the second part of the caption in this court which reflects the caption of the Civil Appellate High Court. There is nothing to show

that the said amended caption tendered by the plaintiff's lawyer in the lower court is the correct one as it is not available. Thus, to hold in favour of the plaintiff in relation to any errors in the said second part of the caption, this court cannot satisfy itself that the correct caption was there before the lower appellate court and the Plaintiff has not contributed to the errors alleged in the second part of the caption. However, a party making an appeal should be vigilant to peruse orders made by the court to substitute and amend the caption.

As already shown above, the Plaintiff has not made 1st, 7th ,16th and ,17th Defendants in the caption to the petition of appeal filed for his appeal to the Appeal Court which was later adjudicated by the Civil Appellate High Court. There is nothing to show that any substitution took place in relation to 1st ,16th and 17th Defendants in the court below except for the 7th. Thus, if there is an error in not showing 1st, 16th and 17th Defendants or their substituted parties in the 2nd part of the caption in this court, it may be the result of not making them parties by the plaintiff himself to the appeal he made to the appellate court below. The journal entries in 'B' do not indicate that the Plaintiff made any attempt to bring those parties to the Appeal he made except for substituting for the 7th Defendant who was not made a party to the caption of the appeal he made to, from the original court decision.

Though, it appears that certain substitutions have been done in relation to the 7th, 23rd and the 24th Defendants as indicated above, as explained above there is no certification to say that the complete record of the appellate court below is available before this court. The amended caption tendered by the Plaintiff on 24.04.2014 and the proxies of the parties as well as the applications for substitution before the court below are not available before this court for its perusal. It is not clear whether the correct caption was tendered by the Plaintiff on that date or not and whether the Defendant Appellants blindly followed the caption filed by the Plaintiff. Since this court cannot be satisfied that the complete case record of the court below is before this court as shown above, this preliminary objection should not be allowed owing to the alleged defects in the second part of the caption in this court as last amended caption in the lower court is not available. Perhaps, even the errors in the second part of the caption by not showing the substitutions done in relation to 7th ,23rd and 24th Defendants before

the Civil Appellate High Court might have been resulted from the caption filed in the lower court by the Plaintiff.

On the other hand, action filed in the original court was a partition action and the Partition Act was amended by the Act No. 17 of 1997. Section 27 of the said Act replaced the Section 81 of the principal enactment with a new Section 81 which required every party to a partition action to file a memorandum nominating legal representatives. Section 29 of the said amending Act states that every pending partition action on the commencement of the said amending Act, shall, so far as the circumstances permit, be continued and proceeded with final judgment and decree under the provisions of the principal enactment as amended by the said Act,(including the provisions requiring the filing of memoranda nominating legal representatives by parties to the action and others) in the same manner and every respect as if the same had been originally instituted after the date of commencement of this Act. Thus, nominating a legal representative has become a responsibility of the relevant party in new cases as well as pending cases after the said amendment. As per subsections 81(9) and (10) of the Partition Act, failure to file a memorandum and not appointing a legal representative cannot make any judgment, decree, order, sale, partition or a thing done in a partition action invalid. Section 81(12) of the Partition Act states that no proceedings under the partition law shall be postponed or adjourned nor any step in the action be postponed by reason of a death of a party required to file a memorandum. Thus, it is clear that after the said amendment brought in 1997 August, it was the duty of the relevant party to nominate his legal representative and death of a party could not make the proceedings postponed or invalid when there is no nomination. Hence, one can say that, now, the Plaintiff or any other party carrying on with the case is not burdened with taking steps to substitute. In this backdrop, now I prefer to look at the aforesaid second part of the caption again. As said before, the Defendant Petitioners have named the Plaintiff Appellant as he was the appellant in the Civil Appellate High Court and also named all the defendants in the original court as the Defendant Respondents in this second part but 1st, 7th ,16th and 17th has been named as deceased parties without substitution. It must be noted that the Plaintiff who raises the preliminary objection had not even mentioned 1st, 7th, 16th and 17th Defendants as Respondents to his petition of appeal to the Court of Appeal for some reason.

Perhaps, they might have been dead at the time he made the appeal and there were no nominations made as per the amendment. Even the notice of appeal found at page 1 of "A" indicates that they were dead even at the time of filing the notice of appeal in the District Court. Thus, if there is any failure on the part of the Defendant Petitioners with regard to the second part of the caption which is to indicate the full title of the appellate court below, it is that they have failed to name the substituted parties in the Civil Appellate High Court for the 7th, 23rd and 24th Defendant Respondents in this second part of the caption, since others, namely 1st, 16th ,17th perhaps the 13th defendants were not apparently alive during the appeal and no substitution was done before the court below.

With regard to the 1st, 13th ,16th and the 17th Defendant Respondents, to name any substituted parties, it is not established that there were any nominations done by the deceased parties and on the other hand, it is not shown that they or any substituted parties on behalf of them were even made parties to the Appeal made by the Plaintiff to the Civil Appeal High Court. The counsel for the Defendant Petitioners in his written submission states that the same counsel appeared for the 14th, 16th ,17th Defendants before the Civil Appeal High Court. Even the document marked "C" indicates that it was the written submissions for 2nd to 5th and 8th to 20th Defendants (which includes 13th ,14th ,16th and 17th Defendants), but no proxy tendered in the court below for the said parties is found in the brief and the aforesaid notice of appeal which is not challenged by any party indicates that, out of 2nd to 5th and 8th to 20th Defendants, 4th,5th, 13th, 16th and 17th were dead at that time. Thus, it is doubtful and cannot be accepted that the 16th and 17th Defendants were represented by the same counsel before the Court below as stated by the Counsel for the Defendant Petitioners.

Now it is necessary to see whether not naming the substituted Defendant Respondents who were substituted in the Civil Appellate High Court in the places of deceased 7th, 23rd and the 24th Defendant Respondents in the second part of the caption has to be considered fatal to this application. The aforesaid second part of the caption is basically to indicate the parties who were before the Court which heard the appeal from the original Court. Parties made to the present appeal by the Petitioners to this appeal are mentioned in the third part of the caption which starts from the words "AND NOW BETWEEN" on the 7th page of the petition to the end of the caption on the 9th page of the petition. Hence, notices

need not be served on the names found in the second part of the caption unless they were made parties to the third part of the caption which part shows the Petitioners to this court and the Respondents to this application. If there is any error in this second part, allowing to correct it will not harm or prejudice any party as it is only there to depict the parties to the appeal in the court below. On behalf of the Plaintiff Appellant certain decisions have been cited to state that the failure to set out full title or complying with rule 28(2) and (5) is fatal.[2] However, it appears that those cases refer to situations where a person who should have been a party respondent to an appeal and entitled to receive notices had been omitted to be included in the caption. However, the situation discussed above was with regard to the 2nd part of the caption which is there only to indicate parties to the court immediately below in this leave to appeal application, and no notices are expected to be issued under that part.

On the other hand, as shown above, the omission is that the substituted defendant Respondents for the 7th, 23rd, and 24th Defendants as per the substitution done in the Civil Appellate High Court were not named in the second part after naming the 7th ,23rd, and the 24th Defendant Respondents. As per section 81(14) of the Partition Act, a legal representative means a person who represents the estate of the deceased person. Generally, in a partition action shares are given or rights are granted to the original party and if the party is dead, the legal representative gets it not for him/her but on behalf of all the heirs of the deceased or for the person/s entitled under the original deceased party. Thus, since the Defendant Petitioners have named the original deceased party in the 2nd part of the caption which is not there for the naming of the Respondents who must be served with notices, one can say that they have sufficiently complied with the rule 28(2) though not perfectly complied with. Since it is an omission that can be cured without any harm to any party and no notice is expected to be issued under that part of the caption, I do not think that this Court should reject the appeal on the omission of not naming the Substituted Defendant Respondents in the second part of the caption as per the substitutions done in the Civil Appellate High Court.

[2]Illangakoon Mudiyanselage Gunathillake Illangakoon Vs Anula Kumarihamy SC/HCCA/LA/277/2011, Ibrahim V Nadaraja (1991) 1Sri. L R 131, .

Now it is necessary to consider the preliminary objections with regard to the 3rd part of the caption to this appeal which represents the parties to this application, namely the Petitioners and the Respondents. If any party who should be included in this part is omitted from mentioning, it will be a defect in the full title of the application of this court as well as a breach in complying with rule 28(5) mentioned above. As mentioned above, this third part starts at page 7 of the Petition after the words "AND NOW BETWEEN". In this part the Defendant Petitioners have named 2nd ,4B & 5A, 8th, 9th, 10th, 11th, 12th ,14th, 15th, 18th, 19th, 20th who were the original Defendants and/or Respondents before the Civil Appellate High Court bearing the respective numbers as Defendant Respondents. And this part of the caption indicates that the named Respondents are the Plaintiff who was the appellant in the appeal before Civil Appellate High Court and the 3rd, 6th, 22nd ,23rd, and 24th Defendants. It must be noted that one Maddage Dona Tilda and Pattiyawatte Nimala Nandanie Perera had been substituted for 23rd and 24th Defendant Respondents respectively by the Civil Appellate High Court as per the Journal entries dated 22.10.2012 and 05.02.2013.However, while deciding that 23rd and 24th defendants should be respondents to this appeal, the Defendant Petitioners have omitted to make the relevant substituted Defendant Respondents who were appointed to safeguard the rights of those original Defendant parties to this appeal.

Further, it can be observed that the person substituted for the 7th Defendant in the Civil Appellate High Court as per Journal entry dated 22.10.2012, or 1st, 13th, 16th, 17th, and 21st Defendants who were parties before the original court have not been made parties to this appeal. One may say, since 1st ,16th and 17th Defendants were not parties to the petition of appeal to the Civil Appellate High Court and have not been brought in as parties later on either by substitution or otherwise as per the journal entries filed, they need not be Respondents to this appeal since this is an appeal against the judgment of the Civil Appeal High Court. Be that as it may, still, substituted 7th defendant, 13th and 21st Defendants have not been made party Respondents to this appeal. Again, the 13th defendant, even though named as a party to the petition of appeal to the Civil Appellate High Court, appears to have been dead even at the time of filing notice of appeal as indicated above. One may say since there was no nomination, there need not be a naming of any substituted party in place of the 13th defendant, but still

substituted 7th defendant and the 21st defendants have not been made respondents to this application. Supreme Court Rule 28(5) makes it clear that the party appellant has to name as respondents all the parties,

- in whose favour the judgment or order complained against was delivered, or
- adversely to whom such appeal is preferred, or
- whose interests may be adversely affected by the success of the appeal.

The Civil Appellate High Court held in favour of the Plaintiff and the 6th Defendant allotting them shares and also kept certain number of shares unallotted. The Plaintiff and the 6th Defendant have been made parties. As mentioned before, this appeal has been preferred against the Plaintiff, 6th Respondent and 23rd and 24th Respondents but without making the substituted Respondents of the 23rd and 24th Respondents parties. It must be taken into account that, since this is a partition action, unallotted shares can be claimed in the same action by parties, if their claims fit into or not in conflict with the original ownership or the pedigree approved by the judgment which gave rights to the plaintiff and the 6th defendant. In a partition action when a judgment is given allotting shares to some parties it not only decides the rights of those parties to the corpus of the action but also decides the identity of the corpus as well as a pedigree flowing from an original ownership or part of such pedigree as part of a judgment in rem. As such, if there is any party who can tender an application for unallotted shares, his rights also may be affected by the success of this appeal since the prayer in the application is to set aside the judgment of the Civil Appellate High Court. Since the original action was filed as a partition action whatever may be the claim in the original court made by any party, once a decision is given to partition the land with unallotted shares it is always better to make all the parties, who claimed shares in the land, respondents in appeal since they may get a chance to claim rights in unallotted shares without filing a fresh action through the practice developed by our courts.

In this backdrop, I will consider the parties not named as respondents to this appeal in the third part of the caption by the 2nd, 4B, 5A, 8th, 9th, 10th, 11th, 12th, 14th, 15th 18th 19th and 20th Defendant Petitioners and whether they are in breach

of rule 28(2) and 28(5) in relation to the full title of the present application as well as rules relating to naming of the Respondents to the present application.

- 1st, 16th and 17th Defendants have not been made Respondents in the third part of the caption which indicates the parties to this appeal by the Defendant Petitioners. However, notice of appeal found at page 1 of the document marked "A" shows that they were dead at the time of filing the notice of appeal by the Plaintiff for his appeal to the Civil Appeal High Court. Even his petition of appeal to the Civil Appellate High Court indicates that they were dead and no substitutions have been done. Documents available in this brief do not indicate that anyone was substituted on behalf of them during the appeal before the Civil Appellate High Court. Thus, the Plaintiff should not be allowed to raise preliminary objections in relation to not making the 1st, 16th, and 17th Defendant Respondents parties to this application when it appears that he himself has not made them parties to his appeal to the court below or when he has not taken steps to substitute for them in the court below. On the other hand, there is no material before this court to show that 1st, 16th and 17th Defendants nominated any legal representatives for them as per the requirements of the Partition Act as amended. As per section 81(9) and (10) of the Partition Act, proceedings cannot be invalidated due to non-appointment of legal representatives when a party failed to file a memorandum of nominees. Even if an application to substitute is made and appointment is made thereon, the legal representative would be bound by the proceedings up to the time of such appointment. Thus, I am not inclined to consider the preliminary objection in relation to not making the 1st ,16th and 17th Defendants party Respondents to this application.

- Substituted 7th Defendant has not been made a party Respondent to this case by the Defendant Petitioners. It is true that in the notice of appeal filed by the Plaintiff in the district court, 7th Defendant has been described as a deceased party but as explained before and as per the journal entry dated 22.10.2012 found in document marked B, one Rosalin has been substituted in the place of the 7th Defendant. Thus, the substituted 7th Defendant was a party to the appeal before the Civil Appellate high Court.

As per the case record marked 'A', the 7th Defendant had filed a statement of claim disputing the corpus and the plaintiff's rights and praying for a dismissal of the plaintiff's action and partitioning of the land in accordance with his pedigree. He has not appealed against the district court judgment when it dismissed the plaintiff's claim. Proceedings before the District Court does not show that he took part in the trial. Since the Defendant Petitioners pray through this appeal to set aside the judgment of the Civil Appeal High Court, one may argue that the result of this appeal does not affect adversely to this substituted defendant and therefore, it is not necessary to make him a respondent. I am not in total agreement with that argument. It must be observed that the 7th Defendant though filed a contesting statement of claim to the plaintiff's claim, he did not contest the plaintiff's case at the trial. In the same manner the substituted 7th defendant did not file an appeal against the High Court Judgment. However, he is a person who by a statement of claim asked for shares in the corpus. Thus, he is a party who may be entitled to claim from the unallotted shares without filing a fresh action. Hence, the substituted 7th defendant is a party who can be considered as a person whose interests may be adversely affected by the success of this appeal. In my view, not making him a party to this appeal as a Respondent affects the full title of this application as well as is not in compliance with the aforesaid Supreme Court Rule 28(5) because it is for the substituted 7th defendant to decide whether he claims from the unallotted shares or ignore his claims.

- 13th defendant has not been made a respondent to this appeal by the Defendant Petitioners. However, the aforesaid notice of appeal found at page 1 of the case record marked "A" indicates, by hand writing, that he was dead at the time the notice of appeal was tendered. If he was dead, he cannot be considered as a party before the Civil Appellate High Court for the appeal that was before it as there is no indication of a substitution. If so, what I said with regard to not making 1st,16th, and 17th Defendants party respondents to this appeal mutatis mutandis applies for not naming the 13th Defendant as a respondent. On the other hand, the Plaintiff in his plaint has not given any share to the 13th Defendant nor has any other party through their statement of claims. Even the 13th Defendant has not

filed a statement of claim indicating that he has any right to the corpus. Thus, there is nothing to think that he may be able to tender a claim on unallotted shares. Hence, I have no material to consider that he may be adversely affected by this appeal. Thus, I am not inclined to consider the preliminary objection in favour of the Plaintiff on the basis of not making the 13th Defendant a party Respondent to this appeal.

- 21st Defendant has not been named as a Respondent to this appeal. However, it appears that it was the 7th Defendant who has revealed the 21st Defendant as a person entitled to shares in the land but without indicating her share. The 21st Defendant has not filed a statement of claim in the original court claiming her entitlement. Thus, I do not see at this moment that there is sufficient material to say that she is a possible claimant for unallotted shares. Thus, I am unable to consider that the result of this appeal would adversely affect her rights.

- Not making substituted 23rd and 24th Defendant Respondents to this appeal; The Defendant Petitioners have made the 23rd and 24th Defendant Respondents to this application but they are dead and substitutions have been done in the Civil Appeal High Court. This shows that the Defendant Petitioners for some reason preferred to file this application against 23rd and 24th defendants making them Respondents. Rule 28(5) allows all parties adversely to whom such appeal is preferred to be made Respondents to the appeal. After filing the appeal, now the Defendant Petitioners should not be allowed to say that they did not intend to prefer this appeal against them. In such a situation, not making the substituted 23rd and 24th Defendants parties to this application can be considered as non-compliance of Rule 28(5) since it is the Defendant Petitioners themselves who preferred to file this application adversely to them.

In my view, Section 759 (2) of the Civil Procedure Code has no application to the present issue as this is not an appeal from the original court to the first appellate court and this application, as said before, is subject to the stipulations made by Supreme Court Rule 28.

For the foregoing reasons, I am of the view that the Defendant Petitioners are in breach of Rule 28(2) and (5), since they did not make the substituted defendants for 7th, 23rd, and 24th Defendants party respondents to this application. As per Rule 28(3), respondents are the parties who are entitled to receive notices. Until notices are served, a court may not have jurisdiction to adjudicate over such parties. Thus, not naming substituted 7th ,23rd and 24th Defendants as respondents have to be considered as fatal to this application.

Thus, while upholding the preliminary objection with regard to not making the substituted 7th, 23rd and 24th Defendant party respondents, I dismiss this leave to appeal application.

No 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.

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

In the matter of an application for Contempt of Court under and in terms of Article 105(3) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Ranawaka Sunil Perera
43/11 Walawwatta Road,
Gangodawila,
Nugegoda.

Petitioner

SC Rule No.1/2018

Vs-

Sadda Vidda Rajapakse Palanga Pathira
Ambakumarage Ranjan Leo Sylvester
Alphonsu
Alias
Ranjan Ramanayaka
No.A5,
Member of Parliament's Housing Scheme,
Madiwela,
Sri Jayawardenapura,
Kotte.

Respondent

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

Counsel: Rasika Dissanayake with Sadun Senadhipathi for the Petitioner on the instructions of Sanath Wijewardena
M.A. Sumanthiran with Viran Corea and J.C. Thambiah for the Respondent on the instructions of D. Vithanapathirana.
Sarath Jayamanne PC ASG with Suharshi Herath SSC for the Attorney-General

Argued on : 10.12.2018, 28.1.2019, 30.1.2019, 30.7.2019, 6.8.2019, 28.8.2019 10.9.2019, 6.7.2020, 16.7.2020, 24.8.2020, 25.8.2020
Written submission
tendered on : 9.8.2016 by the Defendant-Petitioner-Appellant
6.8.2017 by the Plaintiff-Respondent-Respondent

Decided on: 12.1.2021

JUDGMENT OF THE COURT

The following Rule was read to the Respondent by the Registrar of this court on 8.8.2018 and he pleaded not guilty.

"CHARGE SHEET

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

In the matter of a Rule in terms of Article 105(3) of the Constitution of the Democratic Socialist Republic of Sri Lanka against Sadda Vidda Rajapakse Palanga Pathira Ambakumarage Ranjan Leo Sylvester Alphonsu alias Ranjan Ramanayake.

SC.Rule No. 01/2018

SC(Contempt of Court) Case No. 04/2017

Ranawaka Sunil Perera,
43/11, Walawwatta Road,
Gangodawila,
Nugegoda.

Complainant

-Vs-

Sadda Vidda Rajapakse Palanga Pathira
Ambakumarage Ranjan Leo Sylvester Alphonsu
Alias
Ranjan Ramanayake,
No. A-5, Members of Parliament's Housing Scheme,
Madiwela, Sri Jayawardenapura,
Kotte.

Respondent

TO: THE RESPONDENT ABOVE NAMED

WHEREAS at all times material to this mater, you were a Member of Parliament of the Democratic Socialist Republic of Sri Lanka, holding the portfolio of Deputy Minister of Social Empowerment;

WHEREAS you were interviewed by media personnel immediately outside the premises of *Temple Trees,* the Official Residence of the Hon. Prime Minister, after a parliamentary group meeting of which you were a member, on 21 August 2017;

WHEREAS the said interview was broadcast on " *News 1st* " news bulletin at 10.00 p.m on **සිරස** TV of MTV Channel (Private) Limited on 21st August 2017;

WHEREAS you, in the course of the aforementioned interview, *inter alia stated as follows;*

"මම කියන්නේ නීතිඥයො තමයි කිවුවට නීතිඥයෝ බහුතරයක් තමයි ලංකාව වනාශ කරේ. ඒ තමයි තිත්ත ඇත්ත. මේ කළු කෝට්කාරයෝ. බහුතරයක්, හැමෝම නෙවෙයි. ලංකාවේ බහුතරයක් ඉන්නේ අ.....ආ... Corrupted වනිසුරුවරු. Corrupted මෙ.. මෙ.. ලෝයස්ලා ඔවුන් සල්ලි වලට වැඩ කරන්නේ. ඒ හින්දා මම හිතනවා අධිකරණ ඇමතිවරයා හැටියට එන පුද්ගලයා නීතිඥයෙක් උනාට කමක්නෑ. ජනතාවාදී නීතිඥයෙක් වෙන්න ඕන. ඔහු ජනතාවට කඩේ යන අය වෙන්න ඕන සේවාදායකයන්ට කඩේ යන කෙනෙක් වෙන්න හොඳ නෑ කියන එක තමයි මගේ මතය."

WHEREAS Mr. Ranawaka Sunil Perera, a member of the public, residing at 43/11, Walawwatta Road, Gangodawila, Nugegoda,after viewing the broadcast of the aforementioned statement, complained to the Supreme Court in terms of Article 105(3) of the Constitution on 22 August 2017 alleging that the said statement was contempt of Court, in Case No. S.C. (Contempt of Court) 04/2017;

WHEREAS, the Supreme Court, by its order dated 21 November 2017 and 14 December 2017 made in the above case, called for a copy of the full recording of the aforementioned statement from MTV Channel (Private) Limited, in your presence and in the presence of your counsel, who represented you before the Supreme Court;

WHEREAS, His Lordship the Chief Justice and the other Honourable Judges of the Supreme Court, thereupon, viewed the recording that contained the aforementioned statement; and,

WHEREAS His Lordship the Chief Justice and their Lordships the other Honourabe Judges of the Supreme Court of the Democratic Socialist Republic of Sri Lanka, have taken cognizance of the aforementioned statement as being contempt of Court warranting proceedings to be brought against you in terms of Article 105(3) of the Constitution of the Democratic Socialist Republic of Sri Lanka, as minuted in the case record on 01 June 2018,

This rule is, therefore, issued to command you to show cause as to why you should not be found guilty and punished under Article 105(3) of the Constitution of the Democratic Socialist Republic of Sri Lanka for committing the offence of contempt of Court.

08.08.2018

Pradeep Mahamuthugala.
Registrar of the Supreme Court"

Pradeep Mahamuthugala called by the Attorney General gave evidence. He stated in his evidence that he is the Registrar of the Supreme Court; that the Rule in this case was served on the Respondent on 8.8.2018 and the plea of the Respondent has been recorded.

Gayan Sampath called by the Attorney General gave evidence and stated the following facts. He was the News Director in Sirasa TV on 21.8.2017. Dhananjaya Naranbedda and Lucknuwan have been assigned to cover the activities near Temple Trees on 21.8.2017. They forwarded a video which contained a statement made by Ranjan Ramanayake the Respondent in this case on 21.8.2017 near Temple Trees. He examined the said video and published it in Sirasa News at 10.00p.m. Later on a directive by the Supreme Court, he submitted the DVD/CD

containing the said video to the Supreme Court. This video was replayed in court. After watching the video, he identified it as the DVD/CD that he submitted to the Supreme Court. This DVD/CD was marked and produced as P1. However, the witness admitted that P1 was an edited version. The contents of the DVD/CD have been typed and the said document was marked as P2. It contained among other things the following words. "Majority in Sri Lanka are corrupted judges, corrupted lawyers. They work for money.' (ලංකාවේ බහුතරයක් ඉන්නේ කරප්ටඩ් විනිසුරුවරු. කරප්ටඩ් ලෝයර්ස්ලා. ඔවුන් සල්ලි වලට වැඩ කරන්නේ.)

Luck Nuwan Dhanushka Warnakulasuriya called by the Attorney General gave evidence and stated that on 21.8.2017, he being the cameraman attached to the Sirasa TV videoed a programme in which Ranjan Ramanayake (the Respondent in this case) made a statement; that he forwarded it to Gayan Sampath, the News Editor in Sirasa TV; that Dhanajaya Naranbedda assisted him in operating the microphone; and that this video is produced as P1.

Dhanajaya Naranbedda called by the Attorney General stated in evidence that he operated the microphone and assisted Luck Nuwan Dhanushka Warnakulasuriya who videoed the programme in which Ranjan Ramanayake made a statement and that the said video is the video produced as P1. He further said that Ranjan Ramanayake did not, on any occasion, ask him as to why he did not record good things said about judges by him (Ranjan Ramanayake).

Sudeva Hettiarchchi called by the Attorney General stated in evidence that he is the News Director in Hiru Television and Hiru Radio; that the members of the Hiru Television record activities and speeches made by various people in a Microchip; that he examines it before publishing it; and that he decides to publish an edited or unedited version of the activities and speeches made by people. He further stated in

evidence that on 21.8.2017 he received a Microchip recorded by Eranda Gunawardena who is a member of Hiru Television and that after editing, it was televised for the 1st time in Hiru Television on 12.10.2017 after the proceedings against the Respondent Ranjan Ramanayake commenced in the Supreme Court. He produced the unedited video of the said speech of Ranjan Ramanayake and its transcript in this court as P3 and P4. He stated in evidence that the said video contained a statement made by the Respondent Ranjan Ramanayake on 21.8.2017. This video was replayed in court. It contained among other things the following words made by the Respondent Ranjan Ramanayake. "Majority in Sri Lanka are corrupt Judges. Corrupt lawyers. About 95%. They work for money. They everyday protected murderers, corrupt people and drug dealers for money."(ලංකාවේ බහුතරයක් ඉන්නේ කරප්ටඩ් විනිසුරුවරු. කරප්ටඩ් ලෝයර්ස්ලා. සියයට 95 ක් විතර වගේ. ඔවුන් සල්ලිවලට වැඩ කරන්නේ. ඔවුන් හැමදාම මිනිමරුවන්ව, දූෂිතයන්ව, කුඩුකාරයන්ව ආරක්ෂා කළා සල්ලිවලට.)The above words are also contained in the transcript of the video (P3) marked as P4. He stated in evidence that P3 is the unedited statement made by the Respondent Ranjan Ramanayake on 21.8.2017. He further stated in evidence that the edited version of the statement made on 21.8.2017 by the Respondent Ranjan Ramanayake was televised in Hiru Television on 12.10.2017. He produced the said edited version and its transcript marked as P5 and P6. P5 was replayed in open court. P6 contained the following words. "Majority in Sri Lanka are corrupt Judges. Corrupt lawyers. About 95%. They work for money. They everyday protected murderers, corrupt people and drug dealers for money." He further stated that the Respondent Ranjan Ramanayake outside the Supreme Court building made several statements. He produced the said video as P7 and its transcript as P8. P7 was replayed in open court. P7 and P8 reveal the following matters.

1. On14.12.2017 the Respondent Ranjan Ramanayake has said the following words. “I will not, under any circumstances, withdraw the opinion expressed by me. Therefore I told only about these Judges.” (මම කියපු මතය ඉවත් කරගන්නේ නැහැ කිසිලෙසකින්වත්. ඒ හින්දා මා කිව්වේ මේ විනිසුරුවරු ගැනමයි.)
2. On 23.3.2018 the Respondent Ranjan Ramanayake has said the following words. “If the Honourable court gets some self satisfaction to conclude it after sending me to jail, I will very happily go. I will not withdraw anything what I have said.” (ගරු අධිකරණයට යම්කිසි ස්වයං වින්දනයක් තියෙනවානම් මාව හිරේ දාලා ඒක ඉවරයක් කරගන්න මම බොහොම කැමැත්තෙන් යනවා. මම කිව්ව දේවල් එකක්වත් ඉල්ලා අස් කරගන්නෙත් නැහැ.)
3. On 4.6.2018 the Respondent Ranjan Ramanayake has said the following words. “As at present I have twenty one cases. I will not withdraw what I have said.” (මට නඩු දැනට 21 ක් තියෙනවා. මම කියපු කතාව මම ඉල්ලා අස්කර ගන්නෙත් නැහැ.)
4. On 18.6.2018 the Respondent Ranjan Ramanayake has said the following words. “I will never withdraw. I maintain the opinion that I am correct.” (මම කවදාවත් ඉල්ලා අස්කර ගන්නේ නැහැ. මම ඉන්නේ නිවැරදියි කියන මතයේ.)
5. On 5.9.2018 the Respondent Ranjan Ramanayake has said the following words. “I will never withdraw. Even if they sentenced me to one year, two years, five years, ten years, twenty years or life imprisonment, I maintain what I have said.” (ආයි ඉල්ලා අස්කරගන්නේ නැහැ පිව්තේට. මේ අය අවුරුද්දක් නෙවෙයි, දෙකක් නෙවෙයි, පහක් නෙවෙයි, දහයක් නෙවෙයි, විස්සක් නෙවෙයි, පිවිතාන්තය දක්වා මාව හිරේ දැම්මත් මම කියන්නේ මම කිව්ව දේමයි.)

All the above statements have been made outside the Supreme Court building but in the premises of the Supreme Court.

Under cross-examination he (Sudeva Hettiarchchi) admitted that the words ‘a’, ‘a’ and ‘me’, ‘me’ are not found in P3. However we note that the words ‘a’, ‘a’ and

‘me’, ‘me’ are found in document marked P2. P2 is a transcript of P1. P1 is the video which contained the statement made by the Respondent Ranjan Ramanayake and was published in Sirasa News at 10.00p.m.

Witness Eranda Gunawardena said that he, as cameramen of Hiru Television was waiting outside the Temple Trees on 21.8.2017; that he recorded what the Respondent Ranjan Ramanayake said outside the Temple Trees on 21.8.2017; and that the said video is produced as P3.

Wickramage Ajith Wickramasinghe called by the Attorney General stated in evidence that he, as the court correspondent of Hiru Television, videoed the statement made by the Respondent Ranjan Ramanayake outside the Supreme Court building on several occasions and that he produces the said video as P7 but did not record what the Respondent Ranjan Ramanayake said on 21.8.2017 outside the Temple Trees. The said video P7 was replayed in open court. He stated that the said video P7 contained the statement made by the Respondent Ranjan Ramanayake on 21.8.2017, 14.12.2017, 23.3.2018, 4.6.2018, 18.6.2018 and 5.9.2018. He further stated in evidence that he videoed what the Respondent Ranjan Ramanayake said outside the Supreme Court building on 14.12.2017, 23.3.2018, 4.6.2018, 18.6.2018 and 5.9.2018. The said video was marked as P7. According to P7, the statements alleged to have been made by the Respondent Ranjan Ramanayake on 14.12.2017, 23.3.2018, 4.6.2018, 18.6.2018 and 5.9.2018 outside the Supreme Court building respectively are as follows.

1. “I will not, under any circumstances, withdraw the opinion expressed by me. Therefore, I told only about these Judges.” This witness in evidence confirmed that the Respondent Ranjan Ramanayake made the above statement on 14.12.2017.
2. “If the Honourable court gets some self satisfaction to conclude it after

sending me to jail, I will very happily go. I will not withdraw anything what I have said."

3. "As at present I have twenty one cases. I will not withdraw what I have said."
4. "I will never withdraw. I maintain the opinion that I am correct."
5. "I will never withdraw. Even if they sentenced me to one year, two years, five years, ten years, twenty years or life imprisonment, I maintain what I have said."

This witness (Wickramage Ajith Wickramasinghe) in evidence confirmed that the Respondent Ranjan Ramanayake made the above statements. He, under cross-examination, admitted that the words 'pardon me' used by the Respondent Ranjan Ramanayake are missing in the video relating to 14.12.2017.

The Respondent Ranjan Ramanayake gave evidence under oath. He stated that he is a Member of Parliament and a non-Cabinet Minister. He further stated that he was a film actor; that he entered politics in the year 2006; that in the Parliamentary Election held in August 2015 he was elected as a Member of Parliament from Gampaha District; that from August 2015 to date he represents Gampaha District; that as at present he is a State Minister; that he has produced films regarding corrupt politicians; that he entered politics in order to send corrupt politicians to jail; that in the ten year period of his politics he was not accused of any corruption; that he refused to accept two vehicles sent to him by the Government; that he refused to accept enhancement of attendance allowance given to the Members of Parliament and enhancement of salary given to the Members of Parliament; and that he does not enjoy privileges given to the Members of Parliament. He further stated in his evidence that on 21.8.2017 after attending a meeting at Temple Trees

he addressed the journalists and said that 95% of Judges and lawyers are corrupt; that although he said the above words, he had no intention of mentioning of Judges but had the intention of speaking about lawyers; that when he made the above statement to the journalists, his intention was to criticize the former Minister of Justice and talk about lawyers; that when he used the word 'Judges' he changed it saying 'me, me'; and that in the said interview held on 21.8.2017 outside the Temple Trees no question arose about Judges.

Thereafter, at the request of Mr. Sumanthiran President's Counsel appearing for the Respondent, video marked P7 was replayed in open court. Mr. Sumanthiran President's Counsel questioned the Respondent Ranjan Ramanayake if his intention was not to mention about Judges as to why he made a statement on 14.12.2017 stating that he would not withdraw what he said earlier. He (Ranjan Ramanayake) then said that his statement made on 21.8.2017 has some truth when the statements made by former Chief Justices were considered. He again said that it was not his intention to refer to Judges when he made the statement on 21.8.2017 outside the Temple Trees. He further stated in his evidence that on 14.12.2017, 23.3.2018, 4.6.2018, 18.6.2018 and 5.9.2018 he mentioned about good Judges such as Neville Samarakoon Chief Justice and Sarath Ambepitiya but these portions of his statements had been removed by Hiru TV.

Ranjan Ramanayake further stated in his evidence that on 21.8.2017 when he made the statement outside the Temple Trees, he did not want to speak about Judges but the word 'Judges' slipped from his mouth. He further stated in his evidence that when he makes statements to the electronic media, he has his own team to record what he says. Whilst Ranjan Ramanayake was giving evidence, P1 which is a CD/DVD recorded by Sirasa TV was replayed in open court. He (Ranjan

Ramanayake) admitted in the witness box that P1 contains what he said on 21.8.2017 outside the Temple Trees. P2 which is a transcript of P1 was shown to him whilst he was giving evidence in the witness box. He admitted that P2 contains what he said on 21.8.2017 outside the Temple Trees. P1 and P2 contain among other things the following words.

"Majority in Sri Lanka are corrupted Judges, corrupted lawyers. They work for money."

Whilst he (Ranjan Ramanayake) was giving evidence in the witness box, P3 which is a CD/DVD recorded by Hiru TV was replayed in open court and P4 which is a transcript of P3 was shown to him. He went through P4. He admitted that P3 and P4 contain what he said on 21.8.2017 outside the Temple Trees.

Whilst he (Ranjan Ramanayake) was giving evidence in the witness box, P5 which is a CD/DVD recorded by Hiru TV was replayed in open court and P6 which is a transcript of P5 was shown to him. He went through P6. He admitted that P5 and P6 contain what he said on 21.8.2017 outside the Temple Trees.

Whilst he (Ranjan Ramanayake) was giving evidence in the witness box, P7 which is a CD/DVD recorded by Hiru TV was replayed in open court. He admitted that P7 contains the statements made by him on 14.12.2017, 23.3.2018, 4.6.2018, 18.6.2018 and 5.9.2018 in court premises but outside the Supreme Court building. He admitted in evidence that the word 'Judges' in his statement made by him on 21.8.2017 outside the Temple Trees was a mistake. He also admitted that he did not correct this mistake in his subsequent statements made by him in court premises outside the Supreme Court building on 14.12.2017, 23.3.2018, 4.6.2018, 18.6.2018 and 5.9.2018. The defence of the Respondent (Ranjan Ramanayake) is that he had no intention to refer to Judges and reference to Judges in his statement made on 21.8.2017 outside the Temple Trees was a mistake. If that is so, he could

have easily corrected this mistake and apologized for the mistake in his subsequent statements made on 14.12.2017, 23.3.2018, 4.6.2018, 18.6.2018 and 5.9.2018. But he did not do so. For the above reasons, we reject his defence. His evidence does not create any reasonable doubt in the case presented against him. Although Ranjan Ramanayake says in his evidence that he had had no intention to refer to Judges in his statement made on 21.8.2017 outside the Temple Trees, his subsequent statements made on 14.12.2017, 23.3.2018, 4.6.2018, 18.6.2018 and 5.9.2018 indicate and clearly demonstrate that his intention was to refer to Judges.

Learned President's Counsel for the respondent contended that according to the evidence led before this court, nothing had been said against the Supreme Court and that therefore the Supreme Court has no jurisdiction to hear and determine this case. We now advert to this contention. Although learned President's Counsel contended so, according to the evidence, the respondent has said that the majority of Judges in Sri Lanka are corrupted Judges. Thus the above statement of the respondent refers to the Judges of the Supreme Court as well. Therefore the above contention of learned President's Counsel should fail.

Article 105(3) of the Constitution reads as follows.

> *"The Supreme Court of the Republic of Sri Lanka and the Court of Appeal of the Republic of Sri Lanka shall each be a superior court of record and shall have all the powers of such court including the power to punish for contempt of itself, whether committed in the court itself or elsewhere, with imprisonment or fine or both as the court may deem fit. The power of the Court of Appeal shall include the power to punish for contempt of any other court, tribunal or institution referred to in paragraph (1)(c) of this Article, whether committed in the presence of such court or elsewhere :*

Provided that the preceding provisions of this Article shall not prejudice or affect the rights now or hereafter vested by any law in such other court, tribunal or institution to punish for contempt of itself."

According to the above Article, the Supreme Court has the power to deal with the offence of contempt of court whether the offence of contempt of court was committed in court or elsewhere. Therefore the above contention of learned President's Counsel for the Respondent should fail. Further it is noted that the objection to the jurisdiction of this court was taken up after closure of the Respondent's case. For the purpose of clarity, we would like to state here that this objection was taken up only when learned President's Counsel for the Respondent was making his final submission. It is an accepted principle that the objection to the jurisdiction should be taken up at the very inception of the case. This view is supported by the following judicial decisions. In Nagalingam Vs Lakshman De Mel 78 NLR 231 this court held as follows.

"Further the Petitioner, having participated in the proceedings without any objection and having taken the chance of the final outcome of the proceedings, is precluded from raising any objection to the jurisdiction of the Commissioner of Labour to make a valid Order after the zero hour. The jurisdictional defect, if any, has been cured by the Petitioner's consent and acquiescence."

In The King Vs Kitchilan 45 NLR 82 Court of Criminal Appeal held as follows.

"Even if there had been a misjoinder of charges, the Court would have dismissed the appeal as no embarrassment or prejudice had been caused to the accused. In such a case the Court of Criminal Appeal has a wider discretion than that conferred upon an Appellate Court under section 425 of

the Criminal Procedure Code. The proper time at which an objection of the nature should be taken is before the accused has pleaded."

Learned President's Counsel for the Respondent submitted that the procedure laid down in Section 792 and 793 of the Civil Procedure Code should have been followed in this case. The said section reads as follows.

Section 792: In all courts the summary procedure to be followed for the exercise of the special jurisdiction to take cognizance of contempt and to punish summarily offences of contempt of court, and offences declared by this Ordinance to be punishable as contempt of court, shall be that which is prescribed in the sections next immediately following.

Section 793: The court shall issue a summons to the accused person in the form No. 132 in the First Schedule or to the like effect, which summons shall state shortly the nature of the alleged offence and the information or grounds upon which the summons is issued, and shall require the accused person to appear before the court on a day named in the summons to answer the charge.

In the present case, the charge was read to the Respondent and an opportunity was given to him to plead or not to plead guilty to the charge. He pleaded not guilty to the charge. The evidence against him was led in open court and his counsel was given an opportunity to cross-examine the witnesses. The respondent was given an opportunity to call witnesses. The respondent too gave evidence. Thus the respondent was given the freedom of a fair trial which is in my view more than the procedure laid down in Section 792 of the Civil Procedure Code. For the above reasons, we reject the above contention of learned President's Counsel for the Respondent.

Learned President's Counsel for the Respondent cited Section 38 of the Penal Code. It reads as follows.

1) *Except in the Chapter and sections mentioned in subsections (2) and (3), the word "offence" denotes a thing made punishable by this Code.*

2) In Chapter IV. and in the following sections, namely, sections 67, 100, 101, 101A. 102, 103, 105, 107, 108, 109, 110, 111, 112, 113.113A, 113B.184, 191, 192,200,208,210, 211, 216, 217, 218, 219, 220, 318, 319, 320. 321, 322, 338, 339, 377, 378, and 431, the word "offence" denotes a thing punishable in Sri Lanka under this Code, or under any law other than this Code.

3) And in sections 138, 174. 175, 198, 199, 209, 213, and 427, the word "offence" has the same meaning as in subsection (2) when the thing punishable under any law other than this Code is punishable under such law with imprisonment for a term of six months or upwards, whether with or without fine.

Learned President's Counsel for the Respondent citing Section 38 of the Penal Code contended that the offence of contempt of court has not been made punishable by any law. We now advert to this contention. Is the offence of contempt of court punishable by any law? To answer this question, we would consider Article 105(3) of the Constitution. We would again like to state Article 105 (3) of the Constitution. It reads as follows.

> *"The Supreme Court of the Republic of Sri Lanka and the Court of Appeal of the Republic of Sri Lanka shall each be a superior court of record and shall have all the powers of such court including the power to punish for contempt of itself, whether committed in the court itself or elsewhere, with imprisonment or fine or both as the court may deem fit. The power of the*

Court of Appeal shall include the power to punish for contempt of any other court, tribunal or institution referred to in paragraph (1)(c) of this Article, whether committed in the presence of such court or elsewhere :

Provided that the preceding provisions of this Article shall not prejudice or affect the rights now or hereafter vested by any law in such other court, tribunal or institution to punish for contempt of itself."

The words *"the power to punish for contempt of itself, whether committed in the court itself or elsewhere, with imprisonment or fine or both as the court may deem fit"* in the above Article should be stressed. The above Article clearly states that a person who committed the offence of contempt of court can be punished with an imprisonment. In this regard we would like to consider definition given to the offence in the Criminal Procedure Code. Section 2 of the Criminal Procedure Code defines the offence as follows.

"Offence means any act or omission made punishable by any law for the time being in force in Sri Lanka;"

The act of contempt of court has been made punishable by Article 105(3) of the Constitution. Therefore the act of contempt of court is an offence and this offence is punishable with an imprisonment or a fine.

Lord Denin MR in the case of In Re Bramblevale Ltd [1970] 1CH 128 held as follows.

"A contempt of court is an offence of a criminal character. A man may be sent to prison for it."

In the case of Croos Vs Dabrera [1990] 1SLR 205 Court of Appeal held as follows.

"The offence of contempt of court under our law is a criminal charge and the burden of proof is that of proof beyond reasonable doubt."

When we consider all the aforementioned matters, I reject the above contention of

learned President's Counsel for the Respondent.

Learned President's Counsel for the Respondent cited Perera Vs The King 1951 AC 482. In the said case Perera being a Member of the House of Representative of Ceylon paid a visit to the Remand Prison in Colombo and made the following observation in the Prison Visitors' Book.

> *"Visited Remand Prison in the company of Jailor Wijewardena. Premises clean. Adequate library facilities required. The present practice of appeals of Remand prisoners being heard in their absence is not healthy. When represented by Counsel or otherwise the prisoner should be present at proceedings. In my opinion not more than one prisoner should be in a cell (7x9) approximately."*

The Commissioner of Prisons later forwarded the above remarks to The Registrar of the Supreme Court asking for his observation. The Registrar of the Supreme Court forwarded the above remarks to a Judge of the Supreme Court who was in charge of unstamped petitions from prisoners in jail and His Lordship made the following minute.

> *"The statement is incorrect and is a contempt of the Court. Issue a rule on Perera returnable on Tuesday the 25th. I shall sit specially on that day."*

Mr. Perera was found guilty of contempt of court and a sentence was imposed on him. The Privy Council in appeal set aside the conviction and the sentence and held as follows.

> *"Finally his criticism was honest criticism on a matter of public importance. When these and no other are the circumstances that attend the action complained of there cannot be Contempt of Court."*

Learned President's Counsel for the Respondent citing the above judicial decision contended that Mr. Perera in the above case did not make any reference to a Judge. He further contended that in the present case, the respondent did not make any reference to a Judge and that therefore the respondent cannot be convicted for the offence of contempt of court. But we would like to state here that according to the evidence led in this court, the respondent has said the following words. *"The majority in Sri Lanka are corrupted judges."* Further the Respondent on a later occasion (14.12.2017) has said the following words. "I will not, under any circumstances, withdraw the opinion expressed by me. Therefore I told only about these Judges." (**මම කියපු මතය ඉවත් කරගන්නේ නැහැ කිසිලෙසකින්වත්. ඒ හින්දා මා කිව්වේ මේ විනිසුරුවරු ගැනමයි.**)

Thus it is clear that the respondent has spoken about Judges. When we consider all the above matters, we hold the view that the above contention does not hold water.

The charge levelled against him is that he committed the offence of contempt of court when he made the statement on 21.8.2017 outside the Temple Trees. He admitted in his evidence that he said the following words when he made the above statement. "Majority in Sri Lanka are corrupted Judges, corrupted lawyers. They work for money."

We have earlier rejected his defence. For the above reasons, we affirm the Rule served on the Respondent and hold that the charge of contempt of court levelled against him has been proved beyond reasonable doubt.

For the aforementioned reasons, we convict him for the offence of contempt of

court punishable under Article 105(3) of the Constitution and sentence him to a term of four (4) years rigorous imprisonment. The Registrar of this court is directed to issue a warrant committing the Respondent to prison to a term of four (4) years rigorous imprisonment.

Justice Sisira. J. de Abrew
Judge of the Supreme Court.

Justice Vijith. K. Malagoda
Judge of the Supreme Court.

Justice 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 of Article 128(2) of the Constitution of the Democratic Socialist Republic of Sr Lanka.

Plexus Cotton Limited,
265/279, Martins Building,
4, Walter Street,
Liverpool,
England.

Presently at;
Cotton Place
2, Ivy Street,
Britenhead,Wirrel,
CH41 5EF

Petitioner

-VS-

SC/SPL/LA No.27/2012
CA Revision No. 1865/05
DC Colombo No. 6375/SPL

Dan Mukunthan,
No.76, Davidson Road,
Colombo 04.

Presently at;
No. 3, Charles Place,
Colombo 3.

Respondent

AND

Plexus Cotton Limited,
265/279, Martins Building,
4, Walter Street,
Liverpool,
England.

Presently at;
Cotton Place
2, Ivy Street,
Britenhead,Wirrel,

CH41 5EF

Petitioner - Petitioner

-VS-

Dan Mukunthan,
No.76, Davidson Road,
Colombo 04.

Presently at;
No. 3, Charles Place,
Colombo 3.

Respondent – Respondent

AND NOW BETWEEN

Dan Mukunthan,
No.76, Davidson Road,
Colombo 04.

Presently at;
No. 3, Charles Place,
Colombo 3.

Respondent – Respondent – Petitioner

-VS-

Plexus Cotton Limited,
265/279, Martins Building,
4, Walter Street,
Liverpool,
England.

Presently at;
Cotton Place
2, Ivy Street,
Britenhead, Wirrel,
CH41 5EF

Petitioner - Petitioner – Respondent

Before: Jayantha Jayasuriya, PC. CJ.,
Vijith K. Malalgoda, PC. J., and
Murdu N. B. Fernando, PC. J.

Counsel: Uditha Egalahewa PC with N. Ashokbharan and Amaranath Fernando instructed by K.U. Gunasekera for the Respondent- Respondent - Petitioner.
Shammil Perera PC with Primal Ratwatte and D. Perera for the Petitioner-Petitioner- Respondent.

Argued on: 12-06-2019

Decided on: 03-03-2021

Murdu N.B. Fernando, PC. J.

This is a Special Leave to Appeal application filed against the judgement of the Court of Appeal dated 13-01-2012. By the said judgement the Court of Appeal set aside the Order made by the District Court pertaining to the refusal of an application for registration of a foreign judgement obtained from a Court in the United Kingdom, under the provisions of the Reciprocal Enforcement of Judgements Ordinance No 41 of 1921.

When this application was taken up for granting of Special Leave to Appeal before us, the learned Presidents' Counsel for the Petitioner – Petitioner – Respondent ("the Respondent") and the Respondent – Respondent – Petitioner ("the Petitioner") appraised the Court of the preliminary objection raised by the Respondent, when this matter was initially taken up for support on 28-05-2012 with regard to non-compliance with Rule 8(3) of the Supreme Court Rules of 1990 by the Petitioner and moved that the said objection be taken up for determination in the first instance.

Having heard the parties before this Court with regard to the said preliminary objection and also having considered the many sets of written submissions tendered to Court prior to the said date and subsequent to the hearing of submissions on the said date, I now proceed to consider the said preliminary objection.

However, prior to examining the said preliminary objection raised by the learned Presidents' Counsel for the Respondent, I wish to refer to certain facts, *albeit* brief, relevant to this application which in my view is important to understand the nature of this Special Leave to Appeal application.

01. The Respondent, a company registered in the United Kingdom entered into a contract of sale of cotton yarn with Veyangoda Textiles Mills Limited, a company incorporated in Sri Lanka, in the year 1998.
02. The Petitioner being a shareholder of the said Veyangoda Textiles Mills Limited guaranteed the performance of the said contract of sale, by way of a guarantee agreement.
03. In the year 1999, the ownership and management of Veyangoda Textiles Mills was vested with Peoples' Bank, in view of default of payment of loans obtained by Veyangoda Textiles Mills Limited and the Mills continued to function under the aegis of a Competent Authority appointed by the Bank.
04. Veyangoda Textiles Mills Limited failed to honour the terms of the said contract of sale and the **Respondent filed action in the High Court of the Royal Court of Justice in the United Kingdom** against the Petitioner, upon the Guarantee Agreement executed between the parties.
05. The Respondent also resorted to the provisions of the Mutual Assistance in Civil and Commercial Matters Act No.39 of 2000, by filing an application in Sri Lanka before the Court of Appeal to obtain Orders of Court to serve notice on the Petitioner and record his evidence in Sri Lanka.
06. Whilst the said application filed in the Court of Appeal was still pending, the Respondent obtained a **'default judgement' against the Petitioner dated 04-10-2001 from the Royal Court of Justice (Queens Bench Division) in the United Kingdom.**
07. The Respondent thereafter filed an action in the District Court of Colombo to **register the said default judgement in terms of Section 3(1) of the Reciprocal Enforcement of Foreign Judgements Ordinance No 41 of 1921** ("the Ordinance") and that case is the genesis of the application before us.
08. The Petitioner too, filed an action in the District Court of Colombo and prayed for an Order of Court to refuse registration of the default judgement in terms of Section 3(2) of the said Ordinance, for the reason that the said default judgement has been obtained without summons being served on the Petitioner.

09. The learned District Judge by Order dated 07-06-2005 **refused the application filed by the Respondent to register the default judgement** obtained from the High Court of the United Kingdom, **upon the ground of non-service of summons** on the Petitioner and dismissed the application.

10. Being aggrieved by the said judgment, the Respondent went before the Court of Appeal by way of a revision application. The Court of Appeal, set aside the said District Court judgement and directed the District Judge to proceed to register the judgement under the provisions of the Ordinance.

11. It is against the said Court of Appeal judgement that the Petitioner has now come before this Court having filed a Special Leave to Appeal application dated 22-02-2012.

12. Upon filing of the said application, **this Court, by Order dated 24-02-2012 directed that this matter be listed for support on 28-05-2012. It also made order to issue notice on the Respondent.**

13. The Respondent thereafter filed a motion dated 17-04-2012 together with a proxy and caveat and moved that it be accepted.

14. On 28-05-2012, when this application was taken up for granting of Special Leave to Appeal, the journal entry indicates that the learned Counsel for the Respondent informed Court that he intends to take up a preliminary objection and the matter was re-fixed for support for 17-09-2012.

15. On the said date the Presidents' Counsel for the Respondent raised the preliminary objection pertaining to non-compliance of Rule 8(3) of the Supreme Court Rules of 1990 and the matter was once again re-fixed for support.

16. The record bears out, that this application was taken up for inquiry on three occasions, parties heard, written submissions filed and judgement reserved prior to this matter being taken up before this bench.

Having referred to the facts pertaining to the application, I now wish to look at Rule 8(3) of the Supreme Court Rules - 1990.

The said Rule 8(3) reads as follows: -

"**The Petitioner shall tender** with the application such number of **notices as is required for service on the Respondent** and himself together with such number of copies of the documents referred to in Sub- Rule (1) of this rule as is required for service on the Respondent and shall tender the required number of stamped envelopes for the service of notice on the Respondents by registered post…." (emphasis mine)

For easy reckoning, I wish to refer to the corresponding Rule 8(1) and Rule 8(2) which reads as follows: -

Rule 8(1)

"Upon an application for Special Leave to Appeal being lodged in the Registry of the Supreme Court, the **Registrar shall forthwith give notice,** by registered post, of such application to each of the Respondents in the manner hereinafter set out. There shall be attached to the notice, a copy of the petition, a copy of the judgment against which an application for Special Leave to Appeal is preferred and copies of affidavits and annexures filed therewith." (emphasis mine)

Rule 8(2)

"Such notice shall be in the prescribed form and shall specify,

a) That the Respondent, **if he intends to oppose the grant of Special Leave,** shall lodge within fourteen days of the receipt of such notice, **a caveat** indicating such intentions; and
b) **The date of hearing……**"(emphasis mine)

Thus, Rule 8 (3) clearly indicates **a Petitioner to tender required notices for service on the Respondent and himself** and **Rule 8 (1) spells out** the **Registrar to forthwith give notice** specifying,

(i) if the Respondent intends to oppose the grant of Special Leave, to lodge a caveat indicating his intentions;

(ii) and the date of hearing.

Hence, the primary obligation laid down in the said Rule 8 (3) is for a Petitioner to tender such notice. Upon the tender of such notice, the Registrar is required to give notice, under Rule 8(1).

The preliminary objection raised by the Respondent as clearly laid down in the written submissions is, **that the Petitioner failed to tender the relevant notices, which triggered such notice not being served on the Respondent, through the Supreme Court Registry,** although admittedly such notice was served directly by the Petitioner on the Respondent, under registered cover at its registered address in the United Kingdom.

Thus, the contention of the Respondent, before this Court, was that **firstly, no notice was tendered by the Petitioner and secondly, no notice was served on the Respondent through the Registry** as spelt out in Rule 8(3) and thereby the Petitioner failed to comply with a mandatory rule.

Countering the said position, the **Petitioners contention was that five copies**, corresponding to the number of copies required for the record or the docket as is commonly called and the three judge's brief and to serve on the Respondent of the petition, affidavit and marked documents **were tendered to the Registry of the Supreme Court together with the motion dated 22-02-2012 and** as an additional precaution a set of documents was also directly dispatched to the Respondent, as the Respondent was in a foreign country on the said date itself. The Registered Attorney for the Petitioner furnished the postal article in proof of such posting upon the Respondent, **and hence** contended that **the necessary copies were tendered to the Registry and Rule 8(3) was complied, by the Petitioner** for all intents and purposes.

Both parties in the written submissions filed before this Court, relied on the entries made in the Motion Books and Day Books maintained at the Supreme Court Registry to justify their respective contentions. The extracts of the said records and entries were annexed to the written submissions and quoted extensively by both Counsel.

The parties also drew the attention of Court to a number of judgements to substantiate its respective positions.

The Respondent relied on a series of cases of this Court to establish the mandatory nature of Rule 8(3) and especially referred to the following judgments, in which *admittedly, notices were not tendered to the Registry by the Petitioner in the first instance.*

- **Woodman Exports (Pvt) Ltd. v. Commissioner General of Labour and others [2012] BLR 238,**
- **A.H.M. Fowzie and 2 others v. Vehicle Lanka (Pvt) Ltd. [2008] 1 SLR 23;** and
- **Sudath Rohana and another v. Mohammed Cassim Mohammed Zeena and another [2011] BLR 277.**

The Petitioner on the other hand, pleaded that the preliminary objection raised should be rejected *in limine,* based upon many contentions.

Firstly, that for all intents and purposes the Petitioner has complied with Rule 8(3).

Secondly, the Petitioner relied on the observations made in;

- **Tissa Attanayake v. Commissioner General of Elections and others – [2011] 1 SLR 220;** and
- **Samantha Niroshana v. Senarath Abeyruwan – SC/SPL/LA 145/2006 – S.C. minutes of 02-08-2007,**

to justify its proposition that the *purpose of the said Rule is to ensure that all necessary parties are properly notified in order to give a hearing.* Further, the rationale of giving notice is to adhere to rules of natural justice and in this instance the said purpose was achieved, the Respondent received notice, filed a caveat indicating its intention to resist granting of Special Leave to Appeal and on the first day itself when the application was supported for leave, a Counsel represented the Respondent.

Thirdly, no disadvantage or prejudice was caused to the Respondent by the alleged non-compliance of Rule 8 (3) and heavily relied on the observations made by a Divisional Bench of this Court in **AG v. Dr. Shirani Bandaranayake and others SC Appeal 67/2013** - **S.C. minutes of 28-06-2013** in rejecting a preliminary objection raised pertaining to Rule 8 (3).

In addition to the above, another contention of the Petitioner was that the Respondent relied on a 'misconceived fact' that the Petitioner has failed to tender the

required number of documents to the Registry and in accordance with the provisions of Section 101 of the Evidence Ordinance submitted that 'he who asserts must prove' and shifted the burden to the Respondent to prove 'that the required number of copies were not tendered by the Petitioner to the Registry'. The Petitioner also relied on Rule 9 of the Supreme Court Rules which state that 'the Registrar may call upon the parties to furnish additional copies if he deem necessary for proper determination of the application' and submitted that in this instance, the Registrar did not call for additional copies as the Petitioner, at the relevant time had tendered the necessary number of copies.

Having referred to the submissions made by both Counsel, *albeit* brief, I would, now move to examine the record before us and the entries therein to ascertain the correct perspective of this application. However, I do not intend to go on a voyage of discovery and examine motion books and day books of the Registry to investigate and come to a finding as to the nature of documents filed, the number of copies filed, the date it was filed, or what was not filed. I will restrict myself to examine and peruse only the record before Court and the judges' brief.

The record bears out that the jurisdiction of this Court was invoked by the Petitioner by filing a motion. Let me begin by examining the said **motion dated 22-02-2012.** It was filed by the Attorney-at-Law for the Respondent-Respondent-Petitioner and it indicates that *the proxy, petition and affidavit of the Respondent-Respondent-Petitioner and marked documents are annexed thereto and moved Court to accept and file it of record*. The motion also gives the name of the Counsel retained on behalf of the Petitioner to support the said application and three dates to get this matter fixed for support. It also bears out, that the copies of the documents have been posted under registered cover to the Respondent and the relevant postal receipt dated 22-02-2012 annexed as proof of same.

The motion bears the seal of the Supreme Court dated 22-02-2012 and significantly has a minute therein dated 24-02-2012 and initialed,

"List for support on 28-05-2012."

The **first journal entry** of the record also sheds light to the matter in issue. The minute of the Registrar of the Supreme Court appearing below the notation; 'Attorney-at-Law files proxy from the Petitioner, petition, affidavit and documents' reads as follows;

'i. File

ii. ***Issue notice on Respondent for 28-05-2012***'

However, the journal entries do not indicate whether notices were tendered or dispatched but the next journal entry dated 24-04-2012 demonstrates that 'Attorney-at-Law for the Petitioner – Petitioner – Respondent has filed a motion dated 17-04-2012 with proxy and caveat and moved to accept same'.

It is observed that the said motion is worded thus:

> *"Whereas a notice of an application for Leave to Appeal on behalf of the Respondent-Respondent- Petitioner abovenamed* ***have been issued to Petitioner-Petitioner-Respondent in terms of Rule 8 (1) of the Supreme Court Rules,*** *I do hereby lodge caveat on behalf of Petitioner-Petitioner- Respondent indicating the Respondent's intention to oppose the grant of Leave to Appeal."* (emphasis mine)

Further, it is observed that, the proxy annexed to the said motion and filed of record is signed by the Chairman of the Respondent Company on 03-04-2012 in Liverpool, United Kingdom.

It is also observed that although the original motion of the Petitioner dated 22-02-2012 refers to the 'petition' in singular form, that the Judges' briefs have copies of **petition and other documents with an original seal (in purple ink) of the Supreme Court Registry bearing the date 22-02-2012 on the motion annexed to the petition itself, thus, giving credence to the fact, that more than one set of papers were filed.**

Therefore, the record in my view, bears out that **a judge of this Court**, after examining the documents filed by the Attorney-at-Law for the Petitioner and been satisfied of the said documents **directed that the matter be listed for support on 28-05-2012 and the Registrar of the Supreme Court made order to issue notice on the Respondent for 28-05-2012.**

Thus, excepting the above minutes, all the other matters which the parties made reference to relying upon motion books and day books, pertaining to number of notices

tendered, the date of tender and the date of dispatch in my view, are all disputed facts, and I do not intent to rely on same.

What is undisputed, relevant and significant is that the Court listed this application for 'Support' and directed to issue notice on the Respondent; the Respondent filed proxy and caveat six weeks prior to the date of Support and was before this Court on 28-05-2012, the first day the case was listed for Support, and on the said date itself raised a preliminary objection with regard to non-compliance of Rule 8(3) by the Petitioner.

Having examined the record before Court, **I would now proceed to consider Rule 8(3**) in the light of the submissions made before this Court.

Let me begin by summarizing the arguments put forward by the two parties. The Respondents contention is that, Rule 8 (3) is mandatory in nature and since the Petitioner has failed to comply with the provisions of the said Rule, the application should be dismissed *in limine.* The contention of the Petitioner on the other hand is the Petitioner has complied with the provisions of Rule 8 (3) for all intents and purposes and hence the said objection has no force or effect in law and should be overruled. Without prejudice to the above argument, the Petitioner also contends, that **the purpose of the Rule has been achieved and no prejudice has been caused** to the Respondent and hence the objection raised, should in any event be overruled.

Hence, with regard to the first argument of the Petitioner, it is apparent that this case revolves around the documents that were tendered to Court, at the point of invoking its jurisdiction.

As already emphasized, I do not wish to come to a finding with regard to disputed facts or matters that are highly contentious between parties. Hence, I make no pronouncement on the contention of the Petitioner, that the Petitioner has for all intents and purposes complied with Rule 8(3), based upon the record before Court.

Thus, I limit myself to answer the question **with regard to the instant application, is Rule 8(3) mandatory in nature which would result in dismissal of the application for non-compliance of Rule 8(3), or Could this Court use its discretionary power and excuse the Petitioner for non– compliance of the mandatory provisions of Rule 8(3)?**

The plethora of Judgements of this Court, recognize the mandatory nature of Supreme Court Rules and especially Rule 8 (3). Nevertheless, in certain cases, the Court has examined the facts pertaining to the matters before Court and excused a Petitioner for non-compliance of the said Rule 8 (3).

In the said background, I wish to consider the authorities relied upon by the learned Presidents' Counsel for the Respondent **to establish the mandatory nature of Rule 8(3)** and I wish to examine certain material facts of the said authorities in detail, since in my view, the factual matrix of the said authorities can be distinguished from the facts of the instant application before this Court for determination.

The first case relied upon by the Respondent is **Woodman Exports (Pvt) Ltd. v. Commissioner General of Labour and others (supra)**

The Petitioner in the said case, filed a Special Leave to Appeal application without annexing a single document on 23-12-2008 and one month hence, by way of a motion, tendered the documents and moved to list the application for support. Two weeks thereafter, the Registrar minuted that the notices have still not been tendered. On 20-03-2009 the day the application was listed for support, Court made Order, 'notices not given to Respondents' and **directed the Petitioner to support the application with notice to the parties** and re-fixed the case for a date two months hence. Six days prior to the 2nd date of support, notices were tendered and sent by registered post to the first to sixth Respondents, Commissioner General of Labour and Five others and when the matter came up for support on the 2nd day; viz 20-05-2009 there was no appearance for the Respondents and the matter was once again refixed. Meanwhile, notices sent to the fourth to sixth Respondents were returned and re-issued. The case was taken up on 15-07-2009 the third day of support and seven months after the lodging of the application and on the said date, the first and second Respondents were represented by State Counsel, and a preliminary objection was raised, that the notices were tendered to the Supreme Court only five months after date of filing of petition and that too, nearly two months after the direction of Court and thus, the Petitioner has not complied with Rule 8(3) of the Supreme Court Rules. Based on the aforesaid circumstances, the Court upheld the preliminary objection and dismissed the application of the Petitioner.

In my view, the facts of **Woodman case** can be distinguished from the instant application, in which the Respondent, a foreign company was very much aware of the Special Leave to Appeal application and filed caveat stating that it was in receipt of notice in terms of Rule 8(1) six weeks prior to the first date of support of the said application and indicated its intention to oppose the application for Special Leave to Appeal.

The *second case* relied upon by the Respondent, to establish the mandatory nature of Rule 8(3) was **A.H.M. Fowzie and 2 others v. Vehicle Lanka (Pvt) Ltd. (supra)**

In the said case too admittedly, the Petitioner failed to file the notices together with the application for Special Leave to Appeal. The Respondent, a local company however became aware of the Special Leave to Appeal application a day prior to the date of support of the Special Leave application when a case against the same party was taken up in the Court of Appeal and filed a motion and moved Court to reject the application *in limine* for the reason that Rule 8(3) had not been complied with.

The Court upheld the preliminary objection and rejected the Application of the Petitioner and held, that the purpose of Rule 8 is to ensure that all parties are properly notified in order to give a hearing to all parties and such purpose has not been achieved by the actions of the Petitioner in not adhering to the Supreme Court Rules, although the Petitioner, consequent to the motion filed by the Respondent to reject the application, filed papers and served it on the Respondent. The Court went onto hold, that filing of papers on a subsequent date cannot be considered as discharging the requirement under Rule 8(3) or substantial compliance with Rule 8(3) or as an application for extension of time under Rule 40 of the Supreme Court Rules.

This case too, in my view can be distinguished from the instant application before us, in which no motion was filed for the dismissal of the case *in limine* and in any event, the Respondent, the foreign company was put on notice and was very much aware of the Special Leave to Appeal application and the date fixed by Court for support of the application and as stated earlier also filed a caveat and a motion and more over indicated in the motion filed in Court that Papers were served under Rule 8 (1) and indicated the opposition to the application and was present in Court on the said date.

The *third case* relied upon by the Respondent with regard to the mandatory nature of Rule 8(3) is **Sudath Rohana and another v. Mohammed Cassim Mohammed Zeena and another (supra)**

The said case was a Leave to Appeal application filed against the Order of the Provincial High Court, wherein the Petitioner admittedly failed to file notices together with the said application but served a set of documents on the Respondent direct and not through the Supreme Court Registry. The Respondent filed a motion raising a preliminary objection with regard to the mandatory requirement of Rule 8(3) and moved to reject the application *in limine*. In the said case, response of the Petitioner to the said contention was that there was no requirement for the Petitioner to follow the procedure laid down in Rule 8(3) as it was not an appeal from the Court of Appeal.

Shirani Bandaranayake, J. (as she was then) after a careful consideration of the appeal procedure viz-a-viz the Supreme Court Rules held that it is Rule 28 (3) of Section C of Part I of the Supreme Court Rules that is applicable for appeals from the Provincial High Court and not Rule 8 (3) of Section A of Part I of the Rules. The Court went on to hold that Rule 28(3) too, is mandatory and thus, upheld the preliminary objection and dismissed the appeal.

Whilst, I am in agreement with the *ratio-decidendi* of the aforesaid **Sudath Rohana case** pertaining to appeals from the Provisional High Court to the Supreme Court, the applicability of Supreme Court Rules and the mandatory nature of Rule 28(3), in my view, the said case is not on 'all fours' similar to the instant application, since the Respondent in the instant application did not take any constructive steps, prior to the date of support either to file a motion and move for rejection of the application *in limine* for non-compliance of Rule 28(3) or for dismissal of the application and thus the aforesaid case relied upon by the Respondent too, in my view can be distinguished from the instant application.

Having referred to the three judgements relied upon by the Respondent, I wish to refer to two other judgements which are often cited before this Court, where Rule 8(3) has been meticulously analyzed.

The first case is **Tissa Attanayake v. Commissioner General of Elections and others (supra)** wherein, this Court upheld the preliminary objection raised with regard to non-compliance of Rule 8(3). This case too, in my view, can be distinguished from the instant

application since, it is apparent from the facts of the said case, that the Petitioner therein moved to serve notice on several of the Respondents, only after the first day the matter was fixed for support and moreover after such objection was raised on behalf of the Respondents. In the said case, the Court held that the purpose of Rule 8(3) was to ensure that parties are properly notified in order to give them a hearing, prior to determining a Special Leave to Appeal application.

Secondly, **Udaya Shantha v. Jeewan Kumaratuga and others 2012 [BLR] 129** wherein this Court upheld the preliminary objection raised pertaining to non-compliance of Rule 8(3) of the Supreme Court Rules and reference was made to the entire gamut of the cases delivered by this Court pertaining to the mandatory nature of the said Rule. However, from the facts of the said case it is apparent that at the time the said case was lodged, admittedly no notice was tendered and for a period of six months no steps what so ever were taken by the Petitioner to tender notices. Thereafter only steps were taken, to amend the petition, file annexures to the petition, and seek extension of time in terms of Rule 40 and to get the case fixed for support and serve notice on the Respondents and at that point of time the Respondents filed a motion moving Court to dismiss the application *in limine* for controverting Rule 8(3) and failing to prosecute the application with due diligence. Thus, in my view, the said case too can be distinguished from the instant application before this Court for determination.

Likewise, in **Colombo Business School Ltd v. Sri Lanka Tea Board – SC/HC/LA 69/2018 - S.C. minutes of 25.01.2021** a recent judgment of this Court, pertaining to Rule 28(3) of the Supreme Court Rules, this Court placed much reliance and weight on the minute of the learned Judge of this Court, in determining the crucial issue with regard to tendering of notice. In the said case, the relevant minute of the Judge sitting in chambers viz. *"Petitioner is directed to tender notice and move for leave"* was considered the pivotal point in coming to the conclusion that no notice was tendered by the Petitioner, at the time of lodging of the Leave to Appeal application which in turn resulted the Court to uphold the preliminary objection raised with regard to non-compliance of Rule 28(3) and dismiss the case *in limine.*

Furthermore, in the aforesaid case, it is observed that the fact of notices not being tendered which resulted in notice not being issued on the Respondent was not a disputed fact between the parties, unlike in the present case**, where tender and issuance of notice is**

the bone of contention between the two parties. Hence, the said case too, can be distinguished from the instant application.

In all the cases discussed above, although the focal point or the pivotal issue is Rule 8(3) and its mandatory nature, the facts pertaining to tender and issuance of notices in the said cases are distinct and different and hence in my view not comparable and can be distinguished from each other and more so with the instant application. Hence, though the thread that runs through the fabric is Rule 8(3) and the said cases speak of the mandatory nature of Rule 8 (3), it has no direct bearing, in so far as the instant application is concerned, since in the instant application the Petitioner and the Respondent are at variance with regard to the tender and issuance of notice.

Furthermore, in the cases discussed above without any exception, admittedly, notices were not tendered together with the Petition of Appeal, whereas in the instant matter, the Petitioner emphatically adverts that notice was tendered to Court together with the Petition of Appeal and contends that for all intents and purposes the Petitioner has complied with Rule 8(3). Hence, there is a material difference between the instant application and the rest of the cases considered and analyzed in this judgement.

Thus, whilst appreciating the submissions of the learned Presidents' Counsel for the Respondent with regard to the mandatory nature of Rule 8(3) of the Supreme Court, I am of the **view that the instant application is unique and this application should be looked at and examined independently from its precise facts and context.**

At this stage, I wish to draw attention to another judgement of this Court.

In **AG v. Lokugalappathilage Cyril SC/SPL/LA 272/2013 - S.C. minutes of 10-10-2016** wherein a preliminary objection pertaining to Rule 3, 6 and 10 of the Supreme Court Rules was raised, this Court observed that there is a necessity to give a strict interpretation to Supreme Court Rules and also that matters concerning Rules need to be considered on a case by case basis.

Whilst I am in agreement with the said observation, I am of the view that each case is unique and when a Court is considering a preliminary objection, the object of the rule, the circumstances of default, the explanation of the Petitioner for the default, should be carefully

analyzed and examined on a case by case basis, in deciding whether a case should be dismissed *in limine,* for failure to comply with a Supreme Court Rule.

Having said that, I pause at this moment to examine the submissions of the learned Presidents' Counsel for the Petitioner pertaining to Rule 8(3).

First and foremost, the learned Presidents' Counsel for the Petitioner emphatically contends, the authorities relied upon by the Respondent has no relevance to this matter, since the Petitioner has fully complied with the mandatory provisions of Rule 8(3) and tendered the necessary papers to Court and that in the first instance when this matter was taken up before Court, the instructing Attorney personally informed this Court, that five copies were tendered to Court and in addition a copy was directly served on the Respondent. However, as stated earlier the record before us, does not bear out the said facts and the said facts are the 'disputed facts' that I will not endeavor to investigate or rely upon in determining this case.

Thus, I will confine myself to the record before Court and only rely upon the minutes in the record, which I believe was entered after examining the documents before Court and which unambiguously state "List for Support on 28-05-2012" and "issue notice on the Respondent."

The next contention of the Petitioner before this Court was twofold.

Firstly, **that in any event the Respondent is before Court and the purpose of the Rule has been achieved; and**

Secondly, **no prejudice whatsoever has been caused to the Respondent by the alleged non-compliance of Rule 8(3) by the Petitioner.**

In order to substantiate the first contention with regard to **the purpose of the Rule,** the learned Counsel for the Petitioner relies on the below mentioned observations made by Shirani Bandaranayake, J. in **Tissa Attanayake case (supra)** and in **Saman Niroshana case (supra)** wherein it is stated as follows;

> *"the purpose of Rule 8(3) is to ensure that all necessary parties are properly notified and to give a hearing to all parties"*

Likewise, in order to substantiate its second contention **that no prejudice was caused to the Respondent** by the Petitioners' alleged non-compliance of Rule 8(3), the learned Counsel for the Petitioner relies on the Order made by a Divisional Bench of five Judges of this Court, in **AG v. Dr. Shirani Bandaranayake and Others (supra)** wherein it is observed,

> *"that no prejudice whatsoever has been caused to any of the parties in this case by reason of non-compliance of Rule 8(3)."*

I wish to consider the Order made by the Divisional Bench first, in the aforesaid **AG v. Dr. Shirani Bandaranayake** case. The Petitioner of the said case was the Hon. Attorney General and it was a Special Leave to Appeal application against the Judgement of the Court of Appeal. Consequent to support of the case by the Petitioner, the Court granted Special Leave to Appeal against all the Respondents. Subsequently, at the hearing of the appeal before the Divisional Bench, two of the Respondents brought to the attention of Court, that they could not file caveat nor appear in Court on the date on which the matter was first taken up for granting of Special Leave to Appeal as the said two Respondents were not served with any notice, pursuant to filing of the application for Special Leave to Appeal by the Petitioner; i.e. non-compliance of Rule 8(3) of the Supreme Court Rules.

The Court examined the record and held that there **was substantial compliance by the Petitioner of Rule 8(3) of the Supreme Court Rules.** However, in the interests of justice, the said two Respondents who were initially not heard at the time of granting of special leave were *granted an opportunity to participate in the proceedings for granting of Special Leave to Appeal* and accordingly the Court set aside the earlier Order and set down the matter for granting of Special Leave to Appeal against the said two Respondents. Thereafter, when the case was taken up for the said purpose of granting of Special Leave against the said two Respondents, the two Respondents once again raised an objection pertaining to non-compliance with Rule 8(3). The Divisional Bench of this Court examined the said issue and then held, that **no prejudice whatsoever was caused to any of the parties by reason of non-compliance of Rule 8(3) by the Petitioner** and overruled the objection raised pertaining to Rule 8(3) of the Supreme Court Rules. Thus, in the aforesaid case it is observed that a **Divisional Bench of this Court, when examining the mandatory nature of Rule 8(3)**

considered 'substantial compliance' as well as 'no prejudice rule' in arriving at its determination.

The contention of the Petitioner pertaining to 'purpose been achieved' and 'no prejudice been caused to the Respondent' in my view, is a significant factor that should be borne in mind when considering matters of this nature.

Thus, having referred to the contentions of both parties, I now come to the fundamental question that begs an answer in this application.

If the purpose of the Rule has been achieved and no prejudice has been caused to the Respondent, then in such a situation should the Court uphold a preliminary objection raised, with regard to non-compliance of Rule 8(3) or , if I may be more explicit, if the Respondent is before Court, very much prior to the first day of support, having indicated that notices were issued on the Respondent in terms of Rule 8(1) of the Supreme Court Rules and it is apparent that the purpose of the Rule has been achieved and no prejudice whatsoever has been caused to the Respondent, then should a Court uphold a preliminary objection raised based exclusively upon the mandatory nature of Rule 8(3) and dismiss a Special Leave to Appeal application *in limine*, notwithstanding the position taken up by the Petitioner, that he has complied with the provisions of Rule 8(3).

The foremost duty of a Court is to administer justice and in the pursuit of seeking justice, I do not think that a Court should take such a drastic action of dismissal of an action. The circumstances of this case in my view, does not warrant such a course of action to be taken at this point of time. Undoubtedly, this Court in many an instance has held that the Supreme Court Rules are mandatory in nature and I am in agreement with that view.

The question before this Court now, is the consequences of non-compliance. Can the Court use its inherent power and excuse such a non-compliance? Is it a matter where the discretion of Court can be resorted to? In order to find answers to such queries, I wish to consider the recent jurisprudence of this Court, with regard to Supreme Court Rules and specifically, the consequences of non-compliance of a specific Supreme Court Rule.

The first case, I wish to consider with regard to the *exercise of discretion of Court* is the case of **Rohitha Peiris and another v. Doreen Peiris 2015 Vol XXI [BLR] 101**. In this case,

admittedly the Petitioner failed to file the notices to be served on the Respondents together with the Petition of Appeal and an objection was raised pertaining to non-compliance of Rule 8(3). This Court whilst re-iterating the mandatory nature of Rule 8(3), observed that *the Court has a discretion to make Order in an appropriate case even if non-compliance had not been explained.* In this **Peiris** case, the only explanation for non-compliance was 'inadvertence'. Sripavan, J., (as he then was) considered the said position in order to exercise the discretion in favour of the Petitioner and also examined the entire appeal process resorted to by the Petitioner, the failure to adhere to Rule 7 and 40 and specifically the time bar of lodging the appeal and held that the **Court was not inclined to exercise the discretion** in favour of the Petitioner and upheld the preliminary objection and dismissed the application.

The next case, I wish to consider is **Nestle Lanka PLC v Gamini Rajapakse SC/HC/LA No.54/2018 – S.C. minutes of 20.09.2020 i**n which the preliminary objection raised was with regard to the failure of the Petitioner to comply with Rule 2, 7 and 8 of the Supreme Court Rules. This Court in its judgement pronounced by his Lordship the Chief Justice emphasized the importance and mandatory nature of the Supreme Court Rules and the consequences that would follow in case of a breach of a Rule.

His Lordship also considered in detail, the series of cases where this Court held that non-compliance of Rule 8(3) would result in the dismissal of an application and also the cases which recognized the proposition that mere technicalities should not be thrown in the way of administration of justice and specifically Rule 34 and 2 respectively, which require a party to show due diligence in prosecuting an appeal as well as a party seeking Special Leave to exercise due diligence in obtaining necessary material to submit to Court at the time of filing papers and observed that the Petitioner in the aforesaid case was **unable to satisfy Court that it exercised due diligence** and thus upheld the preliminary objection raised by the Respondent and dismissed the application.

Similarly, in **Colombo Business School case** discussed earlier, this Court examined the threshold provisions of timeline referred to in Rule 28 (3) and 7 of the Supreme Court Rules and held, the consequences of the failure of the Petitioner to comply with Rule 28(3) would necessarily result in upholding the preliminary objection raised pertaining to the mandatory nature of Rules 28(3). Nevertheless, the Court considered the 'due diligence rule' to ascertain whether the Court could excuse the Petitioner of its non-compliance and came to the

conclusion, that the **Court cannot exercise its discretion** in favour of the Petitioner, when the Petitioner failed to adhere to the time line in filing an application for Special Leave to Appeal and based upon the said factors upheld the preliminary objection raised pertaining to Rule 28(3) and dismissed the application.

From the afore discussed cases, it is manifestly clear, that this **Court in determining matters pertaining to Supreme Court Rules, not only considered the mandatory nature of such Rules, but also explored the possibility of exercising the discretionary power** it inherits and looked into the circumstances of the case to examine whether the actions or the failure to comply with the provisions of the Supreme Court Rules can be excused in favour of a Petitioner.

Similarly, the **Court has also explored the 'due diligence rule' incorporated in Rule 34 of the Supreme Court Rules** *viz-a-viz* the course of action followed by a Petitioner, to determine whether the steps taken by a Petitioner is sufficient or to the satisfaction of Court, in order to excuse a Petitioner from non-compliance of a Supreme Court Rule.

Nevertheless, it is significant that in the aforesaid cases having discussed the discretionary power of Court, this Court upheld the said preliminary objection raised by the Respondents pertaining to non-compliance of Rule 8(3) and 28(3) respectively. Thus, the Court did not exercise its discretion in favour of the Petitioner in the said instances.

However, it is seen in certain cases determined by this Court, in the recent past, the discretionary power has been exercised in favour of the Petitioner. The Courts have taken this path when the purpose of the Rule has been achieved; when no prejudice has been caused to the Respondent; and when there is substantial compliance of the Rule. The learned Counsel for the Petitioners' main contention before this Court was also based upon this ground.

Hence, I wish to examine some of the said judgements at this juncture.

In **Wijesinghe v. Tenderlea Farm (Pvt) Ltd. SC/SPL/LA No. 159/2017 - S.C. minutes of 17-09-2020,** a preliminary objection was raised by the Respondent pertaining to the Petitioner not tendering certain documents together with the Petition and thus, not complying with Rule 2 and 6 of the Supreme Court Rules of 1990. The Court held that there was 'no material breach' of Rule 2 and 6 on the part of the Petitioner. The Court further

observed that the Petitioner has 'substantially complied' with the Rules in filing the said case and also **'no prejudice has been caused'** to the Respondent. Hence, the preliminary objection raised by the Respondent pertaining to the non-compliance of Supreme Court Rule was overruled by this Court.

In the said judgement, reference was made to the case of **Kiriwanthe v. Navaratne [1990] 2 SLR 393,** wherein observations were made in respect of Supreme Court Rules of 1978 as follows:-

> *Rules must be complied with but the law does not require or permit an automatic dismissal of the party in default and that consequences of non-compliance is a matter falling within the discretion of the Court, to be exercised after considering the nature of the default as well as the excuse or explanation therefore, in the context of the object of the Rule.*

Similarly, in **Ediriwikrama v. Rathnasiri SC App 85/2004 – S.C. minutes of 18-12-2012**, this Court overruled an objection taken pertaining to Rule 8(3). It was upon the basis that the objection was raised not at the initial stage of granting of leave but ten years thereafter when the hearing of the appeal was taken up. The Court was inclined to accept the submission that **no prejudice has been caused** to the Respondent by the failure of the Petitioner in non-tendering of notices as stipulated in the Supreme Court Rules. In overruling the submission of the Respondent with regard to the mandatory nature of Rule 8(3), the Court observed and highlighted that in the special circumstance of the said case that to achieve the smooth function of Court, it was not desirable to do otherwise since no prejudice whatsoever has been cased to the Respondent.

Likewise, in **Sirisena v. Gunawardena – SC/SPL/LA 133/15 – S.C. minutes of 02-08-2017**, a case in which the notices were not tendered as required under Rule 8(3), but were tendered seven days thereafter and a preliminary objection was raised pertaining to non-compliance of Rule 8(3) and 40 of the Supreme Court Rules, the purpose of Rule 8 was considered by this Court in the light of discretion enumerated in Rule 40 and held, though delayed, there was 'substantial compliance' and such compliance was considered sufficient

to overrule the preliminary objection raised and entertained the application. Further, the Court went on to observe that in considering matters of this nature, it is necessary to consider whether non-compliance with the Rules has adversely affected a party to the case and the functioning of justice in coming to its determination.

Thus, it could be seen in an appropriate case, this Court has used its discretion and overruled the objections raised pertaining to Rule 8(3), although in a multitude of cases, this Court has upheld the mandatory nature of Rule 8(3), thus giving credence to the fact that every case should be looked at and considered on its own merits, in order to administer justice and to maintain the smooth function of the Court procedure.

It is also apparent with regard to Rules, that the jurisprudence of this Court has been vibrant and diverse. On one hand this Court has accepted the mandatory nature of Rule 8(3) and on the other hand has considered due diligence, no prejudice rule and discretion of Court in determining a preliminary objection raised before Court pertaining to complying with Supreme Court Rules. This in my view, is giving a holistic approach to the consideration and examination of the Supreme Court Rules, based upon the facts of each case independently on a case by case basis.

At this juncture, I also wish to refer to the oft-quoted observation made by Mark Fernando J., in **Kiriwanthe v Navaratne case (supra)** with regard to Supreme Court Rules of 1978.

> "I am content to hold that the requirement of Rule 46 must be complied with, but strict or absolute compliance is not essential, it is sufficient if there is compliance which is
>
> "substantial''- this being judged in the light of the object and purpose of the Rule. It is not to be mechanically applied [ ] the Court should first have determined whether the default has been satisfactorily explained, or cured subsequently without unreasonable delay, and then have exercised a judicial discretion either to excuse the non-compliance or to impose a sanction."

The above observation made in respect of Supreme Court Rules of 1978 was referred to and meticulously analyzed and evaluated by Shirani Banadaranayake J., in **Fowzie v Vehicle Lanka case (supra)** viz-a-viz the Supreme Court Rules of 1990, in coming to the conclusion, inter alia that the purpose and the objective of Rule 8, is to ensure that all parties are properly notified in order to give a hearing to all parties, which school of thought has run through the gamut of cases in respect of Rule 8(3), wherein this Court has upheld its mandatory nature and I am in agreement with such school of thought.

Nevertheless, as discussed earlier, this Court has categorically upheld the inherent power of Court to look at Rule 8(3) from the perspective of achieving the purpose of the Rule as well as no prejudice being caused to the Respondent as specifically observed in the **Divisional Bench decision of this Court in AG v Shirani Bandaranayke (supra)** and thus unequivocally accepted the discretionary power vested with this Court to look at a matter pertaining to Supreme Court Rules independently and sacrosanctly.

This brings me back to the case before us for determination.

In the instant application, filed almost a decade ago, the Honourable Judge of this Court sitting in chambers, directed that the matter be supported with notice to the Respondent. The Respondent, a foreign company filed caveat upon the basis that notice was received in terms of Rule 8(1) and indicated its intention to oppose the Special Leave to Appeal application pertaining to *an Enforcement of a default judgement obtained from the Royal Courts of Justice in the United Kingdom.* On the first day the case was taken up for support, the Respondent was present in Court and raised the preliminary objection pertaining to Rule 8(3), upon the premise that the Respondent was not served notice through the Supreme Court Registry. It is admitted and not in dispute that notice was served directly by the Petitioner on the Respondent, whereas tender of notice and issuance of notice on the Respondent through the Supreme Court is the matter in dispute, upon which the entire case revolves.

Eight long years have passed and the case is still at the starting block. The issues that spring from the Court of Appeal judgement with regard to registering of a default judgement in terms of the Reciprocal Enforcement of Foreign Judgement Ordinance, and the merits of the application viz-a-viz the provisions of the Mutual Assistance in Civil and Commercial

Matters Act, have still not been considered by this Court, to determine in the first instance, whether this application is a fit and proper case to grant Special Leave to Appeal or not.

Whilst emphasizing the mandatory nature of Rule 8(3) of the Supreme Court Rules and that the said Rules, made under and in terms of the Constitution should be followed and cannot be easily disregarded, I wish to consider this unique case independently and on its own steam. I am also mindful of the length of time and the delay in administering of justice to the parties before Court.

I place no reliance on disputed facts as discussed earlier in the judgement and rely only on the Order made by the Judge of this Court directing to 'list this matter for support and to notice the Respondent'. Thus, I observe that there is no clear evidence before this Court to establish the principal assertion of the Respondent, that the Petitioner failed to 'tender notice' and did not 'tender notice' when lodging the instant application and hence failed to act diligently and thereby breached or failed to comply with Rule 8(3) of the Supreme Court Rules. Unlike in most or almost all the judgements referred to herein where the non-tender of notice together with the Petition of Appeal is an admitted fact, in the instant application, the Respondent has failed to establish on the face of the record, the main ingredient required to raise a preliminary objection pertaining to Rule 8 (3), namely failure to 'tender notice' to the Supreme Court together with the Petition of Appeal. As discussed earlier in this judgement it is a matter in dispute and not an admitted fact in the instant application.

On the other hand, the purpose of Rule 8(3) is to ensure that parties are notified and given a hearing and in this application, undoubtedly such purpose has been fulfilled. The Respondent filed caveat very much prior to the day the application was first fixed for granting of Special Leave to Appeal and in its motion indicated that notices were issued in terms of Rule 8(1) and on the first date itself, was before this Court and was represented by Counsel who himself was the competent authority of the British Company.

Thus, I am of the view that no prejudice whatsoever has been caused to the Respondent. In fact, substantial compliance of Rule 8(3) is accepted by both parties and the purpose and the object of the Rule has been achieved. Hence, I see no reason whatsoever, not to excuse the Petitioner, from non-compliance of Rule 8(3) as contended to by the Respondent. I am of the view, that this is a fit case for this Court to use its inherent power in

determining this application, and excuse the Petitioner in the circumstances of this case, for non-compliance of Rule 8(3) as adverted to in this application.

Thus, for reasons more fully adumbrated in this judgment, I hold that this case is a unique and a stand-alone case, fit and substantial enough for this Court to exercise its judicial discretion in favour of the Petitioner. Thus, I overrule the preliminary objection raised before this Court by the Respondent pertaining to Rule 8 (3) of the Supreme Court Rules of 1990 and reject the application made by the Respondent to dismiss this Special Leave to Appeal application *in limine.*

The preliminary objection is thus overruled and rejected. In the circumstances of this case I order no costs.

Judge of the Supreme Court

Jayantha Jayasuriya PC, CJ.

I agree

Chief Justice

Vijith K. Malalgoda PC, J.

I agree

Judge of the Supreme Court

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

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

1. **Walbothalage Sayuki Lyensa Fernando**
No. 74C, Malwatta Road, Asgiriya,
Gampaha.

2. **Walbothalage Saman Dharshana Fernando**
No. 74C, Malwatta Road, Asgiriya,
Gampaha.

Petitioners

SC FR Application No. 17/19

Vs.

1. **S.A.S.U. Dissanayake**
No. 142, Lakshmi Road, Bendiyamulla,
Gampaha.

2. **S.T. Hettiarachchi**
No. 142/1, Lakshmi Road,
Bendiyamulla,
Gampaha.

3. **S.P.S.M. Sudasinha**
No. 228/F, Vijayarama Road,
Gampaha.

4. **S.A.L.N. Dissanayake**
No. 142, Lakshmi Road, Bendiyamulla,
Gampaha.

5. **I.P. Hettiarachchi**
No. 142/1, Lakshmi Road,
Bendiyamulla,
Gampaha.

6. **S.P.T.P. Sudusinha**
No. 228/F, Wijerama Road,
Gampaha.

7. **H.M. Gayani Wathsala**
Principal and the Chairman of the
Interview Board to admit students to
Grade 1 of WP/Gam/ Yasodara Devi
Balika Maha Vidyalaya,
Yasodara Devi Balika Maha Vidyalaya,
Vidyalaya Mawatha,
Gampaha.

8. **N.P.T.M. Rupasinha**
The Secretary of the
Interview Board to admit students to
Grade 1 of WP/Gam/ Yasodara Devi
Balika Maha Vidyalaya,
Yasodara Devi Balika Maha Vidyalaya,
Vidyalaya Mawatha,
Gampaha.

9. **L.P.D. Perera**
Senior Teacher from the Primary
Section and Member of the Interview
Board to admit students to
Grade 1 of WP/Gam/ Yasodara Devi
Balika Maha Vidyalaya,
Yasodara Devi Balika Maha Vidyalaya,
Vidyalaya Mawatha,
Gampaha.

10. **R.A.I.D. Ranaweera**
Member of the Interview Board to admit students to Grade 1 of WP/ Gam/ Yasodara Devi Balika Maha Vidyalaya,
Yasodara Devi Balika Maha Vidyalaya,
Vidyalaya Mawatha,
Gampaha.

11. **W.A.D. Udayangani**
Representative of the Old Girls' Association and Member of the Interview Board to admit students to Grade 1 of WP/Gam/ Yasodara Devi Balika Maha Vidyalaya,
Yasodara Devi Balika Maha Vidyalaya,
Vidyalaya Mawatha,
Gampaha.

12. **M.D.S. Jayalath**
The Principal,
WP/Gam/ Kirindiwela Maha Vidyalaya,
Gampaha.
(Chairman of the Appeals and Objections Investigation Board to admit students to Grade 1 of WP/Gam/ Yasodara Devi Balika Maha Vidyalaya)

13. **P.N. Damayanthi**
The Secretary of the Appeals and Objections Investigation Board to admit students to Grade 1 of WP/Gam/ Yasodara Devi Balika Maha Vidyalaya

14. **J.A.N. Thushara**
Vice Principal
Siddhartha Maha Vidyalaya,
Gampaha.

Member of the Appeals and Objections Investigation Board to admit students to Grade 1 of WP/Gam/ Yasodara Devi Balika Maha Vidyalaya

15. **Thusitha Kottahachchi**
Representative of the School Development Society and Member of Appeals and Objections Investigation Board to admit students to Grade 1 of WP/Gam/ Yasodara Devi Balika Maha Vidyalaya

16. **K.M.H.M.I. Kariyawasam**
Representative of the Old Girls Association and Member of Appeals and Objections Investigation Board to admit students to Grade 1 of WP/ Gam/ Yasodara Devi Balika Maha Vidyalaya

17. **W. Mallika**
Director
Office of Regional Education,
Gampaha.

17(A). **K.G. Sirima**
Director,
Office of Regional Education,
Gampaha.

18. **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.**
Appearance	**:**	Saliya Pieris, PC with Susil Wanigapura for the Petitioner. Rajiv Goonetillake, SSC for the 7th, 17th, 17A and 18th Respondents.
Argued on	**:**	31st August and 25th September, 2020
Written Submissions	**:**	Post-argument written submissions on behalf of the Petitioners filed on 23rd October 2020. Post-argument written submissions on behalf of the 7th, 17th and 18th Respondents filed on 5th January 2021.
Judgment delivered on	**:**	23rd March, 2021

JUDGMENT

Yasantha Kodagoda, PC, J.

This judgement relates to an Application filed in terms of Article 126 of the Constitution alleging infringement of fundamental rights. On 4th November 2019, this Court granted leave to proceed to the Petitioners in respect of the alleged infringement of Article 12(1) of the Constitution.

The 2nd Petitioner is the father of the 1st Petitioner, who is a minor. This Application relates to the refusal by one or more of the Respondents to admit the 1st Petitioner to Grade 1 of the Western Province, Gampaha, Yasodara Devi Balika Maha Vidyalaya (hereinafter referred to as the 'Yasodara Devi Balika Maha Vidyalaya').

The 1st, 2nd and 3rd Respondents are three children and the 4th, 5th and 6th Respondents are their respective parents. According to the Petitioners, applications submitted on behalf of these three children had been allocated marks in a manner discriminatory of the Petitioners, and they have been admitted to Yasodara Devi Balika Maha Vidyalaya, through the same category the application submitted on behalf of the 1st Petitioner belonged, namely 'children of residents living in close proximity to the school'. The 7th

Respondent is the Principal of Yasodara Devi Balika Maha Vidyalaya who had also functioned as the Chairman of the Interview Board that selected students for admission to Grade 1 of the school. The 8th Respondent was the Secretary of the Interview Board and one of its members. The 9th to 11th Respondents were the other members of the said Interview Board. The 12th, 13th and 14th to 16th Respondents were respectively the Chairman, Secretary and members of the Board of Appeals and Objections established in terms of the circular containing the scheme of admission to Grade 1 of public schools. While the 17th Respondent was at the time of filing this Application the Director of the Regional Education Office of Gampaha, the 17A Respondent is his successor. The 18th Respondent is the Honourable Attorney General and had been cited in compliance with the requisite legal requirement.

Notwithstanding Notice being issued on all Respondents, the 1st to 6th and 8th to 16th Respondents were absent at the hearing and unrepresented. However, it was evident that, the 7th Respondent in effect represented the interests of the 8th to 17A Respondents. The absence of participation of the 1st to 6th Respondents at the hearing was significant, particularly as the Petitioners levelled a particular allegation against them. However, at the hearing, learned President's Counsel for the Petitioners informed Court that he was not urging that this Court makes any order against the interests of the said Respondents.

As I had the occasion to observe in *Shavanthi Lakshika Samarakoon and Another v. The Secretary, Ministry of Education and Others* [CA(Writ) 67/2019, C.A.M. 21st November 2019], young parents understandably consider gaining admission of their children to preferred public or private schools to be of fundamental importance in ensuring that a sound education is provided to their children in order to pave the way forward to a good foundation being laid for their future. Preference of schools is largely determined based on both the actual position as well as perceptions regarding the availability of educational resources and the standard of education, existence of co-curricular and extra-curricular activities, discipline, nature and the strength of the alumni of the relevant school, convenience in so far as the location of the school is concerned and the reputation of the school. Particularly given the demand for reputed public and private schools far exceeding the availability of such schools, parents obviously consider gaining admission of their children to preferred schools to be a major challenge. It takes the form of a stiff competition among parents who prefer applications to schools on behalf of their children. In *Sarath Hulangamuwa v. Siriwardena, Principal, Visakha Vidyalaya and others* [(1986)1 Sri L.R. 275] Justice Siva Selliah aptly described this competition as the *'annual scramble for admission'*.

Unavoidably though, insufficiency in the availability of necessary resources in the public sector has prevented the State from providing equal resources to all schools. Thus, there exists a significant disparity in resources and standards of public schools. This is a factor which partially negates reaping the fruits of free education. Though free education is not a fundamental right per-se, Article 27(2)(h) of the Constitution recognizes the duty on the part of the State to provide for the complete eradication of illiteracy and the assurance to all persons the right to universal and equal access to education at all levels. Thus, it is necessarily the responsibility of the State to ensure that, as far as it is reasonably possible, the standard of education of all public schools be raised to a suitable level, enabling children to receive a suitably high quality of primary and secondary education, irrespective of the school to which they gain admission. If the prevailing disparity in the standards of public schools is reduced to a meaningful level and the standards of all schools are raised, the clamour on the part of parents to admit their children only to a few reputed public schools will be significantly reduced.

Be that as it may, while semi and fully private schools manage admission of students to their schools through their own internal selection and decision-making schemes and processes founded upon their own internal interests, values, and policies, the admission of students to public schools (both managed by the Government and Provincial Councils) is regulated by State policy. Section 37 of the Education Ordinance, which empowers the Minister to make Regulations, provides in section 37(2)(d) that the Regulations which the Minister is empowered to make, may include those relating to admission of children to schools. The legality of the admission scheme, the application of which is the subject matter of this Application, has not been challenged. Hence, further judicial scrutiny of the legality of the scheme contained in Circular No. 24/2018 dated 31st May 2018 issued by the Secretary to the Ministry of Education referred to in this judgment, would not be necessary. Nevertheless, it is necessary to point out that the scheme relating to the admission of students to public schools must necessarily be founded upon the principle of equality which is the core value protected by Article 12 of the Constitution.

It is necessary for me to place on record that the Supreme Court which is called upon to scrutinize the lawfulness of the selection or rejection of a student for Grade 1 admission of a public sector school, is acutely conscious of the arduous task that has to be fulfilled by both the interview and appellate panels within a limited time frame. Application of the provisions of the governing circular to literally hundreds of applications and taking decisions on admissions, is certainly not an enviable task.

Prior to the narration of the evidence placed before this Court by the Petitioners and the 7th Respondent, and the positions taken up by and on their behalf, it would in my view be appropriate to set down the applicable provisions of the afore-stated Circular, in terms of which both the Petitioners and the Respondents agree that admission of students for

Grade 1 of all public schools for the year 2019 was governed. This circular contains the applicable scheme in terms of which decisions should be taken regarding the admission of students to Grade 1. Chief Justice Sarath Silva has in *Haputhanthrige and others vs. Attorney-General [2007 (1) SLR 101]* held that a circular containing the admission scheme to Grade 1 is to be deemed the 'law' governing admission of children to public schools, as it is *'a binding process of regulation pertaining to the admission of children to government schools'*. Thus, it is necessary to proceed on the footing that the afore-stated circular contained the 'applicable law' relating to this matter. It is trite law that a violation of the applicable law would amount to a violation of the rule of law, and hence such a violation would tantamount to an infringement of the fundamental right to equality enshrined in Article 12 of the Constitution. Therefore, the primary focus of this judgment would be to consider whether clauses of Circular No. 24/2018 had been correctly applied to the application presented by the 2nd Petitioner on behalf of the 1st Petitioner to Yashodara Devi Balika Maha Vidyalaya with the objective of gaining admission to Grade 1 of that school.

Scheme for the admission of students for Grade 1 of all public schools

Admission of students for the year 2019 to Grade 1 of all public schools which includes both 'national schools' coming under the purview of the government and 'provincial schools' coming within the purview of the provincial administration system, is regulated by the afore-stated circular. While the published version of this circular titled "Provisions and Guidelines applicable regarding the admission of students to Grade 1" was produced by the Petitioners marked "P2", the full circular titled "Admission of students to Grade 1" was produced by the 7th Respondent, marked "R5". It was admitted by both learned counsel that the contents of these two documents are identical.

According to clause 3 of this circular, there are six categories under which students should be admitted to Grade 1 of public schools for the year 2019. They are (i) children of residents living in close proximity to the school, (ii) children of old boys / girls of the relevant school, (iii) brothers / sisters of students already receiving education in the relevant school, (iv) children of personnel working in institutions coming within the Ministry of Education and which perform functions directly relating to school education, (v) children of officials of government institutions / corporations / statutory boards and government banks who have been transferred either due to requirements of the government or on annual transfers, and (vi) children of those who had been resident overseas with the respective child and returned to Sri Lanka. Of these six categories, 50% of the student intake is to be from the first category, namely, children of those resident in close proximity to the school (hereinafter referred to as the 'close proximity to the school category'). The maximum number of marks that may be assigned to each of these categories is 100.

In terms of clause 4.7 of the circular, for the purpose of being eligible for selection under the 'close proximity to the school category', the parents or the guardian of the child who is sought to be admitted to a particular school should be resident within an area referred to as the 'catchment area' of that school. What is referred to as the 'catchment area', is generally the administrative district within which the relevant school is situated. If the school is situated near a boundary of a particular district, the closest and adjacent divisional secretariat area of the adjacent district is also included in the 'catchment area'. This requirement of being resident in the 'catchment area' would not be applicable to those seeking admission under the 'old boys / girls category'.

Those seeking admission of a child under the 'close proximity to the school' category, must be resident at the address declared in the application form and should submit documents in proof thereof, for which in terms of the circular, marks will be assigned. Additionally, school authorities should carry out a 'site inspection' to physically verify the actual residency of the applicant at the given address. Documents that may be submitted in proof of the position that the applicant is in fact resident at the given address have been specified in the circular and categorized into two groups. They are 'main documents' and 'additional documents'.

In terms of clause 7.2.1.1, for the purpose of this circular, what is recognized as 'main documents' in support of residency are, (i) Deeds of Transfer, (ii) Deeds of Gift, (iii) documents depicting donations, (iv) government grants, (v) Deeds of Lease issued by the Commissioner General of Buddhist Affairs in terms of the Buddhist Temporalities Ordinance or certificates issued by a Viharadhipathi and certified by the Commissioner General of Buddhist Affairs, (vi) Deeds of Declaration supported by corresponding folio entries depicting their registration, (vii) houses purchased based on the payment of installments supported by the agreement entered into with the owner and receipts in proof of payment of such installments, (viii) existence of continuous lease agreements or where the resident is a tenant coming within the purview of the Rent Act or is resident in government official quarters along with proof thereof, (ix) any other documents to establish residency. If any document referred to in sub-categories '(i)' to '(vii)' is submitted, and such document is in the name of the applicant or the spouse of the applicant, the applicant will be eligible for a maximum of 30 marks. If any document referred to in sub-category '(viii)' is submitted, the applicant will be entitled to a maximum of 12 marks. Even though the applicant is unable to submit a document falling within sub-categories '(i)' to '(viii)', if the applicant is a permanent resident at the given address and has been so resident for a minimum period of five years, he shall receive marks at the rate of 1.5 marks for 'any other document to establish residency' [sub-category '(ix)'] per document, for each of the following documents, namely electricity bills, water bills, assessment rates payment bills, and birth certificate of the applicant or his

spouse. While the maximum number of marks that can be so assigned is 6, marks will be assigned for these documents only if a minimum of three of these documents are submitted.

In terms of clause 7.2.1.2, if the applicant has submitted any of the 'main documents' referred to in clause 7.2.1.1, the applicant will be entitled to further maximum of 5 marks at the rate of 1 mark per document, if he has submitted any of the following 'additional documents' too, namely (i) national identity card or driving license, (ii) telephone bills in relating to fixed telephone line connections, (iii) school leaving certificate, (iv) marriage certificate, (v) Samurdhi entitlement card, (vi) life insurance policy and (vii) child's birth certificate. The application of this clause is of particular importance to the determination of this matter.

Clause 7.2.2 provides that, details pertaining to registration on the 'voters list' for the preceding five years should be provided in the application form. Depending on the number of years in respect of which information relating to registration of the *voters' list* is available, and whether or not the names of both the mother and the father or guardian of the child has been registered, marks ranging from 25 to 2.5 would be assigned. If both the mother and father or the guardian's name has been registered for the preceding 5 years, the full complement of 25 marks would be assigned. If only the name of the father or the mother has been registered for one year, the number of marks to be assigned would be 2.5. The

The application of clauses 7.2.1., 7.2.2 and 7.2.2.3 are not relevant to the determination of this Application.

Clause 7.2.4 provides that, the full complement of marks for residency within the 'catchment area' is 40. The full complement of marks would be assigned only if there are no other public schools to which the child may gain admission situated in closer proximity to the residence. Should there be such schools situated in closer proximity, 4 marks each should be deducted for such schools. In terms of clause 7.1.5, when determining the proximity to the school applied for, a circle should be drawn using the main entrance of the residence of the applicant as the axis and the entrance to the school applied for as a point on the circumference of the circle. What should be considered is the direct distance to the relevant school from the residence, using a map of the Surveyor General's Department. Thereafter, the existence of other schools within that circle should be considered. Further, if due to the existence of natural obstacles such as rivers, lakes, marshy lands, forests etc. access to such a school is not possible, marks should not be deducted for the existence of such school within the circle. Whenever a difficulty arises in this regard, the circular recognizes that a 'Google map' and the map of the Surveyor

General's Department may be used for comparison, and to thereby arrive at a determination.

Case for the Petitioners

Sequel to a Notice calling for applications to admit students for the year 2019 to Grade 1 of public schools, the 2nd Petitioner preferred an application on behalf of the 1st Petitioner to Yashodara Devi Balika Maha Vidyalaya, on the basis of the category 'close proximity to the school'. In addition to the perfected application form, certain documents in support of the place of residence of the Petitioners under the categories 'main documents' and 'additional documents' had been submitted along with a supporting affidavit. The 'additional documents' submitted have been the (i) Birth Certificate of the 1st Petitioner, (ii) National Identity Card of the 2nd Petitioner, (iii) Identity Card of the 2nd Petitioner issued by the Sri Lanka Medical Council, (iv) a certificate issued by the Grama Niladhari of the area of their residence, (v) a bill relating to the 2nd Petitioner's usage of his mobile telephone, and (vi) a bill relating the settlement of dues pertaining to a Credit Card used by the 2nd Petitioner issued by the Nations Trust Bank. Upon being summoned, on 6th September 2018, the 2nd Petitioner presented himself for an interview, which was conducted by the 7th to 11th Respondents.

The 2nd Petitioner's position is that whereas according to a 'self-appraisal' based on the scheme contained in circular 24/2018, the application presented on behalf of the 1st Petitioner should have received 88 marks, following the afore-stated interview, only 82 marks had been assigned. The basis on which the said 82 marks had been given by the 7th to the 11th Respondents, is as follows:

(I) Proving the place of residence by registration in electoral register:
Full complement of 25 marks.

(II) Documents in proof of residence:

(a) Ownership of place of residence –
Full complement of 30 marks

(b) Additional documents to confirm the place of residence –
3 out of 5 marks

(III) Proximity to the school from the place of residence:
24 out of 40 marks

The claim of the Petitioners is that, (a) the full complement of 5 marks should have been assigned for 'additional documents' submitted in confirmation of the place of residence, and (b) 16 marks out of 40 should not have been reduced for 'proximity to the school from the place of residence'.

The 2nd Petitioner alleges that at the conclusion of the interview, he signed the 'marks sheet' following an undertaking given by the Interview Board that the marks assigned to the 'proximity to the school from the place of residence' will be reconsidered.

On 10th October 2018, a 'Provisional List' of children selected under the category of 'children of residents in close proximity to the school' had been published, and in the said list, the 1st Petitioner had been placed at the 8th place in the 'waiting list'. On 20th October 2018, the 2nd Petitioner preferred an 'appeal' to the 'Board of Appeals and Objections'. Sequel thereto, on 19th November 2018, the 2nd Petitioner presented himself before the 'Board of Appeals and Objections'. Following a consideration of the appeal, there had been no revision of the marks previously allocated. Since the 2nd Petitioner did not agree with the allocation of marks at the appeal hearing, he expressed disagreement by not signing the 'marks sheet'. As a result of which, the marks to be assigned to the 1st Petitioner had not been entered in the 'marks sheet'. The 2nd Petitioner had been subsequently notified that there will not be any revision of the marks already assigned.

On 17th December 2018, an undated 'Final List' had been published indicating the names of children who had been selected for admission, under the earlier mentioned 'children living in close proximity to the school' category. That list indicated that the 'cut off mark' for this category was 84. Though not included in the list, the 2nd Petitioner had got to know that the 1st Petitioner's name had been included at the 7th place in the 'waiting list'. By letter dated 30th November 2018, which the 2nd Petitioner received on 22nd December 2018, the 7th Respondent had informed the 2nd Petitioner, that while the 'cut off' mark for the 'children living in close proximity to the school' category was 84, the 1st Petitioner had been assigned 82 marks, and thus the 1st Petitioner could not be selected for admission to Grade 1.

On 21st November 2018, the 2nd Petitioner had presented another appeal to the 17th Respondent, to which he had not received any response.

Additional documents submitted in proof of residence:
The position of the Petitioners is that clause 6.1 of the circular prescribes the manner in which up to a maximum of 5 marks should be allocated for 'additional documents' in support of the location of the residence. Those marks should be allocated at the rate of 1 mark per each of the documents, namely the national identity card or the driving license, bills relating to fixed telephone connections, school leaving certificate of the mother or the father of the child, marriage certificate of the parents of the child, Samurdhi beneficiary card, life insurance policy, and the child's birth certificate. The position of the Petitioners is that, they were able to submit 3 of these documents, namely the Birth Certificate of the 1st Petitioner "(P5A)", 2nd Petitioner's national identity card ("P5B"), and a bill relating to a

fixed telephone connection ("P5E"). The Petitioners claim that, certain other documents which reflect the address of the residence such as the identity card issued to the 2nd Petitioner by the Sri Lanka Medical Council ("P5C"), a certificate issued by the Grama Niladhari of the area ("P5D"), and a Credit Card Statement issued to the 2nd Petitioner by the Nations Trust Bank ("P5F") were submitted in proof of residence at the given address. The interview panel had not recognized these documents as amounting to 'additional documents', and hence did not assign marks for them. The position of the Petitioners is that the documents referred to in clause 6.1 are only 'some' of the documents which come under the category of 'additional documents' and that the list is not an exhaustive list. Learned President's Counsel for the Petitioners submitted that, documents produced marked "P5C", "P5D" and "P5F" were documents which add credence to the position of the Petitioners that they in fact reside at the given address. Therefore, he submitted that, the Interview Board should have given a broad interpretation to clause 7.2.1.2 of the circular and given marks for the submission of those documents too, as they were genuine additional documents in support of the given address.

In this regard, learned President's Counsel for the Petitioners cited the following quotation from the judgment of the Supreme Court in FR 35/11 (SC Minutes 12.07.2011):
"… they cannot rule out those documents just because they are not listed in the relevant clause. What is necessary to be seen is as to whether such documents can be considered to confirm the residence of the applicant. In such circumstances, important documents such as the child's health development record and the letters regarding their employment should have been considered …"

Therefore, learned President's Counsel submitted that members of the Interview Board should have recognized the afore-stated three documents as amounting to 'additional documents' in support of the residential address given in the application form, and assigned the full complement of 5 marks.

Learned President's Counsel for the Petitioners submitted that, in view of the foregoing, the refusal on the part of members of the Interview Board to assign the full complement of 5 marks for 'additional documents' was unfair, irrational, unreasonable and arbitrary, and hence amounted to an infringement of Article 12(1) of the Constitution.

Reduction of marks for the existence of other schools in closer proximity:
The Petitioners point out that, according to the scheme contained in "P21", after determining the distance between the residence and the school, 4 marks each is to be deducted from the marks obtained under the 'proximity' category for the existence of every school to which the child is entitled to gain admission. Under this formula, 4 marks each had been deducted for the existence of Asgiriya Walpola Junior School, Siddhartha Junior School, Sudharshana Junior School and the West Asgiriya Junior School.

The Petitioners point out that, the Attanagallu Oya, Palu Ela and a vast marshy land lie between the residence of the Petitioner and Asgiriya Walpola Junior School and Siddhartha Junior School. The afore-stated circular provides that, where there is a difficulty in accessing the school from the applicant's residence due to natural barriers such as rivers, lagoons, marshy lands, forests, etc., notwithstanding the fact that such schools may be located in closer proximity than the school applied for, marks should not be deducted for the existence of such schools within the circle. The Petitioners point out that while the distance by road from their residence to Yashodara Devi Balika Maha Vidyalaya is 1.2 km, the distance to the afore-stated two schools are 2.2 km and 1.7 km. In view of the foregoing, the Petitioners' position is that only 8 out of the total of 40 marks should have been deducted, whereas the Respondents had deducted 16 marks. In the circumstances, the learned President's Counsel for the Petitioners submitted that out of the total of 40 marks, the Petitioner was entitled to receive 32 marks, as only 8 marks could have been deducted in lieu of the existence of two schools in closer proximity than the school applied for. He submitted that, the reduction of 16 marks was contrary to the marking scheme contained in "P 2" and had resulted in the total marks earned by the Petitioners becoming less than the 'cut off' mark for the 'proximity' category. He submitted that, if the marking scheme was correctly applied and only 8 marks were deducted, the Petitioners would have received 92 marks which was above the 'cut off' mark of 84. Learned President's Counsel submitted that on this account too, the conduct of the Respondents is both arbitrary and unreasonable.

Discriminatory assignment of marks for the 1st, 2nd and 3rd Respondents

The 1st, 2nd and 3rd Respondents had been admitted to Yashodara Devi Balika Maha Vidyalaya also having applied under the 'proximity' category. According to the Petitioners, there had been an error in identifying the exact location of the front doors of the residences of the 1st and 4th, 2nd and 5th and 3rd and 6th Respondents. It is the position of the Petitioners that, had the correct location of the main door of the respective residences been identified and thereafter the circles drawn, it would have revealed that from the residence of the 1st and 4th Respondents and the 2nd and 5th Respondents (which are located very close to each other), Sri Bhodhi Vidyalaya, Gajaba Vidyalaya and Wimaladharmasooriya Vidyalaya are situated in closer proximity than Yashodara Devi Balika Maha Vidyalaya. From the residence of the 3rd and 6th Respondents, Siddhartha Kumara Vidyalaya, Sri Bhodhi Vidyalaya and Parakrama Vidyalaya are situated in closer proximity than Yashodara Devi Balika Maha Vidyalaya.

In proof of this position, the Petitioners produced with the Petition documents marked "P20A", "P20B" and "P20C" and subsequently with Motion dated 21st September 2020 a colour map of the Gampaha Town designed and produced by the Surveyor General's

Department on which a registered licensed surveyor had marked the residences of the 1st and 4th, 2nd and 5th and 3rd and 6th Respondents as "1", "2" and "3". On this map, the afore-stated schools were highlighted. It is the position of the Petitioners that the locations marked "R6", "R7" and "R8" are the locations where the 4th, 5th and 6th Respondents have intentionally or otherwise incorrectly shown the location of the main doors of their respective residences. The Petitioners point out that, the Respondents have not submitted any proof that, the main doors of the 1st and 4th, 2nd and 5th and 3rd and 6th Respondents are located at the points depicted in plans "R6", "R7" and "R8". Learned President's Counsel for the Petitioners submitted at the hearing that, the 1st to the 6th Respondents were ideally placed to establish the fact that the locations pointed out by them to the Interview Board were in fact the locations of the main doors of their respective residences, and notwithstanding Notice of this Application having been served on them, they refrained from participating in these proceedings. In view of these circumstances, it was submitted by the learned President's Counsel for the Petitioners, that it was erroneous on the part of the Interview Board to have only deducted 8 marks on the premise that only two schools lay in closer proximity to the residences of the 1st and 4th Respondents and the 2nd and 5th Respondents than Yashodara Devi Balika Maha Vidyalya. Further, it was equally erroneous to have deducted only 4 marks on the premise that only one school was situated in closer proximity to the residence of the 3rd and 6th Respondents than Yashodara Devi Balika Maha Vidyalaya.

It was further submitted that, unlike in the case of the schools which were in closer proximity to the Petitioners residence, as regards the Respondents, there are no natural barriers between their residences and the afore-stated schools situated in closer proximity.

The Petitioners submit that, in the circumstances, 16 marks each should have been deducted from the maximum of 40 marks for the 'proximity' basis, in respect of the applications submitted by the 4th, 5th and 6th Respondents on behalf of the 1st, 2nd and 3rd Respondents. In which event, the applications submitted by the 4th, 5th and 6th Respondents should have received 84, 83 and 75 marks respectively, as opposed to the marks assigned to their applications by the Interview Board, being 92, 91 and 87 marks, respectively. Learned President's Counsel submitted that, this was evidence of the discriminatory manner in which the Petitioners had been treated by the 7th to 17th Respondents. Learned President's Counsel for the Petitioners submitted that the applications submitted by the 4th, 5th and 6th Respondents had been assigned marks in violation of circular No. 24/2018 and in a discriminatory manner. Therefore, he submitted that the admission of the 1st, 2nd and 3rd Respondents to Grade 1 of Yashodara Devi Balika Maha Vidyalaya was an infringement of the Petitioners fundamental rights.

Learned President's Counsel submitted that had Circular No. 24/2018 been correctly applied to the application submitted by the 2nd Petitioner on behalf of the 1st Petitioner, the 1st Petitioner would have become entitled to gain admission to Grade 1 of Yashodara Devi Balika Maha Vidyalaya.

In view of the foregoing, learned President's Counsel for the Petitioners urged this Court to issue a declaration that the decision not to admit the 1st Petitioner be declared an infringement of the Petitioners' fundamental rights guaranteed in terms of Article 12(1) of the Constitution, and therefore for the Court to be pleased to quash the decision of the Respondents not to admit the 1st Petitioner to Yashodara Devi Balika Maha Vidyalaya and to issue a direction that she be admitted to that school. Though originally pleaded in the Application to this Court, during the hearing, learned President's Counsel for the Petitioners submitted that he was not insisting that a directive be issued requiring the 1st, 2nd and 3rd Respondents be removed from the school, on the basis that they had received marks which they were not entitled to receive in terms of the circular 24/2018.

Case for the 7th Respondent

The 7th Respondent (Principal of Yashodara Devi Balika Maha Vidyalaya) admits that the application presented by the 2nd Petitioner on behalf of the 1st Petitioner received a total of 82 marks. As stated by the Petitioners, the aggregate of 82 marks had been given on the basis of (i) 25 marks for the existence of the name of the 2nd Petitioner and his wife on the relevant electoral list, (ii) 30 marks for the deed depicting ownership of the residence given in the application form, (iii) 1 mark each for the 'additional documents' submitted, namely, the Birth certificate of the 1st Petitioner, National Identity Card of the 2nd Petitioner, and for the telephone bill relating to the fixed telephone line which also depicts the address given in the application form, and (iv) 24 marks for proximity to the school applied for. The position of the 7th Respondent is that, in terms of Circular No. 24/2020, only certain documents are recognized as 'additional documents', and hence marks could be given only for the afore-stated documents, though the Petitioners had submitted certain other documents as well.

Learned Senior State Counsel representing the 7th Respondent submitted that clause 7.2.1.2 of the circular governing 'additional documents' is very specific. It contains a list of seven documents that should be recognized as amounting to 'additional documents'. Any five of those documents would attract the maximum 5 marks. The Petitioners had submitted only 3 of those documents recognized by clause 7.2.1.2, and hence 3 marks out of the maximum of 5 marks had been given. School admission authorities have not been vested with discretionary authority to recognize the validity of any other documents, notwithstanding such documents also containing references to the address of the residence of the applicant. Thus, learned Senior State Counsel asserted that it was not possible for the Interview

Board to assign more marks for the other documents produced by the Petitioners marked "P5C", "P5D" and "P5F".

In response to the quotation of the judgment of the Supreme Court in FR 35/2011 cited by learned President's Counsel for the Petitioners, the learned Senior State Counsel submitted that the applicable school admission circular considered by the Supreme Court in that Application did not have an 'exhaustive list of documents that may be submitted in proof of the residential address given in the application to the school'. The circular applicable to that Application contained an 'inclusive clause' and by the use of the term 'such as' in the relevant clause, the authorities deciding on admission of students to public schools were conferred with some degree of discretion to decide on the documents to be accepted and accordingly assign marks.

The 7th Respondent has also pointed out that Asgiri Walpola Kanishta Vidyalaya, Asgiri Kanishta Vidyalya, Sudarshana Kanishta Vidyalaya and Siddartha Kumara Maha Vidyalaya are situated more proximate to the residence of the Petitioners, as seen even in the map marked "P19(b)" and produced by the Petitioners. Learned Senior State Counsel for the 7th Respondent submitted that clause 7.1.5 of the circular required the authorities handling admission of students to compute the 'direct distance' between the residence and the relevant school, colloquially referred to as 'measured the way the crow flies'. He emphasized that, the direct distance between the residence of the Petitioners and those four schools were less than the distance between the residence and Yashodara Devi Balika Maha Vidyalaya. Thus, in terms of Circular No. 24/2018, the Interview Board was required to deduct 4 marks in respect of each of those four schools, and that was the reason for the deduction of 16 marks out of the maximum of 40 marks for the heading 'proximity to the school'. Learned Senior State Counsel strenuously submitted that the reduction of marks in respect of such schools which are located in closer proximity to the residence of the Petitioners was carried out strictly in conformity with the afore-stated circular.

In response to the position of the Petitioners that though 16 marks had been deducted due to the existence of the four schools described above, access to Asgiriya Walpola Junior School and the Siddhartha Junior School is difficult due to the existence of Attanagallu Oya, Palu Ela and a vast marshy land, the 7th Respondent has stated that access to those schools is not difficult as 'there are broad carpeted roads granting access to the schools' and hence the obstacles referred to by the Petitioners are not applicable in terms of paragraph 7.1.5 of the circular.

In response to the allegation made by the Petitioners that the Interview Board had not deducted the correct number of marks for the existence of more proximate schools from

the residences of the 4th, 5th and 6th Respondents and thus the admission of the 1st, 2nd and 3rd Respondents to Yashodara Devi Balika Maha Vidyalaya was wrong and discriminatory of the Petitioners, the 7th Respondent took up the following position. The 7th Respondent pointed out that though the Petitioners allege that four schools are located in closer proximity to the residence of the 4th and 5th Respondents, in actual fact only two schools are located in closer proximity than Yasodara Devi Balika Maha Vidyalaya to the residence of the 4th and 5th Respondents, namely Gajaba Vidyalaya and Wimaladharmasooriya Vidyalaya. Thus, only 8 marks each out of 40 marks should be deducted in respect of the application submitted by the 4th and 5th Respondents on behalf of the 1st and 2nd Respondents, respectively. Similarly, the 7th Respondent has stated that, only one school namely Sidhartha Vidyalaya is situated in closer proximity to the residence of the 6th Respondent, and hence only 4 out of 40 marks were deducted in respect of the application presented by the 6th Respondents on behalf of the 3rd Respondent. In proof of this position, the 7th Respondent produced relevant portions of the Surveyor General's map of the relevant areas, marked "R6", "R7" and "R8". Further, the 7th Respondent pointed out with the aid of "R6", "R7" and "R8", that the schools referred to by the Petitioners as being in closer proximity to the residence of the 4th, 5th and 6th Respondents are in fact not in closer proximity to their residence and situated more distant than Yashodara Devi Balika Maha Vidyalaya. That is evident by the fact that, those schools are situated outside the circle drawn with the residences of the 4th, 5th and 6th Respondents being at the axis of those circles. Therefore, the 7th Respondent pointed out that the allocation of 92, 91 and 87 marks for the applications presented by the 3rd, 4th and 6th Respondents, respectively, was correct. Learned Senior State Counsel submitted that, even if 'some marks' are to be deducted for the existence of certain schools in closer proximity to the residences of the 4th and 5th Respondents, as they have scored 'significantly higher marks than the cut-off mark' the 1st and 2nd Respondents would still be entitled for admission to Yashodara Devi Balika Maha Vidyalaya.

The 7th Respondent also took up the position that, the Petitioners having scored 82 marks was placed 7th on the 'provisional list'. The applicants who were placed 1st to 5th in the said 'provisional list' had obtained 84 marks, 83.3 marks (3 applicants) and 83 marks, respectively. Thus, those placed 1st to 5th had scored more marks than the Petitioners. The applicant placed 6th had scored 82 marks and his residence is situated in closer proximity to the Yashodara Devi Balika Maha Vidyalaya than the residence of the Petitioners. The 7th Respondent has taken up the position that, the Petitioners were aware of these placements as the 'provisional list' was published, and has chosen not to cite them as Respondents to this Application, notwithstanding their interests being affected if the Petitioners are successful in prosecuting this Application.

Analysis of the evidence, application of the law and conclusions

Based on the evidence placed before this Court and the submissions made by learned Counsel for the Petitioners and the Respondents, I am of the view that, the following are the contentious issues in respect of which this Court needs to arrive at findings, enabling the adjudication of this matter. I will present those issues in form of questions to which I propose to find answers.

(i) Were the Petitioners entitled to the full complement of five (5) marks for the submission of 'additional documents'?

(ii) If the assignment of only three (3) marks for the submission of 'additional documents' was incorrect, what should have been the correct number of marks the 7th to 11th Respondents should have assigned to the application submitted by the 1st Petitioner in respect of the submission of 'additional documents'?

(iii) Was it correct for the 7th to 11th Respondents to have deducted sixteen (16) marks in lieu of four schools said to be located in closer proximity to the residence of the Petitioners than Yashodara Devi Balika Maha Vidyalaya?

(iv) If the deduction of sixteen (16) marks for the alleged existence of four schools in closer proximity of the residence of the Petitioners was incorrect, what was the correct deduction of marks the 7th to 11th Respondents should have carried out?

(v) Was the deduction of marks in respect of the existence of schools in closer proximity to the residences of the 4th, 5th and 6th Respondents correctly carried out by the 7th to 11th Respondents?

(vi) If the deduction of marks in respect of the existence of schools in closer proximity to the residences of the 4th, 5th and 6th Respondents were not correctly carried out, what should have been the correct deduction of marks the 7th to 11th Respondents ought to have carried out?

(vii) If there is to be a reduction in the marks to be carried out with regard to the applications submitted by the 4th, 5th and 6th Respondents, would it have an impact on the entitlement of the Petitioners to gain admission to Yashodara Devia Balika Maha Vidyalaya?

(viii) What should be the correct total number of marks that should have been assigned by the 7th to 11th Respondents for the application submitted by the 2nd Petitioner on behalf of the 1st Petitioner?

Additional documents

As stated earlier, clause 7.2.1.2 provides that up to a maximum of 5 marks shall be assigned for the submission of certain specified documents in proof of the address of the residence, which are referred to as 'additional documents'. The term 'residence' is to be understood as being a reference to the residential address given in the application form. Each document is to attract 1 mark. The documents specified in this clause are, the National Identity Card or the Driver's License, Telephone bills issued in respect of fixed

line telephones, School Leaving Certificate, Marriage Certificate, Samurdhi Development Certificate, Life Insurance Policy and the child's Birth Certificate. It is apparent from the manner in which the clause is worded that the list contains specific items, is exhaustive in nature and does not contain what is commonly referred to as an *ejusdem generis* clause. Thus, the Interview Board has not been conferred with any discretionary authority to accept any document other than those specified in clause 7.2.1.2, however much such other document may be genuine and correctly reflect the address of the applicant as given in the application form. Possibly, the Secretary to the Ministry of Education would have been mindful that if discretion was vested in the Interview Board, it would have led to difficulties with applicants presenting a wide range of documents in proof of residency, with some having been obtained through what may be referred to as *convenient, dubious or collusive arrangements.* The authenticity of such documents may be in doubt, but nevertheless difficult to be determined within a limited time period.

It is not in dispute that the Petitioners had submitted the Birth Certificate of the 1st Petitioner ("P5A"), National Identity Card of the 2nd Petitioner ("P5B"), a bill relating to a fixed telephone connection ("P5E"), an identity card issued to the 2nd Petitioner by the Sri Lanka Medical Council ("P5C"), a certificate issued by the Grama Niladhari of the area ("P5D") and a Credit Card Statement issued to the 2nd Petitioner by the Nations Trust Bank ("P5F"). Of these six documents, three, those being "P5A", "P5B" and "P5E" directly fall within three of the categories specified in clause 7.2.1.2 of the circular. The 7th Respondent has not expressed any doubt as to the genuineness of the other three documents. However, his position as expounded clearly by learned Senior State Counsel is that the circular had to be strictly and uniformly applied, and the circular does not empower the Interview Panel to recognize the remaining three documents, and therefore, it was not possible for the Interview Board to assign marks for "P5C", "P5D" and "P5F".

An examination of clause 7.2.1.2 of the circular reveals that it is a clause that can be classified as being *straightforward and rigid*. It certainly does not confer any discretionary authority on the Interview Board to recognize and assign marks to any genuine document which may add credence to the position taken up by the applicant regarding the address contained in the application form, unless, such document falls within the ambit of the eight documents specified in that clause. Thus, I do agree with the submission made by learned Senior State Counsel that the Interview Panel had correctly applied the circular to the 'additional documents' submitted by the 2nd Petitioner in proof of the declared address. Due to the reason that the clause of the circular referred to in the judgment of the Supreme Court in FR 35/11 had been worded differently to clause 7.2.1.2 of Circular No. 24/2018 which is the applicable 'law' in this instance and as the circular considered by the Supreme Court in that matter having contained an *ejusdem generis* clause which conferred discretionary authority on the school admission authorities to assign marks for certain

specified documents and other similar documents, I am of the view that in this matter, this Court cannot adopt the approach taken by the Supreme Court in FR 35/11. Therefore, I am unable to agree with the submission of the learned President's Counsel that the Interview Board should have recognized the remaining documents marked "P5C", "P5D" and "P5F" and assigned the full complement of 5 marks for the 'additional documents' submitted by the Petitioners in proof of the residential address.

Due to the foregoing reasons, I conclude that members of the Interview Board have correctly applied clause 7.2.1.2 and assigned 3 marks in respect of the additional documents submitted by the Petitioners. Thus, in response to the 1st question I have raised above, I hold that the Petitioners were not entitled to the full complement of 5 marks in respect of the 'additional documents' submitted by them. In the circumstances, the need to answer the 2nd question does not arise.

Schools in closer proximity to the residence of the 2nd Petitioner

It is evident from an overall analysis of Circular No. 24/2018, that when formulating the policy based upon which the provisions of the circular had been drafted, policy makers have proceeded on the footing that when selecting students for admission to a particular school, preference should be afforded to children living in close proximity to the relevant school. This is observable by the allocation of 50% of the number of students who are to be admitted to Grade 1, to those coming within the category *'children of occupants living in close proximity to the school'*. There also seem to have been another consideration, that being, ideally, children should attend the school situated closest to their residence. This seems to be in consonance with the declared policy of the Ministry of Education at the time relevant to this Application, that being *"the closest school is the best school"*. This is a rationale policy, particularly if the closest school is as 'good' as the other schools in the relevant area. In actual fact, other than in exceptional situations, the closest school would not necessarily be the 'best' school. When a child is admitted to the nearest school, it is convenient to both the student and his parents or the guardian. Further, the time and resources that may be consumed for travel to and from the school would be minimum if the residence is located in close proximity to the school. Thus, selecting students who live in close proximity to the school, is sound policy. However, the nearest school may not be the school of choice for both parents and children. That is quite understandable, given the large disparity in educational and extra-curricular resources available in public schools and the individual reputation of schools. Therefore, it can easily be appreciated as to why a parent would wish to admit his child not to the nearest school, but to a school situated even at a considerable distance to the residence. Thus, while providing for the admission of children living within the 'catchment area' (which would in almost all instances be the administrative district in which the school is situated), the present scheme as reflected in the circular, provides for the assignment of 40 marks for living within the 'catchment area'

and provides for deduction of 4 marks for each school that may be situated closer to the residence than the school applied for. Thus, the full complement of 40 marks would be assigned only if the applicant is resident within the 'catchment area' and no other school is situated in closer proximity to the residence of the applicant. Without calculating the actual distance between the residence and the school applied for, and assigning the highest number of marks to the applicant living closest to the school applied for, this is a rational way in which a significantly larger number of applicants become entitled to apply and gain admission, and preference is given to those living in areas in which no other schools are located in closer proximity to the residence.

When narrating the scheme contained in Circular No. 24/2018, I have explained the manner in which schools in closer proximity than the school applied for are identified, and how marks from the maximum of 40 should be deducted on the basis that there are other suitable schools situated in closer proximity to the residence, than the school applied for. Following the application of this scheme, the Interview Board has identified that within the circle drawn (with the axis of that circle being the residence of the Petitioners and one point on the circumference being the entrance to Yashodara Devi Balika Maha Vidyalaya), four other public schools are located. They being, Asgiriya Walpola Kanishta Vidyalaya, Siddhartha Kanishta Vidyalaya, Sudharshana Kanishta Vidyalaya and West Asgiriya Kanishta Vidyalaya. That those four schools are located within the 'circle' is not in dispute. This fact is seen clearly in the map tendered on behalf of the Petitioners following the first date of argument, with Motion dated 17th September 2020. [It is to be noted that, the learned Senior State Counsel did not object to the tendering of this map (which has been published by the Surveyor General's Department) and for treating it as an item of evidence.] The Petitioners also submitted attached to the Petition a 'Google Map' of the area covered by the afore-stated map marked "P19B". On that map, the following information is depicted and is decipherable. The direct aerial distance between residence of the Petitioners and Yasodara Devi Balika Vidyalaya is 1,489.28 metres. The direct aerial distance between the residence and Siddhartha Kanishta Vidyalaya, Asgiriya Walpola Kanishta Vidyalaya, West Asgiriya Kanishta Vidyalaya and Sudharshana Kanishta Vidyalaya are 1,438.71, 1,284.94, 847.31 and 420.44 metres, respectively.

Therefore, it is seen that, using the terminology quite rightly used by the learned Senior State Counsel, *'as a crow flies'* these schools are situated in closer proximity to the residence of the Petitioners, than Yashodara Devi Balika Maha Vidyalaya. It is on this premise that learned Senior State Counsel submitted that the deduction of 16 marks (4 marks per school) out of the maximum of 40 marks was the result of a correct application of clause 7.2.4 of the circular.

However, the uncontradicted position of the Petitioners is that though the direct aerial distance to these respective schools is as it is reflected in "P19B", the actual 'travelling distance' (the distance when travelling by road) to the relevant schools are as follows:

(i) Distance between the residence of the Petitioners and Yashodara Devi Balika Maha Vidyalaya is 1,750 metres.

(ii) Distance between the residence of the Petitioners and Asgiri Walpola Kanishta Vidyalaya, Siddhartha Kanishta Vidyalaya, West Asgiri Kanishta Vidyalaya and the Asgiriya Walpola Kanishta Vidyalaya are 2,600, 1,900, 1,100, and 900 metres, respectively.

These distances have been certified by Licensed Surveyor J.P.N. Jayasundera, and a certificate to that effect has been presented with the Petition marked "P19A". These facts have not been contradicted by the Respondents.

The position of the learned President's Counsel for the Petitioners was that for the purpose of clause 7.2.4 of the circular, when determining whether there exist schools in closer proximity to the residence of the applicant, consideration should be given not to the 'direct aerial distance' alias 'as a crow flies distance', but to the 'actual travelling distance by road to the relevant school'. If the latter approach is taken, it would be noted that, only West Asgiriya Kanishta Vidyalaya and Sudharshana Kanishta Vidyalaya are situated 'in closer proximity' to the residence of the Petitioners. That is the premise on which learned President's Counsel submitted that only 8 marks should have been deducted for the existence of other schools in closer proximity to the residence, and therefore, the Petitioners were entitled to 32 out of 40 marks for the criteria 'proximity to the school from the residence'.

It is necessary for me to point out that the principle of equality enshrined in Article 12 of the Constitution which provides for the equal protection of the law, encompasses the need to objectively and rationally apply the law (in this case the public schools Grade 1 admission circular, No. 24/2018) in a manner that would give effect to the underlying policies based upon which the law has been created. As pointed out by Justice Priyantha Jayawardena in *Kirihandi Yeshin Nanduja De Silva and others v. Sumith Parakramawansha, Principal, Dharmashoka Vidyalaya and others* [SC/FR 50/2015, SC Minutes 02.08.2017], the criteria for school admissions should be construed in the light of government policy.

I am of the view that the application or enforcement of a law should be for the purpose of achieving the governing objectives of such law. A law has to be enforced for the purpose for which it has been enacted, and not oblivious of the purpose for which it has been created, or for a collateral or abusive purpose.

The 'right to equality', the 'rule of law' and 'procedures established by law', which are interrelated concepts of law, are in my view, the three cornerstones based upon which Article 12 has been conceptualized and enshrined in the Constitution. Being 'equal before the law' and being entitled to 'equal protection of the law' as provided in Article 12(1) of the Constitution, can be enjoyed by all persons in Sri Lanka, only if all three of these legal concepts are in full operation. These concepts require law enforcement personnel to, in good faith, objectively and correctly interpret and apply the law, in the manner in which the underlying policies of the relevant law are given effect to, and most fair, reasonable, rational, appropriate and justifiable outcomes are achieved. All laws must be interpreted, enforced and applied in public interests. A deviation from such an approach would infringe the right to equality, which Article 12 guarantees. A law cannot be perfunctorily applied. Mechanical application of a law without ensuring that the objectives of the law are achieved, can as in this instance, give rise to inequality, resulting in injustice including arbitrary, unreasonable and discriminatory outcomes. That would amount to an infringement of Article 12 of the Constitution. What the Petitioners have brought before this Court, in my opinion, is a candid example of such a situation.

I am acutely conscious of the wisdom contained in the following observation of Justice Prasanna Jayawardena in his Judgment in *Himanshu Suneth Nanayakkara and Others v. S.S.K. Aviruppola, Principal, Visakha Vidyalaya and Others* [SC/FR 24/2018, SC Minutes 29.11.2018]: "*Further, being well aware of the onerous nature of the task faced by officers who implement the provisions of such circulars and are called upon to balance the rights of a large number of applicants while applying the provisions of the circulars, this Court would be inclined to intervene and exercise our fundamental rights jurisdiction* ***only where the provisions of the circular have been ignored, violated, misapplied or misinterpreted or where there has been an abuse of process or a mistake which prejudices a child, or other similar grounds***." (Emphasis added.) Thus, I am of the view that the Supreme Court should not interfere with the findings of the Interview Panel on a mere technicality. However, where there is evidence of an infringement of fundamental rights, it is the bounded duty of this Court to intervene and ensure that justice is delivered.

It is to be noted that, clause 7.1.5 refers to the fact that when determining the distance between the residence and the school applied for, the 'direct' distance should be taken into consideration. It is to this 'distance' that the learned Senior State Counsel referred to as the 'crow flies' distance. Further, it provides that, marks should be deducted for the existence of other suitable schools located within the circle and in closer proximity. Clause 7.2.4 merely provides that 4 marks each should be deducted in respect of the existence of other schools in 'closer proximity'. Clause 7.2.4 does not specify as to the manner in which it should be determined whether a particular school is located in closer proximity than the

school applied for. Learned Senior State Counsel submitted that as regards those schools too, the 'direct distance' should be computed.

However, in my view, it is necessary to, at this stage, reflect on the underlying policy of these two clauses, when taken as a whole. I have stated above, the finding of this Court as regards the underlying policy. If the policy of the State is to give preference to students living in proximity to the school and to deduct marks for the existence of other suitable schools located in closer proximity to the residence of the applicant, would it be rational to consider the 'direct aerial distance' between the residence and those other schools within the circle, or take the distance the child would actually have to take in order to travel to such schools? I am of the view that in order to give effect to the policy of the State, it would be necessary to take into consideration the 'actual distance' a child would have to travel to the relevant school either by road or by footpath, as opposed to the 'direct aerial distance'. The fallacy as I see, in the submission made by learned Senior State Counsel is that, though a crow would actually fly in a direct line as he can and generally does so, since he flies above the surface of the earth, a child would have to necessarily travel by road or using a footpath, and not 'fly' to school. Thus, it would be rational to take into consideration the 'actual distance by road' as opposed to the 'aerial distance'. Clause 7.1.5 recognizes the possible use of a 'Google Map' and the 'Survey General Department's Map' in instances where a difficulty arises in computing the distance. In fact, one advantage in using a 'Google Map' is that it facilitates the measuring of the 'distance by road' between two locations. In the circumstances, I hold that, the term 'other schools situated more proximate to the residence' in clause 7.2.4 should be necessarily interpreted to mean 'other schools situated more proximate to the residence, given the distance one would have to travel by road or recognized footpath generally used by the public'.

As it would be seen from the evidence placed before this Court, if one were to take the 'actual distance by road' between the residence of the Petitioner and the relevant schools, from the residence of the Petitioners, only West Asgiri Kanishta Vidyalaya and Sudharshana Kanishta Vidyalaya are situated at a shorter distance to the residence of the Petitioners, than the distance to Yashodara Devi Balika Maha Vidyalaya. Thus, it would be reasonable to deduct 4 marks each for the existence of only the said two schools.

Therefore, I hold that, in compliance with clause 7.2.4, only 8 (4+4=8) marks ought to have been deducted from 40 marks. Thus, the total number of marks that should have been assigned to the criteria 'proximity to the school' should have been 32 and not 24. Accordingly, I hold that the deduction of 16 marks from the maximum of 40 marks has been the result of an irrational and erroneous application of clauses 7.2.4 read with 7.1.5 of circular 24/2018.

This in my view is a clear instance of a situation where the school admissions circular has been both misinterpreted and misapplied. In view of the factual circumstances described above, the Supreme Court in the exercise of its 'fundamental rights jurisdiction' conferred on the Court by Article 126(1) of the Constitution is required by the Constitution to intervene, and in terms of Article 126(4) make appropriate orders granting such relief with the view to remedying the injustice caused or make such other directions as the Court may deem just and equitable. Failure to do so, would amount to the Court deviating from its Constitutional duty, and contributing towards the continued infringement of the fundamental rights of persons.

Thus, in response to the 3rd question above, I hold that it was incorrect and unlawful for the 7th to 11th Respondents to have deducted sixteen (16) marks in lieu of four schools said to be located in closer proximity to the residence of the Petitioners than Yashodara Devi Balika Maha Vidyalaya. In response to the 4th question, I hold that the correct deduction of marks the 7th to 11th Respondents should have made was eight (8) marks.

Schools in closer proximity to the residence of the 4th, 5th and 6th Respondents

The position of the Petitioners, albeit brief is that, the 4th, 5th and 6th Respondents have not honestly and correctly pointed out to the Interview Board the location of their respective residences. As a result, the Petitioners allege that the said Respondents have been successful in avoiding the inclusion of certain schools from their respective 'circles'. This in turn has resulted in less marks being deducted for the existence of schools situated in closer proximity to their respective residences in comparison with the respective distances to Yashodara Devi Balika Maha Vidyalaya. With the view to proving this position, the Petitioners have produced maps which reflect the location of their respective residences as pointed out by them, as opposed to the actual location of their respective residences. It is necessary for me to point out that the 7th Respondent has not made any serious effort to contradict such evidence, apart from making a sweeping assertion that that the 4th, 5th and 6th Respondents have correctly pointed out the location of their residences. Be that as it may, in view of my afore-stated finding regarding the manner in which the actual distance from the residence to the respective schools is to be calculated and the absence of such evidence relating to the 4th, 5th and 6th Respondents, I do not propose to arrive at any conclusion with regard to this allegation presented by the Petitioners. However, based on a consideration of the maps produced by the Petitioners, it is necessary for me to hold that there seems to be considerable merit in the position taken up by the Petitioners in this regard. It is necessary to point out that clause 9.3.3 of the circular requires the school admission authorities to, prior to the publication of the 'provisional list' of those selected for admission, conduct a 'site inspection' and ascertain whether applicants in fact reside at the given addresses. This investigative step can also be used to determine whether the location identified by the applicant on the area map is in fact the location where the

residence is situated. In view of my refraining from arriving at a finding regarding this matter, I will not answer the 5th, 6th and 7th questions.

Conclusions and Relief

In view of the foregoing, it is my considered view that a correct and purposive application of Circular No. 24/2018 would have resulted in the application presented by the 2nd Petitioner on behalf of the 1st Petitioners receiving the following marks:

1. Proving the place of residence by registration in the electoral register - 25
2. Documents in proof of the residence:
    a. Ownership of the place of residence - 30
    b. Additional documents to confirm the place of residence - 3
3. Proximity to the school from the place of residence - 32

Thus, in response to the 8th question above, I hold that the total number of marks which should have been assigned to the afore-stated application submitted by the 2nd Petitioner on behalf of the 1st Petitioner, is 90. The 'cut-off' mark for the category 'close proximity to the school' had been 84. Thus, if the circular was rationally interpreted and applied, the 1st Petitioner would have been entitled for admission to Grade 1 of Yashodara Devi Balika Maha Vidyalaya.

In view of the foregoing, I declare that, the 7th to 17th Respondents have infringed the fundamental right to equality of the 1st Petitioner guaranteed by Article 12(1) of the Constitution by their decision not to admit her to Grade 1 of Yashodara Devi Balika Maha Vidyalaya.

I am conscious that had the 1st Petitioner been admitted to Grade 1 of the school in January 2019, she would, by now, be studying in Grade 3 of that school. Therefore, I direct that the 7th Respondent or should the 7th Respondent have now been replaced by another, the present Principal of Yashodara Devi Balika Maha Vidyalaya to admit the 1st Petitioner to Grade 3 of the said school.

A careful consideration of the process and events relating to the decision not to admit the 1st Petitioner to Grade 1 of Yashodara Devi Balika Maha Vidyalaya, reveals that the 7th to 17th Respondents have not acted either maliciously or dishonestly. It appears that they have acted in good faith, though the interpretation and application of clauses 7.2.4 read with 7.1.5 by members of the Interview Board and the Board of Appeals and Objections had been contrary to the underlying policy of the State and hence irrational.

In view of my finding that the 7th to 17th Respondents have infringed the fundamental right of the Petitioners guaranteed in terms of Article 12(1) of the Constitution and since

this Court should necessarily take judicial notice of the fact that the Petitioners would have expended a considerable sum of money to seek relief from this Court and has not received education for over two years from the school at which she was entitled to receive education, I declare that the Petitioners should be entitled to compensation. Taking into consideration the facts and circumstances relating to this matter, I direct the State to pay the Petitioners a sum of Rs. 5,00,000/= as compensation to the 2nd Petitioner. It shall be the responsibility of the 17A Respondent to facilitate the payment of compensation.

Due to the reasons stated above, the 7th to 17th Respondents shall not be personally required to contribute towards the payment of compensation.

Accordingly, this Application is allowed.

Judge of the Supreme Court

Murdu Fernando, PC, J.

I agree.

Judge of the Supreme Court

S. Thurairaja, PC, J.

I agree.

Judge of the Supreme Court

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

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

1. Hettiarachchige Srimathi Devika Tissera

2. Welgamage Yoshika Nadishani Perera

3. Welgamage Vishan Madusha Perera

SC/FR No. 94/2013

All of No. 505/B, Yakkaduwa, Ja-Ela and No. 441/B, Niwandama, Ja-Ela

Petitioners

Vs.

1. Police Constable
Madagammeddegedara Nirosha Sanjeewa Jayasekara (88696),
Police Station, Ja-Ela.

2. Police Constable Rajakaruna Mudiyanselage Saman Sanjeewa Bandara (79186),
Police Station, Ja-Ela.

3. Police Constable Fernando (29644),
Police Station, Ja-Ela.

4. Inspector of Police Weerathilake,
Officer-in-Charge (Minor Offences Branch),
Police Station, Ja-Ela.

5. Chief Inspector Chandana Kandewatta,
Officer-in-Charge,
Police Station, Ja-Ela.

6. Udaya Hemantha,
   Assistant Superintendent of Police (Peliyagoda),
   ASP's Office, Peliyagoda.

7. Senior Superintendent of Police,
   Police Headquarters,
   Colombo 01.

8. The Honourable Attorney General,
   Department of the Attorney General,
   Colombo 12.

Respondents

Before: Buwaneka Aluwihare, PC. J.
L. T. B. Dehideniya, J.
S. Thurairaja PC. J

Counsel: Saliya Pieris PC with Anjana Rathnasiri for the Petitioners.

Dr. Sunil Coorey with Sudarshani Coorey for the 1st and 2nd Respondents.

Induni Punchihewa SC for the Hon. Attorney General.

Argued on: 13. 07. 2020

Decided on: 30. 06. 2021

Judgement

Aluwihare PC. J.,

The Petitioners were granted Leave to proceed for the alleged infringement of their fundamental rights enshrined in Articles 11, 12 (1), 13 (1) of the Constitution.

Initially, I wish to set out the versions submitted by the Petitioners as well as the 1st and 2nd Respondents, before the court.

The Version of the Petitioners

On the Christmas eve of 2012, the 1st Petitioner, along with her 25year old daughter and the 15year old minor son [the 2nd and 3rd Petitioner], had gone to the Public Market Complex, Ja-Ela situated along the Colombo-Negombo main road to make some purchases for Christmas. The 1st Petitioner who had been driving the 2nd Petitioner's car had parked it in front of the Public Market Complex in the space between the edge of the main road and the kerb. The Petitioners maintain that it is a space where the public is normally allowed to park their vehicles and that the car was parked at an angle to the kerb in such a manner that it did not block any vehicular traffic, plying along the main road. While the 1st Petitioner had gone shopping, her children had stayed in the car, the 2nd Petitioner in the driver's seat and the 3rd Petitioner in the front passenger seat.

The Petitioners aver that while they were so waiting, the 1st Respondent had come up to the car and had knocked on the shutter of the car on the driver's side, asking the 2nd Petitioner to open it. When the 2nd Petitioner rolled down the shutter, the 1st Respondent had admonished the 2nd and 3rd Petitioners with obscenities, accusing them of behaving inappropriately inside the car. The 2nd Petitioner had informed the 1st Respondent that they were waiting for their mother and reversed the car in order to approach the main road. The 1st respondent had then banged on the vehicle ordering her to stop, "නවත්තපිය තෝ කොහෙද යන්නේ?". At this point the 2nd Respondent had arrived at the scene and had made an attempt to grab

the 2nd Petitioner by her shoulder. When she tried to block the 2nd Respondent, he had hit her hand and pulled her out of the vehicle by her shirt while verbally abusing her with obscenities. Thereafter, the 2nd Respondent had pinned her against the car by applying force on her chest. In the midst of this incident, it is also alleged that, while the 3rd Petitioner was still in the vehicle, the 1st Respondent slapped him.

When his sister was dragged out of the car, the 3rd Petitioner had got out of the car and had moved towards her, in an attempt to make the 2nd Respondent release her. The 2nd Respondent had then approached the 3rd Petitioner uttering the words "ඇයි මට ගහන්නද?" and had slapped him. At this point, the 1st Petitioner had returned and seeing the incident, she had made an attempt to push the 1st and 2nd Respondents away from her children. The 2nd Respondent had reacted by grabbing her by the hands and assaulting her. When the 2nd and 3rd Petitioners came to the rescue of their mother [the 1st Petitioner], they too had been subjected to assault.

At this point, the 3rd Respondent had arrived at the scene and had separated the two parties and asked the Petitioners to get into the car. The Petitioners allege that the 2nd Respondent then had misshapen the ignition key, by striking it on the car and had thrown it onto the road. The 3rd Respondent had picked it up and having straightened it, had returned it to the Petitioners, advising the 2nd Petitioner to drive the car to the Ja-Ela Police Station. The 3rd Respondent himself had got into the vehicle. The Petitioners state that even as they were leaving the scene, the 2nd Respondent continued to obstruct them, however, with the assistance of the 3rd Respondent, the 2nd Petitioner managed to steer the vehicle to the main road and headed to the Ja-Ela Police Station. The Petitioners have also stated that, the 1st Petitioner lost her mobile phone in the melee.

Upon arrival at the Ja-Ela Police Station, the Petitioners had met the Officer-in-Charge of the police station [the 5th Respondent], and had conveyed that they want to lodge a complaint regarding the assault by the 1st and 2nd Respondents. The

Petitioners, thereupon, had been directed to the Traffic Branch. The Petitioners allege that, while they were seated at the traffic branch to have their complaint recorded, the 2nd Respondent had come there and kicked the 3rd Petitioner stating in Sinhala, "තොපිව පුටුවල නෙමෙයි, තොපිව බිමයි ඉන්දන්නේ." When the 1st Petitioner protested at his conduct, the 2nd Respondent had replied that it was an accident and had left.

Subsequently, the 2nd Respondent had returned to the Traffic Division together with the 1st and 4th Respondents and had had a discussion for about an hour before calling the 3rd Petitioner inside the room to record a statement. When the 3rd Petitioner went into the room, the 1st and 2nd Respondents had started abusing him in indecent language and the 4th Respondent, the Officer-in-Charge of the Minor Offences Branch who had been present there, however, had made no attempt to stop them. Observing that the 3rd Petitioner was being verbally abused by the 1st, 2nd and 4th Respondents, the 1st Petitioner had entered the room. The 3rd Petitioner had informed her that the Respondents were verbally abusing him. When she inquired from them as to whether the purpose of summoning the 3rd Petitioner was to abuse them, the 1st and 2nd Respondents had left the room, while neither the 4th Respondent nor any other officer had proceeded to record statements from the Petitioners.

The Petitioners aver that, although they had inquired several times from the 4th and 5th Respondents as to why they were not recording the Petitioner's complaint, they had been asked to wait at the Traffic Branch until the police investigate the matter. The Petitioners assert that at one point they saw the 1st, 2nd, 4th and 5th Respondents having a discussion in the office of the Officer-in-Charge. In spite of their numerous appeals to the said Respondents, that they be allowed to leave the Police Station as they wanted to attend the Midnight Mass that night, they had been kept at the police station. Meanwhile, the Petitioners had managed to contact the

1st Petitioner's brother and while they were waiting at the Traffic Branch, some of their relatives had arrived at the police station.

According to the Petitioners, at about 8.30 pm they had been informed by the 4th Respondent to get into a police vehicle as they need to consult the 6th Respondent, [ASP Peliyagoda]. As the Petitioners refused to travel in a police vehicle, the Petitioners and the 4th Respondent had travelled to the 6th Respondent's office, by a private vehicle.

While the Petitioners were waiting outside the 6th Respondent's office, the 1st, 2nd, 4th, 5th and 6th Respondents and the Attorney-at-Law of the petitioners, had had a discussion. At one point, the Petitioners had been called in to the office of the 6th Respondent and the Petitioners had explained the incident to the 6th Respondent. He had expressed his regret for the injustice caused to the Petitioners by the officers of the Ja-Ela Police Station and directed the 1st and 2nd Respondents to apologize to the Petitioners which they had proceeded to do. The 6th Respondent had then asked the Petitioners to make statements at the Ja-Ela Police Station and to proceed home.

The Petitioners had then been brought back to the Ja-Ela Police Station around midnight, but their statements, however, had been recorded only after a further delay of 2 to 3 hours. The Petitioners state that they were not allowed to read their statements before signing them, and the 1st Petitioner had alleged that when she requested that she be permitted to read her statement, she had not been permitted to do so.

Even after the recording of the statements, the 1st and 2nd Petitioners had not been allowed to leave the Police Station. The 4th Respondent had informed them that the 7th Respondent would be visiting the Police Station in the morning and that they should wait for him, while the 3rd Petitioner could go home. Around 4.30 am the 3rd Petitioner had been allowed to leave.

On the following day, i.e. 25th December, the 7th Respondent had come to the Ja-Ela Police Station along with the 6th Respondent at about 1.30 pm in the afternoon. The Petitioners allege that up until then they were not provided with any food nor allowed to have any food from outside. The 7th Respondent had informed them that they would be produced before the Magistrate.

The 1st and 2nd Petitioners had then been produced before the Magistrate at the Magistrate's residence around 2.30 pm. The Petitioners have alleged that the 5th Respondent made a false allegation to the effect that the 1st and 2nd Petitioners had assaulted police officers and requesting the magistrate to place the Petitioners on remand custody. In support of this statement, the Petitioners have submitted the information [B report] filed by the 5th Respondent ['P-8A'], alleging that the 1st and 2nd Petitioners committed offences punishable under Sections 183, 314 and 344 of the Penal Code. No reference, however, had been made to the 3rd Petitioner.

The Magistrate had ordered that the two Petitioners be remanded until 26th December 2012. On 26th December, the Petitioners had been produced before the Magistrate and the Magistrate had released them on bail.

The day after, i.e, 27th December 2012, the 1st Petitioner had gone to the Colombo North Teaching Hospital, Ragama where she had got herself admitted. On 28th December she had been examined by Dr. B. C. S. Perera, Assistant Judicial Medical Officer. The Diagnosis Ticket and Treatment Sheet marked 'P9-A' to 'P9-C' as well as the Medico-Legal Examination Report marked 'P-22A' have been produced by the Petitioners as part of their case. On the same day the 2nd and 3rd Petitioners had also been examined by the Judicial Medical Officer. The Judicial Medical Officer's examination has revealed that the 1st and 3rd Petitioners had sustained contusions. As the 1st Petitioner was in a state of shock due to the incident, she had been directed to the Psychiatrist, Dr. Aruni Hapangama who had examined her on 28th December 2012 and reviewed her on 07th February 2013.

Version of the 1st and 2nd Respondents

The 1st and 2nd Respondents have taken up the position that they were on duty in the immediate vicinity of 'Subhani' Junction, by the Colombo-Negombo main road close to the Ja-Ela Public Market Complex. They contend that the1st Petitioner had parked the car on the Colombo-Negombo highway where there was neither a kerb nor a designated parking space and in addition it had been parked just 20 meters away from a pedestrian crossing. The manner in which the car was parked, had resulted in a heavy obstruction to the movement of vehicular traffic on the highway.

Contrary to what the Petitioners have submitted, the Respondents state that the 3rd Petitioner was seated in the driving seat and shifted to the front passenger seat while the 2nd Petitioner who was seated in the rear of the car, crossed to the driving seat. When the 1st Respondent requested the 2nd Petitioner to remove the vehicle, she had admonished the 1st Respondent and continued to do so as she started to drive the car towards Colombo.

The 2nd Respondent had observed the 2nd Petitioner admonishing the 1st Respondent, while driving and had gone there when the car had to stop at the pedestrian crossing. When the 2nd Respondent asked for the 2nd Petitioner's driving license in order to spot fine her for the violation, she had shouted in a hostile manner and refused to do so.

The 2nd Respondent submits that the 3rd Petitioner had asked for his 'PC' number in a threatening manner. The 2nd Respondent also alleges that the 3rd Petitioner warned him by saying that, if he did not watch out, he will deal with him. The 1st Petitioner who had returned by then, had approached the 2nd Respondent and had slapped him. Immediately the 2nd Petitioner too had approached the 2nd Respondent. The 2nd Respondent alleges that 1st Petitioner pulled the white belt

attached to his uniform and she dealt several blows to his body. The 1st Petitioner however, has denied the above assertion in her counter affidavit [Paragraph 10 of the counter affidavit]. The 1st Petitioner's version is that she attempted to push the 1st and 2nd Respondents away, in order to prevent them from assaulting her children.

The Respondents state that the general public who witnessed the incident attempted to assault the Petitioners and cause damage to the car, but that the 1st and 2nd Respondents managed to prevent that. The two Respondents maintain that, contrary to the allegations of the Petitioners, the two of them did not assault or abuse the Petitioners nor damage their property, despite the Petitioners' attack on them. The Respondents concede that the 3rd Respondent came to the scene thereafter and accompanied the Petitioners in the car, to the Ja-Ela Police Station.

Regarding the events at the Ja-Ela Police Station, the Respondents deny the averments of the Petitioners and state that the 1st and 2nd Respondents met the Officer-In-Charge of the Ja-Ela Police Station, the 5th Respondent, and informed him about the incident. The 5th Respondent had directed them to make a statement regarding the incident to the Minor Crimes Branch of the Ja-Ela Police Station and accordingly around 2 pm, the 2nd Respondent had given a statement complaining that he was assaulted by the 1st and 2nd Petitioners. The 1st Respondent had given a statement around 2.30 pm.

The 2nd Respondent denies the allegation that he kicked and scolded the 3rd Petitioner, while the Petitioners were waiting at the Traffic Branch and stating further that, such an incident could not take place in a public place like the Ja-Ela Police Station. After making the statements the Respondents had returned to traffic control duty assigned to them. At around 3.35 pm the 5th Respondent had visited the place where the incident had taken place. Thereafter, around 5.30 pm while the Respondents were engaged in their duties, they had received a message summoning them to the Police Station and upon arrival, they were informed to

meet the Assistant Superintendent of Police, the 6th Respondent, and they had travelled to his office in Peliyagoda. The Respondents have explained the incident to the 6th Respondent and the assault by the Petitioners. In contrast to the Petitioner's version, the Respondents state that the Petitioners apologized to them and even offered them money to settle the matter, which they had declined.

The Respondents state that the 1st and 2nd Petitioners had then returned to the Ja-Ela Police Station where their statements were recorded. The 1st and 2nd Petitioners had been arrested for the commission of offences punishable under Sections 183, 314 and 344 of the Penal Code. The Respondents deny the allegation that the Petitioners were not allowed any food.

The entry made by the IP Wijethilake of Ja-ela police in the information book ('R14') reflects that on 25th December around 2.00 pm the 2nd Respondent had been examined by the JMO of the Ragama Hospital, who had referred the 2nd Respondent to the Ear Nose and Throat (ENT) clinic. The outcome of any such referral, however, had not been produced before this court.

The written submissions filed on behalf of the Attorney General [8th Respondent] indicate that, consequent to the Petitioners' complaint to the 7th Respondent, an inquiry had been conducted by the Special Investigations Unit (SIU) in respect of the 1st to 6th Respondents. According to the letter dated 13th September 2013, sent by the Acting Director of the SIU addressed to Director legal Police Headquarters, ['X1']; the findings of the said inquiry were that, the 1st and 2nd Respondents had had an argument with the Petitioners in the discharge of their official duties and the incident had brought disrepute to the Police Service. The conclusion had been that, although it was evident that the 1st and 2nd Respondents were directly connected to the incident, there was no evidence to substantiate the allegation that the 1st and 2nd Respondents had assaulted the Petitioners.

Accordingly, it had been recommended to the Inspector General of Police to charge sheet the said two Respondents for 'improper conduct' and to have them

transferred out of the Western Province. The 1st and 2nd Respondents had been transferred pursuant to the SIU's recommendation and punishments, in the form of a warning in the case of the 1st Respondent and two days of additional work in the case of the 2nd Respondent, had been imposed. Disciplinary action against the 3rd Respondent had not been recommended as it was concluded that there was no liability on his part. The 4th to 6th Respondents had also been found liable at the inquiry for failing to discharge their duties according to procedure.

A preliminary objection was raised by the Respondents that the one-month period for the institution of a fundamental rights application has lapsed. The alleged incident occurred on 24th December 2012 and the present application was filed on 19th March 2013. The Petitioners have lodged a complaint at the Human Rights Commission on the 31st of December 2012 as evidenced by the receipt 'P-15B'. By letter dated 3rd of January 2013 ('P-15C') the Petitioners had been informed to submit affidavits and other relevant documents to the Human Rights Commission prior to the 01st of February 2013. Section 13 (1) of the Human Rights Commission Act No. 21 of 1996 states that the period within which an inquiry is pending before the Human Rights Commission shall not be taken into account in calculating the one-month period within which an aggrieved party should invoke the fundamental rights jurisdiction of the Supreme Court. As the date given for the submission of documents was the 01st of February the possible assumption is that the inquiry by the Commission would have commenced on the 2nd of February at the earliest. Given the above timeline, we overrule the preliminary objection of the Respondents.

Infringement of Article 11

Upon the analysis of the material placed before us, it cannot be said with certainty, as to whether the 1st Petitioner had parked the car at a designated parking slot or whether it was parked in a manner obstructing the vehicular traffic, as maintained by the Respondents. The photograph marked 'P-5', submitted by the Petitioners to

demonstrate as to how the car was parked at the time the 1st Respondent initially approached the car, though illustrative, is devoid of much probative value in arriving at a firm finding that the Petitioners had parked in the manner and at the spot depicted in the photograph, being a photograph which is not contemporaneous, but one that had been taken subsequent to the incident.

The Respondents on the other hand have submitted a sketch indicating the positioning of the car drawn by the 4th and 5th Respondents in the course of their investigations, (extracts from the AIB ('R1') and CIB ('R2') dated 25th December 2012, maintained at the Ja-Ela Police Station, to buttress their position that the car was parked in fact on the highway obstructing vehicular traffic. If this court were to go by the sketches produced, then, it is indicative of the car in question had not been parked in a designated parking area.

In my opinion, the court would be justified in taking judicial notice of the fact that the localities in the area concerned are predominantly inhabited by people belonging to the Christian faith and it being the Christmas eve, the shopping areas would have been crowded with Christmas shoppers. This situation would have led to a heavy traffic build up in the shopping areas and as a consequence, the shoppers would have been jostling for parking space. On top of the traffic buildup due to the festive season, the need to ensure free flow of traffic along the Colombo-Negombo Highway, that being the main artery linking the city of Colombo and the Katunayake International Airport would have been paramount in the minds of the police officers deployed for duty to regulate traffic.

What is apparent, however, is that, an argument and a scuffle had taken place between the Petitioners and the 1st and 2nd Respondents. The divergent versions of the two parties provide little assistance to draw a clear conclusion as to whether one party instigated the scuffle and the other party merely exercised force in their defence or whether both parties were equally responsible for the incident.

Prima facie, the incident does not reach the threshold of torture or cruel or inhuman treatment. At the most, the alleged conduct of the 1st and 2nd Respondents (if the Petitioner's version is accepted) would reach the threshold of 'degrading treatment'. Dr. A.R.B. Amerasinghe J. in **Premadasa v. OIC Hakmana and Others** SC App 127/94 SC Mon. 10 March 1995 held that "…. *the mere fact that there was an assault and some injury may not be violative of Article 11. Torture or Cruel, Inhuman or Degrading treatment or punishment may take many forms, but whether the relevant Criteria have been satisfied for the violation of Article 11 depends on the circumstances of each case*."

It must be noted that the material relating to the present case is such that, apart from the Medico-Legal Reports, the veracity of the available evidence is not adequately guaranteed to be able to pin liability on the 1st and 2nd Respondents for the infringement of Article 11. The Medico-Legal reports of the Petitioners indicate minor injuries in the nature of contusions, compatible with injuries one may sustain in the course of a scuffle. The Medico-Legal Reports of the Respondents have not been submitted to the court.

The medical records indicate that the 1st Petitioner had sustained three contusions, one above the elbow joint of the right hand and two on the front aspect of the right side of the chest. The Assistant JMO's opinion has been that "*The injury pattern, causative weapon and dating of injuries are compatible with the history given by the examinee*." The Consultant Psychiatrist's opinion of 07th February 2013 as recorded in the Medico-Legal Examination Report of the 1st Petitioner has been that the 1st Petitioner was suffering from Post-Traumatic Stress Disorder (PTSD) and displayed 'depressive symptoms' which "*can be a consequence of the alleged incident.*" The 2nd Petitioner's Medico-Legal Report marked 'P-22B' indicates "*no injuries*" while the 3rd Petitioner's Medico-Legal Report ['P-22C'] indicates that he had sustained a single contusion *"over the lateral malleolus of the right leg*". Therefore, even if the 2nd Petitioner had in fact been subjected to force in the

manner alleged by her, she does not appear to have sustained any injuries. It is quite possible that the injury of the 3rd Petitioner is such that it could have been sustained in the course of the scuffle.

The Respondents have denied using any force to prevent the Petitioners from obstructing the Police or in committing any violations of the law. This position does not lend much credence to their version placed before the court, when considering the nature of the contusions received by the 1st Petitioner. The injuries make it evident that the 1st Petitioner had been subjected to some bodily restraint directed to the upper body. The injury of the 3rd Petitioner too indicates that he was subjected to some force.

While the evidence is, thus, the decisive factor is that it is uncertain whether force was used to prevent the Petitioners from attacking the 1st and 2nd Respondents as maintained by the Respondents or in offence as maintained by the Petitioners. In that light we are unable to hold that the 1st and 2nd Respondents have infringed the rights of the Petitioners under Article 11. Judicial opinion has been that as the violation of Article 11 entails serious consequences to public officers, strict certainty is needed on a balance of probability for a finding of liability under Article 11 (See **Jeganathan v. Attorney General** (1982) 1 SLR 302**, Namasivayam v. Gunawardena** (1989) SLR 401, **Channa Pieris v. Attorney General** 1994 1 SLR 6, **Goonewardene v. Perera and others** (1983) 1 SLR 305).

If the events unfolded in the manner made out by the Petitioners, the conduct of the 1st and 2nd Respondents would have amounted to 'degrading treatment' as envisaged in Article 11. In **Abeywickrema v. Gunaratna** [1997] 3 SLR 225 the court cited with approval the definition of 'degrading treatment' put forward by Justice A. R. B. Amerasinghe in the treatise '**Our Fundamental Rights of Personal Security and Physical Liberty**' to the effect; "*Something might be degrading in the relevant sense, if it grossly humiliates an individual before others, or drives him to act against his will or conscience.*" However, as the evidence is inadequate to tilt the

balance in favour of the Petitioners i.e. to say that it is more probable that the 1st and 2nd Respondents assaulted the Petitioners in the manner alleged, this court is not in a position to hold that Article 11 was violated. Regarding the obvious fact that the 1st and 2nd Respondents were engaged in an argument and a scuffle with the Petitioners, we take note that the 1st and 2nd Respondents have already been subjected to disciplinary action for conduct bringing disrepute to the police force.

Having held thus, it is pertinent here to make the following observation. On one hand, there is a responsibility for the civilians to respect and obey the directions of the law enforcement agencies, in the legitimate exercise of their authority. Where possible, the members of the public are expected to assist and cooperate with the police in maintaining law and order, without conducting themselves in a manner that causes inconvenience to the public, as well as the police in carrying out their duties. On the other hand, enforcing the law of the land and preserving public order, should not be at the cost of the protections every person is entitled to by law. If the members of the police force lack the discipline and professionalism required to deal courteously with the public and are wont to use the power and authority vested in them to unduly harass civilians, the relations between the police and the public are bound to become strained. When dealing with members of the public who do not readily follow the directions of the Police, it is equally important that police officers maintain their own discipline and professionalism. The ability of the police force to command the trust and cooperation of the public should not be obstructed by the actions of officers who misuse their position.

Infringement of Article 13 (1)

In order to consider whether the Petitioners' rights under Article 13 (1) were violated, it is necessary to first ascertain whether the Petitioners were in fact 'arrested'.

The 'Explanation' to Section 23(1) of the Code of Criminal Procedure Act reads thus; "*Keeping a person in confinement or restraint without formally arresting him or under the colourable pretension that an arrest has not been made when to all intents and purposes such person is in custody shall be deemed to be an arrest of such person.*"

In **Piyasiri v. Nimal Fernando** (1988) 1 SLR 173 the Petitioners, Customs Officers returning from work at the Katunayake Airport, were asked to go to the Seeduwa Police Station in their own cars followed by the 1st Respondent and other police officers, and were searched and the monies in their possession were taken into the charge of the 1st Respondent. Then they were ordered to go to the Bribery Commissioner's Department in their own cars accompanied by the 1st Respondent. After their statements were recorded at the said Department, they were released on a written undertaking to appear before the Magistrate the next morning. The Supreme Court, taking note that the Petitioners were arrested on speculation in order to ascertain whether they could have committed the offence of bribery, held; "*There was in fact an arrest of the petitioners by the 1st respondent. Custody does not necessarily import the meaning of confinement, but has been extended to mean lack of freedom of movement brought about not only by detention, but also by threatened coercion, the existence of which can be inferred from the surrounding circumstances.*" The court referred to Dr. Glanville Williams' article, '**Requisites of a Valid Arrest**' (1954) Criminal Law Review 6 at page 8 where Dr. Williams had stated that "*If an officer merely makes a request to the suspect, giving him to understand that he is at liberty to come or refuse, there is no imprisonment and no arrest. If, however the impression is conveyed that there is no such option, and that the suspect is compelled to come, it is an arrest...*"

It is uncontested that the Petitioners in the instant case initially went to the Police Station on the directions of the 3rd Respondent. The Petitioners have not complained that they were made to go to the Police Station forcibly and further, at

the Police Station the Petitioners of their own volition have sought to lodge a complaint and been directed to the Traffic Branch. There is no complaint that their freedom of movement was inhibited by any police officer, up to that point, at the police station.

At the Traffic Branch however, with the complicity of the 4th and 5th Respondents, the Petitioners had been made to wait by delaying the recording of their complaint despite their requests to be allowed to leave. Although the 1st and 2nd Respondents have denied this in their submissions, they have been unable to submit any record of a complaint lodged by the Petitioners, to substantiate their position. Paragraph 13(a) of the objections of the 1st and 2nd Respondents further prove that the Petitioners were compelled to stay at the Police Station until at least 5.30 pm, the time at which the two Respondents state that they were called back to the Police Station to go to the 6th Respondent's Office with the Petitioners. The 1st and 2nd Respondents [by Paragraph 12(c) of their objections] state that the 5th Respondent OIC visited the scene where the incident was alleged to have taken place, around 3.35 pm. The CIB record and the MOIB record marked 'R2' and 'R8' confirm the time of their visit to be around 3.35 pm. The Petitioners have averred that they "*were informed to wait upstairs until the police investigate.*" It appears that there has been an unnecessary delay in carrying out the investigation. The scene of the incident was only 200m away from the Ja-Ela police station and the 5th Respondent has not explained the reasons for the inordinate delay.

Thus, it can be seen that prior to the point at which the Respondents state that the 1st and 2nd Petitioners were arrested, the Petitioners were in fact under arrest by implication. As there was no complaint that the 3rd Respondent coerced the Petitioners to proceed to the Police Station, it has to be concluded that although there was no express act of arresting, the Petitioners were under arrest after they arrived at the police station, by being made to wait there indefinitely by the 4th and 5th Respondents.

Article 13 (1) further requires that the person being arrested is informed of the reason for arrest. It is well-accepted that the arrestee is entitled to know the reasons for the arrest in order to decide whether the arrestee is bound to submit to the arrest, and to take steps to regain his or her freedom without delay. The point at which reasons should be given was explained in **Mallawarachchi v. Seneviratne, OIC, Police Station, Kollupitiya** [1992] 1 SLR 181. In the said judgement, Justice Kulatunge presented a summary of the propositions as to arrest established by the House of Lords in the much-quoted case of **Christie v. Leachinsky** (1947) AC 457. One of the points was that "*The obligation is to give the reason at the moment of arrest or where it is, in the circumstances excused, at the first reasonable opportunity.*" (at page 189). In the present case, according to the Petitioners, they were not informed of the reason for the arrest of the 1st and 2nd Petitioners. The written submissions as well as the objections of the 1st and 2nd Respondents indicate that the 1st and 2nd Petitioners were arrested, but there is no averment to the effect that they were informed of the reasons for arrest.

Regarding the arrest by implication, it appears that the Petitioners were not given reasons except that an investigation was ongoing. In **Piyasiri** (*supra*) it was stated that "*It is a condition of lawful arrest that the party arrested should know on what charge or on suspicion of what crime he is arrested. Therefore, just as a private person arresting on suspicion must acquaint the party with the cause of his arrest, so must a policeman arresting without warrant on suspicion state at the time* ***(unless the person is already acquainted with it)****, on what charge the arrest is being made or at least inform him of the facts which are said to constitute a crime on his part. Even if circumstances exist which may excuse this, it is still his duty to give the information.*" [at page 186]. In the present case the Petitioners had come to the police station to lodge a complaint in order to seek redress regarding what they had to encounter at the hands of the police officers and in that backdrop, the 4th and 5th Respondents ought to have informed the Petitioners the reasons for their arrest.

Section 32 (1) of the Criminal Procedure Code empowers any peace officer to arrest without an order from a Magistrate and without a warrant, any person "*who in his presence commits any breach of peace*" [**Section 32 (1) (a)**] or "*who obstructs a peace officer while in the execution of his duty…*" [**Section 32 (1) (f)**]. The information submitted to the Magistrate (case No. B5536/12) by the Police dated 26th December 2012 marked 'P-8A' states that the 2nd Respondent was assaulted and obstructed, in the execution of his duty by two women (The 1st and 2nd Petitioners).

In **Joginder Kumar v. State of Uttar Pradesh** AIR 1994 SC1349 which involved the questionable arrest of an Advocate, the court holding that a police officer must be able to justify the arrest i.e. that he had a reasonable belief that the person was complicit in the offence and that, there was a need to arrest such person, stated "*The existence of the power to arrest is one thing. The justification for the exercise of it is quite another.*" (at page 49). The court highlighted the importance of the reasonable justification for arrest, as denying a person of liberty was a serious matter and could cause harm to the arrestee's reputation and self-esteem. The above stance holds true for Sri Lanka and is apt in the circumstances of the present case where the Petitioners who stepped out with the intention of completing their Christmas shopping ended up spending Christmas in police custody.

Furthermore, after the formal arrest of the 1st and 2nd Petitioners they had been produced before the Magistrate much later in the afternoon of the 25th, the day after their arrest as the Respondents state that the Petitioners were arrested on the 24th close to midnight. It is contrary to the best practices enunciated in **Section 36 of the Criminal Procedure Code** that, a peace officer making an arrest without warrant shall, without unnecessary delay and subject to the provisions as to bail in the Criminal Procedure Code, take or send the person arrested before a Magistrate having jurisdiction in the case. The 1st and 2nd Petitioners were produced before the Magistrate only after a delay the reasons for which has not been adequately

explained by the 4th and 5th Respondents, thereby failing to comply with Section 36.

The 4th and 5th Respondents implicitly arrested the Petitioners by making them wait indefinitely at the police station and thereafter formally arrested the Petitioners without adhering to the procedure established by law and failed to give them the reasons for their arrest. The uncontested facts that the 5th Respondent as the OIC carried out an investigation of the incident and that he accompanied the Petitioners to meet the 6th Respondent amply indicates that he was aware of the events unfolding at the police station. Under these circumstances, it would be reasonable in my view to deduce that the 5th Respondent had taken charge of the investigation into the matter. As such, no subordinate officer could have made decisions on their own after the OIC was put on notice, in particular with regard to the arrest of the Petitioners. Hence the 5th Respondent was responsible for the unjustified arrest of the Petitioners, both implicitly and formally, and the contravention of the established procedure and safeguards in such arrest.

Infringement of Article 12 (1)

Article 12 (1) of the Constitution stipulates that "*All persons are equal before the law and are entitled to the equal protection of the law.*" From requiring that equals were treated unequally or that equals were treated unequally in order to make a finding of the infringement of the right to equality, the Supreme Court has over time moved away to hold that the arbitrary exercise of power- even when not falling within the aforesaid 'classification' doctrine- amounts to a violation of Article 12 (1). (See **Sampanthan v. The Attorney General** SC FR 351/2018-356/2018, SC FR 358/2018-361/2018, SC Minutes of 13th December 2018)

In that light, we hold that the arbitrary treatment of the Petitioners, especially by the 4th to 5th Respondents and the failure to follow established procedure set out in detail above, amount to a violation of Article 12 (1).

Conclusion

According to the letter 'X1' submitted by the Hon. Attorney General, relating to the aforementioned investigation into the incident carried out by the Special Investigations Unit (SIU), the findings had been that the 4th to the 6th Respondents were in violation of the 'Departmental Orders' in the manner they handled the present case. It had been found by the SIU investigation that the 4th Respondent had released the minor child contrary to accepted procedure by not making any entry regarding the release and further that he had made a 'false' entry that the Petitioners were arrested at 20:10 hours at the police station when in fact, they had been at the 6th Respondent's office at that time. Regarding the 5th Respondent, it had been found that he had been in violation of 'Departmental Orders' by failing to inform the "Officer in Charge of the District" of the incident in writing within a reasonable time. The 6th Respondent had been found to be in violation of his duties as the Officer in Charge of the District by failing to commence investigations into the matter as early as possible. 'X1' being a summary of the investigation report, and not the investigation report itself, it is unclear what course of action was recommended by the SIU in relation to the 4th to 6th Respondents.

To conclude, I hold that the 1st and 2nd Petitioner's fundamental rights under Article 12 (1) and Article 13 (1) have been violated by the 4th and 5th Respondents. I hold that the said Petitioners are entitled to compensation for wrongful arrest. We direct the 5th Respondent to pay Rs.15,000/= each to the 1st and 2nd Petitioners. The primary responsibility of ensuring the safeguarding fundamental rights being with the State, we also direct the State to pay the 1st and 2nd petitioners Rs. 30,000/= each as compensation.

The 1st and 2nd Respondents had been already subjected to disciplinary action, in the nature of transfers out of the Western Province. The fact that it was not conclusively established that the necessary threshold to hold that the 1st and 2nd

Respondents liable for an Article11 violation was reached, no compensation is ordered to be paid by the 1st and 2nd Respondents. No liability can be attached to the 3rd Respondent either as his conduct does not indicate any violation of the rights for which leave was granted, which conclusion is confirmed by 'X1' as well.

Application partially allowed.

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 Article 11, 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Case no.SC/FR/97/2017

1. Hewa Maddumage Karunapala
2. Pallekkamkanamge Dona Kumudini
3. Child Petitioner (as he is a minor his name has been withheld)

PETITIONER

VS.

1. Jayantha Prema Kumara Siriwardhana,
   Teacher,
   Puhulwella Central College

2. M. Leelawathie,
   Puhulwella Central College,
   Puhulwella

3. W.R. Weerakoon,
   Zonal Director of Education,
   Zonal Education Office,
   Hakmana

4. Sunil Hettiarachchi,
Secretary,
Ministry of Education,
Isurupaya, Pelawatta,
Battaramulla

4A. Prof Kapila Perera,
Secretary,
Ministry of Education,
Isurupaya, Pelawatta,
Battaramulla

5. Hon. Akila Viraj Kariyawasam, MP,
Ministry of Education,
Isurupaya, Pelawatta,
Battaramulla.

5A. Prof.G.L.Pieris,
Hon. Minister of Education,
Isurupaya, Pelawatta,
Battaramulla.

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

RESPONDENTS

BEFORE : **SISIRA J. DE ABREW, J.**
MURDU N. B. FERNANDO, PC, J. AND
S. THURAIRAJA, PC, J.

COUNSEL : Thishya Weragoda with Sanjaya Marambe, Sewwandi Marambe, Meinusha Gamage and Sashya Karunokalage for the Petitioners.

Harishke Samaranayake instructed by Namal Premardana for 1st and 2nd Respondents.
Ms. Swasha Fernando, SC for 6th Respondent.

ARGUED ON : 17th September 2020.

WRITTEN SUBMISSIONS : 6th Respondent on 10th September 2020.
Petitioners on 10th September 2020.

DECIDED ON : 12th February 2021.

S. THURAIRAJA, PC, J.

The 3rd Petitioner (a minor of 15 years of age at the time of Petition, whose name is withheld, hereinafter referred to as "Child Petitioner"), was a student at Puhulwella Central College. The 1st and 2nd Petitioners are respectively the father and mother of the Child Petitioner.

The 1st Respondent, Jayantha Prema Kumara Siriwardhana (hereinafter referred to as the 1st Respondent), is the Art Teacher, Teacher in Charge of Discipline and Sectional head of Puhulwella College while the 2nd Respondent, M. Leelawathie,

is the Principal of the same school. The 3rd Respondent, 4th Respondent, 5th Respondent are authorities under whose overall guidance and supervision Puhulwella Central College as a public school operated at the time of the incident while the 4A Respondent and 5A Respondent are current office-bearers of the specified positions.

The Petitioners instituted an action at the Supreme Court under Article 126 of the Constitution, through Petition dated 7th March 2017 against the 1st-6th Respondents stating that the Fundamental Rights of the Child Petitioner as guaranteed by Article 11 of the Constitution have been infringed by the Respondents.

The facts

The facts are such that on the 13th February 2017, the 3rd Petitioner attended school as usual. During the 1st and 2nd periods of the day allocated for Agriculture, the Petitioner was made part of one of three groups in the class and was directed to plough a designated area of the school grounds at the plant nursery in order to plant vegetables.

The Petitioner, during the execution of this exercise had felt fatigued and had sat on a half wall near the plant nursery for a short amount of time prior to resuming this activity. One of the classmates of the Child Petitioner had kept the Petitioner company during this time. Thereafter the Child Petitioner had resumed the designated task following this short break.

The Child Petitioner further states that while he was washing his hands and tools, two students had approached him and told him that the 1st Respondent asked him to come to his office. The 1st Respondent also admits to this and adds that on seeing the Child Petitioner seated on the culvert during the previous period, had summoned him and reminded him that the Principal had previously warned them not to sit on that specific culvert as it was dangerous and questioned him as to why he had done so even after the warning.

It is observed from the material submitted to this court that the Child Petitioner states that the 1st Respondent then questioned the Child Petitioner asking:

"කොහෙද උඹ අර වාඩි වෙලා හිටියේ ?"

("Where was it that you were sitting?")

And slapped the Child Petitioner across the face. The Petitioner states that the blow landed on his face, upon his left ear. The Petitioner had felt excruciating pain, severe discomfort, and been startled and disoriented. However, after the incident, the Child Petitioner had been chased out of the classroom by the 1st Respondent.

The Child Petitioner had then been in his class and remained in excruciating pain. When the 1st Respondent was informed of the Child Petitioner's situation, the 1st Respondent came to the Child Petitioner and said:

"ඕක ගණන් ගන්න එපා"

("Don't take it so seriously/ Ignore it")

Thereafter, the Class teacher had been informed that the Child Petitioner wants to speak to her. The Child Petitioner states that when he had told her that the Art teacher had hit him and stated that his ear was hurting and that he wants to go home, the Teacher has responded saying:

"ඕක ඇරිල යයි. ගෙදර ගිහින් එක දෙක කරලා අම්මලාට කියන්න එපා."

("It will pass. Now don't go home and exaggerate it and tell your parents")

The Child Petitioner had returned to his classroom where the 1st Respondent had later returned with another teacher who spoke to the Child Petitioner and said:

"කනෙන් ලේ ආවොත් කියන්න"

("Tell me if it bleeds")

And further offered to get the Child Petitioner tea from the canteen.

It must be noted that no staff member offered any form of medical assistance to the Child Petitioner. As no such assistance was forthcoming and he was not allowed to go home, the Child Petitioner had bought himself 2 Panadol pills as painkillers from the school canteen.

It must further be noted that no staff member proceeded to inform the school Principal of this incident prior to the Principal being informed later in the day by a family member of the Child Petitioner before he was admitted to the hospital.

After the Child Petitioner returned home from school at the end of the school day, he told his grandmother that the Art teacher had slapped him and that his ear was aching. Thereafter the Child Petitioner was taken to the Kirinda-Puhulwella Rural Hospital and his ear had been examined. The Doctor has commented that there is eardrum damage and recommended that the 3rd petitioner be admitted to the Matara General Hospital. In the Medical note issued by the Kirinda-Puhulwella Rural Hospital to the Director of Health, Matara General Hospital, annexed as 'P2', it is stated as follows:

> *"This 15 Year old school boy c/o- L hearing in L/ear following an assault to ear by a teacher.*
>
> *Penetration in ear drum. Please admit for ENT opinion"*

The Child Petitioner was thereafter taken to the Matara General Hospital and admitted. It should be noted that even though the child was suffering from ear pain he was not officially transferred/transported to the General Hospital. The Child Petitioner was taken to Matara General Hospital by the 2nd Petitioner. At the time of arrival of the 2nd and 3rd Petitioners at the Matara General Hospital, the 2nd Respondent and two other teachers of the school were at the hospital awaiting the arrival of the Child Petitioner. The Child Petitioner was thereafter transferred to Karapitiya Teaching Hospital on 14th February 2017 for further investigation and returned to Matara General Hospital on the same day. The Petitioner also states that

a statement was recorded by the Police while the Child Petitioner was at the Matara General Hospital and the Petitioner was thereafter discharged.

The investigative notes are available at 'P3'. As per the note, it appears that it is an internal administrative document maintained by the hospital and not issued to the patient. According to the details available it states as follows:

"Assaulted by teacher to left ear"

A diagram drawn illustrates that there is a small perforation, Send to THK (presumed Teaching Hospital Karapitiya), And it is a rubber stamp of consultant ENT surgeon of Matara hospital placed on the document. It is observed that P3 document is an internal document as it states, "not to be taken away". Further, there is no proper medical report available.

However, as there had been no conclusive treatment, the Child Petitioner continued to be in excruciating pain after returning home. In these circumstances, being unsatisfied with the treatment at the previous hospitals, the 2nd petitioner after discussing with the 1st Petitioner decided to admit the Child Petitioner to the Colombo National Hospital on the 15th of February 2017 for treatment and further investigation. The Child Petitioner was kept overnight for observations and investigations and discharged the following day.

The medical investigations as evidenced by the true copy annexed as 'P4' written by the Doctors of the Colombo National Hospital, demonstrate that the finding was one of a perforated ear drum and that the Child Petitioner was suffering from "*conductive hearing loss*" on the left ear in hearing low frequencies. The Petitioners believe this to have been caused by the assault on the Child Petitioner by the 1st Respondent as the Child Petitioner did not have any history of hearing loss prior to this incident.

The Child Petitioner was admitted on 15th February 2017 and discharged on 16th February 2017. It appears he was examined by Consultant ENT surgeon at the

National Hospital. Further, he was referred to the Department of Audiology and a proper examination was done on the Child Petitioner. The report from the Audiology Department makes the comment that there is normal hearing in the right ear, but that there is Mild Conductive hearing loss only at low frequencies in the left ear. Additionally, a plan of action was given, inclusive of Psychological counselling.

The above documents were submitted together with the FR application dated 30th Aug 2018.

I must note that there is no medical report from the Kirinda-Puhulwella Rural Hospital, Karapitiya Teaching Hospital or the Matara General Hospital, and that unfortunately, the State, even though they had the power and authority to get the reports form the relevant government hospitals, have not endeavored to do so. They have merely made their observations and not made any attempt to assist the court in this regard.

According to the Petitioners when the matter was taken up with the school authorities, they had not taken any interest in this matter.

When leave was granted the Attorney General refused to appear for the 1st and 2nd Respondents. The Attorney at law for the 3rd,4th, 5th and 6th Respondents, tendered his appointment as the Attorney-at-law for the aforementioned parties while submitting the affidavit of the 3rd respondent, The Zonal Director of Education of the Zonal Education Office at Hakmana and further submits the report regarding the preliminary inquiry held under the supervision of the Zonal Director of Education annexed as '3R1'. Paragraph 5 of this report finds that the 1st Respondent has hit the Child Petitioner despite doing so without malicious intent or with intent to cause injury. It further finds that by such act, the 1st Respondent has violated circular no. 14/2016 issued on 29th April 2016 issued by the Secretary of the Ministry of Education. Paragraph 6 establishes that for the stated violation, the 1st Respondent is to be removed from the Disciplinary Board of the school in addition to being advised to never repeat such conduct as assaulting a student in the future.

In regards to the document '3R1', I wish to make two observations. Firstly, I must clarify that the report indicates a factual error in the circular referred to therein. In the final page of the report, it is stated as mentioned above, that the 1st Respondent has violated circular no 14/2016 issued on 29th April 2016 issued by the Secretary of the Ministry of Education. However, for the clarity of reference it must be noted that the circular issued on 29th April 2016 by the Secretary of the Ministry of Education bears the Circular number 12/2016 and not 14/2016, and it is the current circular in operation in relation to matters of discipline of school children.

Secondly, I cannot overlook the contradictions in the statements by the 1st Respondent in the examination of '3R1' and the affidavit of the 1st Respondent. I must note that the report does not include the complete statements of the concerned parties, mentioned in the report as annexures 1 through 8, as the annexures have not been reproduced before this court. However, in the summary of the statements by the 1st Respondent as produced on Page 2 and 3 of the report, it is stated that the 1st Respondent affirms that he had sent 2 students to fetch the Child Petitioner and upon the arrival of the Child Petitioner to his classroom, he proceeded to remind the Child Petitioner that the School Principal had previously advised on the dangerousness of sitting on the specific culvert wall, while hitting the upper portion of the body of the Child Petitioner. He has further stated that the Child Petitioner ducked at the exact time and that the slap had hit the Child Petitioner in the face, but that he is confident that the slap did not land on the Child Petitioner's ear. Additionally, as per the summary of statements by the Head of the disciplinary board of Puhulwella Central college, Mr. P. S. K. H Abhewikrama, he was made aware of the situation during school hours upon being told that the 1st Respondent had brought in a student and hit him. Thereafter, he had spoken to the Child Petitioner and deemed that the injury was not serious enough to refer the matter to the school Principal. The above statements make it evident that there has been assault by the 1st Respondent on the Child Petitioner.

However, I find that the 1st Respondent contradicts his statements in the affidavit dated 9th January 2018. The 1st Respondent states that when he confronted the Child Petitioner in that he did something very risky, the Child Petitioner admitted it. The 1st Respondent provides a narrative whereby he then seems to have quite calmly explained that there were other places where the Child Petitioner can sit down if he felt tired and not on top of the derelict wall and that he further explained that only a disorderly or "rowdy" person would behave in such a manner. He paints a picture in that after having warned the Child Petitioner, he simply tapped the Child Petitioner's shoulder and demanded that he rectify this behavior in the future. Thereafter, the 1st Respondent in his affidavit vehemently denies the fact that he assaulted the Child Petitioner and that for this reason, the statements of the Petitioner's actions are *mala fide* and contrary to law. However, the official report annexed as '3R1' in paragraph 4.1 expressly finds that the 1st Respondent has assaulted the Child Petitioner as per his own statements in that he attempted to slap the Child Petitioner, albeit him stating that it was directed at the upper body and that the Child Petitioner seems to have been at fault for ducking in the last moment. Thus, I am of the view that this benevolent stance introduced in the Respondent's affidavit is in no way supported by the evidence and statements before this court.

Finally, in matter to be noted in the 1st Respondents Affidavit, he states that the Child Petitioner failed to promptly inform the school Principal and the medical center about his alleged complaints and that the Child Petitioner has only done so several hours following his return home.

I am of the view that the statements in his affidavit are not supported at any point in any other document, but rather that all evidence before this court contradicts this stance taken by the 1st Respondent in his affidavit. As the official report annexed as '3R1' in paragraph 4.1 expressly finds that the 1st Respondent has assaulted the Child Petitioner as per his statements, I am inclined to believe and maintain this stance proceeding forward. Additionally, I observe that it is the duty of the 1st Respondent,

Class teacher and any other teacher of the school aware of this situation during school hours, to direct the Child Petitioner to the school Principal and/or the medical center. However, they have acted negligently by downplaying this incident and providing no assistance whatsoever to the Child Petitioner, even after being made aware of the situation.

Based on the above facts, The Petitioner deems the admonishment by the Zonal Director of Education as stated in the document marked '3R1' at Paragraph 6, to be insufficient in relation to the damage caused and submits that assaulting the Child Petitioner by slapping him across the face, causing injuries to the left eardrum of the Child Petitioner, failing and/or neglecting to provide medical attention to the Child Petitioner constitute to violation of the rights of the Child Petitioner protected by Article 11 of the Constitution in that the acts amount to torture, cruel, inhuman degrading treatment or punishment. As such, the Petitioners request for relief under Article 17 of the Constitution, as the alleged violation has occurred by an administrative act by a school teacher in his capacity. For the above reasons, the Petitioners pray for this Court to declare that the Child Petitioner's fundamental Rights have been infringed and grant such relief as the Court may deem just and equitable taking into account the facts and circumstances of the case.

Corporal Punishment

In addressing the instant case, I firstly wish to address the origin of Child protection laws of Sri Lanka.

The protection of children has been of common global interest since the early twentieth century as there were no standards for protection of children in the industrialised countries. It was common practice for them to work alongside adults in unsanitary and unsafe conditions. Growing recognition of the injustice of their situation, propelled by greater understanding of the developmental needs of

children, led to a movement to better protect them. The Human Rights Commission of the United Nations identified the need of a convention for the welfare and protection of children. Thus, the **United Nations Convention on the Rights of the Child (UNCRC)** was prepared jointly by the United Nations Organisation and non-governmental organisations under the patronage and guidance of the Human Rights Commission and was adopted on November 20th, 1989 at the 44th session of the General Assembly of the United Nations. It is considered the most rapidly and widely ratified human rights treaty in history. Sri Lanka signed the Convention on the Rights of the Child on 26th January 1990 and ratified it on 12th July 1991. As a follow-up to the UNCRC, the government of Sri Lanka formulated the Children's Charter in 1992. Thereafter, Sri Lanka has proceeded to sign and ratify multiple convention as well as implement and amend national laws in order to further the cause of protecting the rights of Children, in line with the commitments Sri Lanka has undertaken as signatory to the UNCRC.

Article 28 on the Child's Right to Education states as follows in subsection 2:

> *"States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention."*

Article 28 thus recognises the need for children to face disciplinary actions in schools where necessary but allow for no exception to deviate from the standard imposed by the convention in avoiding any form of physical or mental violence towards children. This is supported by Article 19 of the UNCRC which states as follows:

> *"States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child."*

It is not a point of contention that the UNCRC stands strictly against Corporal Punishment. By the early 21st century, more than 100 countries had banned the Corporal Punishment of children in school. In 2006, **the Committee on the Rights of the Child issued in its 42nd Session, "General Comment No.8 (2006)"**, focused on the right of the child to protection from Corporal Punishment and other cruel or degrading forms of punishment. This Commentary largely focused on Article 19, 28(2) and 37 of the UNCRC. **Paragraph 11** of **Comment no. 8** describes Corporal Punishment as follows:

> *"any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light. Most involves hitting ("smacking", "slapping", "spanking") children, with the hand or with an implement - a whip, stick, belt, shoe, wooden spoon, etc. But it can also involve, for example, kicking, shaking or throwing children, scratching, pinching, biting, pulling hair or boxing ears, forcing children to stay in uncomfortable positions, burning, scalding or forced ingestion (for example, washing children's mouths out with soap or forcing them to swallow hot spices). In the view of the Committee, Corporal Punishment is invariably degrading. In addition, there are other non-physical forms of punishment that are also cruel and degrading and thus incompatible with the Convention. These include, for example, punishment which belittles, humiliates, denigrates, scapegoats, threatens, scares or ridicules the child."*

Based on the above it is clear that the UNCRC cannot be interpreted as supportive of Corporal Punishment of any form. However, it must be recognised that rejection of Corporal Punishment is not a rejection of the concept of discipline. It must be understood that the healthy development of a child depends on parents and adults providing the necessary guidance, in line with the child's evolving capacities in order to assist their growth towards responsible life in society. An individual's understanding of discipline, respect for rules, a healthy attitude towards a non-violent

society are integral attributes that must be instilled from a young age. However, in civilized society, these goals are to be accomplished using alternative forms of discipline which do not inflict physical or mental harm.

Sri Lanka as a signatory to the UNCRC has understood the need to curb the widespread use and acceptance of Corporal Punishment. This evolution in mindset can be viewed through the development of laws through the enactment of amendments to existing laws, circulars exhibiting the attitude of the Ministry of Education as well as the changing attitude expressed in Judgements, in regards to Corporal Punishment.

The Penal Code in discussing Criminal force has stated in Section 341 that any person who intentionally uses force on any person without the consent of the other person, *"in order to the committing of any offence, or intending illegally by the use of such force to cause, or knowing it to be likely that by the use of such force he will illegally case injury, fear, or annoyance to the person to whom the force is used, is said to use "criminal force" to that other."* In regards to Corporal Punishment, I must bring to light Illustration (i) which illustrates as follows:

> *"A, a schoolmaster, in the reasonable exercise of his discretion as master, flogs B, one of his scholars. A does not use criminal force to B, because, although A intends to cause fear and annoyance to B, he does not use force illegally".*

While the above provision and illustration have not yet been repealed, the current approach considers the above to be archaic. Upon ratification of the UNCRC the need to make relevant changes to the Penal Code was understood and led to the **Penal Code (Amendment) Act, No.22 of 1995.** The Amendment inserted a Section operative as Section 308A of the principle enactment as follows:

> *(1) Whoever, having the custody, charge or care of any person under eighteen years of age, willfully assaults, ill-treats, neglects, or abandons such person*

or causes or procures such person to be assaulted, ill-treated, neglected, or abandoned in a manner likely to cause him suffering or injury to health (including injury to, or loss of sight of hearing, or limo or organ of the body or any mental derangement), commits the offence of cruelty to children.

(2) Whoever commits the offence of cruelty to children shall on conviction be punished with imprisonment of either description for a term not less than two years and not exceeding ten years and may also be punished with fine and be ordered to pay compensation of an amount determined by court to the person in respect of whom the offence was committed for the injuries caused to such person.".

Further, the **Penal Code (Amendment) Act, no.16 of 2006** added the following Explanation for the above Section:

"*Explanation: "injuries" includes psychological or mental trauma.*".

Thus, the above demonstrated the evolving approach taken by legislators in the 20th and 21st century, progressively accepting the illegality of Corporal Punishment in 1995 and thereafter the recognition of mental trauma associated with violence in 2006. This criminalisation of Corporal Punishment is drastically different from the approach taken by the principle enaction in 1883.

The Ministry of Education has not been blind to the practice of Corporal Punishment. As the institution in charge of the education of all young minds in this country, particularly those within the public school system, the Ministry of Education has issued multiple circulars in relation to Corporal Punishment. The Circular, as mentioned in the document marked '3R1', which is **Circular number 12/2016** issued on 29.04.2016, which was to be enforced with effect from 02.05.2016 superseding the provisions of the **Circular No.17/2005** on securing discipline within the school, is the current circular in regards to Corporal Punishment within schools. This follows much of the same material available in the previous circular with the addition of provisions

on the Disciplinary Board of a school. The circular recognises that the duties and nature of responsibility borne by the teachers comes from the concept of *loco parentis* which essentially stands to mean "in the place of parents". Thus, teachers tend to recognise that they, in the place of parents, bear the responsibility to keep children safe, teach children and look to the general growth, discipline and safety of children. The circular further states that groups such as Medical Officers, Psychologists, and Humanitarians have explicated Corporal Punishments as chastisement that causes physical pain. They have further stated that it would negatively affect to the learning process of the students and their tendency to show anti-social acts would increase whilst it may improve severe distress among them and that since there is minimum evidence to confirm that student behavior in the classroom have been developed through such chastisements, it is deemed to be a useless process. The Circular in paragraph 2.2.1 lists the negative outcomes of the practice of Corporal Punishment revealed through various studies.

Importantly to the instant case, the circular states that a school must have a Board of Discipline and states the constitution of the board. Section 2.3 of the circular discusses the functions of the Disciplinary board while section 2.4 states the repercussions and possible legal redress against teachers who punish students, even when it is done so with the objective of maintaining discipline. Section 2.3.2 offers alternative methods of discipline in place of Corporal Punishment, in the instant case, all of the demonstrated methods of discipline could have been used by the 1st Respondent in place of using physical violence, particular those in subsection ii - iv given the nature of the error by the Child Petitioner, but the 1st Respondent did not attempt to resort to such non-violent methods.

Section 2.4 recognises that Corporal Punishment even when used as a method of disciplinary action may lead to legal action. The circular expressly recognises that a cause of action may arise over the infringement of Fundamental Rights in terms of the **Article 11** of **Chapter III** and **Article 126** of **Chapter XVI of the Constitution of**

the Democratic Socialist Republic of Sri Lanka, as has occurred in the instant case. Further it is stated that a course of action may arise over the offence of Cruelty to Children in terms of the **Section 3** of the **Penal Code (Amendment) Act (No. 22 of 1995)** and **Section 308A** of the **Penal Code**, as enumerated above. If it is advised by the Hon. Attorney General that legal action can be taken in that regard, having considered facts submitted at the investigation, a case can be instituted against the relevant offenders. Finally, if it is proved at the disciplinary inquiries conducted by the Authorities of the Ministry of Education over the imposition of Corporal Punishments, disciplinary actions can be taken in terms of the Establishments Code.

The current circular as discussed and circulars regarding the discipline of children preceding this circular have continually emphasized the importance of maintaining discipline within the school without inhuman physical or mental punishments and it emphasises furthermore that teachers are responsible for creating a school environment free of child abuse. Thus, given the clear guidelines of the circular which have not been adhered to and the express provision by the circular to the Petitioners to institute the present action, the 1st Respondent is clearly liable for his violations of the above circular as recognised by the Zonal Director of Education in document '3R1' as stated in Paragraph 5.1 at page 5 of the report.

The archaic attitude towards punishment of children of "spare the rod and spoil the child "prevails strongly in Sri Lankan culture, indeed the saying used is,

"නොගහා හදන ළමයයි, හැඳි නොගා හදන හොද්දයි වැඩක් නැත."

(The child raised without beating and the curry made without stirring is useless)

This view does not essentially originate from Sri Lankan culture. In Sri Lanka, there is ample evidence in relation to laws introduced by Kings in order to promote a non-violent, benevolent society, raising nurturing children. In reference to the Chulawamsa it says that during the Anuradhapura and Polonnaruwa era we had two

kings who introduced legislature explicitly stating that there should be no physical punishment on both adults and children. Therefore, our culture was such that it had a negative view on Corporal Punishment. Corporal Punishment was a prevalent method of punishment used during the colonial era of occupation brought into practice from public school practices from their respective countries, thereby trickling into the attitudes and daily practices of citizens of the country. Indeed, The **General Comment no.8 to the UNCRC** recognises that the defense of "lawful" or "reasonable" chastisement or correction has formed part of the English common law for centuries, as has a "right of correction" in French law. However, at such time, the same defense was available to justify the chastisement of wives, slaves, and servants, which clearly demonstrates that this defense is long outdated. The irony is in that these western nations recognised the detrimental nature of Corporal Punishment and have abolished such practices well before our culture started to recognise the necessity of reforming societal attitudes towards Corporal Punishment. It is indeed an outdated and disproven practice from the western world that we are dearly holding on to.

As educators, teachers hold a primary responsibility in ensuring the safety of children. As discussed above, it has been expressly clarified by the Ministry of Education that Corporal Punishment is against this fundamental responsibility. Additionally, it is the practices ingrained and experienced by children that they carry forward into adulthood. Experiencing physical violence in childhood increases the likelihood of producing adults that engage in violence in daily life and the infliction of violence upon future children as it is the "traditional" and "tried and tested" method of raising children

Corporal Punishment as a method of discipline is ineffective for multiple reasons. It is used by adults for the simple reason that physical violence is more likely to bring instant compliance. This method of correction teaches children to fear violence and normalises violence as opposed to bringing any sense of understanding

of the wrong committed or of the true societal value of discipline. The behavior is avoided in the future not due to understanding of the wrong committed but due to the trauma of violence. Encouraging corporal violence normalises violence, undermines the dignity of a child, and inflicts trauma in children which is reflected in unhealthy and disruptive behavior as adults. Corporal Punishment disregards the integrity, autonomy, and dignity of each child. The **General Comment no.8 to the UNCRC** in paragraph 47 recognises that " The Convention asserts the status of the child as an individual person and holder of human rights. The child is not a possession of parents, nor of the State, nor simply an object of concern." This further points out the aims of education and the method of providing proper guidance for children in a healthy environment. Thus, caretakers are not entitled to inflict violence upon minors in their care, as minors are beings of their own rights and not mere property under the care of the legal guardians.

We must also recognise that adults are protected by law from similar incidents as it would amount to criminal use of force, assault, and other crimes against the person. Children as minors and vulnerable members of the society, when hit, injured, traumatised in the name of discipline or punishment, must not be left defenseless and unheard when faced with such violence. Normalising violence as in the instant case is unacceptable as this leaves voiceless minors vulnerable in the face of mental and physical violence and trauma, and we, as an institution of Justice would be failing in our duty to allow for such normalisation of violence and victimisation of children.

In addition to the above act of the infliction of harm upon the Child Petitioner, a secondary aspect of the offence by the 1st Respondent is that of negligence. Section 308A as enumerated above includes negligence that causes suffering to the minor. I must observe the negligence of all the teachers concerned that were aware of this occurrence, who continued to undermine the pain of the Child Petitioner and provided no medical assistance to the Child Petitioner despite his communication to them that he was in excruciating pain. The concept of "locus parenti" as mentioned

above, meaning to be in the place of parents, imposes an obligation upon teachers to address a child's injuries and to provide assistance and care. It means the best interest of the child, as opposed to the convenience and best interest of the teachers. In this regard, the 1st Respondent and even the other teachers aware of this incident have failed their duty. The only offer made to the Child Petitioner was that of tea. His claims of being in unbearable pain was met with indifference and being told that "it will pass" and to not exaggerate and tell his parents of his pain. As the Child Petitioner saw that no assistance was forthcoming, he himself purchased painkillers from the school canteen. This entire incident, inclusive of the assault and the subsequent negligence is such that students and parents alike are likely to lose their faith and trust in the public education system, the school, those in charge as the Principal and all teachers who undertake the care of children.

Violation of Fundamental Rights (Corporal Punishment and torture)

The Petitioners apply to this court under Article 11 of the Constitution for an alleged violation of the Child Petitioner's fundamental rights, the provision which reads as follows:

> *"No person shall be subjected to torture or to cruel inhuman or degrading treatment or punishment".*

Further, in reference to minors, the **Child Rights Convention** in **Article 37** states as follows:

> *"States Parties shall ensure that:*
>
> *(a) No child shall be subjected to torture or other cruel, inhuman, or degrading treatment or punishment. "*

In addition to the above, all notable international declarations of human rights prohibit torture as well as cruel, inhuman, or degrading treatment or punishment.

Article 5 of the Universal Declaration of Human Rights, Article 7 of the International Covenant on Civil and Political Rights and **Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment** contain similar terms.

It is indeed established as above, that the injury to the Child Petitioner occurred due to a punishment in the form of Corporal Punishment. In relation to Corporal Punishment and the association with the freedom from torture, cruel inhuman or degrading punishment, the Committee on the Rights of the Child notes in its concluding observations on States Parties' reports and in other comments that any Corporal Punishment of children, however light, is incompatible with the Convention on the Rights of the Child, citing, in particular, article 19, which requires protection of children "from all forms of physical or mental violence", and in relation to school discipline, Article 28(2), in addition to Article 37.

Thus, while Corporal Punishment does not amount to torture in itself in the instant case, the practice of infliction of physical or mental punishment which disregards the inherent dignity of a child amounts to inhuman or degrading punishment. However, I must clarify that the gravity of the crime would reflect on the sentence as well, and as such, extreme use of force or continual use of force in Corporal Punishment could even amount to torture if a situation warrants for it.

It is indeed established in Sri Lanka that Corporal Punishment may amount to violations of Article 11 of the Constitution. In the case of **Bandara V Wickremasinghe (1995) 2 SLR 167**, despite the case being prior to the amendments to the penal code criminalizing Corporal Punishment or recognising mental trauma in 2006, the Supreme Court supported the view that excessive use of force by teachers and administrative officials in maintaining discipline could amount to cruel and degrading treatment. In that case Kulatunga, J was of the view that:

> *"I agree that discipline of students is a matter within the purview of schoolteachers. It would follow that whenever they purport to maintain*

discipline, they act under the colour of office. If in doing so, they exceed their power, they may become liable for infringement of fundamental rights by executive or administrative action."

He was further of the view that:

"This Court must by granting appropriate relief reassure the petitioner that the humiliation inflicted on him has been removed, and his dignity is restored. That would in some way guarantee his future mental health, which is vital to his advancement in life."

I am inclined to support the view as stated above. Given the advancements of society as enumerated above, this view must be fundamentally held and developed upon. In the instant case, the court as the upper guardian of the child, must ensure that the Child Petitioner is provided with a sense of justice being restored in view of the violation of his person and the lack of respect to his dignity exhibited by the 1st Respondent. While I recognise Parents, Teachers and Guardians as being responsible for the growth and upbringing of children, they are entrusted with the duty of guiding children and instilling discipline in them. However, children are not to be considered property of the adults entrusted with their care. Children are entitled to their own sense of self and dignity being separate beings. It is unacceptable to consider that a child assaulted may not be entitled to remedy while an adult in the same circumstances would be entitled to such relief, for the reason of being a minor. In any case, minors as vulnerable and impressionable members of society must be entitled to a higher degree of protection.

In the case of **Wijesinghe Chulangani vs Waruni Bogahawatte SC FR App No. 677/2012 (Supreme Court minutes dated 12th June 2019),** violation of Article 11 was discussed by Aluwihare PC. J in relation to police custody of a minor. However, the case of **Bandara V Wickremasinghe** (*ibid*), in order to state the following:

"Nevertheless, this Court recognises that what amounts to a 'high degree of maltreatment' in relation to an adult does not always resonate with the mental constitution of a minor. Therefore, when a minor complains of degrading treatment, the Court as the upper guardian must not be quick to dismiss the claims for failing to meet the same high threshold of maltreatment. Instead, it must carefully consider the impact the alleged treatment may have had on the mentality and the growth of the child."

Thus, with regard to the above, I am of the view that in the instant case it is imperative to the child that he is assured that his dignity is recognised by law and is thus reflected by this decision, for his healthy advancement of life and appreciation of this fundamental dignity of himself and of others.

This stance is one that is not only applicable to Sri Lanka. In the case of **Parents Forum for Meaningful Education vs Union of India and Another 89 (2001) DLT 705**, The UNCRC, the Right to be free from torture, The Right to life have been discussed extensively, among others by the Delhi High Court. In arriving at the decision that Corporal Punishment must be outlawed, the learned judge has made important observations including that fundamental rights of the child will have no meaning if they are not protected by the State and that the State and the schools are bound to recognise the right of the children not to be exposed to violence of any kind connected with education. It was stated that to allow even minimum violence to children can degenerate into aggravated form as a teacher using the rod cannot every time be mindful of the force with which he may be hitting the child. Further, that children are entitled to all the constitutional rights and that a child cannot be deprived of the same just because he is small. Being small does not make him a less human being than a grown up.

A Child is a precious national resource to be nurtured and attended with tenderness and care and not with cruelty. Subjecting the child to Corporal Punishment for reforming him cannot be part of education given that as noted above,

it causes incalculable harm to him, in his body and mind. The learned judge accurately describes this phenomenon as follows:

> *"The child has to be prepared for responsible life in a free society in the spirit of understanding, peace, and tolerance. Use of Corporal Punishment is antithetic to these values. We cannot subject the child to torture and still expect him to act with understanding, peace and tolerance towards others and be a protagonist of peace and love. It was probably for this reason Mahatma Gandhi said that "if we are to reach real peace in this world, and if we are to carry on a real war against war, we shall have to begin with children, And if they will grow up in their natural innocence, we won't have to struggle, we won't have to pass fruitless idle resolutions, but we shall go from love to love and peace to peace, until at last all the corners of the world are covered with that peace and love for which, consciously or unconsciously, the whole world is hungering."* "

I must also importantly note that the Petitioners further prefer this application under Article 17 of the Constitution which states that:

> *"Every person shall be entitled to apply to the Supreme Court, as provided by Article 126, in respect of the infringement or imminent infringement, by executive or administrative action, of a fundamental right to which such person is entitled under the provisions of this Chapter"*

It is established through the case of **Bandara V Wickremasinghe** *(supra)*, that teachers in the act of maintaining discipline, act in the colour of their office and not in their personal capacity and that if they so exceed their powers while in this pursuit, they may become liable for infringement of fundamental rights by executive or administrative action (as quoted and discussed above). For this reason, I am of the view that in the instant application, the 1st Respondent was acting in his official capacity and that for this reason, the incident was a violation of the fundamental right

of the Child Petitioner as guaranteed by Article 11 of the Constitution, by an executive or administrative action.

Additionally, in the instant case, I must also note that the 1st Respondent states in his affidavit that the 1st Respondent did not know any details of the Child Petitioner, and bore no personal grudge against the Child Petitioner prior to this incident and thus that there was never any malicious intent on his part. However, there is no requirement of malice or intent required for the violation of Article 11 or Article 17 of the Constitution. Further, it is established through the circulars by the Education Ministry, in circular 12/2016 paragraph 2.4, that even with the best interest of the child and the discipline of the school in mind, a teacher may be in violation of all relevant provisions in reference to Corporal Punishment. Thus, the intention of the perpetrator is irrelevant to the illegality of Corporal Punishment, be it a teacher, parent, guardian or any other adult under who's care or contact that the minor may be in, for the sole reason that it is the duty of the State to protect children from all forms of physical violence.

Finally, I must also recognise that the elimination of the practice of Corporal Punishment may not be achieved through isolated incidents, but a profound understanding by those entrusted with the care of children that violence is not a justifiable means to the end of discipline. Cruelty, violence, physical harm, particularly in the view of setting an example is condemned by all major faiths of our country, which forms the bedrock of our culture. The Dhammapada, profoundly states as follows:

"Attānañce tathā kayirā,

yathaññam-anusāsati,

sudanto vata dametha,

attā hi kira duddamo."

(As one instructs others, so should one act; if one would tame others, one should first be well tamed. Truly, it is very hard to tame oneself).

It is thus clear, that those guiding and instructing impressionable children, do not set a suitable example in impulsively engaging in violent acts that harm children in the name of disciplining them, as children are only likely to carry forward this behavior. If teachers aim to instill self-discipline and non-violence in children, they must set the example by instilling the same values in themselves. While this is difficult practice, if one is to expect this of children, they are to reflect it and expect it of themselves.

It is imperative that we do not, as a State, condone behavior as in the instant case as it is detrimental to the growth of a child and is to be construed as cruel or degrading treatment. For this reason, I find that the actions by the Zonal Director of Education as stated in the document marked '3R1', which was to remove the 1st Respondent from the Disciplinary Board of the school in addition to advising him to never repeat such conduct in the future, as insufficient, taking into consideration the violation in question, as well as the permanent damage caused to the Child Petitioner by the 1st Respondent in the instant case.

Decision

Considering the Petition, Affidavit and Written Submission of the Petitioners and the Respondent as well as the submissions made by the Counsel, I find that the Fundamental Rights of the Child Petitioner enshrined in Article 11 of the Constitution have been violated by the 1st Respondent and the State. After careful examination of all facts and relevant matters, especially a permanent lifelong damage to the Child Petitioner's hearing ability, I order compensation of One Hundred and Fifty Thousand Rupees from the 1st Respondent to the Child Petitioner and a further sum of Five

Hundred Thousand Rupees by the State to be paid to the Child Petitioner. The aforementioned sum is to be paid within 6 months from the date of this judgement.

Application allowed.

JUDGE OF THE SUPREME COURT

SISIRA J. DE ABREW, J.

I agree**.**

JUDGE OF THE SUPREME COURT

MURDU N. B. FERNANDO, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an application under Article 17 and 126 of the Constitution.

1. Herath Mudiyanselage Ajith Rohitha Bandara Herath,
   Hewapola,
   Pilessa.

2. Weerasooriya Arachchilage Padmini Damayanthi Weerasoriya,
   Hewapola,
   Pilessa.

3. J.M.N. Bandara,
   No. 53, 'The Breeze',
   Kiriwawula, Thorayaya,
   Kurunegala.

Petitioners

SC FR Application 101/2014

-Vs-

1. K. Thawalingam,
   Former Surveyor General,
   Surveyor Department of Sri Lanka,
   No. 150, Kirula Road,
   Narahenpita, Colombo 5.

2. S.M.P.P. Sangakkara,
   Additional Surveyor General,
   (Title Registration),
   Surveyor Department of Sri Lanka,
   No. 150, Kirula Road,
   Narahenpita, Colombo 5.

2A. S.K.Wijesinghe,
   Additional Surveyor General
   (Title Registration),
   Surveyor Department of Sri Lanka,
   No. 150, Kirula Road,

Narahenpita, Colombo 5.

2B. P. A. N. De Silva,
Additional Surveyor General,
(Title Registration)
Surveyor Department of Sri Lanka,
No. 150, Kirula Road,
Narahenpita, Colombo 5.

3. R.T.P. Herath,
Former Provincial Surveyor General,
Provincial Surveyor Generals' Office,
South Circular Road,
Kurunegala.

3A. A.M.R.B.K Atapattu,
Provincial Surveyor General,
Provincial Surveyor Generals' Office,
South Circular Road,
Kurunegala.

4. E.M.D.M Ekanayake
Former Senior Supritendent of Surveys,
District Survey Office,
South Circular Road,
Kurunegala.

4A. E.M.P.U.K. Tennakoon,
Senior Superintendent of Survey,
District Survey Office,
South Circular Road,
Kurunegala.

5. H.P.S. Hettiarachchi,
'Kusumsiri', Wadakada Road,
Pothuhera.

6. E.A.M. Perera,
74/30J, Rajamal Uyana,
Colombo Road, Kurunegala.

7. B.D. Premaratne,
No. 50, Rideegama Road,
Mallawapitiya.

8. R.D.M.P.R. Rajapaksha,
19/3A, Mallawapitiya,
Kurunegala.

9. S.M. Ariyadasa,
Akkara Ata,
Kalugamua.

10. A.S.K. Paranage,
Temple Road, Hiripitiya,
Nikadalupotha.

11. K.L.S. Rathnayaka,
'Sandalu', Daragala,
Welimada.

12. P.A.N. Gunasiri,
Hewanellagara,
Nakkawatta.

13. E.M. Gunawathie,
128, Welangollawatta,
Welagedara Uyana,
Kurunegala.

14. P.P. Weerakkody,
Kithulheragama,
Nagallagamuwa.

15. M.V. Ariyaratne,
Rideegama Road,
Mallawapitiya, Kurunegala.

16. S.B. Abeykoon,
Pannala-Kuliyapitiya Road,
Kankaniyamulla,
Walakumburumulla.

17. H.M.S. Priyadarshana,
Muwanwellegedara,
Awulegama.

18. K.A. Amarathunga,

567/4, Sewendana,
Maharachchimulla.

19. W.M.P.B Wijekoon,
50/10, Negombo Road,
Kottagas Junction,
Uhumeeya.

20. A.P. Kumarasinghe,
Dunukelanda, Welagane,
Maspotha.

21. P.B. Dissanayaka,
234/10, Wilgoda Road,
Kurunegala.

22. K.S. Dasanayaka,
13/12, Jaya Pathirana Mawatha,
Bauddhaloka Road,
Kurunegala.

23. R.M. Rathnapala,
'Prasansani', Bamunawala,
Kurunegala.

24. L.W.I. Jayasekara,
2nd Land, Athuruwalawatta,
Dambadeniya.

25. J.A.R. Jayalath,
1, Sri Indrajothi Mawatha,
Udubaddawa.

26. J.A.S. Jayalath,
75, Kuliyapitiya Road,
Udubaddawa.

27. R.M. Pushpadewa,
Dangolla, Horombawa.

28. J.D. Hapuarachchi,
Nugawela,
Maharachchimulla.

29. L.G. Ranathunga,
111, Kandy Road,
Kurunegala.

30. M.P.I.K. Pathirana,
272, Lake Road,
Theliyagonna, Kurunegala.

31. H.V.A. Jayalath,
33, Thalgodapitiya Mawatha,
Malkaduwawa, Kurunegala.

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

33. Nihal Gunawardena,
Former Surveyor General,
Surveyor Department of Sri Lanka,
No. 150, Kirula Road,
Narahenpita, Colombo 5.

33A. P.M.P. Udayakantha,
Surveyor General,
Surveyor Department of Sri Lanka,
No. 150, Kirula Road,
Narahenpita, Colombo 5.

Respondents

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

Counsel: Pubudini Wickramaratne with Yamindri Perera for the Petitioner.
Rajitha Perera SSC, for the 2B, 3A, 4A, 32 and 33A Respondents.

Argued on: 14.01.2019

Decided on: 12.03.2021

Murdu N.B. Fernando, PC. J.

The Petitioners filed this application before this Court, seeking inter-alia a Declaration that the 1st to 4th and 33rd Respondents or any of the said Respondents have infringed the Fundamental Rights guaranteed to the Petitioners under Article 12(1) of the Constitution. Leave to Proceed was granted by this Court to the Petitioners on 13-02-2015.

The relevant facts as stated in the Petition dated 25.03.2014 *albeit* brief is as follows: -

01. The three Petitioners are Registered Licensed Surveyors. They are holders of an annual practicing license issued in terms of the Survey Act No 17 of 2002. They are also empowered to conduct cadastral surveys and have been issued with Certification of Accreditation to conduct surveys for the purpose of the Registration of Title Act No. 21 of 1998. Such Certificates were issued to the Petitioners by the Surveyor General after being satisfied of their competence.

02. All three Petitioners were Government Surveyors now retired and engaged in conducting private surveys.

03. In terms of the Registration of Title Act No.21 of 1998 conducting of surveys and preparation of cadastral plans and maps in the island for registration of title fell within the purview of the Survey Department. This project is referred to as the 'Bim Saviya programme'.

04. When the Survey Department launched the said programme in the Kurunegala District, the Petitioners were deployed and assigned work for the below mentioned years:

- 1st Petitioner - 2009 to 2012
- 2nd Petitioner - 2011 and 2012
- 3rd Petitioner - 2012

05. In 2012, the Surveyor General called for applications for the engagement of Surveyors for the said programme **with regard to the year 2013**. Selections were made and a priority list for Kurunegala District was prepared. In the said list of Registered Licensed

Surveyors ("the Surveyors") only the names of the 2nd and 3rd Petitioners were included. The 1st Petitioner was not among the selected Surveyors. However, no surveys were assigned to any of the Surveyors named in the list, including the 2nd and 3rd Petitioners as surveys were not carried out in the Kurunegala District under the Bim Saviya programme for the year 2013, due to financial constraints.

06. **For the year 2014** too, applications were called by the Surveyor General by letter dated 07-11-2013 (P8). The three Petitioners applied and were selected to conduct surveys in the Kurunegala District and were placed at the 23rd, 24th and 25th positions respectively in the **'Priority List' (P12).**

07. The grievance of the Petitioners before this Court, is their placement in the priority list and the Petitioners plead that they are entitled to be placed higher in the said priority list (P12).

08. The Petitioners also plead that the scheduled work in the Kurunegala District for 2014 is only to be assigned to 17 Surveyors and that it would be assigned to the Surveyors placed at the top 17 places in the priority list (P12) and not to the Petitioners who are placed at the lower end of the priority list. The said 17 Surveyors who are placed at the top end of the priority list have been named as the 5th to 21st Respondents in the petition filed before Court.

09. Hence, the Petitioners are challenging the priority list (P12) and specifically the placement of seven of the said Respondents, viz 16th, 17th, 18th, 19th, 21st, 23rd and 24th Respondents before Court. The names of the said seven Respondents appear at the 12th, 13th, 14th, 15th, 17th, 19th and 20th positions in the priority list. The said seven Surveyors are placed over and above the three Petitioners who are slotted in at the 23rd, 24th and 25th places in the priority list.

10. Thus, the Petitioners plead that, determining the order of priority in the priority list (P12) and the selection and/or the assignment of work to the 5th to 21st Respondents is arbitrary, capricious, unreasonable and has no force or effect in law and violates the fundamental

rights of the Petitioners guaranteed under Article 12(1) of the Constitution, for the below mentioned reasons: -

a) The guidelines (P11) for selection of Registered Licensed Surveyors to carry out cadastral surveys under the Bim Saviya programmes in 2014 specifies that first preference should be given to Surveyors who have conducted surveys under the said program for 2011, 2012 and 2013 and the Petitioners have conducted such surveys and are entitled to receive first priority in terms of the selection criteria marked P11;

b) The 16th, 17th 18th, 19th, 21st, 23rd and 24th Respondents have not conducted any surveys under the said Bim Saviya programme during the said years and therefore, could not have been selected and placed ahead of the Petitioners in the priority list;

c) Some of those selected do not possess the eligibility criteria and could not have been selected; and

d) The Petitioners have a legitimate expectation that they would be selected in terms of the selection criteria in P11.

11. Therefore, the Petitioners pray;

a) for a declaration that the fundamental rights of the Petitioners guaranteed under Article 12(1) have been violated;

b) for a declaration that the Petitioners are entitled to receive first priority to conduct cadastral surveys for the year 2014;

c) for a declaration that the priority list (P12) is null and void;

d) make order to direct the 1st to 4th and 33rd Respondents to determine the order of priority; and

e) interim relief restraining, assigning of work under the said program to the 5th to 21st and/or 22nd to 31st Respondents, in the Kurunegala District for the year 2014.

Having referred to the facts stated by the Petitioners, let me now move onto consider the case of the Respondents.

The journal entries bear out that when this application was first taken up for support, the learned Senior State Counsel appearing for the 32nd Respondent, the Hon. Attorney General submitted to Court that the three **Petitioners have failed to show effective work progress during the relevant years, i.e. 2011, 2012 and 2013** as stipulated in the document marked P11 and moved to file a copy of the 'Evaluation Sheet of the Effective Work Progress of the Surveyors'. This application was permitted by Court. The Petitioners were also permitted to counter the contents in the said Evaluation Sheet.

The Evaluation Sheet of Effective Work Progress was thus filed in Court prior to the date of support of this application and the Petitioners countered same by filling an affidavit annexing a number of documents and challenged the computation of the effective work progress of the Petitioners reflected in the Evaluation Sheet.

Consequent to Leave to Proceed being granted by this Court to the Petitioners, objections were filed on behalf of the 1st to 4th and the 33rd Respondents. Objections were not filed by the 5th to 31st Respondents nor were they represented before this Court.

The position of the 1st to 4th and the 33rd Respondents ("the Respondents") as reflected in the objections is that the **Priority list (P12) was prepared based upon the selection criteria laid down in P11.**

Clause 2.1 of P11 stipulates that when selections are made **first priority** should be given to Surveyors who have conducted surveys under the Bim Saviya programme during the years 2011, 2012 and 2013 and **have maintained an effective work progress**. The Respondents plead that the three Petitioners did not possess the said threshold requirement i.e. the average effective work progress of 40 lots per month and were thus not considered under the said category (referred to as category I) for which first preference was given.

Clause 2.3 of P11 indicates that **second preference** should be given to Surveyors who have conducted surveys under the supervision of the Surveyor General during the years 2009 to 2013 but have not been assigned work nor exposed to the Bim Saviya programme earlier. The three Petitioners did not fall within the said category (referred to as category II) either. Thus, the Petitioners could not be accommodated under category I or II and were slotted in thereafter, under category III in terms of P11, the selection criteria.

The Respondents also contended that in the priority list (P12) all three categories of Surveyors were included. The first ten names were of the Surveyors who met the average effective work progress to be considered as "efficient" and fulfilled the applicable criteria and were thus given first priority and fell within category I. The next ten names were of the Surveyors who had the required qualifications and had conducted surveys under the supervision of the Survey Department but had not been given the opportunity or exposure to conduct Bim Saviya programmes previously by the Surveyor General. Thus, they fell within category II and were given the second priority, in terms of the selection criteria and an opportunity and exposure to conduct Bim Saviya surveys in order to demonstrate their efficiency. The Surveyors who had conducted Bim Saviya programmes earlier and specifically during the period of evaluation, viz 2011, 2012 and 2013 but failed to meet the average target were next placed in the priority list together with other Surveyors and consisted of the last segment of the Surveyors (Category III) totaling a list of thirty Surveyors in the priority list (P12).

The Respondents further contended that it was not in the best interest of the Bim Saviya programme to give priority to Surveyors who failed to meet the average target and hence considered 'inefficient'. The said Surveyors were not accommodated among the 1st set of Surveyors but were placed below the 2nd set of Surveyors, i.e. category II Surveyors who have conducted surveys under the Surveyor General during the last five years, but not deployed for the Bim Saviya programme. Thus, the Petitioners who fail to pass the threshold mark fell within category III and were slotted in after category II, in which the 16th to the 24th Respondents were placed. Therefore, the Respondents aver that placing the 16th to 24th Respondents ahead of the Petitioners is in order and in terms of the relevant circular P11.

Hence, the Respondents contended that the priority list (P12) was prepared based upon the applicable criteria and thus, was not arbitrary, capricious or unreasonable and did not violate the fundamental rights of the Petitioners.

The case presented by the Counsel for the Petitioners at the hearing before us, was materially different to the case enumerated in the petition. It is observed according to the petition, the main grievance of the Petitioners was failure to grant preference over and above the 16th, 17th, 18th, 19th, 21st, 23rd and 24th Respondent. However, the Petitioners main contention at the hearing was that the **Evaluation Sheet of Efficient Work Progress marked R1 was compiled erroneously**, in so far as the Petitioners were concerned which resulted the Petitioners

being placed low in the priority list. Thus, the Petitioners primary challenge before us was the Evaluation Sheet and its compilation. The Petitioners also contended that the priority list (P12) prepared based upon the said Evaluation Sheet is erroneous, grossly unfair, arbitrary, discriminatory and unreasonable.

Hence, the question that this Court is now called upon to determine is whether the fundamental rights of the Petitioners guaranteed under Article 12(1) of the Constitution, have been violated by the Respondents in the above stated circumstances.

Article 12(1) of the Constitution reads as follows: -

> "All persons are equal before the law and are entitled to the equal protection of the law."

It is trite law, that equality postulated in Article 12(1) is the right of a person to be treated alike among equals and there should not be any discrimination among those who are equally circumstanced. Similarly, it is trite law, that such guarantee of equality doesn't forbid reasonable classification, which is founded on intelligible differentia, since the concept of equality only forbids actions which are arbitrary, capricious and unreasonable and not the classification which is reasonable. These concepts of reasonable classification have been considered in many judicial decisions and writings and I do not wish to repeat same except to reiterate;

> "Article 12 of the Constitution forbids hostile discrimination, but does not forbid reasonable classification…Reasonable classification is inherent in the concept of 'equality', because all persons are not similarly situate"
>
> Rienzie Perera and another V. University Grants Commission and another 1978.79.80 (i) SLR 128

> "It is now settled law that the Equal Protection Clause prohibits discrimination not only by substantive law but also by a law of procedure. What is forbidden is class legislation, not class classification. A permeable classification must satisfy two

> conditions, (i) it must be founded on an intelligible differentia that distinguishes persons or things that are grouped together from others left out of the group and (ii) the differentia must have a rational relation to the object sought to be achieved. The differentia and object are different elements and as such the object by itself cannot be the basis for classification."
>
> Fundamental Rights in Sri Lanka – Jayampathy Wickramaratne (1st Edition) page 290.

Having considered the nature of Article 12(1), let me now turn to examine the grievance of the Petitioners. Is there an infringement in terms of the said clause as complained by the Petitioners before this Court or has the provisions of Article 12(1) been violated by the Respondents in any manner by their alleged conduct?

The case presented and the matter for determination in my view, revolves around the priority list (P12). Hence, the next issue I wish to examine pertains to the priority list (P12). **Was the priority list prepared, in accordance with the guidelines laid down and in terms of the law as contended by the Respondents or is it erroneous, unfair and arbitrary as contended by the Petitioners?**

In the first instance, I wish to look at the procedure involved in the issuance of the priority list (P12) in detail.

Under the Bim Saviya programme, the role of the Survey Department is to survey and prepare cadastral maps and plans in terms of the Registration of Title Act. This programme was initiated in certain areas in the island on a time line basis. In the selected areas where the programme was being implemented, if there was a dearth of Surveyors at the Survey Department to carry out the surveys in order to meet the time lines laid down, Surveyors who were not in public service or retired from public service and now engaged in conducting surveys as freelance private Surveyors were deployed and this process began by calling for applications.

Thus, by **P8**, the Surveyor General extended an invitation to Registered Licensed Surveyors who fulfill the eligible criteria, to survey and prepare cadastral maps and plans for the Bim Saviya programme for the year 2014 in the Districts and divisions referred to in the said notice. Upon applications received, selections were made by the Surveyor General based

on the selection criteria. Priority lists were prepared and communicated to the respective Provincial Surveyor Generals for implementation of the Bim Saviya programme. P10 is the letter sent by the Surveyor General to the North-West Provincial Surveyor General for such purpose. The document P11 and P12 were also sent together with P10.

Whilst **P10** gives a detailed description of the functions to be performed by the provincial office to execute agreements, supervise work performed and payment to be made to the private Surveyors, **P11** is captioned qualification, selection, conditions pertaining to registration of Registered Licensed Surveyors for 2014 and **P12** gives the name list of selected Surveyors to be assigned work in the District of Kurunegala for the year 2014.

With regard to selection of Surveyors, two clauses in P11 are material. They are Clauses 2.1 and 2.3. Whilst clause 2.1 of document **P11** indicates that **priority will be given to Surveyors who have conducted surveys under the Bim Saviya Programme during the last three years i.e. 2011, 2012 and 2013 and importantly have shown an effective work progress,** Clause 2.3 of P11 indicates that Surveyors who have conducted surveys under the supervision of the Surveyor General during the last 5 years i.e 2009 to 2013 will be given priority thereafter. The rest of the Surveyors will be considered next in order to be assigned work under this special project.

The contention of the learned Counsel for Petitioners is that the Petitioners fall within the first category since the three Petitioners have conducted surveys under the Bim Saviya programme during the relevant three years i.e 1st and 2nd Petitioners in 2011 and 2012 and the 3rd Petitioner in 2012. Thus, the Petitioners argue that they should get priority over seven Respondents, viz 16th,17th,18th,19th,21st,23rd and 24th Respondents who come under the said category II, as the said seven Respondents have not conducted any surveys under the Bim Saviya programme. It is noted that for some unexplained reason the 20th and 22nd Respondents have been left out from the said category. Further, the Petitioners argue that the said seven Surveyors can only be considered, if and only if, there aren't any Surveyors, who have had previous experience in the said programme.

On the other hand, the contention of the learned Senior State Counsel for the Respondents is that although the Petitioners have conducted surveys under the Bim Saviya programme, that the **Petitioners have not maintained an 'effective work progress' and thus cannot be considered under the first category to be given preference over category II**

Surveyors. Further the Surveyors were classified based upon their performance and the performances of the Petitioners was far below the average considered as effective work progress and therefore the three Petitioners could not be categorized under the first category but could only be considered under the third category of the selection criteria laid down in P11.

The learned Senior State Counsel also contended that the 'effective work progress' of the Surveyors who conducted surveys under the Bim Saviya programme were evaluated based on a standard mathematical formula which was used island wide, and only the Surveyors who passed the threshold, i.e. maintained the average of 40 lots surveyed per month were considered as having an 'effective work progress' and placed under category I. The Surveyors who could not pass the said threshold were not considered under the said category and thus, not given first priority in the final list of selections.

The case of the Respondents was with regard to the preparation of the priority list P12 for Kurunegala District, the same yardstick was used. P12 was compiled based upon the performance data of each Surveyor for the three years under review and the average effective work progress per month. As stated earlier only the Surveyors who maintained an average survey of 40 lots per month were placed under category I to be given first priority. The Petitioners average effective work progress was 32.8, 30.9 and 24.3 respectively which was far below the threshold of 40 lots per month and thus could not be given first priority and placed in category I of the eligibility criteria reflected in clause 2.1 of P11. Therefore, the submission of the Respondents was that the priority list (P12) which reflects such decision, is neither arbitrary, capricious, unreasonable nor violative of the fundamental rights of the Petitioners.

I see merit in the said submission. **If a Surveyor cannot achieve the threshold mark to be considered as having an effective work progress, such a Surveyor cannot expect to be given preference and be placed among Surveyors who have achieved the threshold mark.** If a Surveyor has failed to achieve the target required to be placed at a particular point, then the said Surveyor has to face the consequences. In the instant matter, the Petitioners failed to achieve the threshold. Thus, the three Petitioners could not be slotted in under category I and given preference in the priority list P12.

I would pause at this moment and look at P12 the priority list from another angle. It has 30 names of selected Surveyors in the order of merit. There is no dispute that for the year 2014,

the North-West office of the Surveyor General, could assign work only for 17 Surveyors for conducting of Bim Saviya surveys in the Kurunegala District (vide P10). Thus work had to be assigned to the first 17 Surveyors in the priority list (P12). Out of the said 17 Surveyors, the top 10 Surveyors as discussed earlier were classified under category I, having conducted surveys under the Bim Saviya programme and maintaining the average effective work progress for the years 2011, 2012 and 2013 as stipulated in P11 and more fully reflected in R1 the Evaluation Sheet. The next 7 Surveyors came under category II, i.e the Surveyors who had performed surveys under the Surveyor General for the last five years but were not given the opportunity to conduct any surveys under the Bim Saviya programme. Nevertheless, with a view to give an exposure to this programme, they were considered next in the order of preference as stipulated in P11.

In the priority list the Petitioners were placed at the 23rd, 24th and 25th positions and the three Petitioners did not come within the said 17 Surveyors. The grievance of the Petitioners as reflected to in the petition is not against the first 10 Surveyors i.e. the category I Surveyors who had maintained the average effective work progress but against the next set of 7 Surveyors i.e. the Surveyors who were considered under category II and who were placed next in the order of preference and were slotted in at the 12th, 13th, 14th, 15th, 17th, 19th, and 20th positions. The grievance of the Petitioners is against priority being given to these seven Respondents viz-a-viz the Petitioners. The submission of the learned Counsel for the Petitioners is whatever may be the Petitioners performance, the Petitioners should get priority and be placed under category I, over and above the Surveyors of category II.

This brings me to the crux of the issue before this Court for determination - classification. **Is the classification reasonable? Can Surveyors be classified in this manner? Is it founded on intelligible differentia? Can classifying Surveyors on performance be termed 'an intelligible classification'?**

In simpler terms, **should a Surveyor maintain an 'effective work progress' and be deemed 'efficient' to obtain priority in P12**? Or could a Surveyor who has not maintained the average effective work progress and deemed 'inefficient' handling surveys under the Bim Saviya programme be treated equally and be **given priority in P12, the list of selectees under the same category of classification of the Surveyors who have maintained the average effective work progress?**

In my view, the criteria for selection as spelt out in P11 is rational. It is well defined and precise. In order to obtain the object sought to be achieved through this programme, an effective work progress is mandatory. Mere conducting of surveys under the Bim Saviya programme is not sufficient. Efficiency of handling a survey is *sine-qua-non* to be considered for selection in a subsequent occasion. The Petitioners are freelance Surveyors, handling private work. When such freelance Surveyors are co-opted and tasked to do work for the State and the Surveyor General for remuneration, laying down a yardstick, a transparent system or a marking scheme and placing the Surveyors on a merit list is laudable and salutary, especially because this programme is a time lined project, based on a concept which is novel and pioneering in respect of the land regime in Sri Lanka.

In the instant case, the Surveyor General has resorted to such a mechanism of classification. The Surveyor General has evaluated the performance of the Surveyors during the last three years, i.e. 2011, 2012 and 2013 and placed only the Surveyors who have maintained the average effective work progress in Bim Saviya surveys, in the order of merit, based on the average obtained, subject to a threshold cut-off mark in category I. The Surveyors who have not been assigned surveys under the Bim Saviya programme but nevertheless worked under the supervision of the Surveyor General by conducting many surveys during the 5 year period 2009 to 2013 have been placed next in the order of priority (category II). The rest of the Surveyors, including the Surveyors who have not reached the effective work progress in the relevant years under the Bim Saviya programmes have been placed thereafter (category III). Thus, the Petitioners fall within the 3rd category. I see no fault in resorting to such a scheme. In my view such a mechanism or classification to achieve the object of the Bim Saviya programme is neither arbitrary nor unreasonable, capricious, grossly unfair as suggested by the Petitioners and it does not violate the fundamental rights of the Petitioners guaranteed under Article 12(1) of the Constitution.

Corollary, if the Surveyor General did not follow a reasonable classification or arbitrarily dished out work at his whim and fancy to persons of his choice and placed them in a list at his discretion, then in such a situation a person could challenge such a scenario for being discriminatory or violative of his fundamental rights.

'Classification' as discussed earlier was considered by this Court in the case **Ananda Dharmadasa and Others V Ariyaratne Hewage and Others [2008] 2 SLR 19** where the non-appointment of the petitioners therein to a particular class of the public service, was the point of issue in a fundamental rights application. In the said case Shirani Bandaranayake, J (as she then was) observed as follows: -

> "The concept of equality postulates the basic principle that equals should not be placed unequally and at the same time unequals should not be treated as equals."

In the said judgement reference was made to the oftquoted statement of Bhagawati, J in **Royappa v State of Tamil Nadu (AIR 1974, S.C. 555)** that,

> *"Equality is a dynamic concept with many aspects and dimensions and it cannot be 'cribbed, cabined and confined' within traditional and doctrinaire limits. From a positive point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies."*

In **Ananda Dharmadasa's case,** after an in depth study of the equal protection clause and case law, this Court went on to observe as follows: -

> "It also has to be borne in mind that every differentiation would not constitute discrimination and accordingly classification could be founded on intelligible differentia." (vide page 33)

I am in agreement with the above observations and especially **that every differentia of persons would not constitute discrimination.**

Hence, the main ground of challenge referred to in the petition that the Petitioners who have conducted surveys and had previous experience under the Bim Saviya programme, should not be discriminated but be considered and placed in category I irrespective of their efficiency ahead of the 16th,17th,18th,19th,21st,23rd and 24th Respondents (of category II) who lacked previous experience in Bim Saviya surveys, in my view has no force or effect in law. Similarly, the Petitioners contention that merely because the Petitioners had conducted surveys for the

Bim Saviya programme previously, that the three petitioners should be placed in category I, is erroneous and unfounded.

The selection criteria P11 specifically states that the Surveyors who have conducted surveys under the Bim Saviya programme should in addition to the necessary certification, demonstrate an effective work progress in conducting of such surveys. Thus, classification of Surveyors, based on laid down conditions and criteria as category I, II and III by the Surveyor General will not amount to discrimination as it is based on clear and identifiable criteria. Similarly, evaluating the Surveyors on such a yardstick, prioritizing on efficiency and classifying them as 'efficient' and 'not so efficient' and placing the Surveyors who have shown an efficient work progress ahead of the 16th to 24th Respondents (selected under category II) and the three Petitioners who have not shown an efficient work progress after the 16th to 24th Respondents cannot be deemed discriminatory, arbitrary or unreasonable. It is observed that in making the selection, equals were neither placed unequally nor unequals treated equally. Hence it did not affect the equal protection guaranteed by the Constitution to the Petitioners.

Thus, the one and only ground the Petitioners pleaded and relied upon in the petition to challenge the priority list (P12) in my view is without reason, baseless and unfounded. Moreover, classifying and prioritizing the Surveyors upon their work progress is to achieve the object of the Bim Saviya programme. Therefore, considering performance and efficiency of Surveyors is just and fair and is in accordance with the selection criteria referred to in P11. Hence, in my view, the Petitioners have failed to establish that the priority list (P12) violates the Petitioners fundamental rights guaranteed under Article 12(1) of the Constitution and upon the said ground alone, this application should be dismissed.

However, in the submissions presented before Court, the learned Counsel for the Petitioners also **challenged the formula used by the Surveyor General to mark and measure the performance of the Surveyors** who had conducted surveys for the Bim Saviya programme. Thus, the Counsel for the Petitioners challenged the award of marks of the Petitioners reflected in R1 Evaluation Sheet and the placement of category I Surveyors in the positions one to ten in the priority list (P12) i.e. the placement of the 5th to 15th Respondents before Court in the first ten places in the priority list (P12) *viz-a-viz* the award of marks and placement of the Petitioners at 23rd, 24th, 24th, and 25th positions in the priority list (P12).

Initially, the Petitioners case was against the placement of the 16th to 24th Respondents ahead of the Petitioners. The Petitioners new ground of challenge is basically against the placement of the 5th to 15th Respondents in the priority list (P12) viz-a-viz the Petitioners.

Hence, an entirely a new case was presented by the Petitioners before Court and I would now consider the said case in the interest of justice.

In order to justify the said contention, the Petitioners main submission is that the **effective work progress of the Surveyors reflected in the Evaluation Sheet (R1) has been erroneously computed by the Respondents.** Thus, the Petitioners argue that the said wrongful computation was to the detriment of the three Petitioners and resulted in them being placed very much lower in the priority list (P12).

The Counsel for the Petitioners relied on two grounds to put forward its contention.

Firstly, use of two different modes of computation of the 'effective work progress' of Surveyors by the Respondents; and

Secondly, the administrative delays of the Survey Department.

The Petitioners contention with regard to the 1st point is that the effective work progress has not been calculated as indicated by the Respondents by dividing the total number of lots surveyed and carried out during the year by twelve, the total number of months of the year. The Petitioners aver according to the Evaluation Sheet (R1) for the years 2012/2013 the effective work progress has been computed by dividing the total lots surveyed by a variable figure over and above 12 being the number of months of the year. Therefore, two different methods of calculations have been adopted by the Respondents which the Petitioners contend is grossly arbitrary, unfair and to the detriment of the Petitioners.

The Petitioners 2nd point of contention is that the administrative delays of the Survey Department immensely prejudiced the three Petitioners. In its written submissions filed before Court, the Counsel for the Petitioners laid down a litany of woes and shortcomings which the Petitioners alleged, amounted to administrative delays of the Survey Department in completing the preparatory steps of the Bim Saviya programme, examples being delays in signing agreements, conducting public awareness programmes, installing and releasing of GPS

controlling points. The Petitioners referred to the assignments given to the 2nd Petitioner by dates and months in order to substantiate its contention. The Petitioners therefore aver that when calculating the effective work progress, 'the actual number of months' taken to complete the survey physically on the ground should be considered and not the average effective work progress of twelve months or a percentage as has been relied upon by the Respondents.

Having referred to the contention of the Petitioners put forward at the hearing, I would now move onto consider the second ground relied upon by the Petitioners to establish its position.

The facts relied upon by the Petitioners to present its argument, in respect of the **administrative delays** as indicated earlier is not referred to in the petition nor substantiated by an affidavit. It is only referred to in the written submissions. Thus, there is no evidence before Court pertaining to the said facts and I see no reason to rely on such unsubstiated facts. The Petitioners have also not distinguished themselves individually or as a core group to draw a comparison and substantiate that the alleged administrative delays had an impact on the Petitioners alone, compared with the rest of the 16 Surveyors referred to in the Evaluation Sheet R1. There is also no evidence before Court to establish the position that the purported administrative shortcomings referred to by the Petitioners, were caused by the Survey Department to the detriment of the three Petitioners only or that the standard formula used island wide by the Surveyor General in computing the effective work progress was in any way affected by the said administrative delays.

Hence, I see no merit in the contention that the administrative delays the Petitioners aver, had a prejudicial impact on the Petitioners alone. If at all there were shortcomings, it was common to all 19 Surveyors referred in the Evaluation Sheet R1. The formula used to compute the effective work progress treated all alike and the Petitioners have failed to establish a discrimination or a violation of a fundamental right based upon such ground. Moreover, the Petitioners have failed to establish how the said delays could make the formula of computation of the effective work progress erroneous which the Petitioners submit resulted in them being placed at the lower end of the priority list (P12).

The other ground the Petitioners argue to establish that computation of the effective work progress was erroneous, is the **use of two different methods of calculation** by the Respondents.

The selection criteria for the year 2014 as reflected in P11, clearly indicates that selections will be based on the performance of the work carried out the in the years 2011, 2012 and 2013 and the Surveyors possessing an 'effective work progress' will be given first priority. It is common ground that new assignments were not given in the Kurunegala District for the year 2013 due to financial constraints. Thus, selections had to be made only on the work assigned for the years 2011 and 2012. The said fact is clearly embodied in the postscript in the Evaluation Sheet (R1).

The Evaluation Sheet also demonstrates that for the year 2011, work was only assigned to the 1st Petitioner. The 2nd and the 3rd Petitioners were not selected nor assigned any work in 2011. It is observed that though in the petition and in the affidavit of the 2nd Petitioner filed in Court, it is averred that the 2nd Petitioner carried out surveys in 2011, the curriculum vitae of the 2nd Petitioner annexed to the petition and the written submissions filed before this Court by the Petitioners themselves, reflect otherwise. Thus, the Petitioners have misrepresented facts to this Court with regard to the selection and assignment of work of the 2nd Petitioner for the year 2011.

The Evaluation Sheet (R1) further demonstrates that **for the year 2011**, the 1st Petitioner conducted surveying of 706 lots. In order to ascertain the effective work progress of the 1st Petitioner for the said year, such number of lots has been divided by 12, the number of months per year, which give an average of 58.8 per month. It is observed that the same yard stick of measurement has been used in respect of all the Surveyors without any exception. Thus, in order to compare and contrast the work progress of the Surveyors, the average effective work progress per month has been obtained by dividing the number of lots surveyed by 12, the number of months in the year in a uniform manner.

It is also observed that, **for the year 2012** work has been assigned to all three Petitioners. The R1 Evaluation Sheet postscript demonstrates that in order to obtain the effective work progress of Surveyors for 2012/2013 in the Kurunegala District, the work assigned in 2012 but completed in 2013 was also considered in view of the fact that new assignments were not given

in 2013. Thus, for 2012/2013 the 1st Petitioner completed a total of 82 lots, the 2nd Petitioner a total of 402 lots and the 3rd Petitioner 292 lots. Whilst the 1st and 3rd Petitioners have completed the 2012 assigned work in the year 2012 itself, the 2nd Petitioner has utilized an extra month to complete the work assigned. In arriving at the effective work progress for 2012/2013 in respect of the 1st and 3rd Petitioners, the number of lots surveyed had been divided by 12, whereas for the 2nd Petitioner it has been divided by 13 (12+1), considering the extra month the 2nd Petitioner spent in completing the assigned work in 2012.

The R1 Evaluation Sheet further signifies that this mode of computation has been used not only for the Petitioners but also for the rest of the Surveyors as well. Out of the 19 Surveyors evaluated in R1, 10 have completed the assigned tasks on time and in 2012 itself, whereas the rest of the Surveyors have delayed their assignments and completed the work only in 2013.

Thus in order to arrive at the effective work progress for 2012/2013, of the ten Surveyors who completed the work on time, i.e. in 2012 itself, which includes the 1st and 3rd Petitioners, the formula, total lots surveyed divided by 12 (the number of months per year) has been used. This mode of computation is the same formula used in the year 2011 as discussed earlier and there is no variation whatsoever with regard to the method of calculation as averred to by the Petitioners.

However, with regard to the nine **Surveyors who delayed the assignments of 2012 an exemption has been made**. It is observed that five Surveyors have utilized an extra one month in 2013, two Surveyors have utilized extra five months in 2013 and the balance two Surveyors have utilized six months and eleven months respectively in 2013 to complete their assigned duties of 2012. Hence, in order to arrive at the effective work progress of 2012/2013 of the said Surveyors who delayed their assignments and completed the work in 2013, the total number of lots surveyed by the said Surveyors have been divided by 13 (12+1), 17 (12+5), 18 (12+6) and 23(12+11) respectively, considering the extra time utilized in 2013 to complete the assignments. This is similar to the computation of effective work progress of the 2nd Petitioner who also delayed completion of the assigned work of 2012. Thus, one yardstick has been used in respect of all Surveyors who delayed their assignments. It is also observed if not for this computation, the work assigned in 2012 and not completed on time in 2012 would not have been taken into

consideration at all, in arriving at the effective work progress for 2012 with regard to these nine Surveyors.

The above method of granting an exemption and considering the extra time utilized for completion of the work in 2013 for work already assigned in 2012, is what the Petitioners refer to as **using two different methods**, which the Petitioners aver makes the computation of effective work progress erroneous. I see no merit in such contention. The material before Court clearly envisage that only one method was used to obtain the average effective work progress of 2011 as well as for 2012. However, when calculating the average effective work progress of 2012 as stated earlier an exemption has been made in respect of Surveyors who delayed their assignments. The effective work progress of the said Surveyors has been computed by considering the extra time utilized to complete the assignments. (If not for this exemption, the work of the aforesaid nine Surveyors partially performed in 2012 would not have been evaluated when arriving at the effective work progress of 2012.) Thus, extending an exemption to a uniform and a standard method used island wide, in my view would not amount to using two methods as averred to by the Petitioners.

The same exemption has been given to the 2nd Petitioner and I am of the view that the Petitioners have failed to establish how such an exemption would affect the rest of the Petitioners viz-a-viz the rest of the Surveyors referred to in (P12) the priority list. In the said circumstances, I see no merit in the submissions of the Petitioners pertaining to the use of two methods, which the Petitioners averred was wrongful and unfair.

Corollary, the learned Counsel for the Petitioners put forward another contention and in its written submissions went to a great extent to elaborate and establish the said argument. i.e as discussed earlier since utilizing extra time was considered favourably by the Respondents, only the ‘actual time spent on a survey’ should be considered in arriving at the effective progress of work and not to rely on an average figure. Thus, the Petitioners contention was if a Surveyor physically surveys 100 lots in 3 months then 100 divided by 3 should be the effective work progress and not 100 divided by twelve (the number of months in a year) in order to arrive at the average effective work progress per month.

The general meaning of the word ‘average’ is the standard or the central or the typical value in a set of data and in particular the median or the mean of a set of numbers and figures,

arrived at by dividing the total number by a standard unit. That is the concept that has been utilized in arriving at the monthly average work progress of Surveyors to consider their efficacy. It is a standard mathematical formula, scientifically and statistically used. Thus, I see no reason or merit whatsoever, in the contention of the Petitioners that such computation of average is erroneous and should not be resorted to in arriving at the average effective work progress in order to assess the work progress of Surveyors.

Moreover, the data in the Evaluation Sheet R1 indicate that certain Surveyors have been given a higher number of lots to be surveyed whereas certain Surveyors have been given a lesser number of lots to be surveyed. *Thus, in order to compare and contrast the performance of the Surveyors, obtaining the cumulative average of the two years and arrive at the effective work performance is the most suited methodology*. Upon the said ground too, I see no basis or reason in the submissions of the Petitioners that only the 'actual time spent on the survey' should be considered in arriving at the effective work progress and not an average figure.

Further, the data in the Evaluation Sheet R1 demonstrates that the 2nd and 3rd Petitioners had only one years (2012) work for evaluation whereas the 1st Petitioner had two years (2011 and 2012) work for evaluation. Further the 1st Petitioner had a high average of effective work progress for 2011, but the work progress for 2012 was significantly low compared to the rest of the Surveyors evaluated in R1, thus, giving him a low cumulative average for 2011 and 2012. It is observed that these varying factors could be standardized when a specific methodology is used and that is exactly what the Respondents have resorted to in this instance. It is also noted that there are six other Surveyors placed below the Petitioners in the priority list in category III, i.e. the 25th to 31st Respondents before this Court about whom no submissions were made for or against by the Petitioners.

Therefore, I see no reason or rationale in the contention of the Petitioners that only the actual time taken for a survey, should be considered in arriving at the average effective work progress. Hence, I see no basis or merit in the submissions of the learned Counsel for the Petitioners that the method of calculation reflected in the Evaluation Sheet R1 was arbitrary, unfair and erroneous.

In the above circumstances, I am of the view that the Petitioners have failed to establish the new and the alternative case put forward by the Petitioners. The Petitioners have also failed to establish that the average effective work progress of Surveyors which is the pivotal factor upon which priority was determined and the Surveyors placed in the order of merit in the priority list (P12) is erroneous or violated the fundamental rights of the three Petitioners.

The selection criteria P11, clearly lays down that 'efficiency' is the key factor and 'effective work progress' is the yardstick to evaluate such efficacy; The data presented before this Court and documented in the Evaluation Sheet R1 also clearly symbolizes that the average effective work progress of the Petitioners is far less than the rest of the Surveyors. This resulted in the category I and II Surveyors being placed ahead of the Petitioners in the priority list P12.

Thus, in my view classifying the Surveyors in terms of the selection criteria and placing them under different stratas in the priority list P12 is fair and reasonable. Similarly, first preference given to Surveyors whose average effective work progress is above the threshold and thereafter, second preference given to Surveyors who have previously not been exposed to the Bim Saviya programme but worked under the Surveyor General for a period of five years is also just and reasonable. Such methodology based on selection guidelines in my view does not violate the equal protection clause nor discriminate the Petitioners against category I and II Surveyors. The Petitioners have failed to pass the threshold in the selection criteria and therefore could not be grouped under category I or II.

Hence, for reasons adumbrated in this judgment, I see no reason nor merit in the contention of the Petitioners that the priority list P12, is arbitrarily, irrational, discriminatory or erroneous and has been prepared contrary to the criteria laid down in the selection guidelines issued by the Surveyor General.

Therefore, I hold that the Petitioners have failed to establish that the fundamental rights guaranteed under Article 12(1) of the Constitution of the Petitioners have been violated by the 1st to 4th and 33rd Respondents.

For the aforesaid reasons, the application of the Petitioners is dismissed. I make no order with regard to costs.

The application is dismissed.

Judge of the Supreme Court

Buwaneka Aluwihare, PC. J.

I agree.

Judge of the Supreme Court

Priyantha Jayawardena, PC.J.

I agree.

Judge of the Supreme Court

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

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

SC FR 132/2014

1. R.A.S.R. Kulathunga
B 07 Police Flats, Thimbirigasyaya.

Petitioner

Vs.

1. Pujith Jayasundera, Inspector General of Police, Police Headquarters, Colombo 01.
2. B.K.G. Navarathne,
Senior Deputy Inspector General (Administration) Police Headquarters, Colombo 01.
3. P.H.P.G. Prasanna, OIC, Police Station, Balangoda.
4. F.U. Woodlar, OIC, Police Station, Wellawatte.
5. E.A.D.S.S.P. Edirisinghe,
Community Police Training Centre, Gampaha.
6. A.L.M. Jameer, HQR Police Station, Thalaumannar,
7. H.L.C. Hiriyadeniya,
Narcotic Division, 3rd Floor, New Secretariat Building, Colombo 01.
8. G.W.S.C. Jayathileke, OIC , Police Station, Madolsima.

9. S.A.S.C. Satharasinghe, OIC, Police Station, Wadukkotte.

10. P.K. Hettiarachchi, OIC , Police Station, Agarapathana.

11. R.A.G. Dammika, Presidential Security Division, Colombo 01.

12. H.K.H.S. Priyantha, OIC , Police Station, Kalawanchikudy.

13. A.B.I. Udayanga, Field Force Headquarters Colombo. 05.

14. M.M. Jarool, HQI, OIC Police Station, Polonnaruwa.

15. A.G. Sisira Kumara, Presidential Security Division, Colombo 01.

16. L.A.G. Liyanage, State Intelligence Service, No. 10, Cambridge Place, Colombo 07.

17. B.L.A. Prasanna, HQI, OIC Police Station, Paliyagoda.

18. M.D.A. Jayantha, HQI, OIC Police Station, Tangalla..

19. M.M.I. Janaka, Police Station, Kurunegala.

20. S.A.B.S.K. Senanayake, Presidential Security Division, Colombo 01.

21. N.P.K. Liyanaka, Presidential Security Division, Colombo 01.

22. G.P. Bodhipaksha, Crime Investigation Department, New Secretariat Building, Colombo. 01.

23. R.A.M.J. Ariyaratne, HQI, OIC Police Station, Haputale.

24. O.V.R.P. Olugala, Police Station, Modera.

25. B.N. Ekanayake, OIC, Police Station, Welimada.

26. K.S. Pathirana, OIC, Police Station, Chawalakade.

27. P.B.M.C. Basnayake, OIC, Police Station, Bibila.

28. P.N.C.R.. Tennakoon, Police Station, Kantale.

29. C.P.K. Wijesekera OIC, Police Station, Hakmana.

30. A.P.N.G. Gunathilaka, Police Hospital, No. 20, Nawala Road, Narahenpita, Colombo 05.

31. M.P. Priyadarshana, Presidential Security Division, Colombo 01.

32. M. Abeysinghe, Crime Investigation Department, New Secretariat Building, Colombo. 01.

33. D.M. Abeysekera, OIC, Police Station Kamburupitiya.

34. H.G. Lal, Terrorist Investigation Division, 2nd Floor, New Secretariat Building, Colombo. 01.

35. L.G. Gunarathne, Police Station, Kankasanthurai.

36. P.K.D. Ajith Kumara, OIC Police Station, Potuwil.

37. C.G. Welagedera, Ministry Security Division, No. 440, Dr. Colvin R. de Silva Mawatha, Colombo 02.

38. H.G.W.N. Deshapriya, OIC Police Station, Dambagalla.

39. H.S.M. Kaldera, HQI, Police Station, Matara.

40. A.A.K.S. Adikari, IC. Police Station, Welipenna.

41. R.L.S. Ranjith, OIC, Police Station, Hemmathagama.

42. P.P.R.S. Jayalath, Parliament Police Station, Sri Jayewardenapura, Kotte.

43. N.D.U. Priyankara, Presidential Security Division . Colombo 01.

44. H.L.P. Hettiarachchi, OIC, Police Station, Koragahahena.

45. T.D. de Silva, Crime Record Division, Torrington Square Colombo. 07.

46. K.M.S.G.R.S.K. Karunanayake, Police College, Kalutara.

47. D.T. Lasasntha, OIC, Police Station, Dikwella.

48. P.G.R. Sumendra, Bribery Commission, No. 36, Malalasekera Mawatha, Colombo 07.

49. R.W.H. Rajapaske, OIC, Police Station, Buttala.

50. N.P. Waidyathileke, HQI, Police Station, Hugurakgoda.

51. M.D.D. Nilanga, OIC, Police Station, Pugoda.

52. R.M.R. Rathnayake, OIC, Police Station, Nanau-Oya.

53. T.M.N.A.B. Totagodawatte, HQI, Police Station, Hatton.

54. S.P. Edirisinghe, OIC, Police Station, Kodikamam.

55. M.WE.S.P. de Silva, Prime Minister Security Division, No. 89, Jawatte Road, Colombo 05.

56. H.C.K.S. Hippola, State Intelligence Service, No.10, Cambridge Place, Colombo 07.

57. R.Jayantha, OIC, Police Station, Kotmale.

58. L.P.K. Rajamanthree, OIC, Police Station, Aranaganwila.

59. I.M.A. Udayakumara, OIC Police Station, Ingiriya.

60. W.A.G.R. Perera, Prime Minister Security Division, No. 89, Jawatte Road, Colombo 05.

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62. Y.R.R. Wimalasiri, Crime Investigation Department, New Secretariat Building, Colombo. 01.

63. M.R.S. Tissa Kumara, OIC, Police Station, Panadura North.

64. W.A. Jayantha, Crime Investigation Department, New Secretariat Building, Colombo 01.

65. M.N.C. Mannapperuma, Sport Division Field Force Headquarters, Thimbirigasyaya, Colombo 05.

66. H.W. Udaya Kumara, OIC, Police Station, Panadura North.
67. C.P. Jayathileke, Police Station, Batticaloa.
68. M.P.C.C. de Silva, Crime Investigation Department, New Secretariat Building, Colombo 01.
69. P.W.G.S. R. de Silva, State Intelligence Service, No.10, Cambridge Place, Colombo 07.
70. D.R.J. Wijeratne, Police College, Kalutara.
71. D.P. Kumara, Police Station, Rathnapura.
72. G.W.L. Raveendra, Terrorist Investigation Division, 2nd Floor, New Secretariat Building, Colombo 01.
73. D.U.P. Maniyangama, OIC, Police Station, Lunugala.
74. P.R. Sunil, OIC, Police Station, Kosgama.
75. K.K.M. Perera, Presidential Security Division, Colombo 01.
76. S.A.R. Samaranayake, Police Station, Awissawella
77. S.R.D. Fernando, OIC. Police Station, Hambegamuwa.
78. H.M.C.C. Herath, Police Station, Kandeketiya.
79. R.C. Daniel , OIC, Discipline and Conduct Division, 5th Floor , Police Headquarters, Colombo 01.
80. H.M.P. Wijesiri, Foreign Employment Bureau, Crime Division, Police Headquarters, Colombo 01.

81. I.D.S Weerasinghe, Crime Investigation Department, New Secretariat Building Colombo 01.

82. D.N. Chandarasiri, OIC, Police Station, Karandeniya.

83. M.Selvakumar, OIC Police Station, Lindula.

84. H.D.N. Fernando, Prime Minister Security Division, No. 89, Jawatte Road, Colombo 05.

85. M.M.K.N.K. Mapa, Presidential Security Division, Colombo 01.

86. R.P. Siriwardana, OIC, Police Station, Rathnapura.

87. J.W. Kottachchi, Police Tourist Division, No 78 Galle Road, Colombo 02.

88. W.B.N.C.P.S. Bandara, HQI, Police Station, Kalutara South.

89. T.M.K.K. Hemarathne, State Intelligence Service, No. 10, Cambridge Place, Colombo 7.

90. M.M.S.B. Manamperi, Police Headquarters, Colombo 01.

91. M.A.S. Kumara, Police Station, Kahawatta.

92. J.M. Suse Hewage, Crime Record Division, Torrington Square, Colombo.07.

93. R.W.W.M.T.T. Halangoda, OIC Police Station, Dalada Maligawa, Kandy.

94. B.N.C.B. Nawarathne, Crime Record Division, Torrington Square, Colombo 07.

95. L.M.D.J. Pradeep, Crime Record Division, Torrington Square, Colombo 07.

96. H.H.Janakantha, Police Station. Bentota.

97. L.L Crishantha, Police Station, Kalawanchikudy.

98. R.M.A. Rajapakse, Police Station, Badulla.

99. G.V.N.B. Yatiwella, Police Station, Pettah.

100. R.D.M. Siril, Police Station, Negombo.

101. C. Ranasinghe, Police Station. Anuradhapura.

102. E.H.M. Karunarathne, Police Station, Borella.

103. H.M. Nawarathne Banda, Police Station, Matale.

104. H.K.G. Anura Priyantha, Police College, Kalutara.

105. M.D.W.S. Wijewardana, Police Hospital, No. 20, Nawala Road, Narahepita, Colombo 05.

106. D.S. Peramjuna, Police Station, Mannar.

107. W.C.T. Botheju, Prime Minister Security Division, No.89, Jawatte Road, Colombo. 05.

108. H. Somasiri, Police Station, Maligwatte.

109. K.D.C.P. Perera, Crime Record Division, Torrington Square, Colombo. 07.

110. S. Kaluarachchi, Crime Record Division Torrington Square, Colombo. 07.

111. P.L. Nissanka, Prime Minister Security Division, No.89, Jawatte Road, Colombo, 05.

112. W.L.U. Samarasinghe, Western Province North Crime Division, Peliyagoda.

113. K.M.A. Wijesinghe, Police Station, Elpitiya.

114. K.M.C. Wijebandara, Presidential Security Division, Colombo 01.

115. K.T.M.P.T.D. Thilakrathne, Police Station, Rathnapura.

116. J.A.H.N. Jayasinghe, Presidential Security Division, Colombo.01.

117. S.N. de Zoysa, Police Station, Piliyandala

118. P.W.S. Sumanapala, OIC, Police Station, Hanwella.

119. D.M.S.P.K. Dissanayake, Police Emergence, Mihindu Mawatha, Colombo 12.

120. K.P.N.O. Perera, Police Station, Cinnamon Gardens.

121. G.S.P. de Silva, Police Station, Mawanella.

122. N.K. Mallika Arachchi, Bribery Commission, No. 36, Malalasekera Mawatha, Colombo.07.

123. W.M.J.S. Gunasekera, Police Station, Ragama.

124. N. Jayasundera, OIC, Police Station, Pettah.

125. D.J.C.K. Pathirana, State Intelligence Service, No. 10, Cambridge Place, Colombo 07

126. Q.R. Perera, Crime Division, Police Headquarters, Colombo 01.

127. S.P.K.K. Samaranayake, Minister's Security Division, No.440, Dr. Colvin R. de Silva Mawatha, Colombo 02.

128. V.S.N. Gunawardene, State Intelligence Service, No. 10, Cambridge Place, Colombo 07.

129. U.V.R. Chamara, State Intelligence Service, No. 10, Cambridge Place, Colombo 07.

130. P.S. Hewawitharana, Police Station, Maradana.

131. A.W.A. Bandaranayake, Minister's Security Division, No.440, Dr. Colvin R. de Silva Mawatha, Colombo 02.

132. H.S. Herriarachchi, Minister's Security Division, No.440, Dr. Colvin R. de Silva Mawatha, Colombo 02.

133. B.N.M.S.L.B. Basnayake, Police Station. Gampaha.

134. P.A.G.S. Senarathne, Building Division, Police Headquarters, Colombo. 01.

135. M.P.D.I. Kulasekera, Colombo Crime Division, Kolonnawa Road, Dematagoda.

136. K.N.T.K. Kannangara, Minister's Security Division, No.440, Dr. Colvin R. de Silva Mawatha, Colombo 02.

137. K.K.C.P. Kaluarachchi, Colombo Crime Division, Kolonnawa Road, Dematagoda.

138. W.V.P. Senarathne, Police Station, Slave Island.

139. C.A. Puwansha, OIC. Building Division, Police Headquarters, Colombo. 01.

140. S.K.Jeewan Kumara, Police Station, Jaffna.

141. M.K.S.P.P. Alwis, State Intelligence Service, No. 10, Cambridge Place, Colombo 07.

142. B.D.N. Perera, Police Station, Peliyagoda.

143. B.P.G. de Silva, Police Headquarters, Colombo 01.

144. W.T.L.G. Wimaladasa, Police Station. Hingurakgoda.

145. S.G. Weerarathne, Minister's Security Division, No.440, Dr. Colvin R. de Silva Mawatha, Colombo 02.

146. T.S.P. Perera, No. 642/D Iriyawetiya Road, Kiribathgoda.

147. D.G.S. Sanjeewa, OIC, Police Station, Thihagoda.

148. A.H.M. Rafaithu, Police Station, Kandy.

149. R.M.Heen Banda, Mounted Division, Mihindu Mawatha, Colombo. 12.

150. J.A. Sirisena, OIC Police Station, Ja-Ela.

151. H.P.Y.W. Herath, HQI, Police Station, Kuliyapitiya.

152. B.D. Premachandra, Puswella, Puswelitanna, Kurunegala.

153. P.N. Guruge, Ministers Security Division, No 440, Dr. Colvin R de Silva Mawatha, Colombo 02.

154. K.C.L. Perera, IT Division, 6th floor, Police Headquarters, Colombo 1.

155. M.G.H.U.K. Wijewardena, Police Station, Kandy.

156. A.G.V.N. Padeniya, OIC, Police Station, Kandy.

157. M.R.S.P. Bandara, Police Station, Kurunegala.

158. K.A.R.W. Kumarapeli, Police Station, Hettipola.

159. K.M.S.B. Samarakoon, HQI, Police Station, Dambulla.

160. R.J.A.S. Jayawardena, Crime Record Division, Torrington Square, Colombo 07.

161. W.M.M.S.P.K. Gunarathne, OIC, Police Station, Fort.

162. M.U.B. Sujeewa Kumara, Police Station, Anuradhapura.

163. K.D.R. Senadheera, Police Headquarters, Colombo 01.

164 J. Athukorala, Police Transport Division, Narahenpita, Colombo 05.

165. A.M.M.K. Alagiyawanna, Police Station, Dehiattakandiya.

166. M.G.N. Rathnasiri, Inspection and Review Division, Police Headquarters, Colombo 01.

167. P.W.U.D. de Silva, Police Station, Mirihana.

168. N.K.A.K.I. Wickremasinghe, Police Station, Pugoda.

169. K.W.W.W.M.S.K.B.M. Waidyanayake, State Intelligence Service, No. 10, Cambridge Place, Colombo 07.

170. B.V.R. Vitharana, OIC, Police Station, Polpitigama.

171. M.S. Premathilake,Police Station, Eravur.

172. S.R.J. Dias OIC, Police Station, Kuttigala.

173. P.D.T.K. Senarathne, Police Station, Hanwella.

174. A.P.N.N.S. Perere, Police Station, Mulativu.

175. H.M.W. Herath, Police Station, Badulla.

176. C.C. Rathnayake, OIC, Police Station, Silawatura.

177. D.N.P. Danthanarayana, Police Station, Kotahena.

178. S.P. Weerarathne, Police Station Kanakarayamkulam.

179. D.J.K. Iddamalgoda, Police Station, Borella.

180. H.R.D.K.C. Darmapriya, OIC, Police Station. Wolfendal.

181. S.W.Y.B.S. B. Baddewela, Police Station, Mulativu.

182. S.D.A.C.R. Darmasiri, Police Station, Narahenpita.

183. W.V.D.G. Samanthilake, HQI Police Station, Negombo.

184. W.P.N.C. Perera, Police College, Kalutara.

185. A.M.P.A.R. Arampola, Police Station, Thambuttegama.

186. P.R.V. Prethiviraj, State Intelligence Service, No. 10, Cambridge Place, Colombo 07.

187. A.D. Kariyawasam, OIC, Police Station, Opanayake.

188. W.A.K.I.P. Premathileka, Police Station, Kurunegala.

189. W. Sisira Kumara, Minister's Security Division, No.440, Dr. Colvin R. de Silva Mawatha, Colombo 02.

190. P. Chandrarathne, Presidential Security Division, No. 89, Jawatte Road, Colombo.05.

191. W.K.A. Silva, Police Station, Kelaniya.

192. H.K.S. Shantha Kumara, Police Station, Payagala.

193. S.D.J. Senadheera, Police Station, Anuradhapura.

194. W.M. Dharmasena, Police Station, Walimada.

195. K.A.S.W. Kumarajeewa, Legal Division, Police Headquarters, Colombo 01.

196. P. Kumaradasa, OIC, Police Station, Narammala.

197. R.A.K. Gamini, Police Headquarters, Colombo 01.

198. P.W.S.B. Palipana, Police Station, Gampola.

199. N.V.R.G. Dharmakeerthi, Colombo Crime Division, Kolonnawa Road, Dematagoda.

200 S.A. Anil Priyantha, Minister's Security Division, No.440, Dr. Colvin R. de Silva Mawatha, Colombo 02.

201. A.M.P.K. Chandrasekera, Police Station, Badulla.

202. S.M.S.B. Senanayake, Police Station, Aranayake.

203. B.K.C.N.D. Wijethilake, Minister's Security Division, No.440, Dr. Colvin R. de Silva Mawatha, Colombo 02.

204. A.A.D.L. Sandasiri, OIC, Police Station, Mundal.

205. G.C.J. Kumara, Police Station, Mt. Lavinia.

206. R.S.W.B.T.T. Gamage, Police Headquarters, Colombo 01.

207. R.D.A. Rajapakse, OIC, Police Station Palei.

208. K.M.L.C. Jayasekera, Police Station, Gampaha.

209. M.P.D.D. Weerasinghe, Police Station, Trincomalee.

210. W. Darmasooriya, Police Station Kodikamam.

211. A.H.M.D.W.B. Herath, Building Division, Police Headquarters, Colombo 01.

212. W.P. Mendis, Sport Division, Field Force Headquarters, Thimbirigasyaya, Colombo 05.

213. U.G.S.P. Senarathne, Police Station, Ampara.

214. M.A.C.N. Francis, Police Station, Kegalle.

215. B.M.T. Basnayake, Police Station, Narahenpita.

216. R.S.A. de Silva, Colombo Crime Division, Kolonnawa Road, Dematagoda.

217. J.T. Senarathne, Police Station, Seeduwa,

218. D.B. Gnanathileke, Presidential Security Division, Colombo 01.

219. M.K.I. Asar, Police Station, Ampara.

220. D.M.J.S.P. Ubayasena, Police Hospital, No. 20 Nawala Road, Narahenpita, Colombo 05.

221. G.I.T. Karunarathne, Police Station, Nuwara Eliya.

222. I.K.M.T. Nilangasekera, OIC, Police Station, Balamuna.

223. Y.M.J. Bandara, OIC, Police Station, Bingiriya.

224. W.W. Indrajith, OIC, Police Station, Kollupitiya.

225. H.A.D.N. Karunarathne, OIC, SCIB, Crime Investigation Bureau, Mirihana.

226. K.A. Kithsiri Kumara, Traffic Headquarters, Colombo .11.

227. A.D. Karunarathne, Police Station , Rathnapura.

228. M.M. Upul Priyalal, OIC, Police Station, Anamaduwa.

229. M.M.S. Lakshman Bandara, Crime Division, Police Headquarters, Colombo 01.

230. P.W. Neelarathne, Police Station, Balagolla, Kandy.

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

232. Dharmasena Dissanayake, Chairman.

233. A. Salam Abdul Waid, Member.

234. D. Shirantha Wijayathilleke, Member.

235. Prathap Ramanujam, Member.

236. V. Jegarasasingam, Member.

237. Santhi Nihal Seneviratne, Member.

238. S. Ranugge , Member.

239. D.L. Mendis, Member.

240. Sarath Jayathileke, Member.

241. H.M.G. Senarathne, Secretary,
232nd to 241st Respondents;
Public Service Commission,
No. 177, Nawala Road, Colombo 05.

242. G.Prof. Siri Hettige, Chairman.

243. P.H. Manathunga, Member.

244. Savithree Wijesekera, Member.

245. Y.L.M. Zawahir, Member.

246. Mr. Anton Jeyanandan, Member.

247. Thilak Collure, Member.

248. Frande Silva, Member.
242nd to 248th Respondents
National Police Commission,
Bauddhaloka Mawatha,
Block No. 3, BMICH Premises, Colombo 07.

Respondents

SCFR 131/2014

R.A.R.D. Karunarathne,
Uduwa, Kandy.

Petitioner

Vs.

Pujith Jayasundera, Inspector General of Police,
Police Headquarters, Colombo 01.
And 247 others.

Respondents(In SCFR 131/2014)

SCFR 133/2014

M.W.S.Uvindasiri,
No. 40A, Thusaragira,
Udaperadeniya, Peradeniya.

Petitioner

Vs.

Pujith Jayasundera, Inspector General of Police,
Police Headquarters, Colombo 01.
And 247 others.

Respondents (In SCFR 133/2014)

Before	;	Jayantha Jayasuriya, PC, CJ B.P. Aluwihare, PC, J. L.T.B. Dehideniya, J
Counsel	:	Widura Ranawaka with Sudath Perera instructed by Suraj Rajapakse for the Petitioner in SCFR Nos. 131/2014 and 133/2014. Widura Ranawaka with Sudath Perera and Shyamal Rathnayake for the Petitioner in SCFR No. 132/2014. Rajive Gunathileke, SSC, for the Hon. Attorney General.
Argued on	:	28.08.2020 and 21.09.2020
Decided on	:	18.03.2021

Jayantha Jayasuriya, PC, CJ

Three Fundamental Rights applications namely SC FR 131/2014, SC FR 132/2014 and SC FR 133/2014 were taken up together for argument. Grievance pleaded by the petitioners in these three applications is common to all of them. Petitioners in all three cases agreed to abide by the judgement in SC FR 132/2014, the matter that was taken up for argument before this Court. Petitioners in all these three applications are police officers who were unsuccessful in securing promotions to the rank of Chief Inspector of Police in the year 2014. All Petitioners had joined regular force of Sri Lanka Police at different points of time and were in the rank of Inspector of Police, at the time of filing these applications.

The 1st Respondent, who is the Inspector General of Police, called for applications for the promotions to the rank of Chief Inspector of Police from the officers serving in the rank of Inspector of Police by the order bearing No. D/MD/PRO/927/2013 (RTM 141) dated 4th September 2013, a copy of which produced before this Court, marked as P2.

According to the said Order, applicants had to satisfy two factors to be eligible to apply for the aforesaid promotion. Firstly they should have completed eight years of active service in the rank of Inspector of Police by 25 September 2013 and confirmed in the service. Secondly, they should posses an unblemished record of service for five years preceding 25 September 2013.

Petitioners in all three applications submitted their applications for the promotion, but were unsuccessful. Two hundred and eighteen Inspectors of Police had been promoted through this process as published through the order bearing No. D/MD/ADM/440/2014 dated 23rd April 2014 (TM 594) of the First Respondent, a copy of which is produced marked P8. Said promotions were made with effect from 17 March 2014.

Respondents do not dispute the eligibility of the Petitioner to apply for the promotion described hereinbefore. Furthermore it is conceded that the Petitioner in this application was in the 71st position in the list of seniority, dated 15.11.2012. It is the contention of the Petitioner that his right to equality was violated by denying the promotion to him while thirty-one applicants who were positioned below the thousandth place in the seniority list, being promoted, over and above him. It is his contention that the aforementioned thirty-one promotees (hereinafter referred to as 'promotee-respondents') had been favourably treated. It is his contention that these promotee-respondents did not satisfy the basic requirement of eight years service in the rank of Inspector as all of them were absorbed to the Regular Service in the police force with effect from 01 February 2006. The Petitioner contends that the thirty-one promotee-respondents should not have been promoted as they have initially joined the reserve police service and have not completed 8 years in active service as at 25th September 2013. They had been absorbed to the rank of Inspector of Police in the Regular Force of the Police Department with effect from 01 February 2006 – approximately seven years and eight months before the closing date of the applications namely 25 September 2013. Furthermore the petitioner contend that he had a legitimate expectation to be promoted to the rank of Chief Inspector of Police through the process initiated in 2013 as he had completed thirty years of service in the Police Department of which eleven years in the rank of Inspector of Police and was positioned at the seventy first place in the list of seniority. It is his contention that the denial of this promotion is irrational and arbitrary and therefore is violative of the right guaranteed under Article 12(1) of the Constitution.

Petitioner, therefore moves this Court to declare that Fundamental Rights guaranteed to him under Article 12(1) of the Constitution, had been infringed by the 1st Respondent. Furthermore, the Petitioner initially sought an order quashing the promotions granted by the 1st Respondent by his order bearing No. D/MD/ADM/440/2014 dated 23rd April 2014, marked as P8, and to declare the said promotions are null and void. He was further seeking from this Court an order directing the 1st Respondent to promote the Petitioner to the rank of Chief Inspector with effect from 17th March 2014.

However it is pertinent to note that the Petitioner in this matter and the Petitioners in the two other connected matters had been promoted to the rank of Chief Inspector of Police subsequent to the institution of these proceedings before this Court. Therefore the Petitioners in all three applications are now seeking an Order from this Court to back date the promotions to have effect from 17th of March 2014, only. It is significant to note that 17th March 2014 is the date from which the promotions were granted to the 218 successful candidates who applied in consequent to the circular dated 4th September 2013. They contend that that the injustice caused to them in 2013-2014 could be satisfactorily remedied by an Order backdating the effective date of the promotion to the same date on which the promotions were granted by the impugned Order / Circular P8, issued by the 1st Respondent.

The 1st Respondent contends, that rights of none of the Petitioners had been violated through the promotions granted to two hundred and eighteen Inspectors of Police as per the Order dated 23 April 2014 (P8). He further contends that the petitioners had not been successful as they failed to obtain marks above the cut off mark namely, 72.5. All two hundred and eighteen successful candidates, including the thirty-one promotee-respondents (Inspectors of Police who were absorbed to the Regular Police Force from the Reserve Force in 2006), have scored marks above the cut-off mark; whereas the total marks obtained by the Petitioner had been 69. Therefore, Respondents contend that none of the promotees had been favourably treated as against any of the Petitioners but all applicants had been treated equally. A copy of the marks sheet of all the candidates who applied to the post of Chief Inspector of Police was produced in these proceedings marked 1R2.

A copy of the marking scheme for promotion to the rank of Chief Inspector of Police (2013) was produced marked P4. Marks under the said marking scheme is awarded out of 100, where 50 marks are allocated for the period of service and the remaining 50 marks are allocated for merit. Candidates were to be awarded 05 marks for each complete year in the rank of Inspector of Police and half of the marks allocated for each year of service, that is 2.5 marks, were to be awarded for completing service for a period of 06 months or more and less than one year.

The basis for the Petitioner's contention that the thirty-one promotee-respondents had been treated favourably, is twofold. Firstly, it is his contention that those who were absorbed from the Reserve Force in 2006 were not qualified to be considered for the promotion under consideration as they have not completed 'eight years of active service' by the closing date of the applications namely 25 September 2013. It is his contention that such officers had completed only seven years and six months. Petitioner's such calculation is on the basis that the period of service in the Reserve Force should not be counted when calculating the period of 'active service' of such officers. Secondly, he contends that the maximum marks that should have been awarded to such officers was, 37.5 out of 50 marks allocated to the 'period of service'. Furthermore, the petitioner relies on the respective positions on which the Petitioners vis-à-vis the promotee-respondents were placed in the list of seniority as at 15 November 2012. Petitioner was on the seventy first position whereas the promotee-respondents were below the thousandth position in the said list.

Furthermore, the learned Counsel for the Petitioner relying on the judgment of this Court in **Tuan Ishan Raban and others v. Members of the Police Commission and Pradeep Priyadarshana v. Members of the Police Commission and others** (2007) 2 SLR 351 submitted that service in the Reserve Force should not be equated to the service in Regular Force. In **Tuan Ishan Raban and others** (supra) petitioners challenged a provision in a circular issued by the Senior DIG (Administration) on 21 October 2003, which required Sub Inspectors in the Reserve Force to complete six years of service in the Regular Force for them to be considered for the promotion to the rank of Inspector of Police. Petitioners in the said application who were in the rank of Sub Inspector of Police and served in the Reserve Force had challenged the aforementioned circular in 2003 on the basis that it is violative of the rights. Her ladyship Justice Shirani Bandaranayake (as she then was) in the judgment dated 05.07.2006, held that the said circular did not violate the fundamental rights guaranteed in terms of Article 12(1) of the Constitution.

It was held,

"On a careful comparison of the characters of the Reserve Police Force and the Regular Police Force, on the basis of the aforementioned analysis, it is evident that they belong to two different categories without any rational nexus to link the two groups for the purpose of putting them together.

In such circumstances, it is abundantly clear that the officers of the Regular Force and the Reserve Force belong to two different categories and therefore the decision of the Respondents to include Clause 2.1.III in the undated Circular P1 cannot be regarded as unequal, unfair, arbitrary or violative of the Petitioners fundamental rights guaranteed in terms of Article 12(1) of the Constitution." (at page 361) .

In arriving at this decision the court took into account various factors including the fact that the Reserve Force and Regular Force are categorized separately under the Police Ordinance, applicability of different requirements for recruitment and promotions in the two forces and differences in the terms of employment in the two forces.

The learned Senior State Counsel contended that the facts and circumstances in **Tuan Ishan Raban and others** (supra) can be distinguished from the facts and circumstances relating to the applications under consideration. The petitioners in the present applications and all promotee-respondents were in the Regular Force at the time they submitted their applications for promotions, in 2013. These promotee-respondents had been absorbed to the Regular Force in consequent to a cabinet decision based on a cabinet paper presented in the year 2006 which was produced marked 1R3. The cabinet approval was sought to absorb all police officers in all ranks in the Reserve Force to the Regular Force, who possess all qualifications necessary for recruitment to the Regular Force. The Secretary Ministry of Defence by his letter dated 03 February 2006 had conveyed the Cabinet Decision to absorb "officers of the Reserve Police Service into the Regular Police Service on condition that they have fulfilled all qualifications

required to be fulfilled when making recruitment to the Regular Police Service" (P6(a)). The detailed Scheme of Absorption was issued by the Inspector General of Police and is produced marked 1R4. One of the conditions on which the absorption had taken place is that " the reservists who are absorbed will be placed in their seniority just below their counterparts of the Regular Cadre in the respective years in which they have been enlisted and also as per the date on which they have been promoted to the respective ranks". Furthermore the said scheme required "all reservists recommended for absorption should be sent for further training". The learned Senior State Counsel further submitted that absorption process implemented in 2006 had taken cognizance of the differences that existed between the Reserve Force and the Regular Force and the reservists who were absorbed were placed on respective places in the seniority list without any discrimination being caused to the officers who were in the Regular Force.

When all these factors are taken into account I am of the view that the *ratio-decidendi* in **Thuan Ishan Raban and others** can be distinguished and hence cannot be directly applied to the facts and circumstances of the matters under consideration. It is also pertinent to note that the position in the list of seniority was not a factor that was recognised either in setting the criteria for eligibility to apply for the promotion or a factor to assign extra marks for any applicant under the marking scheme applicable to the impugned promotions. Marks were awarded for the period of service (maximum of 50) and merit (maximum of 50). Therefore, the Petitioner's contention that the his rights were violated by granting promotions to the promotee-respondents who were below 1000^{th} position in the seniority list is devoid of merit.

Furthermore, the eligibility criteria as per the notice dated 04 September 2013 (P2) is completion of eight years active service in the rank of Inspector Police and being confirmed in the said rank. The argument of the Petitioner that none of the promotee-respondents were eligible to apply is on the premise that an applicant should have completed a period of eight years active service in the rank of Inspector of Police in the Regular Police Service. It is the contention of the Petitioner that active service mentioned in the said Circular refers only to active service in the Regular Police Service.

It is pertinent to observe that the said Circular only specifies that a minimum of 8 years in active service in the rank of Inspector of Police and it does not make a distinction between active service in the regular force and the active service in the reserve force. It is my view, acceptance of the submission of the Petitioners in this regard would amount to introducing an additional criteria which was not stipulated in the circular. Court in my view should desist from taking such a course. It is evident from document marked 1R6, that the said promotee-respondents had joined the reserve force between 1988 and 1995 in the rank of Sub-Inspector of Police in the Reserve Force. They were promoted to the rank of Inspector of Police in the Police Reserve Service between 1998.04.16 and 2002.10.05. Therefore, they were in the rank of Inspector of Police in the Reserve Police Service when they were absorbed into the Regular Police Service in 2006. These promote-respondents have served an aggregate period between 10 to 14 years in the rank of Inspector of Police as at the date specified in the circular (25.09.2013).

It is also pertinent to note that subsequent to the abovementioned absorption scheme, the National Police Commission by a letter to the Inspector General of Police dated 07th August 2007, (a copy of which is marked as 1R5) had laid down the criteria to be followed in determining the seniority of Police officers who were absorbed to the Regular Police Service.

The criteria stipulated in the said letter is reproduced as follows,

“

i. *Seniority of officers in their respective ranks shall be determined from the date of absorption; and they will be placed junior to all officers of the Regular Police Service on that date.*
ii. *In the case of officers of the Reserve Police Service absorbed into the Regular Police Service on the basis of 8 years active service, in lieu of possessing the required educational qualifications, their seniority in the Regular Police Service will be reckoned after deducting the 8 years active service from their total service.*

iii. In the case of a Reserve Police personnel who had a number of breaks in his/her service due to suspension, demobilization, his/her seniority shall be determined according to period of his/her total active service."

Furthermore, the said letter has confirmed,

"The Commission is in agreement with the Committee's recommendations that in promoting officers from rank to rank, the past service of the Reserve Police Officers be given due recognition".

The criteria set out by the Police Commission as described hereinbefore indicates that the distinctions between the two categories of service were given due consideration all throughout the process of absorption of Officers of the Reserve Service to the Regular Service. Furthermore, it is nothing but fair to give due recognition to the past service of the Reserve Police Officers when promotions from one rank to another is considered while placing them in positions below the positions held by the officers in the Regular Force in the seniority list, at the time of absorption.

Therefore, in my view giving due regard to the period of active service in the Reserve Force in the rank of Inspector of Police in deciding whether an applicant had completed eight years of active service in the rank of Inspector of Police is neither arbitrary nor irrational. I am unable to hold in favour of the claim made by the petitioner in this regard namely that the period of active service in the reserve force should not have been considered in calculating the period of active service in the context of the eligibility to apply for promotions under consideration.

It is also important to observe that 'each and every expectation' cannot be treated as a 'legitimate expectation' in the context of the exercise of rights of an individual. A rational, equal and fair process is a factor *sine-qua-non* to ensure that a legitimate expectation of an individual to gain

promotions to higher ranks in the course of employment, is protected and respected. It is not only the petitioner but all other co-workers are entitled to entertain a legitimate expectation to be promoted into higher ranks in the course of their service in the Police Force. Therefore promotions granted to co-workers through a rational, equal and fair process could not lead to a breach of a legitimate expectation of the Petitioner who failed to obtain more than the cut-off mark prescribed through such promotion scheme.

For the foregoing reasons I am unable to hold that the impugned process through which promotions to the rank of Chief Inspector of Police were granted by the Inspector General of Police with effect from 17 March 2014 is unequal, unfair, arbitrary or violative of the Rights guaranteed to the Petitioner under Article 12(1) of the Constitution. Therefore I hold that the Petitioners have failed to establish that his fundamental rights guaranteed in terms of Article 12(1) of the Constitution had been violated. Therefore the application is dismissed. I make no order, as to costs.

Chief Justice

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

Case no.SC/FR/157/2014

Case no.SC/FR/182/2014

Case no.SC/FR/183/2014

Case no.SC/FR/184/2014

Case no.SC/FR/185/2014

1. Kanda Udage Malika
   Kosmo Farm, Akurukaduwa,
   Meegahakiwula.

PETITIONER

VS.

1. D.M. Aberathna
   Police Constable,
   Kandaketiya Police station,
   Kandaketiya.

2. D.P.K. Gamage,
   Police Constable,
   Kandaketiya Police station,
   Kandaketiya.

3. S.M.R.P. Kumara
   Police Constable,
   Kandaketiya Police station,
   Kandaketiya.

4. S.J.M. Jayasundara
   Civil Defence Force,
   Attach to the Kandaketiya Police station,
   Kandaketiya.

5. D.M. Wijerathna
   Reserve Staff attach to the Kandaketiya, Police station,
   Kandaketiya.

6. R.P. Somarathne
   Sub Inspector,
   Kandaketiya Police station,
   Kandaketiya.

7. Officer in Charge
   Kandaketiya Police station,
   Kandaketiya.

8. Dr. Jagath Perera
   District Medical Officer,
   Meegahakiwula
   Government Hospital,
   Meegahakiwula.

9. Senior Superintendent of Police (SSP)
   Badulla Range,
   Badulla.

10. Deputy Inspector General of Police
    Badulla Range,
    Badulla.

11. Superintendent of Prison
    Badulla Prison,
    Badulla.

12. Commissioner of Prison
    Prison Department,
    Welikada.

13. Mr. Pujith Jayasundara
    Inspector General of Police,
    Police head Quarters,
    Colombo 01.

14. Hon. Attorney General
    Attorney-General's Department,
    Hultfsdorp,
    Colombo 12.

RESPONDENTS

BEFORE : **SISIRA J. DE ABREW, J.**
MURDU N. B. FERNANDO, PC, J. AND
S. THURAIRAJA, PC, J.

COUNSEL : Mr. Lakshan Dias with Ms. Shafnas Shamdeen for the Petitioner

Mr. Pradeep Fernando for 1st to 3rd and 5th and 6th Respondents

Mr. Madhawa Tennakoon SSC with Mr. Thivanka Attygalle SC for the 14th Respondent.

WRITTEN SUBMISSIONS: Petitioner on 18th September 2020.

14th Respondent on 21st September 2020.

ARGUED ON : 22nd September 2020

DECIDED ON : 21st May 2021

S. THURAIRAJA, PC, J.

The Parties in Case no.SC/FR/157/2014

The **Petitioner**; Kanda Udage Malika, is petitioning on behalf of his 17-year-old deceased son (a child), P.H. Sandun Malinga (Herein after sometimes referred to as the deceased) who was deceased in the custody of the Police.

The **1st Respondent;** D.M. Aberathna, **2nd Respondent;** D.P.K Gamage and **3rd Respondent**; S.M.R.P. Kumara are Police Constables in the Kandaketiya Police station and the **4th Respondent;** S.J.M. Jayasundara is in the Civil Defence Force, attached to the Kandaketiya Police station. The 1st – 4th Respondents are alleged to have directly violated the Fundamental Rights of the deceased while the **5th Respondent**; D.M. Wijeratna who belongs to the Reserve Staff attached to the Kandaketiya Police station, the **6th Respondent;** R. P. Somarathne Sub Inspector, Kandaketiya Police station along with **7th Respondent;** the Officer in Charge of the Kandaketiya Police station, the **8th Respondent**; Dr. Jagath Perera, the District Medical Officer of Meegahakiwula, the **9th Respondent**; Senior Superintendent of Police of Badulla, **10th Respondent**; Deputy Inspector General of Police of Badulla, **11th Respondent**; Superintendent of Prison of

the Badulla Prison, **12th Respondent**; the Commissioner of Prison, Welikada and **13th Respondent**; Mr. Pujith Jayasundara the Inspector General of the Police are alleged to have indirectly contributed to the said violation being authorities under whose guidance and/or assistance the said individuals acted, while the **14th Respondent** is the Hon. Attorney General.

The Petitioner instituted legal action in the Supreme Court under Article 126 of the Constitution of Sri Lanka against the 1st -14th Respondents on the 5th of June 2014 for the violation of the Fundamental Rights of the deceased guaranteed by Articles 11, 12(1),13(1),13(2), 13(3), 13(4) of the Constitution.

On the 3rd of March 2015 the Supreme Court granted leave to proceed for the alleged violation of the Fundamental Rights of the deceased guaranteed under **Article 11** of the Constitution against 1 – 6th Respondents and under **Articles 12(1), 13(1)** and **13(2)** of the Constitution against the 1st – 14th Respondents.

It is pertinent to note that the instant case of **SC/FR/157/2014** was taken together with cases **SC/FR/182/2014, SC/FR/183/2014, SC/FR/184/2014, SC/FR/185/2014** with the agreement of the parties as the impugned conduct in all the applications is the same. The Petitioners in the above cases are the relatives of the deceased who accompanied him and who were further subject to assault by the errant police officers.

The Petitioners in particular are, in SC/FR/182/2014; Gamini Hewanayake 42 year old brother-in-law of the Petitioner to the current case and the uncle of the deceased, SC/FR/183/2014 Peruma Hewa Kasun Wiraj Madumadawa 20 year old elder son of the Petitioner to the current case and the brother of the deceased, in SC/FR/184/2014 R. A. Wijeratne a 42 year old friend of the brother-in-law of the Petitioner to the instant case and SC/FR/185/2014 Kanda Uda Kularathne 56 year old brother of the Petitioner to the current case and the uncle of the deceased. The Respondents in all the above cases are the 1st - 14th Respondents to the current case.

Accordingly, the following judgement shall bind the parties to the current case and the aforementioned cases.

The Facts

The facts of the case as per the documents submitted before this Court are as follows,

On the 7th of May 2014 at around 5.30 pm the deceased along with his brother; Peruma Hewa Kasun Wiraj Madumadawa, two uncles; Gamini Hewanayake and Kanda Uda Kularathne and a friend of his uncle; R. A. Wijeratne who are the Petitioners of the aforementioned cases (herein after referred to as other Petitioners) had left to Katawatte with the intention of purchasing a three-wheeler.

The deceased was given Rs. 75,000/- by his father for the purchase of the said three-wheeler. Once the deceased and other Petitioners reached Katawatte they were further directed by the seller to the School in Bogahatenna.

In the meantime, the Kandaketiya Police had received a 119 message (Police Emergency contact) at 8.55 pm indicating that seven persons had entered the Bogahatenna forest reserve at Katawatte and were engaged in treasure hunting.

As per the instructions of the 7th Respondent, the 6th Respondent had proceeded to the reported area with 1st – 5th Respondents at 9.00 pm and had arrived at the location passed 9.45 pm.

According to the other Petitioners, when they reached the school, a group of police officers had walked towards the deceased and the other Petitioners and had surrounded them. The 6th Respondent had inquired whether they had been treasure hunting and had proceeded to beat them.

Even though the brother of the deceased stated that they did not come treasure hunting but to purchase a three-wheeler, the police officers have continued to attack them. During this time the 4th Respondent had advised the 6th Respondent as follows,

'මුංට බෝම්බ 5ක් දාලා ඇතුලට දාමු'

(Let's introduce 5 bombs and arrest them)

rather than attacking them at the time.

However, the 6th Respondent who decided to ignore the same had continued to assault the deceased and the other Petitioners. It is stated that the Respondents attacked the deceased and the other Petitioners using their arms, legs and even a baton.

The 6th Respondent had then instructed to bring the Police jeep to the location.

After sending the four other Petitioners to the Jeep, the 1st - 6th Respondents had continued to attack the deceased. When the brother of the deceased tried to escape from the jeep, not being able to bear the attacks against his brother, he had been hit in the ear and locked inside the jeep.

The 1st – 6th Respondents had then proceeded to take the deceased to a green path and brought him back 45 minutes later and has put him to the jeep. The other Petitioners state that the deceased had wept and complained stating that the 1st – 6th Respondents had attacked him while accusing him of treasure hunting.

Further, the 6th Respondent had stated,

' උඹලව මරණ එක මහ කජ්ජක් නෙමේ'

(Killing all of you is not a big deal)

and has proceeded to take them to the police station. The 6th Respondent while pointing at one of his scars had stated that he got the same during a mission to capture 'Army Suranga' and that he will provide the same fate as of 'Army Suranga' to the deceased and the other Petitioners.

The 1st – 3rd ,5th and 6th Respondents in their statement of objections state that at their time of arrival to the scene, there was a commotion taking place between the

parties and the said Respondents only used minimum force to separate them and had questioned them later.

However, as per the Post-Mortem Report (PMR) of the deceased, the deceased had several injuries including **blunt forced head and chest injuries involving the brain, heart and Lungs** *(sic)*. As per this evidence it is clear that the injuries were not due to a 'commotion' or a result of the use of 'minimal force' but due to heavy attacks possibly as described by the Petitioner.

Other Petitioners claim that the police officers had also taken their wallets.

Once the deceased and the other Petitioners were taken to the Police station, they were forced by the 6th Respondent to sign a document after which they were put in the cell in the Police station. Further he had mentioned to the uncle of the deceased (Petitioner in case application no. 185/2014) that he will not free him for a year as he was acting as if he didn't care much about the situation.

The Petitioner claims that once she was made known of the arrest of the deceased and other Petitioners by a known person, she visited them in the police cell at around 2.30 am of 8th May 2014.

At that time the deceased had complained of chest pains and requested the Petitioner to rub his chest. When she requested the reserve police officer to admit him to the hospital as she realised that he was in critical condition the officer had informed that nothing could be done as there were no officers at the station and ordered them to come later in the morning.

When the Petitioner arrived at the police station at around 7.30 am the deceased was in his worst condition, lying on the cold floor while crying. When the Petitioner rubbed his chest, she realised that the chest region was swollen.

When the Petitioner requested the 6th Respondent to take the deceased to the hospital, he had yelled at the Petitioner stating,

' කෑ ගහන්නේ නැතුව පලයව්, අපි මුන්ව ඉස්පිරිතාලේ ගෙනියන්න තමයි හදන්නේ '

(Get out without shouting, we are going to take them to the hospital)

At around 8.30 am the deceased along with the other Petitioners were taken to the Meegahakiwula District Medical Officer (DMO), who is the 8th Respondent to the case. Before producing them before the DMO, the 6th Respondent has had a private conversation with him for about 30 minutes and then has proceeded to produce the deceased and the other Petitioners.

However, it was stated that the 8th Respondent had not inquired about any wounds/ assault of any of the parties produced.

The parties had been brought back to the Kandaketiya Police station and at about 12.45 pm they had been taken to the Magistrate Court of Passara.

In the meantime, the Petitioner had gone to the Magistrate Court of Badulla as she was informed that the deceased and the other Petitioners will be produced there. Since they were not present, she had then proceeded to the Kandaketiya Police station to inquire about the absence of the deceased and other Petitioners at the Magistrate Court of Badulla , where she was informed that they were being presented at the Magistrate Court of Passara. The Petitioner had then rushed to the Magistrate Court of Passara.

However, the 6th Respondent denies such communication regarding producing all suspects at the Magistrate Court of Baddula.

The case was heard in the Chamber of the Honourable Magistrate. The Respondent had submitted that the deceased and the other Petitioners had been arrested for treasure hunting. It was stated that, at the hearing the lawyer of the deceased and the other Petitioners were not given an opportunity to present their case but was constantly interrupted by the Respondents.

As per the request of the Respondents, the Magistrate had ordered the deceased and the other Petitioners to be remanded for a period of 14 days, till the archeological report of the site in which the deceased and the other Petitioners were arrested was prepared and presented.

Following the above order, the deceased and other Petitioners were taken to the Remand Prison of Badulla where the deceased and his elder brother (Petitioner in case no. 183/2014) had been kept separately from the other three Petitioners (Petitioners in case no.185/2014, 182/2014, 184/2014). The deceased and his elder brother had fallen asleep at around 8.30 pm. The brother of the deceased had woken up at around 5.30 am on the 9th of May 2014 to see the deceased panting and struggling for breath.

Once the brother of the deceased informed the above to the prison officers, they had then taken the deceased to the Badulla Hospital. The prison officers who returned from the hospital had informed that the deceased had passed away and has requested for the contact number of the Petitioner's husband.

Accordingly, following a phone call from the prison at around 8.30 am, the Petitioner together with her husband had arrived at the prison.

The brother of the deceased stated that a report was taken from him regarding the death of the deceased. The other Petitioners had then been taken to the Judicial Medical Officer (JMO) who examined the wounds and made note of the same.

The brother of the deceased was then taken to identify the body of the deceased and taken back to the Police station while the other Petitioners were taken to the Mental Health Unit. He was later taken to the Mental Health Unit on the 29th of May 2014.

The other Petitioners including the elder son of the Petitioner were remanded till the 30th of May 2014 and was released on the same date.

In the instant case, the mother of the deceased has come before this court seeking relief under **Article 126** of the Constitution for the rights of his deceased son, guaranteed under **Articles 11, 12(1), 13(1) and 13(2)**.

The Violation of Fundamental Rights

Article 17 of the Constitution provides for remedial action for breach of Fundamental Rights subject to the Article 126 which provides for the jurisdiction of the Supreme Court and its enforcement mechanism. As seen in previous cases such as **Sriyani Silva V. Iddamalgoda, Officer-in-Charge, Police Station Paiyagala and Others [2003] 1 SLR 63** this right is extended to any person with legitimate interest to prosecute. Accordingly, in the current circumstance the death of the deceased will not cease his right to take remedial actions, but the right will be extended to the Petitioner who is the mother of the deceased.

Alleged infringement of Article 11 of the Constitution

Article 11 of the Constitution reads,

> *"No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"*

This Article in our Constitution is further in line with many International Conventions and Declarations of Human Rights such as Article 5 of the Universal Declaration of Human Rights, Article 7 of the International Covenant on Civil and Political Rights and Article 3 of the European Convention on Human Rights which prohibit torture, inhuman or degrading treatment and punishment.

Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment reads as follows,

> "*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, intimidating or coercing him or a third person, or 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"

In assessing cases such as **Amarasinghe V. Seneviratne and Two Others [2010] 2 Sri LR 205**, **Bandula Samarasekera V. Vijitha Alwis, O.I.C., Ginigathhena [2009] 1 Sri LR 213**, **Channa Pieris and Others V. Attorney General and Others [1994]1 SLR 1** it is evident that acts under Article 11 of the Constitution are broadly interpreted by this court to take many forms including both physical, psychological form.

However, in the current situation such distinction would not be necessary as there is clear evidence of physical torture.

In the instant case the burden is on the Petitioner to prove to the court on a preponderance of evidence with a high degree of certainty the violation of Fundamental Rights by the said Respondents.

As per Dr. Shiranee Bandaranayake J in **Bandula Samarasekera V. Vijitha Alwis** *(supra),*

"In order to establish alleged allegation of torture it would be necessary for an aggrieved party to corroborate his averments against the Respondents and for such corroboration it would be necessary to produce evidence including medical evidence".

As per the petition and affidavits submitted before this court, while the deceased and other Petitioners were waiting for the seller of the three-wheeler, the 1st - 6th Respondents have reported to the area and severely assaulted the deceased and other Petitioners and further taken steps to separate the deceased from the group and

assault him for a period of 45 minutes. At the end of which, the deceased had been weeping and complaining of the assault by the 1st- 6th Respondents.

In the statement of objections, the 1st– 3rd ,5th and 6th Respondents deny the above, stating that at the time of arrival to the scene, there was a commotion taking place between the parties and the said Respondents hence used ***minimum force*** to merely separate them.

I find this response to be rather unconvincing especially in light of the PMR of the deceased submitted to this court. The PMR lays down nine injuries (Ante mortem) including,

i. A scalp contusion (4 x 5 cm – dark blue) with a deep haematoma of the back of the head
ii. A contusion (10 x 13 cm – dark blue) on the chest
iii. A graze (1 x 1.5 cm – brown scab+) with a deeper contusion (3.5 x 4 cm) on the left lower abdomen
iv. A contusion (4.5 x 6 cm – dark blue) on the posterior aspect of the right shoulder
v. A tramline contusion (2 x 21 cm – dark blue) on the posterior aspect of the trunk across the spine
vi. A graze (0.5 x 1 – brown scab+) with a deep contusion (2.8 cm x 4.5 cm) on the right loin
vii. A graze (4 x 10 cm – brown scab+) on the posterior aspect of the right elbow
viii. A tramline contusion (2 x 8 cm dark blue) on the posterior aspect of the right thigh
ix. Heavy blunt forces [ii, iv & v above] have caused effect to lungs and heart

Could a 'commotion' between the deceased and the other Petitioners or 'minimum force' used by the said Respondents cause the aforementioned injuries leading to the death of the deceased? The answer to the above question is negative, as the explanation of the said Respondents do not justify the grave injuries set out above.

Further, even if the Respondents are to use minimum force this would not mean subjecting the person to torture or inhuman treatment. This is further supported by cases such as **Kumara V. Silva, Sub-Inspector of Police, Welipenna and Others [2006] 2 Sri LR 236** and **Amal Sudath Silva V. Kodituwakku [1987] 2 Sri LR 119**.

It is noteworthy to highlight the following statement of Atukorale, J. In **Amal Sudath Silva V. Kodituwakku** *[supra]*,

> *"Nothing shocks the conscience of a man so much as the cowardly act of a delinquent police officer who subjects helpless suspect in his charge to depraved and barbarous methods of treatment.... 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 "*

Therefore, as per the evidence submitted it is apparent that the deceased has been subject to torture or to cruel, inhuman or degrading treatment and accordingly the 1st -6th Respondents are in violation of Article 11 of Constitution.

Alleged Infringement of Article 13 (1) ,13 (2) of the Constitution

Article 13 (1) of the Constitution reads,

> *"No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest."*

As previously mentioned, in the case at hand the Kandaketiya Police had received a 119 message (Police Emergency contact) at 8.55 pm stating that seven persons have entered the Bogahatenna forest reserve at Katawatte and were engaged in treasure hunting. It was on this lead that the Police arrested the deceased and other Petitioners.

As per the 1st- 3rd,5th and 6th Respondents the reason for the arrest was their presence in the forest coupled up with the absence of a valid explanation, despite the other Petitioners stating their intention to purchase the three-wheeler. However, as

per the report presented by the Archeological Department, the area in question has no archeological value and no mining had taken place in the said area.

As per the above evidence the reason for the arrest in itself is an unjustified allegation. In addition to the reason for the arrest, the lawfulness of the manner in which the arrest was conducted is questionable. As discussed under Article 11, When the deceased and the Petitioners were brought to the Police station they were severely injured, with the deceased more so injured than the others.

Further, according to the statements of the other Petitioners the 6th Respondent had continuously intimidated and caused fear of injury during and after the arrest. Such conduct by the said Respondents only prove the lack of ethical and moral value which should be instilled in such peace keeping officers. As highlighted by Dr. Shirani Bandaranayake in **Bandula Samarasekera V. Vijitha Alwis** *(supra),*

> *'…. 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 that is expected from an average person. '*

Accordingly, it is acts such as this that depreciate the title of police officers in the minds of the public. And considering all the above factors it is evident that the 1st - 6th Respondents have violated Article 13 (1) in the process of the arrest.

Further, as per **Article 13 (2)** of the Constitution,

> *"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".*

Procedure established by law in the current circumstance would be Sections 65 of the Police Ordinance No. 16 of 1865.

> *'Every person taken into custody by any police officer without warrant (except persons detained for the mere purpose of ascertaining their name and residence) shall forthwith be delivered into the custody of the officer in charge of a station in order that such person* ***may be secured until he can be brought before a Magistrate*** *to be dealt with according to law, or may give bail for his appearance before a Magistrate, if the officer in charge shall deem it prudent to take bail as hereinafter mentioned:*
>
> *Provided always that where bail is not taken, the prisoner shall be brought before a Magistrate within twenty-four hours, unless circumstances render delay unavoidable.'* *(Emphasis Added)*

In the case at hand the deceased and the Petitioners were brought to the Kandaketiya police station late night on the 07th of May 2014 and was taken to the Magistrate Court of Passara on the 8th of May 2014 at around 12.45 pm. Accordingly, the deceased and the Petitioners were presented to the magistrate within 24 hours of the arrest.

However, it is the duty of the officers to ***secure*** the person till he/she is been presented to the Magistrate. Securing would mean, not the mere ensuring of the detainment of the person but also ensuring the person is in good health and free from unlawful actions.

As per the Petitioner when she reached the Kandaketiya police early morning on the 8th of May, her son had a severe chest pain following the assault by the 1st – 6th Respondents. The Petitioner had then requested the reserve officer to admit him to the hospital. However, he had stated that nothing could be done as there were no one else at the station and to come in the morning.

The deceased was not taken to the hospital even by 7.30 am, but after the request of the Petitioner they were taken to the DMO at around 8.30 am. The Petitioners further claim that the DMO who is the 8th Respondent to the case, did not inquire about any assault or apparent wounds but had merely inquired about their names and marital statuses and had proceeded to fill the requisite documentation. Accordingly, it is observed that the 8th Respondent had not fulfilled his obligation to the best of his ability as he should have given more attention to the health of the deceased and the other Petitioners.

After being presented to the Magistrate the deceased and the Petitioners were then admitted to the Badulla remand prison in the evening of the same day.

According to the Petitioners, the deceased and the other Petitioners had informed the Respondents of the Badulla remand police about the assault, however, the 1st- 3rd and 5th and 6th Respondents deny the same and state that, had they been informed they would have taken steps to present the Petitioners to the medical authorities.

However, the question I encounter is even if the Petitioners had not informed the Respondents, whether the injuries were not apparent to the said officers. When the Petitioners were in custody of the Kandaketiya police station the injuries of the deceased were said to be very severe and even the Respondents seemed to have noticed the same as the deceased and other Petitioners were presented to the DMO (even though this was after the request made by the Petitioner). Further as per the PMR there were visible injuries on the deceased. Accordingly, by this observation did the Police officers at the time not recognize their duty to present the deceased to medical attention?

In light of the above facts, I must also note the claim made by the Petitioners stating that the Magistrate did not provide the lawyer of the Petitioner to present her case as she had been constantly interrupted by the Respondents. Following which the Magistrate in the case had proceeded to remand the deceased and the other

Petitioners for 14 days. As per the records brought before this court it is evident that the deceased and the Petitioners indeed were innocent and were not in good health following the torture inflicted. Accordingly, I observe that the Magistrate in the case should have exercised his/her due diligence in order to approach the situation in a better manner.

In considering the provision on Health of Prisoners under the Prisons Ordinance no. 16 of 1877, Section 66 reads,

> *' The names of prisoners desiring to see the medical officer* ***or appearing out of health in mind or body*** *shall be reported by the officer attending them to the jailer; and the jailer* ***shall without delay*** *call the attention of the medical officer to any prisoner desiring to see him, who is ill, whose state of mind or body appears to require attention and shall carry into effect the medical officer's written recommendations respecting alterations of the discipline or treatment of such prisoner'.*
>
> *(Emphasis Added)*

Accordingly, the section states ***'prisoners desiring medical attention or appearing out of health in mind or body shall be reported.'*** In the current case considering the severity of the injuries, the Respondents too had this duty. Even if the Petitioners did not request such attention the Respondents had a duty to do the same.

Further Section 43 of the Prisons Ordinance reads,

> *'Every criminal prisoner shall also, as soon as convenient after admission, be examined by the medical officer who shall into a book to be kept by the jailer a record of the state of the prisoner's health and any observations which the medical officer thinks fit to add.'*

Accordingly, the prison officers have a mandatory obligation to examine the prisoners as soon as convenient. In observing the phrase 'as soon as convenient' we will look at the circumstance surrounding the incident. Considering that the deceased

was subject to significant assault and there were apparent wounds on the deceased the prison officers had an obligation to refer the deceased to medical attention immediately after admission. Especially considering that the Provincial General Hospital in Badulla is in close proximity to the Badulla Prison, external or inhouse medical attention could have been provided.

As per the records submitted to the court the deceased and other Petitioners were admitted to the Badulla remand prison in the evening of 8th of May 2014. On the following day at 5.30 am the deceased was said to be in very critical condition, however the deceased was taken to the hospital only after the brother of the deceased had screamed for help. As per the PMR the death has occurred at 6.00 am on the 9th of May 2014. Further, it was after the death of the deceased, the other Petitioners were taken to the Judicial Medical Officer.

As per the PMR of the deceased, early medical attention could have saved the life of the deceased. While the prison officers could have acted more responsibly in this regard, I find that there is no violation of Article 13 (2) of the Constitution considering that its' essence has been satisfied as the deceased and the other Petitioners were brought before the Magistrate within twenty-four hours of the arrest.

Alleged infringement of Article 12(1) of the Constitution

Article 12 (1) of the Constitution reads,

> *"All persons are equal before the law and are entitled to the equal protection of the law"*

As per H.N.J. Perera CJ in **SC FR Application no. 351/2018 Supreme Court minutes dated 13th December 2018,** Article 12 (1) of our Constitution offers all persons protection against arbitrary and mala fide exercise of power and guarantees natural justice and legitimate expectations. Accordingly, the Article ensures that every citizen is guaranteed equal protection as a 'person' despite how or what another may consider him/her to be.

In the situation at hand, even though the deceased and the other Petitioners were arrested due to an allegation, (which was later proved to be false) the Respondents did not have any right to use the opportunity to assault them or to treat them in a degrading manner for the simple reason that, no person should be treated in such manner. In fact, the very existence of Article 12 (1) of the Constitution ensures that such conduct is contrary to the law of the country.

Considering the above matters, the 1st– 6th Respondents have violated equal treatment and equal protection that ought to be given to an ordinary person of this country, hence have violated Article 12 (1) of the Constitution.

The final question to be dealt by this court is whether the state including the higher authorities and other senior officers surrounding the actions that took place;7th-14th Respondents should be held liable for the direct violation of the Fundamental Rights by the 1st– 6th Respondents by virtue of State Liability.

The principle of State Liability has been discussed in this court in previous instances including the two possible branches of assessing the same. The first being the liability of the state by way of the law governing vicarious liability under the law of delict and secondly, the liability under the sui generis created by the Constitution under public law, out of which the second approach has been favoured.

The nature of liability imposed was highlighted by Lord Diplock in the case **Maharaj V. The Attorney-General of Trinidad and Tobago, No. 2 [1979] A.C. 385** as follows,

> *"This is not vicarious liability it is a liability of the State itself. It is not a liability in tort at all it is a liability in the public law of the State which has been newly created".*

In the case Lord Diplock emphasised that this was a new liability in Public law created by the Constitution of Trinidad and Tobago and should not be viewed in the perspective of any existing bases of liability. In the case **Ganeshanathan V. Vivienne**

Goonewardene and Others (1984) 1 Sri LR 319 Soza J, while commenting on the above stated that the Sri Lankan Constitution too has created this liability under the public law.

Accordingly, it is well established that the principle of state liability in Fundamental Right matters is dealt with to hold the state liable for acts committed by the executive and administrative directly rather than considering the concept of vicarious liability under the law of delict.

In the case **Erandaka And Another V. Halwela, Officer-in-Charge, Police Station, Hakmana and Others [2004] 1 Sri LR 268** the state was said to be responsible for the violation of the Petitioners' Fundamental Rights as it was proved that the Petitioners sustained the injuries while in the remanded prison.

However, contrary to the above the assault in the current situation; the offence was committed prior to the deceased and the other Petitioners were brought to the custody of the station.

It is illogical to hold the state responsible for acts committed by such officers in pursuing their personal vengeance without the authorization or knowledge of the persons in authority. This was also highlighted in **Goonewardene V. Perera and Others [1983] 1 Sri LR 305** (Soza, J.) as follows,

> *"The State no doubt cannot be made liable for such infringements as may be committed in the course of the personal pursuits of a public officer of 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. "*

In light of the above, the phrase 'colour of office' is not limited to whether or not the officers were in official uniform but includes factors surrounding the conduct of the officers and the authority given to them. In the instant case the

acts committed by the errant officers were not committed under the supervision or the orders of a senior officer. The state has not in any manner approved nor shall approve such conduct. In considering the facts laid before this court the acts of the officers were conducted in their personal capacity and not in the 'colour of office'. Further I find that the state in the current situation has given its fullest corporation to serve justice to the Petitioner.

In perusing the judgment by Sharvananda J (as he was then) in **Velmurugu V. AG [1981] 1 SLR 406** , the learned judge has highlighted the inherent difficulties in proving a case of torture by the Police. One such difficulty highlighted by the learned judge is quoted below,

> *'…where allegations of torture or ill treatment are made the authorities whether the police or armed services or the ministries concerned must* ***inevitably feel they have a collective reputation to defend****. In consequence there may be reluctance of higher authorities to admit or allow inquires to be made into facts which might show that the allegations are true."* *(Emphasis Added)*

The above situation should be distinguished from the instant case, Contrary to the above possibility, in the case at hand the higher authorities have taken action against the 1st – 6th Respondents who were directly linked to the torture.

When the conduct of the errant officers were brought to the attention of the senior officers, the relevant inquires and investigations were conducted and the errant officers; 1st- 6th Respondents were indicted for several offences including murder. The matter was referred to the **High Court of Badulla** under **Case No. 01/2015** and the said Respondents have been found guilty of the offences including the murder of the deceased, being members of an unlawful assembly and for causing hurt to the others arrested and was sentenced to death by the judgement dated 9th January 2017.

It must be placed on record that the above decision of the High Court of Badulla did in no way influence my decision in regard to the violation of Fundamental Rights of the deceased and the other Petitioners. The case presented before this court has been evaluated independently from the above, assessing the facts, circumstances and evidence presented before this court.

Accordingly, the state has fulfilled its obligation and in this circumstance the state cannot be held liable for the conduct of the errant officers. I am convinced that the state has taken prompt action against 1st – 6th Respondents hence the state is not liable for the violation of Fundamental Rights.

The police force is one of the key peace keeping forces of the country. Therefore, it's dignity and esteem ought to be protected at all times. In order to achieve the same, it is imperative that the officers conduct themselves with great respect to their office and the people of this nation while being accountable and transparent about their actions.

Decision

Considering the aforementioned facts and circumstances, I hold that the 1st Respondent; D.M. Aberathna, 2nd Respondent; D.P.K. Gamage, 3rd Respondent; S.M.R.P. Kumara, 4th Respondent; S.J.M. Jayasundara, 5th Respondent; D.M. Wijerathna and 6th Respondent; R.P. Somarathne have violated the Fundamental Rights of the deceased, which is guaranteed under Article 11 ,12 (1), 13(1) of the Constitution. The Petitioner is a poor village woman who was expecting to rest her life with her son whose unfortunate demise caused her shock, loss of care and support.

For the above reasons I order each of the 1st -6th Respondents to pay compensation of Fifty Thousand Rupees (Rs. 50,000/=) and litigation costs of Ten Thousand Rupees (Rs.10,000/=) to the Petitioner. Considering the facts of this case, I hold that the state has fulfilled its obligation, therefore, the state is not responsible for the violation.

In regard to the adjoining cases,

In **SC/FR/182/2014** I hold that the 1st Respondent; D.M. Aberathna, 2nd Respondent; D.P.K. Gamage, 3rd Respondent; S.M.R.P. Kumara, 4th Respondent; S.J.M. Jayasundara, 5th Respondent; D.M. Wijerathna and 6th Respondent; R.P. Somarathne have violated the Fundamental Rights of the Petitioner; Gamini Hewanayake guaranteed under Article 11 ,12 (1), 13(1) of the Constitution and I order to pay Ten Thousand Rupees (10,000/=) each as compensation and Five Thousand Rupees (Rs.5000/=) each as litigation costs to the Petitioner.

In **SC/FR/183/2014** I hold that the 1st Respondent; D.M. Aberathna , 2nd Respondent; D.P.K. Gamage, 3rd Respondent; S.M.R.P. Kumara, 4th Respondent; S.J.M. Jayasundara, 5th Respondent; D.M. Wijerathna and 6th Respondent; R.P. Somarathne have violated the Fundamental Rights of the Petitioner; Peruma Hewa Kasun Wiraj Madumadawa guaranteed under Article 11 ,12 (1), 13(1) of the Constitution and I order to pay Ten Thousand Rupees (10,000/=) each as compensation and Five Thousand Rupees (Rs.5000/=) each as litigation costs to the Petitioner.

In **SC/FR/184/2014** I hold that the 1st Respondent; D.M. Aberathna , 2nd Respondent; D.P.K. Gamage, 3rd Respondent; S.M.R.P. Kumara, 4th Respondent; S.J.M. Jayasundara, 5th Respondent; D.M. Wijerathna and 6th Respondent; R.P. Somarathne have violated the Fundamental Rights of the Petitioner; R. A. Wijeratne guaranteed under Article 11 ,12 (1), 13(1) of the Constitution and I order to pay Ten Thousand Rupees (10,000/=) each as compensation and Five Thousand Rupees (Rs.5000/=) each as litigation costs to the Petitioner.

In **SC/FR/185/2014** I hold that the 1st Respondent; D.M. Aberathna , 2nd Respondent; D.P.K. Gamage, 3rd Respondent; S.M.R.P. Kumara, 4th Respondent; S.J.M. Jayasundara, 5th Respondent; D.M. Wijerathna and 6th Respondent; R.P. Somarathne have violated the Fundamental Rights of the Petitioner; Kanda Uda Kularathne

guaranteed under Article 11 ,12 (1), 13(1) of the Constitution and I order to pay Ten Thousand Rupees (10,000/=) each as compensation and Five Thousand Rupees (Rs.5000/=) each as litigation costs to the Petitioner.

Application allowed.

JUDGE OF THE SUPREME COURT

SISIRA J. DE ABREW, J.

I agree

JUDGE OF THE SUPREME COURT

MURDU N. B. FERNANDO, PC, J.

I agree

JUDGE OF THE SUPREME COURT

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

In the matter of an Application under and in terms of Articles 11, 12, 14(1)(g), 17 and 126 of the Constitution.

SC/FR APPLICATION 242/2010

1. Hondamuni Chandima
   Samanmalee de Zoysa Siriwardena,
   No. 235/A, Station Road,
   Balapitiya.

2. Sudusinghe Liyanage Pubudu Kumara,
   No. 21/3 B, Viharagoda,
   Wathugedara.

PETITIONERS

Vs

1. Inspector Malaweera,
   Police Station,
   Ambalangoda.

2. Sub Inspector Chandrarathna,
   Police Station,
   Ambalangoda.

3. Inspector Prashantha,
   Headquarters Inspector,
   Police Station,
   Ambalangoda.

4. Palitha Fernando,
   Superintendent of Police,
   Ambalangoda Division,
   Ambalangoda.

5. Mahinda Balasooriya,
   Inspector General of Police,
   Police Headquarters,
   Colombo 01.

6. Hon. Attorney – General,
   Attorney – General's Department,
   Hulftsdorp Street,
   Colombo 12.

RESPONDENTS

BEFORE : **B.P. ALUWIHARE, PC, J.,**
L.T.B. DEHIDENYA, J., and
S. THURAIRAJA, PC, J.

COUNSEL : Viran Corea with Sharmaine Gunaratne, Sarita de Fonseka and Pathum Pramoda for the Petitioners.

Induni Punchihewa, SC with S. Fernando, SC for the 3rd – 6th Respondents.

WRITTEN SUBMISSIONS : 3rd – 6th Respondents on 25th June 2020.

Petitioners on 20th May 2011.

DECIDED ON : 30th April 2021.

S. THURAIRAJA, PC, J.

The 1st Petitioner, Ms. Hondamuni Chandima Samanmalee de Zoysa Siriwardena (Hereinafter referred to as the 1st Petitioner), and Mr. Sudusinghe Liyanage Pubudu Kumara (Hereinafter referred to as the 2nd Petitioner), are Attorneys-at-Law of the Supreme Court of Sri Lanka. The Petitioners have made the instant application seeking relief in respect of the infringement of their fundamental rights guaranteed under and in terms of the Constitution, in the manner hereinafter more fully set out, against the Respondents.

The 1st Respondent, Mr. Don Saman Harishchandra Malaweera (as affirmed by his affidavit dated 15th August 2010, hereinafter referred to as the 1st Respondent), was an Inspector attached to the Ambalangoda Police Station at the time of the purported incident. The 2nd Respondent, Mr. Liyana Arachchege Chandrarathna, was Sub-Inspector attached to the Ambalangoda Police Station, while the 3rd Respondent is referred to as Inspector Prashantha, who was Headquarters Inspector of Police Station of Ambalangoda. The 4th, 5th and 6th Respondents respectively are Palitha Fernando, Superintendent of Police of the Ambalangoda Division, Mahinda Balasuriya Inspector

General of Police of the Police Headquarters and the Hon. Attorney General, hereinafter referred to as the 4th Respondent, 5th Respondent and 6th Respondent respectively.

When this application was supported by the learned Counsel for the Petitioners this Court granted leave to proceed for the alleged violation of fundamental rights guaranteed under Article 12(1) and 14(1)(g) of the Constitution by the 1st-5th Respondents and also for the alleged violation of Article 11 of the Constitution by the 1st and 2nd Respondents.

Subsequent to leave being granted, the Attorney General appeared for the 3rd-6th Respondents only and refused to appear for the 1st and 2nd Respondents.

The Petitioner in by the Petition dated 26th March 2010 asserts the following incident. On 1/1/2010, a person called Bodhiyabaduge Ariyapala (hereinafter referred to as the 'Petitioner's Client') met her with his daughter Bodhiyabaduge Nishanthi (hereinafter referred to as the 'mother of the child') and his grand-daughter, Hewawasam Attanayakage Nethmi Nivarthana (the daughter of the said Bodhiyabaduge Nishanthi (hereinafter referred to as the 'Petitioner's Client's granddaughter') intending to file an application for maintenance against Hewawasam Attanayakage Sumith Chinthaka Sandaruwan who is the husband of the said Bodhiyabaduge Nishanthi and the father of her daughter Hewawasam Attanayakage Nethmi Nivarthana (hereinafter referred to as the 'father of the child).

The said maintenance application bearing no. 24261 was supported on 26/02/2010 and the learned Magistrate ordered the Petitioner's client to show the child to her mother who was at the Hospital because of a cancer and gave temporary custody of the said child to the Petitioners client. On the same day the father of the child had attempted to forcibly remove the said child from the custody of the Petitioner's client, while still at the court premises, and upon the failure to achieve this objective, had lodged a complaint in the Police Station to the effect that the Petitioner's client had

kidnapped the said child. Thereafter the Petitioner's client and the child had been summoned to the Ambalangoda Police Station, and upon the police officers handed over the custody of the child to the Petitioner's client after being made aware of the order of the Magistrate for temporary custody of the said child.

Subsequently, on 28th February 2010 the Petitioner was informed by the Petitioner's client that the mother of the child (daughter of the Petitioners client), had passed away on 27th February 2010 due to cancer. The 1st Petitioner was further informed by her client, that his other daughter namely Bodhiyabaduge Shanthi and her husband had been arrested and taken to the Ambalangoda Police Station upon a complaint that the said persons had kidnapped the Petitioner's client's granddaughter and that the Petitioner's client was asked to come to the Police Station with his granddaughter at 5.00 pm regarding the matter, effectively depriving them of attending the funeral of the mother of the child being held that day.

Immediately, the 1st Petitioner informed the officers of the Human Rights Commission (HRC) regarding the situation, and an officer there named Rupasinghe made inquiries from the Police and informed the 1st Petitioner that the officers of the Ambalangoda Police Station had informed him that no such arrest had been made and to visit the said Police Station for further details. Upon this, the 1st Petitioner proceeded to the Ambalangoda Police Station together with her client and the 2nd Petitioner and they went to make inquiries as to the whereabouts of the said Bodhiyabaduge Shanthi and her husband.

Upon reaching the Ambalangoda Police Station at around 5.00 pm, the 1st Petitioner confronted a crowd of persons who had gathered with the father of the child at the Police Station and the said Bodhiyabaduge Shanthi and her husband were seated on a bench at the Police Station. When the 1st Petitioner inquired as to the reason for

the arrest of the two said persons, the 1st Petitioner was notified that there was no arrest as such, nor a record of arrest at the Police Station.

Importantly, the Petitioners admit that they were informed that the 3rd Respondent was away pertaining to a meeting during this day.

Upon the Petitioner reaching the entrance of the Police Station the father of the child approached them and started to verbally abuse the 1st Petitioner saying,

> *"ඔයගොල්ලො ආවේ සල්ලිවලටද? සල්ලි ඕනෙද? අපි සල්ලි දෙන්නම්. අම්මා කෙනෙක් නේද? ලැජ්ජ නැද්ද මේ වගේ වැඩ වලට එන්න?"*
>
> *("Did you come for the money? Do you need money? We will give you money. Aren't you a mother? Aren't you ashamed to come for work of this kind?")*

Thereafter, the 1st Respondent together with the 2nd Respondent took the Petitioner's client inside the Minor offences branch of the Police Station. The 1st Respondent menacingly said,

> *"ආ උඹ ආවද? මම අද හොඳට සලකන්නම්. වරෙන් යන්න."*
>
> *("ah, you came here? Today, I will treat you well. Come with me.")*

The Petitioners state that even after having been informed that the Petitioners were Attorneys-at-Law, the 1st and 2nd Respondents continued yelling and threatening them. Thereafter, the 2nd Respondent pointed at the 1st Petitioner in a derogatory manner and shouted because she had a mobile phone in her hand, saying,

> *"ඕෆ් කරනවා ඔය ෆෝන් එක. ඕෆ් කරනවා. මෙතන ෆෝන් තියාගන්න බැහැ. තේරෙන්නේ නැද්ද?*
>
> *("Switch off the phone. Switch it off. You cannot keep phones here. Don't you understand".)*

The Petitioner also alleges that no objections were raised to the mobile phones carried by the crowd accompanying the father of the child. The 1st Petitioner at this point, started recording the verbal abuse by the 1st and 2nd Respondents using her mobile phone. When the 1st Respondent repeatedly interrogated the 1st Petitioner's client as to his right to the custody of his granddaughter, the Petitioners intervened and stated that such custody was given temporarily by the Magistrate's Court to the grandfather and that the father of the child who was present at the police station was aware of such events. Petitioner stated that even at that point, the 1st Respondent shouted at the 1st Petitioner in derogation by stating that,

> *"මට ඒ වාර්තාව දෙන්න. මට මහේස්ත්‍රාත්තුමියගෙන් එහෙම වාර්තාවක් එවලා නෑ. නඩුවෙ ඒවා මහේස්ත්‍රාත්ට කියන එකයි ඇත්තේ".*
>
> *("Give me that report. I have not received such a report from the Magistrate. Tell that to the magistrate at court, not to me.")*

Despite all the efforts of the Petitioners, the Petitioners state that the 1st and 2nd Respondents were determined to frame charges on the basis that the 1st Petitioner's client had kidnapped the grandchild and the 1st Respondent even went so far as to further shout at the Petitioner,

> *"ළමයා පැහැර ගෙන යාමට වැරදි උපදෙස් දීම ගැන ඔයගොල්ලන්ට විරුද්ධවත් මම පියවර ගන්නවා. මමත් උසාවියට එනවා. එතකොට බලාගන්න පුලුවන් ඔයගොල්ලෝ මේ නඩුවට පේන්නේ කොහොමද කියලා."*
>
> *("I will also take action against you for giving wrong instructions for child abduction. I'm coming to court too. Then we can see how you face this case.")*

and continued to shout saying,

> *"දරුවා නොදුන්නොත් දැන්ම තමුන්ලව අත්අඩංගුවට අරගෙන හෙට උදේ උසාවි දානවා."*

("If you don't hand over the child, you will also be arrested immediately and produced before the court tomorrow morning.")

The Petitioners state that the 2nd Respondent then humiliated and intimidated the Petitioners by saying that,

"කතා කරකර ඉන්නේ මොකටද මේ දෙන්නටත් පැමිනිල්ලක් සටහන්කරලා නඩු දාන එකයි ඇත්තේ."

("Why just stay here talking, we might as well lodge a complaint against these two and sue them as well")

The 1st Respondents then turned towards the party accompanying the father of the child and stated that,

"සාක්ෂි දෙන්න ඕනෑ මේ කට්ටිය ළමයා පැහැරගත් බවට ඔය ගොල්ලෝ... මම මේ අයට විරුද්ධව පියවර ගන්නවා.

("you all need to give evidence saying that they kidnapped the child... I will take action against them".)

At the same time the 2nd Respondent asked and wrote down the Petitioner's names and addresses.

Thereafter the 1st Petitioner's client's daughter Bodhiyabaduge Shanthi stated that,

"අපි ළමයා දෙන්නම් සර්. අපිට කරදර වෙන්න බැහැ. මට ළමයි දෙන්නෙක් ඉන්නවා. මට ගෙදර යන්න ඕනෑ."

("We will give you the child, sir. We can't face such trouble. I have two children. I want to go home.")

Following which she brought the child to the police station. The 1st Petitioner inquired from her client if he was consenting to handing over the child and upon hearing

this, the 1st Respondent continued to attempt to intimidate the 1st Petitioner by claiming that the child needs to be produced or that he will take legal action against them and shouted at the 1st Petitioner.

Furthermore, when the 1st Petitioner tried to explain the fact that the father of the child had failed to maintain the child, the 1st Respondent rudely interrupted the 1st Petitioner and continued yelling,

> *"මට උගන්වන්න එන්න එපා නඩත්තු නඩු පවරන හැටි.."*
>
> *("Don't try to teach me about maintenance suits").*

When the Petitioners sought to explain the circumstances as Attorneys-at- Law, the 1st Respondent simply yelled at them, shouted at the 1st Petitioner saying,

> *"මේ මිනිහා මේ ළමයාව දූෂණය කලොත්, කරදර කලොත් ඔයගොල්ලො මොකද කරන්නේ? ළමයාගේ වගකීම බාරගන්නවද?"*
>
> *("What will you do if this man rapes or abuses this child? Do you take responsibility for the child?")*

The Petitioners states that, then in the most degrading manner, the 2nd Respondent told the 1st Petitioner in total sarcasm:

> *"මහලොකුවට මේ නෝනා ළමයෙක්ගේ නඩුවකට පෙනුනා. අම්මා නර්ස්, තාත්තා ජේලර් ගාඩ්, තමුන්ගෙ දුව දූෂණය කරලා අද. මොකද අද ඇවිත් ඒ වගේ තව නඩුවක් ඇති කරන්න කතා කරනවා. නීතිඥයෝ අසාධාරණ ලෙස මුදල් හම්බ කරගන්නවා."*
>
> *("Today there was a rape case where the mother was a nurse, and the father of a child was a jailer guard who had raped his child. Are you here to create another such case? Lawyers earn money in such unfair ways")*

at which point the Police officers and the members of the public who were present there laughed, causing the Petitioners severe embarrassment and humiliation and to the legal profession at large.

Additionally, The Petitioners submit that it was evident that the 1st and 2nd Respondent were under the influence of alcohol during this encounter due to the strong smell emanating from them and the manner in which they were behaving. However, the 1st Respondent in his affidavit dated 19th August 2010 denies being under the influence of alcohol and submits that he discharged his duties in good faith according to law and consciously believed to be doing the right thing to administer justice. He alleges that the Petitioner strives to construe their words out of context in a different manner to strengthen their feeble case. He further states in objection that he had only assisted the father of the child of that case, to obtain access to the child for him to take the child with him to attend the funeral of the mother of the child together and denies any knowledge of alleged violations. He states that they were polite in requesting the 2nd Petitioner to switch off the mobile phone.

The 2nd Respondent in his affidavit dated 16th June 2010, states his objection by largely adopting a position in line with the stance of the 1st Respondent as above, and he further states that as he suffers from epilepsy, he refrains from taking alcohol and thus denies the allegation that he was intoxicated during the confrontation.

Both the 1st and 2nd Respondent in their affidavits alleges that the reasoning behind the incident on 28th February 2010 whereby the Petitioner's client and his granddaughter were summoned to the Police Station and the alarming phone call by them stating that the Petitioner's client's other daughter as well as her husband were under arrest for kidnapping his grandchild was based on a complaint lodged at the police station by a person bearing the name of the father of the child, but however, the facts of the complaint attached as 'R1', is in contradiction to the narration of accounts

by the Petitioner. In this complaint the father of the child is stated to be a disabled ex-soldier. He admits to that he and his wife were living separately, but states that this is purely owing to the conduct of her parents in having kept her with them on most occasions. He states that upon his request at the magistrate, which was based upon the request of the mother of the child, the Magistrate ordered for him to take the child accompanied by the Petitioner's client (grandfather), to visit her mother at the hospital.

He further purports that the Petitioner's client thereafter refused to do so and had forcefully taken the child with him. Additionally, he states that he files this complaint in order for his child to be able to be at her mother's funeral, which he states is not possible as the grandfather and the mother's family are withholding the child in a very unreasonable manner. This rendition of accounts does not align with the facts put forward by the Petitioners or the affidavit provided by the Petitioner's client.

However, I must note that this extract is dated 28th February 2010, but the time recorded is 6:50 PM of the same date. In the Petition, it is stated that the Petitioner and the Petitioner's client were called to the Police station at 5 PM and they were present at this time. Even if minor room for error is allowed in timing, it is evident that this complaint has been recorded following the initial call ordering the Petitioner's client and the child to be present at the Police Station. In light of the above, it aligns with the statements of the Petitioner in that there were no valid complaints filed on this date authorizing for any such procedure to commence at the time the Petitioner's Client was ordered to present himself and his grandchild to the Police Station.

Further, at no point in 'R1', does this complainant provide any testament specifically against his sister-in law or brother-in-law who were the persons taken to the Police Station initially based on this purported crime of kidnapping. Their names, connection to this incident, nor their existence is acknowledged in this complaint as it is only the Petitioner's Client as well as the phrase "family of his wife" who are mentioned

by the complainant. For the above reasons, I must note that the procedure intended to be followed has simply been disregarded in the conduct of the Police in attempting to solve this incident. Thus, despite the 1st and 2nd Respondent stating that they merely acted in good faith in order to administer justice, they have not done so according to law as this disregard for procedure is a dangerous manner in which to exercise the powers bestowed upon them as police officers, who are guardians of society.

In addition to the above, the 1st Petitioner submits in her Written Submission that she was subject to further incidents of harassment and intimidation following the granting of leave to proceed by this court. There had been an incident where an unknown group of persons had arrived late at her house in a jeep on the 19th of March 2010. She states that they kicked on their front door at which point the family had switched off all lights and called the Police Emergency number. She states that after about 15 minutes the group of persons left in the same vehicle. The next day her and her brother had been asked to write down their statements in regards to this event by the Ambalangoda Police. Further on the 1st of June, there had been a vehicle similar to the one in the previous incident passing by their house several times and parked near her house. A person had gotten out of the vehicle saying "is this the place?". Her neighbor in her statements affirm that the vehicle had a print depicting "Ambalangoda Police"

Additionally, she states that these acts were continued particularly in the form of allegedly having received numerous phone calls harassing her and her family. She states that calls were received from a caller claiming to be from the Ahungalla Police Station, further calls which the CID later traced to be from the same Police station and multiple other calls requesting to settle the case. There have also been persons coming to her house and causing disturbance to her and her family. Given these incidents she states that she has taken steps to keep away from her residence in order to avoid any harm to

herself and to save her family from the harassment and trouble they have undergone due to the instant case. She states that despite the instructions given for the Senior Superintendent and Headquarters Inspector of the Ambalangoda Police Station to give suitable instructions to prevent any interference to the rights of the Petitioners, the Respondents have conducted themselves disregarding all such instructions.

Thus, the Petitioners allege that the behavior of the 1st and 2nd Respondents during the primary incident described and the harassment afterwards caused them severe pain of mind and humiliation. Thus, the Petitioners submits that such treatment meted out to the Petitioners amounts to cruel, inhuman and degrading treatment and is a clear violation of the rights guaranteed under Article 11, 12(1) and 14(1)(g) of the Constitution.

In the instant case, following the granting of leave, it was informed to the Court by the State Counsel that the Police Department has taken several measures and some of them are reproduced for the purpose of completeness.

The Attorney General refused to appear on behalf of the 1st and 2nd Respondents. Initially, this Court took cognizance of the impending disciplinary inquiry against the 1st and 2nd Respondents initiated by the Inspector General of Police and directed him to conclude the said disciplinary inquiry within one month and report the findings of the inquiry through the Attorney General. The disciplinary inquiry held against the 1st and 2nd Respondents and the Petitioner had successfully led evidence to establish the allegations levelled against the 1st and 2nd Respondents, especially the use of abusive language and they were found guilty, thereafter, disciplinary orders were made and punishments were imposed.

The Counsel for the 3rd-5th Respondents further drew the attention of Court to that the fact that on the date in question, the 3rd Respondent was not at the Ambalangoda Police Station where the incident took place (as admitted by the

Petitioners' themselves). The 3rd Respondent was away on official duty at the time and was therefore not privy to the incident pertaining to the Petitioners. Further, it was submitted that while the Respondents were cognizant that the 3rd-5th Respondents are superior officers of the 1st and 2nd Respondent, the 3rd-5th Respondents stated that they have taken all steps required and necessary in law to take disciplinary action against the alleged conduct of the 1st and 2nd Respondents.

The 4th Respondent was directed by the Deputy Inspector General (Southern Province), to record a complaint of the 1st Petitioner in relation to an alleged incident that had taken place at the Ambalangoda Police Station involving the alleged conduct of the 1st and 2nd Respondents who were attached to the Ambalangoda Police Station at the time. Accordingly, this Court observed that, 4th Respondent acted in accordance with the direction and recorded the statements of the Petitioners. Thereafter, on 16.03.2010, through the assistance of the 3rd Respondent, the 4th Respondent took steps to record the statements of the 1st and 2nd Respondents. The 4th Respondent also obtained a statement from WPC 7622 Sujeewani who was on duty at the minor offences branch at the Ambalangoda Police Station on the day of the alleged incident.

Pursuant to the complaint of the Petitioners to the Inspector General of Police, the then 5th Respondent had directed that 4th Respondent to conduct an inquiry pertaining to the 1st and 2nd Respondents. Thereafter, the 4th Respondent had warned the officers and personally called the Petitioners and apologized for the incident that had occurred at the Ambalangoda Police Station. The findings of the inquiry were communicated to the Police Headquarters by a letter dated 22/04/2010 marked as '4R9'. Further by the letter annexed as '4R10' the 4th Respondent has communicated the charge sheet, in which he clarifies that as per the findings of his investigation it is established that the 1st and 2nd Respondents have shouted at the two Attorneys-at-law, and thus has disrespected their integrity and disregarded their dignity as persons and

professionals. Based on the above he further states that the officers are convicted of the violation of Schedule 2 of the Establishments Code, for disreputable behavior, disobedience and intimidation.

The 4th Respondent had recommended that the 1st and 2nd Respondents be charged at a departmental level in respect of the findings of the inquiry and the same was communicated to the Petitioners by letter dated 20/04/2010. Upon the actions taken by the 4th Respondent, the 1st and 2nd Respondents were interdicted from service. The final determination (disciplinary order) of the disciplinary inquiry against the 1st and 2nd Respondents was submitted to this Court by way of motion dated 08/03/2016. Accordingly, the inquiry report pertaining to the 1st Respondent stated that he had been dispossessed of two salary increments, ordered to follow a capacity building program and had also been ordered to pay a sum of Rs. 30,000/- (in 24 instalments). The inquiry report pertaining to the 2nd Respondent indicates that he was found guilty of an offence under the second schedule of offences committed by public officers' in the Establishment Code, and accordingly, he was reprimanded and a stoppage of all salaries and allowances was ordered.

Alleged violations and steps taken by the Respondents

Having referred to the factual matrix of this application as given by the parties, let me now consider the said facts pertaining to the incident in order to ascertain whether the Petitioners' fundamental rights guaranteed under Article 11,12(1) and 14(1)(g) of the Constitution have been violated by the Respondents.

The Petitioners apply to this court under Article 11 of the Constitution for an alleged violation of the Petitioners' fundamental rights, the provision which reads as follows:

"No person shall be subjected to torture or to cruel inhuman or degrading treatment or punishment".

Article 12(1) states that,

"*All persons are equal before the law and are entitled to the equal protection of the law..*"

Article 14(1) (g) states that,

"(1) Every citizen is entitled to-

(g) the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise."

In regards to the violation of the constitutional rights of the Petitioners particularly by the 1st and 2nd Respondents, we may refer to the case of **Mrs. W. M. K De Silva v Chairman, Ceylon Fertilizer Corporation (1989) 2 Sri LR 393 at 405** in which Amerasinghe, J stated that

"In my view Article 11 of the Constitution prohibits any act by which severe pain or suffering, whether physical or mental is, without lawful sanction in accordance with a procedure established by law, intentionally inflicted on a person by a public official acting in the discharge of his executive or administrative duties or under the colour of office"

In the instant case, the trauma caused is a form of mental suffering inflicted intentionally by public officials in the discharge of his duties. Thus, it is imperative that such action should be condemned by this Court.

It is my view that the treatment meted out to the Petitioners by the 1st and 2nd Respondent is a violation of their rights under Article 11 of the constitution. Further it

is a violation of the Petitioners rights under Article 12 and 14 (1) (g) of the constitution as it is an interference with their freedom to engage in their occupation, particularly given that this incident was an occurrence during their exercise of duties as are demands of their occupation, in the best interest of the 1st Petitioner's Client.

Additionally, the Counsel for the Petitioners in his submissions, relied on the ground that the Respondents' conduct was in violation of 'Police Rules 2012'. These rules were published in the gazette notification bearing no. 1758/36 dated 18-05-2012 and were produced before this Court together with the written submissions of the Petitioners. It is observed that these rules issued by the Inspector General of police under Section 55 of the Police Ordinance is cited as 'Appearance of Attorney-at-Law at police stations' and lays down certain guidelines to be followed. Clause two of the rules is reproduced below:

> *"2. These rules shall be applicable to every police station established under the Police Ordinance (Chapter 53) and shall be followed by all police officers of whatever rank, serving in such stations within Sri Lanka. "*

Clause three clarifies how any Attorney at law must be treated by the Police stating that every Attorney at-Law shall be treated cordially and courteously and given a fair and patient hearing as follows:

> *3. (1) Every Attorney-at-Law, who enters the precincts of a police station established under the Police Ordinance situated in any part of Sri Lanka, in his capacity of an Attorney-at-Law for the purpose of representing and watching the interests of a person who is the client of such Attorney-at-Law, shall be treated cordially and courteously and given a fair and patient hearing by the police officers attached to such Police Station, whatever their rank.*

(2) Every police officer attached to a Police Station shall not at any time during which he is dealing with an Attorney-at-Law present in such police station for the purpose of representing and watching the interests of a person who is his client, use physical force on the person of such Attorney-at-Law or resort to the use of abusive language or any other form of intimidatory conduct.

Clause four goes on to state that no police officer shall use physical force on an Attorney at-Law or resort to the use of abusive language or any other form of intimidatory conduct. Clause ten refers to the manner in which an officer of the police force who violates the rules should be dealt with viz. punishable under the provisions of Section 55 of the Police Ordinance and be subjected to a disciplinary inquiry conducted by the Department of Police.

However, the 'Police Rules 2012' were promulgated after the alleged incident. While these rules are valuable in relation to the expression of the conduct expected of police officers, I do not wish to place any reliance on the said rules in order to determine whether the Respondents breached the said rules or whether the Petitioners' fundamental rights were violated by the Respondents in view of the breach of these rules.

The Petitioners contention in respect of the 3rd-5th Respondents was that they should be responsible (vicariously or otherwise) for the alleged violations and further for failing to take remedial measures or steps required by law to secure the rights of the Petitioners.

Petitioners in their submissions relied on the view of Justice Perera's in **Faiz v Attorney- General and others** [(1995) 1 SLR 372 at page 403];

"It is true that a denial of equal protection has hitherto been largely confined to affirmative acts of discrimination. The view that culpable, official state

inaction may also constitute a denial of equal protection has now been recognized by the United States Supreme Court as well. In Burton v. Wilmington Parking Authority et al (12) Justice Clark delivering the opinion of the Court, observed thus "by its inaction the Authority and through it the state, has not only made itself a party to the refusal of service but has elected to place its power property and prestige behind the admitted discrimination." In Lynch v. USA (13) the Federal Court of Appeal stated the opinion thus, "there was a time when the denial of equal protection of the law was confined to affirmative acts, but the law now is that culpable official inaction may also constitute a denial of equal protection."

The counsel for the 3rd- 5th Respondents submitted that the 3rd-5th Respondents had not by way of action or inaction violated the fundamental rights of the Petitioners. The Respondents state that they have diligently carried out their functions and duties as required by their designations and further have taken disciplinary action against the 1st and 2nd Respondents without delay in accordance with the rules binding them. As enumerated above, it is indeed clear that a thorough investigation regarding the incident and further retributory action has been taken by the 3rd to 5th Respondent in furtherance of the functions of the Respondents as superior officers of the 1st and 2nd Respondents.

In light of all the aforementioned affirmative action taken by the 3rd-6th Respondents, I am of the view that satisfactory disciplinary action was taken against the 1st and 2nd Respondent as a response to their behavior, as was directed by this court and based on the complaint lodged by the Petitioners to the Inspector General of Police.

In addressing the conduct of the 1st and 2nd Petitioner, I believe that the views expressed by Justice Shirani A. Bandaranayake in the case of **Adhikary and Another v. Amarasinghe and Others (2003) 1 SLR 270** is of important. It was expressed that

"When police officers, who are guardians of the law and whose duties include 'to prevent all offences, preserve peace and to apprehend disorderly characters', behave in an outrageous manner without paying heed to safe guarding and protecting the rights of the people, a dismal picture of such officers held in such high esteem emerges."

It is indeed for the sake of upholding the integrity of the entire body of police officers that we must condone incidents of misconduct such that the reputation of the police forces may not be tarnished by the misdemeanors of a few. It would be great injustice if the actions of a few were to discredit the valuable services of the dedicated and disciplined officials dutifully ensuring the safety and peace of all citizens.

In the context of the services of police officers, we have seen that the police officers do not always work in optimal conditions to protect the people. That includes investigations, trial proceedings and even includes regularizing the motor traffic. Majority of the officers are acting in the pursuit of the betterment of the people and the country. Violation of rules, laws and standards have been noticed since a considerable period of time by the authorities and are informed to the Police Department and the Government. Unfortunately, in certain incidents there are no prompt and adequate measures taken to control or minimize the violations of errant officers.

However, in the instant case, the State and the Police Department should have taken necessary prevention measures to prevent this incident from happening. This Court has observed that in many cases that some of the violations are recurring, which directs towards a conclusion that the relevant authorities in the Police Department are not taking adequate preventive measures. In order to prevent such incidents from recurring and to protect the necessary parties, it is insufficient to take action in isolated events against the specified officers. There must be awareness raised through all ranks of officers throughout the country, this is given that blaming officers following violations

is not a deterrent to unfavorable practices and it does not build a sustainable method of maintaining proper conduct among officers.

Additionally, officers must be clearly aware of the laws governing them and the standard of conduct expected of each officer, as it is unfair to hold them against standards that they are not aware of. It is indeed a duty of the superiors in helping the subordinate officers to execute their duties to keep them informed of these regulations as they are published and amended. It is only through such practices that such conduct will be continued and will encourage a sense of self discipline among officers themselves. As in the instant case, if at least one of the officers present were aware and informed of the appropriate conduct, they may positively act in deterring other officers from creating such incidents, demoting the recurrence of offences.

Thus, it is imperative that Police Officers are given the necessary training through programs aimed at capacity building. Additionally, in order to restore and retain the faith of the public in regards to our Police Forces, the general public must be made aware of the training the officers undertake.

In the specific context of Police officers dealing with Attorneys-at-law, it must be noted that certain codes of conduct must be followed not only by Police Officers, but also by Attorneys at law. In deciding upon a similar matter Justice Murdu N.B Fernando, PC has expressed her opinion in the judgment of the case of **Ratnayaka Weerakoonge Sandya Kumari vs Lakshitha Weerasinghe, Sub Inspector of Police, Meegahatenna and Others SC FR 75/2012 S.C Minutes dated 18.12.2019** as follows:

> *"Another factor that should be borne in mind is that the office of an Attorney at-Law is also governed by the Supreme Court (Conduct of and Etiquette of Attorney at-Law) Rules of 1988 where it is specifically stated that on Attorney at-Law must not conduct herself in any manner which would be*

reasonably regarded as unworthy, disgraceful and dishonorable by Attorneys at Law of good repute.

When analysing the behavior of the petitioner and the 1st respondent based on the affidavits filed before Court, I am reminded of the oft quoted saying that, 'courtesy begets courtesy'."

In the above case, a key difference was the conduct of the Attorney-at-Law of the case, who had shouted at the police officers in a degrading manner and displayed unprofessional conduct not befitting of an Attorney-at-Law. Thus, it is expected that Attorneys-at-Law are to respect the standards both written and unwritten, with emphasis on good manners, etiquette and good advocacy as highlighted by **A.R.B. Amerasinghe** in his book on **Professional Ethics and Responsibilities of Lawyers.** Indeed, the above referenced case is evidence to the fact that this court upholds such standard by expecting it of all Attorneys-at-Law of the Supreme Court, as the integrity of the legal profession rests in interpretations afforded to their behavior by members of the general public in their daily execution of tasks as a member of the legal profession.

However, while the above shall remain true. It is imperative that society at large, particularly members acting in the benefit of protection of the country respect the judicial system of the country, of which Attorneys-at-Law play a fundamental role. As in the instant case, when an Attorney-at-Law acts in a reasonable, non-provocative and rational manner, unruly behavior by a police officer directed towards her is an unacceptable response. Thus, in order for those of the legal profession to safeguard the dignity of their office, Police officers and other members bearing public office must be of assistance, exercising their duties by respecting codes of ethics as well as respecting the unwritten rules of human decency.

Decision

Therefore, considering the present complaint by the Petitioners, this Court is mindful of that incidents of this nature should be considered to be serious in nature and it should be condemned. Taking all above matters into consideration, I find that the State through their agents, the 1st and 2nd Respondents, have violated the Petitioners Fundamental Rights enshrined in Article 12 and 14(1)(g) of the constitution as the 1st and 2nd Respondents during the incident were acting in the colour of their office and it is indeed the State responsible for the officers and their conduct. Thus, I find that the 1st to 5th Respondents have violated the Petitioners Fundamental Rights as enshrined in Article 12(1) and 14(1)(g) of the constitution. Taking all the material before us into consideration I find that the 1st and 2nd Respondents have also violated the Petitioners Rights as enshrined in Article 11 of the Constitution.

I find that the 4th Respondent in charge of the division has taken meaningful action with the assistance of the 3rd Respondent in the form of an inquiry and subsequent retributory action. Therefore, I find that the 5th Respondent, through the 4th and 3rd Respondent, has taken appropriate action. Hence, I order no compensation by the state. However, I have observed as in many other Fundamental Rights cases the State, especially the 5th Respondent must take steps to adequately train and supervise all police personnel whether gazetted or non-gazetted to adhere to the laws practiced in this country, to show professionalism in policing and to be trained to provide people friendly police service to the public of this country.

In terms of the 1st and 2nd Respondents, I find that they have violated the Rights of the Petitioners enshrined in the Constitution. As enumerated above, the 3rd to 5th Respondents have taken appropriate action and handed down adequate punishment. Since this court is condemning the actions of the 1st and 2nd Respondent, I order the 1st Respondent to pay, from his personal resources, compensation of Rs. 30,000/- to each

of the 1st and 2nd Petitioners and a further sum of Rs.10, 000/- to each of the 1st and 2nd Petitioners as litigation costs. I further direct the 2nd Respondent to pay compensation of Rs. 30,000/- to each of the 1st and 2nd Petitioners and a further sum of Rs.10, 000/- to each of the 1st and 2nd Petitioners as litigation costs. All of which must be paid from his personal resources.

Application allowed.

JUDGE OF THE SUPREME COURT

L.T.B. DEHIDENIYA, J.

I agree.

JUDGE OF THE SUPREME COURT

B.P. ALUWIHARE, PC, J.,

I had the benefit of reading the judgment in draft of my brother, Justice Thurairaja PC, however I wish to express my own opinion in this matter.

This court granted leave to proceed for the alleged violation of fundamental rights guaranteed under; -

[A] Articles 12 (1) and 14 (1) (g) of the Constitution against the 1st to the 5th Respondents

and

[B] Article 11 of the Constitution against the 1st and 2nd Respondents.

The facts, albeit briefly, are as follows;

Both the petitioners are Attorneys-at-Law and were engaged in their profession at the Balapitiya Bar.

Although it might not be directly relevant to the issue before us, in order to appreciate the incident, it would be relevant to narrate the background to the incident.

According to the 1st Petitioner Samanmalee Siriwardena, one of her clients, Ariyapala, had sought her legal assistance to file a maintenance case on behalf of his daughter [Nishanthi] and the grandchild [Nivarthana] against her daughter's estranged husband [Sandaruwan]. At the point Samanmalee Siriwardena's services were sought, Ariyapala's daughter had been terminally ill due to cancer. When the maintenance application was supported, the learned magistrate, having considered the facts and circumstances of the case had handed over the custody of the grandchild to Ariyapala instead of the girl's father, Sandaruwan.

Probably infuriated by losing the custody of his daughter, Sandaruwan had made and attempt to take custody of the child forcibly and followed it by lodging a complaint against Ariyapala to the effect that he [Ariyapala] kidnapped the child. Consequently, being summoned, Ariyapala had had to go the Ambalangoda police station with the grandchild. Upon hearing this, two lawyers had rushed to the Ambalangoda Police station to explain matters to the police and had secured the release of Ariyapala. [Affidavits of Sampath Wimalarathne (P2a) and Nujith De Silva (P2 b) Attorneys-at-Law].

Sometime in February, Ariyapala's daughter Nishanthi had passed away at the Karapitiya Hospital as a result of the terminal illness she was afflicted with.

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The Incident Germane to the Alleged Violations

The day after his daughter's [Nishanthi] death, Ariyapala had contacted the 1st Petitioner over the phone and in addition to conveying the news of Nishanthi's death had also told her that his other daughter, Shanthi and her husband, Aruna Shantha had been taken into custody by the Ambalangoda police on a complaint made by Sandaruwan to the effect that they kidnapped Nivarthana, the grandchild of Ariyapala.

The 1st Petitioner had visited the Ambalangoda police station in the company of the 2nd Petitioner and Ariyapala and found both Shanthi and her husband seated on a bench in the police station. They had also observed a crowd of people, including Sandaruwan [the son-in-law of Ariyapala] gathered in front of the police station. It is alleged that Sandaruwan had made disparaging remarks directed at the Petitioners. According to the 1st Petitioner, when she inquired from the police as to the reasons for the arrest of the two, she was informed that the couple was not arrested but being kept until the arrival of the HQI, the 3rd Respondent.

At the police station, the 1st and the 2nd Respondents had forced Ariyapala into the police station and the 1st Respondent is supposed to have addressed Ariyapala rudely, to wit; "*come, ... Today I will treat you decently*". Even after the 1st and the 2nd Petitioners introduced themselves as lawyers, it is alleged that both the 1st and 2nd Respondent had made a series of disparaging utterances to the Petitioners. I do not wish to repeat them here as his Lordship Justice Thurairaja PC had reproduced the utterances alleged to have been made by the 1st and 2nd Respondents, in his opinion.

From the discussion that ensued between the 1st and 2nd Respondent, the Petitioners had gathered that the police were contemplating preferring a charge of Kidnapping. Although the 1st Petitioner had informed the Respondents that the child is in the custody of Ariyapala pursuant to a court order, the Respondents have paid scant regard to it. Further, the 1st Respondent had threatened to file action against the

Petitioners for offering 'wrong advice regarding the kidnapping of the child'. The 1st Respondent had demanded that the child be produced immediately, failing which the Petitioners would be arrested and kept in custody overnight, until they are produced in court the following day.

In desperation, Ariyapala's daughter Shanthi had acquiesced to surrender the child stating that she cannot undergo further harassment. To this the 1st Respondent had replied that if the child was not surrendered charges would be filed against them. Attempts by the 1st Petitioner to explain the circumstances under which the custody of the child was given to Ariyapala had been cut short rudely by the 1st Respondent with the 2nd respondent chipping in.

At this juncture, Ariyapala had handed over the custody of the child to Sandaruwan, his son-in-law. The Petitioners have taken up the position that Sandaruwan's statement was recorded only at this point.

If that was the case, then it appears that even when Ariyapala's daughter [Shanthi] and son-in-law [Aruna Shantha] were summoned to the police station there had been no complaint with regard to the commission of a crime, for the police to investigate or to act upon.

According to the Petitioners, they had rushed to the Ambalangoda police station around 2.45 in the afternoon. The complaint of Sandaruwan had been recorded at 6.30 in the evening. Thus, the action taken by the 1st and the 2nd Respondents on this occasion does not seem to be in accordance with the procedure established by law.

The Version of the 1st and 2nd Respondents

Both the 1st and the 2nd Respondents have filed objections in this matter.

The position of the 1st Respondent is that he took action pursuant to a complaint made by Sandaruwan [the 1st Respondent had referred to Sandaruwan as 'Moratuwa

Badahalage Aruna Shantha whereas his name is Hewawasam Atthanayakage Sumith Chinthana Sandaruwan according to the documents filed by the 1st Respondent himself.] To the effect that his daughter had been kidnapped and that he needs assistance from the police to take his child to his wife's funeral.

He also asserts that the Petitioners represented a suspect [presumably a reference to Ariyapala], his daughter and son-in-law, against whom the complaint of kidnapping was made. It must be said that this assertion is totally incorrect in that the only allegation Sandaruwan has made in his complaint is that his father-in-law did not allow him to take his daughter to his wife's funeral. Nowhere has he said in his complaint that the family members of his deceased wife were involved in preventing the daughter from being taken to the place where the wife's funeral was to take place, save for Ariyapala.

I do not wish to delve into the manner in which the 1st and 2nd Respondent dealt with the complaint made by Sandaruwan, for the reason that the issue before us is to consider whether their actions had violated the rights of the petitioners.

There is no dispute that the Petitioners had visited the Ambalangoda police station on that day with the objective of representing Ariyapala and getting his daughter and son-in-law released from the custody of the police, a constitutional right guaranteed to them under Article 14 (1) (g). There is no evidence whatsoever that the Petitioners had entertained any animosity towards the 1st and 2nd Respondents.

All what the 1st Respondent had said was that *"it is a well-known fact that my voice is a little louder than that of a normal person"* [Paragraph 30 of the 1st Respondent's affidavits]. The 1st respondent had gone on to state that the Petitioners attempted to constantly interfere with their duties [Paragraph 31 of the affidavit].

The 1st Respondent, other than stating that the complaint against him is false, had not referred to any ill feelings between the Petitioners and him. The 2nd Respondent also had filed objections which is a general denial of the allegations made against him by the Petitioners. The 2nd Respondent has averred that it was the Petitioners who obstructed the performance of the duties of the 1st Respondent. Here too, the 2nd Respondent had made no allegation that the Petitioners entertained any animosity towards him.

In the circumstances there could not have been any reason for the Petitioners to 'fabricates' an allegation against the 1st and the 2nd Respondent. Considering the material placed before this court, I hold that the version of the Petitioners is credible and is safe to act upon.

Infringements of Fundamental Rights

Article 11 of the Constitution endows every person with absolute protection from torture, or cruel, inhuman or degrading treatment or punishment. Article 12 (1) stipulates that everyone is equal before the law and is entitled to the equal protection of the law. It needs no reiteration that the primary responsibility of upholding these fundamental protections lies with the State. As reminded over and over again by this Court, police officers, being state officers tasked with law enforcement and the maintenance of law and order have an utmost responsibility in respecting, safeguarding and advancing these rights. Police officers are expected to extend common courtesies at all times when dealing with the public. The identity or the status of the person whom the police is dealt with should have no bearing whatsoever on the fair and courteous treatment that they are entitled to, as of right. Police officers are bound to treat every person with dignity and respect.

In **D. W. C. Mohotti v. Upul Seneviratne, OIC, Bambalapitiya and Others, SC FR 527/08 SC** minutes 27. 04. 2009 which involved an incident where an Attorney-at-Law was obstructed by a police officer in representing his client at the police station, a settlement was reached between the parties. The terms of the settlement were to the effect that the IGP would issue formal rules under Section 55 of the Police Ordinance delineating the manner in which the police should interact with persons at police stations, police Headquarters and/or any other permanent unit, base, post or such like that have been established by the Sri Lanka Police. By Rule No. 3 it was stated that "*No officer of the Police Force shall in any manner or circumstances whatsoever, use, physical force, abusive language or resort to any other intermediary conduct in respect of any person.*" Regarding the treatment of Attorneys-at-Law who may enter such place for the purpose of representing and/or watching the interests of their clients who are suspects or otherwise, it was stated by Rule No. 1 that their right to represent their clients should be fully recognized. Rule No. 2 required that every officer of the Police Force shall at all times, treat such Attorney-at-Law within the above-mentioned places "*cordially, and courteously, and shall afford to such Attorney-at-Law all reasonable assistance during the course thereof.*" Any officer who acts in violation of those rules, or aids and abets the violation of those rules is to be dealt with severely, according to the available procedures and may be liable to any other disciplinary inquiry/proceedings and punitive sanctions.

Although the present case was anterior to the publication of the 'Police (Appearance of Attorneys-at-Law at Police Stations) Rules, 2012' in Gazette Extraordinary No. 1758/36 of 18. 05. 2012 which provided guidelines to the Police regarding interacting with Attorneys-at-Law within the precincts of police stations, the rules agreed upon in the **Mohotti** case (*supra*) would be applicable to the present case. In my view the Rules referred to have only restated the Fundamental Rights enshrined in the Constitution and referred to them expansively with the objective of enlightening the police officers of the need to respect Fundamental Rights. The effect of the said rules

is that every person who enters a police station or similar premises should be treated with dignity and politeness by the police. Attorneys-at-Law who represents the interests of their clients and are in the exercise of their professional duties too are entitled to courteous and proactive treatment. Needless to say, even in the absence of any binding rules, these are basic human decencies any public servant owes a fellow citizen, in their interactions. This was an occasion where a death had occurred in the family and the grieving family members were summoned to the police while the last rites of the deceased family member was yet to be done. In this backdrop, the conduct of the 1st and 2nd Respondents who were officers, remunerated by the public funds, to maintain law and order cannot be condoned and deserves only abhorrence. Police officers are required to take extra care in the discharge of their duties in view of the fact that they are endowed with coercive powers to perform their functions. In the instant case, they had paid scant regard to the predicament of the bereaved family members.

As far as the Petitioners are concerned, the conduct of the 1st and the 2nd Respondents had resulted in an infringement of Article 14 (1) (g) of the Constitution- which entitles every citizen the "*freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise.*" Obstructing an Attorney-at-Law from representing or looking into the interests of a client or surrendering a client to the police, which are duties that a lawyer is professionally entitled to carry out, is certainly a violation of that right.

Considering the aforesaid, I hold that the 1st and 2nd Respondents are liable for the infringement of the fundamental rights of the Petitioners, enshrined in Articles 12 (1) and 14 (1) (g) of the Constitution.

There is no material before this court to hold the 3rd, 4th and 5th Respondents liable for any infringement of the fundamental rights of the Petitioners.

I direct the 1st and the 2nd Respondents to pay a sum of Rs. 30,000/- each of the 1st and 2nd Petitioners. In addition, I also direct the 1st and 2nd Respondents to pay a sum of Rs.10, 000/- each as costs.

Application allowed.

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.

SC FR 304/2016

1. Tissa Kumara Liyanage
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78. Delpitiya Mudiyanselage Suranjith Athula Delpitiya,
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Petitioners(SCFR 304/2016)

Vs.

1. Hon. Ranjith Siyambalapitiya
Minister of Power and Renewable Energy
Ministry of Power and Renewable Energy
No. 72, Ananda Coomaraswamy Mawatha,
Colombo 07.

1(a) Hon. Ravi Karunanayake
Minister of Power and Renewable Energy
And Business Development

Ministry of Power and Renewable Energy
And Business Development
No. 72, Ananda Coomaraswamy Mawatha,
Colombo 07.

1(b) Hon. Mahinda Amaraweera,
Minister of Power and Energy,
Ministry of Power and Energy,
No. 72, Ananda Coomaraswamy Mawatha,
Colombo 07.

2. Dr. B.M.S. Batagoda,
Secretary
Ministry of Power and Renewable Energy
No. 72, Ananda Coomaraswamy Mawatha,
Colombo 07.

2(a) Mrs. Wasantha Perera,
Secretary
Ministry of Power and Energy
No. 72, Ananda Coomaraswamy Mawatha,
Colombo 07.

3. Ceylon Electricity Board
No. 50, Sir Chittampalam A. Gardiner
Mawatha,
Colombo 02.

4. Mr. W.D.A.S. Wijayapala,
Chairman,
Ceylon Electricity Board
No. 50, Sir Chittampalam A. Gardiner
Mawatha,
Colombo 02.

4(a) Mr. W.P. Ganepola,
Chairman,
Ceylon Electricity Board
No. 50, Sir Chittampalam A. Gardiner
Mawatha,
Colombo 02.

4(b) Mr. Rakitha Jayawardena
Chairman,
Ceylon Electricity Board
No. 50, Sir Chittampalam A. Gardiner
Mawatha,
Colombo 02.

4(c) Mr. Vijitha Herath,
Chairman,
Ceylon Electricity Board
No. 50, Sir Chittampalam A. Gardiner
Mawatha,
Colombo 02.

5. Mr. W.A. Gamini Wanasekera
Vice Chairman,
Ceylon Electricity Board
No. 50, Sir Chittampalam A. Gardiner
Mawatha,
Colombo 02.

5(a) Mr. Rajive Severajah
Vice Chairman,
Ceylon Electricity Board
No. 50, Sir Chittampalam A. Gardiner
Mawatha,
Colombo 02.

5(b) Mr. Y.G.I. Saman Kumara,
Vice Chairman,
Ceylon Electricity Board
No. 50, Sir Chittampalam A. Gardiner
Mawatha,
Colombo 02.

6. Mr. W.R.G.Sanath Bandara,
Working Director
Ceylon Electricity Board
No. 50, Sir Chittampalam A. Gardiner
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Colombo 02.

6(a) Mr. K.K. Tissa Jinadasa,
Working Director
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7. Mr. T.M.K.B. Tennakoon
Member
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No. 50, Sir Chittampalam A. Gardiner
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7(a) Mr. Ranjith Asoka,
Member of the Board,
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No. 50, Sir Chittampalam A. Gardiner
Mawatha,
Colombo 02.

7(b) Mr. M.M. Nayeemudeen,
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8. Mr. S.D.A.B. Boralessa,
Member
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8(a) Mr. S.K. Kannangara
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8(b) Mr. B.K. Jagath Perera
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9. Mr. R. Semasinghe ,
Member of the Board,
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(9(a) Mr, Jude Nilukshan
Member of the Board,
Ceylon Electricity Board
No. 50, Sir Chittampalam A. Gardiner
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Colombo 02.

10. Ms. Jeewani Kariyawasam,
Member
Ceylon Electricity Board
No. 50, Sir Chittampalam A. Gardiner
Mawatha,
Colombo 02.

10(a) Mr. Ruban Wickremarachchi,
Member,
Ceylon Electricity Board
No. 50, Sir Chittampalam A. Gardiner
Mawatha,
Colombo 02.

11. Mr. M.C. Wickremasekera
General Manager
Ceylon Electricity Board
No. 50, Sir Chittampalam A. Gardiner
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11(a) Mr. A.K. Samarasinghe
General Manager
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11(b) Mr. S.D.W. Gunawardena,
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11(c) Mr. D.D.K. Karunaratne,
General Manager,
Ceylon Electricity Board
No. 50, Sir Chittampalam A. Gardiner
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Colombo 02.

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

13. Mr. T.A. Wanniarachchi,
President,
Ceylon Electricity Board Engineer's Union,
Greater Colombo Transmission and Distribution,
Loss Reduction Project,
Ceylon Electricity Board
17, Bullers Lane, Colombo 07.

13(a) Mr. S.W. Kumarawadu,
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Ceylon Electricity Board Engineer's Union,
Greater Colombo Transmission and Distribution,
Loss Reduction Project,
Ceylon Electricity Board
17, Bullers Lane, Colombo 07.

14. Mr.K.L.L. Wijeratne,
Chairman,
National Salaries & Cadre Commission
BMICH
Bauddhaloka Mawatha, Colombo 07.

15. Mr. Asoka Jayasekera,
Secretary,
National Salaries & Cadre Commission
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Respondents

SC FR 204/2016

1. Singappulige Nihal Fernando
No. 65K Sri Silwansa Nahimi Mawatha
Suriya Paluwa, Aldeniya
Kadawatha.

2. Jayasundera Mudiyanselage Dayananda Wijeweera
No. 31/22, 1st Lane
Temple Road,
Maharagama

3. Tissa Kumara Liyanage
No. 8, Isuru Uyana 11,
Kalutara.

Petitioners

Vs.

1. Hon. Ranjith Siyambalapitiya
Minister of Power and Renewable Energy
Ministry of Power and Renewable Energy
No. 72, Ananda Coomaraswamy Mawatha,
Colombo 07.

And 14 others.

Respondents(In SCFR 204/2016)

SC FR 205/2016

1. Dinesh Vidanapathirana
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Colombo 12.

Petitioner

Vs.

01. Hon. Ranjith Siyambalapitiya
Minister of Power and Renewable Energy
Ministry of Power and Renewable Energy
No. 72, Ananda Coomaraswamy Mawatha,
Colombo 07.

And 14 others.

Respondents (SCFR 205/2016)

Before	:	Jayantha Jayasuriya, PC, CJ L.T.B.Dehideniya, J S. Thurairaja, PC, J.
Counsel	:	Romesh de Silva , PC with Shanaka Cooray instructed by Dinesh Vidanapathirana for the Petitioners. Ms. Varunika Hettige, DSG for the 1st to 12th and 14th and 15th Respondents. Faiz Musthapa , PC with Ms. Thushani Machado instructed by H.C. de Silva for the 13th Respondent.
Argued on	:	08th September, 2020
Decided on	:	18.03.2021

Jayantha Jayasuriya, PC, CJ

SC FR Applications 304/2016, 204/2016 and 205/2016 were taken up together with the agreement of the parties as the impugned conduct in all these applications is the same. Counsel made submissions focusing on SC FR 304/2016 and all parties in all three connected matters agreed to abide by the Judgement delivered in SC FR 304/2016.

In SC FR 304/2016, seventy-eight Petitioners have invoked the jurisdiction of this Court under Article 126 of the Constitution. All of them are accountants by profession and are employees of the Ceylon Electricity Board (hereinafter also referred to as CEB). They are members of the 'Ceylon Electricity Board Accountants' Association'. The Petitioners had been holding different positions at senior executive category within the Accounts and Audit Service of the Ceylon Electricity Board, at the time they invoked the jurisdiction of this Court under Article 126 of the Constitution. They hold different positions with different classes, grades and salary scales. Such classes, grades and salary scales are, namely; Class I Special at K Special salary scale, Class I at

K1 salary scale, Class II Grade 1 at K2 salary scale, Class II Grade II at K3 salary scale and Class II Grade II at K4 salary scale.

The Petitioners contended that the criteria for the appointment and recruitment, and the promotion of employees of the CEB at Senior Executive Level are regulated by the General Manager's Circular No 2002/GM/32(1)/Policy titled "Schemes of Recruitment and Promotions For Senior Executive Categories". Petitioners contended that the aforesaid scheme was applicable to employees from key categories of employment including, the Engineering Service, Human Resources Service and Ancillary Services. They contend that all employees at Senior Executive Level at the CEB are placed at different salary scales depending on the class and the grade they are at within a single salary structure namely "K structure" irrespective of the specific service they belong to. In other words, under the scheme in place no distinction is made on the basis of the specific service they belong to when they are holding positions at the same class and grade within the stipulated salary scale.

The Petitioners further contended, that they entertained a legitimate expectation to be placed within a common salary structure irrespective of the Service they belong to. It is their contention, that the creation of a distinct salary scale named "E-salary scale" and a "Unified Engineering Service" applicable only to Engineers who are working at the Senior Executive Grades in the CEB is violative of their Right to equality guaranteed under Article 12(1) and Freedom of occupation guaranteed under Article 14(1)(g) of the Constitution.

The 13th Respondent in this matter is the President of the Ceylon Electricity Board Engineer's Union. The CEB is cited as the 3rd Respondent and the 4th Respondent is the Chairman of the CEB. Objections to the Petitioner's application were filed by way of affidavits of the 4th and 13th Respondents. They contended, that the Petitioners have failed to establish any violation of their rights and furthermore, the acts of none of the Respondents have violated the Fundamental Rights of any of the Petitioners. It is their contention, *inter alia*, that there was no common scheme of recruitment and promotion for employees from different services within the CEB. However, they contend that employees from different services were placed within a common salary scale called K-salary scale. They further contend that the creation of the Unified

Engineering Service and the E-salary scheme for the employees of the Unified Engineering Service is a reasonable classification based on intelligible differentia.

Furthermore, the Respondents by way of a preliminary objection contend, that the application of the Petitioners' should be dismissed *in limine* as it is time-barred. Further they claim that the Petitioners have failed to cite all necessary parties; they suppressed and / or misrepresented material facts and the application is futile in view of the supervening events.

Of these objections I propose to consider the objection of time-bar, first.

It is the contention of the Petitioners, *inter alia* that their rights were violated due to:

'*the continuous payment of salaries to the engineers employed by the 3rd Respondent,* ***under and in terms of the impugned Circular No 2014/GM/46/Pers purportedly dated 27/11/2014'*** (emphasis added).

According to the material placed before this Court, the Board of Directors of the 3rd Respondent at the meeting held on 26 November 2014 has approved the creation of the Unified Engineering Service with the E-Salary scale applicable to the said Service and thereafter on 27 November 2014, the General Manager of the 3rd Respondent was directed to issue necessary circular instructions to give effect to the aforesaid decision of the Board of Directors. However, it was only on 8th January 2015 the administration of the CEB informed its employees regarding the creation of the unified service for engineers and the E-Salary Scale, for the first time. Thereafter, the said circular had been first withdrawn and thereafter re-issued on the following day, namely on the 09th January 2015. Petitioners contend that the salaries of all engineers, senior engineering assistants and engineering assistants have been paid on the basis of the impugned circular, from the month of January 2015.

It is pertinent to note that, it is ***after a period of nineteen months*** from the date on which the Petitioners became aware of the impugned circular and the payment of salaries based on the said circular did take place, for the first time; the Petitioners filed papers in the present application. More particularly, it was on the ***05th September 2016***, that the Petitioners filed papers before this

Court in the present application. Hence, the Respondents' contend that the petitioners' application is time-barred. The other two connected matters namely SC FR 204/2016 and SC FR 205/2016 were filed on 17th June 2016 – two and half months prior to the application under consideration.

The 13th Respondent at the first given opportunity pleaded in these proceedings that the application is time barred and moved Court that the application be dismissed *in limine*. Limited objections dated 14th September 2016, amended limited objections dated 20th September 2016 and the objections dated 24th November 2016 filed by the 13th Respondent do raise the issue of time-bar as a preliminary objection. Limited objections filed on 1st September 2016 in SC FR 204/2016 and SC FR 205/2016 also raise time-bar as a preliminary objection.

Article 126(2) of the Constitution provides that an application on an alleged infringement or an alleged imminent infringement of a fundamental right should be made to the Supreme Court within one month from the date of the administrative or executive action due to which such infringement is alleged to have taken place or alleged to be taking place. Jurisprudence of this Court establishes that the time limit of one month set out in Article 126(2) is mandatory and non-compliance with it would result in the dismissal of such application due to lack of jurisdiction to entertain such delayed applications. However, this Court had, further recognised that an extension of this mandatory one-month time period could be granted in certain circumstances. One such circumstance is the situations in which the principle *lex non cogit ad impossiblia* can be invoked due to the circumstances in a particular case. It is also pertinent to note that this Court had accepted that the calculation of one-month period should begin not from the date of the occurrence of the alleged infringement but from the day the petitioner becomes aware of the alleged infringement. Furthermore, this Court had also recognize that the time period of one month should be deemed to commence only after the Petitioners had a reasonable opportunity to complete the preparatory work which was essential to formulate and file their application, in applications which have been filed in public interest.

Justice Prasanna Jayawardane PC in **Demuni Sriyani De Soyza *et al* v Dharmasena Dissanayake *et al,*** SC FR 206/2008, SC minutes of 09th December 2018, with the other two

judges agreeing with him, cited with approval judgments of this Court[1] and recognized the aforementioned dicta applicable in relation to the issue of time-bar in the context of Article 126(2) of the Constitution.

It is common ground that the e-mails of 8th and 9th January 2015, conveyed the impugned decision reached on 27th November 2014. The application under consideration has been filed in this Court on 5th September 2016, well outside the one-month time period stipulated under Article 126(2) of the Constitution. It is on this basis that the Respondents claim that this application is time-barred. However, the Petitioners refute this contention. The Petitioners claim that there is a 'continuing violation' of the Petitioners' rights in this matter and each instance in which salaries are paid to the members of the Unified Engineering Service, based on the impugned decision, a violation of the Rights of the Petitioners occurs. They have pleaded *"that all engineers of the CEB have been paid their monthly salaries from January 2015 up to August 2016 on the basis of the decisions contained in the impugned Circular No 2014/GM/46/Pers purportedly dated 27/11/2014 hereinbefore marked as P8a, whilst the Petitioners and those similarly circumstanced, have not been paid an equivalent amount as paid to the engineers employed in the same grade as the Petitioners, by the 3rd Respondent"*. The Petitioners contend, therefore, that the application is not time barred.

The Petitioners further contended that this Court in its decision in **Ceylon Electricity Board Accountant's Association v Hon Patali Champika Ranawaka *et al***, [SC FR 18/2015, SC minutes of 03.05.2016] already has held that there is a continuing violation of rights in this matter.

It is pertinent to note that **Ceylon Electricity Board Accountant's Association,** SC FR 18/2015 (supra) is an application made by a trade union which invoked the jurisdiction of this Court on

[1] **Edirisuriya v Navaratnam [(1985) 1 SLR 100], Illangaratne v Kandy Municipal Council [1995 BALJ Vol. VI Part 1 p. 10], Mutuweeran v The State [5 Sri Skantha's Law Reports 126], Ramanathan v Tennekoonn [1988 2 CALR 187], Siriwardane v Rodrigo [(1986) 1 SLR 384], Namasivayam v Gunawardane [(1989) 1 SLR 394], Saman v Leeladasa [(1989) 1 SLR 1], Ukwatta v Marasinghe [SC FR 252/2006, SC minutes of 15.12.2010], Gamethige v Siriwardene [(1988) 1 SLR 384], Goonatilake v Piyadigama [SC FR 219/2015, SC minutes of 30.01.2014], Alawala v The Inspector General of Police [SC FR 219/2015, SC minutes of 15.02.2016].**

the basis of an alleged infringement of Rights of the members of the petitioner union due to the *"decisions contained in Circular No 2014/GM/46/Pers, purportedly dated 27/11/2014"* (the same decision impugned in the present application). The application in SC FR 18/2015 had been filed on 6th February 2015. The Respondents in the aforementioned application by way of a preliminary objection contended that the petitioner union has no *locus standi* and therefore moved that the application be dismissed *in limine*. The Court having considered submissions of all the parties held;

> *"that in the absence of a specific provision permitting a Trade Union to institute action on behalf of its members, the Petitioner Union cannot have and maintain this application on behalf of its members in terms of Article 17 read with Article 126(2) of the Constitution"* ,

and dismissed the petitioner's application.

However, it is pertinent to note that the Court having dismissed the application, further proceeded to observe;

> *"This order does not however preclude a person who has in fact suffered an injury by reason of actual continuous violation of his fundamental rights, bringing an action against the Respondents for judicial remedy. The Court is mindful that it would be disastrous for the rule of law, if such person is prevented from bringing action, for it would be open to the State or a public authority to act with impunity beyond the scope of its power or in breach of a public duty owed by it".* (page 15 of the judgment).

The contention of the Petitioners, in the present application, that the violation complained in these proceedings is a 'continuous violation' is partly based on the last mentioned dicta of this Court, in the previous application.

It is pertinent to observe that the respondents in SC FR 18/2015 had urged four grounds in support of their preliminary objection. They are the *'locus standi'* of the petitioner, the unique status of the petitioner namely that it is neither a natural nor a juristic person, failure to name necessary parties and; the suppression and / misrepresentation of material facts. The Order of this court dated 03.05.2016 focuses solely on one of those grounds namely the *'locus standi'* of the petitioner trade union. There is no material available before this Court to conclude that any of the parties made submissions drawing the attention of the Court on the nature of the violation alleged by the petitioner trade union, in the course of their submissions on *'locus standi'*. The Order of this Court in the aforesaid application also does not reflect that the 'nature of the alleged violation' was an issue that was focused, in the course of submissions by the parties. Furthermore, the observation of this Court in the aforesaid Order, that

> "*This order does not however preclude a person who has in fact suffered an injury by reason of actual continuous violation of his fundamental rights, bringing an action against the Respondents for judicial remedy";*

neither reflects the nature of the material it took into consideration in making this observation nor the reasons for such observation.

I am mindful of the strong views expressed by this Court in the aforesaid Order, but unable to accept the contention that this Court had already determined that the violation alleged in these proceedings is a 'continuing violation'. Furthermore, I am of the view that the Petitioners contention that the aforesaid Order of this Court provides a basis for the Petitioners to invoke the jurisdiction of this Court on the premise of a 'continuing infringement' is devoid of merit.

> *"The rulings of the Supreme Court is not scriptural sanction but is of ratio-wise luminosity within the edifice of facts where the judicial lamp burns the legal flame."*

[**Ceylon Electricity Board Accountant's Association,** SC FR 18/2015 (supra) at page 14].

However, it remains the duty of this Court to consider the nature of the violation alleged in the present application, independent of the failure or success of the contention that this Court in its previous Order had already decided that the alleged violation is a 'continuous violation'.

This Court in **Demuni Sriyani De Soyza** (supra) in the context of the one-month time limitation stipulated in Article 126(2), observed;

> *"There is another development in the interpretation and application of Article 126(2) which should be mentioned here. That is, the principle that, in appropriate circumstances, this Court may be inclined to consider whether it should extend the time limit of one month beyond the date on which an infringement of Fundamental Rights commenced, if that infringement is of a* ***continuing*** *nature"* (at page 13).

Justice Prasanna Jayawardena PC, in **Demuni Sriyani De Soyza** (supra), having considered a series of judgments of this Court[2], in deciding whether a particular violation is 'continuing' in nature recognised the difference between a *'continuing infringement'* and the *'continuing effect of a decision/s taken on a particular day which immediately affect a person or decide his alleged rights'*. It is his Lordship's view that the acts or conduct falling in to the latter category mentioned hereinbefore would not constitute a 'continuing violation' of rights. His Lordship Justice Jayawardena with the other two judges agreeing with him held;

[2] **Sasanasiritissa Thero v De Silva [1989 (2) SLR 356], Jayasinghe v The Attorney-General [1994 (2) SLR 74], Wijesekera v The Attorney-General [2007 (1) SLR 38], De Silva v Mathew [SC FR 64/2009, SC minutes of 27.03.2014], Wijesekera v Lokuge [SC FR 342/2009, SC minutes of 10.06.2011], Lake House Employees Union v Associated News Papers of Ceylon LTD [SC FR 637/2009, SC minutes of 17.12.2014], Gunaratne v Sri Lanka Telecom [1993 (1) SLR 109], Dayaratne v National Savings Bank[2002 (3) SLR 116]**

> *"An infringement can be constituted by a single, distinct and 'one-off" act, decision, refusal or omission. However, some other infringements can be constituted by a series of acts, decisions, refusals or omissions which continue over a period of time. It is only the second type of infringement which can be correctly identified as a 'continuing infringement'.*
>
> *It seems to me that, the essential characteristic of a 'continuing infringement' which is constituted by an* ***act or decision*** *is that, such act or decision or similar acts or decisions are taken several times throughout the period the infringement continues. There is a series of acts or decisions, each of which infringe the Petitioner's Fundamental Rights, which occur through out the period of the infringement. The result is a 'continuing infringement' in relation to which the time period of one month starts on the day last such act is done or decision is taken. It should be understood that, the type of decision contemplated here is, usually a decision taken for the first time on a particular set of facts and not a decision affirming a previous decision"* (at page 17).

Furthermore, this Court made a distinction between the cases where an infringement is a 'refusal or omission' to perform an act which should be done. The Court was of the view;

> *"where the infringement consists of the refusal or omission to perform an act* ***that should be done****, the infringement will be a continuing one as long as the refusal remains in force or the omission persists and the time period of one month specified in Article 126(2) will start on the day on which the such refusal is made and becomes known to the Petitioner or omission to perform the act becomes known to the Petitioner"* (emphasis added) [**Demuni Sriyani De Soyza** (supra) page 17-18].

When the aforementioned dicta of this Court is taken in the context of the facts of this application under consideration, it is important to note that the Petitioners contention as reflected in paragraphs 63, 65, 66 and 67 and prayers (b) and (c) of the Petition, that their Fundamental Rights are violated is mainly based on the fact that *"the continuous payment of salaries to the*

engineers employed by the 3rd Respondent, under and in terms of the impugned circular No 2014/GM/46/Pers purportedly dated 27/11/2014 ……..and by the continuous non-payment of an equivalent salary to the Petitioners who are in the same grade as the aforesaid engineers".

However, the Petitioners based on the pleadings in paragraph 60 and 62 and as prayed for by prayer (d) of the Petition, move Court to declare *"that the decision as contained in Circular ……. to introduce a 'Unified Engineering Service' and / or an 'E-Scale' applicable only to the engineers, senior engineering assistants and engineering assistants of the 3rd Respondent as most recently given effect to by the payment of salaries on the 24th of August, 2016 is a violation and / or continuing violation of the petitioners fundamental rights…"*

Therefore, the core decision the Petitioners are challenging is the decision that is reflected in Circular No 2014/GM/46/Pers. It is through this Circular that the 'Unified Engineering Service' and 'E-Salary Scale' were created and adopted. Material placed before this Court establishes that the aforesaid Circular was initially published by the e-mails dated 8th January 2015 and 9th January 2015. All the engineers, senior engineering assistants, and engineering assistants of the 3rd Respondent had been paid their salaries in accordance with the above impugned decision, from the salary for the month of January 2015. It is abundantly clear that the payment of salaries as per 'E-Scale', which commenced from the month of January 2015, is solely based on the decision reflected in the impugned decision in Circular No 2014/GM/46/Pers. It is in giving effect to the impugned Circular that the payment of salaries based on 'E-Scale' had taken place. Therefore, the continuous payment of the salaries on a monthly basis is the effect of the decision in the impugned circular. Such monthly payments cannot be considered a new or a continuing infringement of rights as the alleged infringement of rights had taken place by the creation of the 'unified engineering service' and the adoption of 'E-Salary Scale' for the employees who fall into the aforesaid service. It is the Respondent's contention that the establishing a distinct unified service for engineers and adopting E-Salary Scale is justified as such distinction is based on intelligible differentia. In my view non-payment of salaries to others who do not fall within the classification of the 'unified engineering service', based on E-Salary Scale, **is not an *'omission of an act that should be done'*** by the 3rd Respondent (CEB), unless and until the Court holds that the Petitioners are also entitled to be paid their salaries on the same scale, namely E-Salary Scale.

The sole basis on which the Petitioners contend that the application is not time-barred is that the infringement complained of is 'continuing' in nature. However, as already reasoned out, I am unable to hold that there is a 'continuing infringement' of the Rights of the Petitioners. The Petitioners do not plead any other ground explaining the delay of nearly nineteen months from the time they became aware of the impugned decision. It is also pertinent to note that there is a delay of four months between the date of the Order in the previous application SC FR 18/2015 and the filing of the present application.

In view of the foregoing reasons, I uphold the preliminary objection of the respondents, that the application is time-barred and therefore dismiss the application. Taking into consideration all the facts and circumstances of this case I make no order on costs.

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 Articles 17 and 126 of the Constitution

Wickramage Stanley Perera,
No. 111/7, Kurawalana,
Kahataovita

Petitioner

SC /FR/ Application No. 403/2016

Vs,

1. P. H. Manatunga
   The Chairman,

1A. K. W. E. Karalliyadda
The Chairman,

2. S. T. Hettige,
   Member,

2A. Gamini Nawarathne
Member

3. Savithri D. Wijesekera,
   Member,

4. B. A. Jayanathan
   Member,

4A. Ashoka Wijethilaka
Member

5. Y. L. M. Zawahir,
   Member,

6. Tilak Collure,
   Member,

7. Frank de Silva,
   Member,

7A. G. Jayakumar
   Member

8. N. Ariyadasa Cooray,
   Secretary,

8A. Nishantha A. Weerasinghe
   Secretary

   All of the
   National Police Commission
   Block No. 09, BMICH Premises,
   Bauddhaloka Mawatha,
   Colombo 07.

9. Pujith Jayasundara
   The Inspector General of Police
   Police Headquarters
   Colombo 01

9A. C. D. Wickramaratne
   The Inspector General of Police (Acting)
   Police Headquarters
   Colombo 01

10. L. K. W. Kamal Silva
   Deputy Inspector General of Police
   Crimes and Traffic Division
   Police Headquarters
   Colombo 01
   [Formerly, Senior Superintendent of Police
   Director, Police Narcotics Bureau
   3rd Floor, New Secretariat Building
   Colombo 01

10A. M. R. Manjula Senarath
   Senior Superintendent of Police
   Director, Police Narcotics Bureau
   3rd Floor, New Secretariat Building
   Colombo 01

11. D. K. C. Siyambalapitiya,
Assistant Superintendent of Police
Police Narcotics Bureau
3rd Floor, New Secretariat Building
Colombo 01

11A. K. W. R. J. Rohana
Assistant Superintendent of Police
Administration
Police Narcotics Bureau
3rd Floor, New Secretariat Building
Colombo 01

12. T. Ludwaik
Chief Inspector
Officer in Charge
Police Narcotics Bureau
3rd Floor, New Secretariat Building
Colombo 01

12A. H. N. P. Ekanayaka
Inspector, Officer in Charge (Acting)
Police Narcotics Bureau
3rd Floor, New Secretariat Building
Colombo 01

13. K. W. R. J. Rohana
Assistant Superintendent of Police
Operations
Police Narcotics Bureau
3rd Floor, New Secretariat Building
Colombo 01

14. Priyantha Liyanage
Superintendent of Police
Director, Organized Crimes Prevention Unit
No. 09, Mihindu Mawatha
Colombo 12.

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

Respondents

Before: **Chief Justice Jayantha Jayasuriya PC**
Justice Vijith K. Malalgoda PC
Justice E. A. G. R. Amarasekera

Counsel: Senany Dayaratne with Ms. Eshanthi Mendis for the Petitioner

Ms. Yuresha de Silva, SSC for Attorney General

Argued on: 30.08.2019, 18.02.2020

Judgment on: 18.01.2021

Vijith K. Malalgoda PC J

Petitioner who was an Inspector of Police, who initially came before the Supreme Court alleging the continued harassment and unjustified transfers in violation of his Fundamental Rights, had later amended the pleadings with the permission of Court when he was served with a vacation of Post Notice with effect from 21st April 2017 by his employer. The said amended petition was tendered before this Court on 23rd June 2017 and it was further amended on 1st August 2017.

During the arguments before us, the learned Counsel who represented the Petitioner, focused his submissions with regard to the service of vacation of post on the Petitioner and restricted his case mainly on the violation of Article 12 (1) of the Constitution, but made extensive submissions with regard to the harassment faced by him for several months prior to him being served with the said vacation of Post Notice.

Even though it is not directly linked to the final relief the Petitioner had prayed for, the continued harassment the Petitioner had complained of for a considerable period, which made him to initially come before this court, has some relevance for the final outcome of the instant application.

As revealed before us, the Petitioner who was enlisted as a reserve Sub-Inspector of Police on 11.08.1990 was absorbed in to the permanent cadre on 09.02.2006, and was promoted to the rank of Inspector with effect from 25.09.2007.

During his long career for nearly 26 years as a reserve Sub-Inspector, Sub-Inspector and Inspector of Police, he had served in several Police Stations Island wide and also served at the Criminal Investigation

Department, Police Narcotic Bureau and Organized Crimes Division before he was served with the said Vacation of Post Notice.

The Petitioner has received many commendations and appreciations including those from the Inspector General of Police in 2007 and 2010 [P3(a) and P3(b)] and more than 321 good entries with several cash rewards. The Petitioner proudly states that he never had a single bad entry during his carrier in the Police Service. The exemplary service the Petitioner had rendered to the Police Department was never challenged by any of the Respondents before us.

However, as submitted by the Petitioner the bad days of his exemplary carrier started when he was serving in the Police Narcotic Bureau. As revealed before us the Petitioner was transferred to the Police Narcotic Bureau on 16.10.2012 and whilst serving in the Police Narcotic Bureau he was successful in conducting a raid and apprehension of 59 kilograms of heroin from a place in Katugastota where he was recommended an award of Rs. 500,000/- which was later increased by the Deputy Inspector General of Police to 800,000/-. He was also successful in the recovery and confiscation of property alleged to be proceeds from drug trafficking worth of Rs. 185,000,000/- and was awarded Rs. 400,000/-. With all this commendable service he discharged in his carrier as an Inspector of Police attached to Police Narcotic Bureau, the Petitioner realized that he is singled out and treated differently by his seniors for several reasons he had complained of. Some of his complains are as follows;

a) The Petitioner has produced several documents before court as confidential documents for the perusal of Court and those documents show the reward monies entitled by the informants in raids conducted by various Police Units including the Police Narcotic Bureau.
   In this regard the Petitioner took up the position that the reward granted to his informant when he successfully recovered 59 kilograms of heroin (one of the biggest quantities recovered at that time) was much less than the rewards awarded to the other informants who passed information on much lessor quantities of heroin. The said reward was recommended in April 2016 with regard to the raid he conducted on 15.08.2014 and he had agitated against the amount rewarded to his informant with his superiors.
b) During the same period in March 2016 the Petitioner played a very active role in detaining two foreign nationals (an Iranian and a Singaporean) and recovery of 110 kilograms of heroin, but the Petitioner observed hostility towards him by some of his superior officers against his good work.

c) The Petitioner was all of a sudden transferred to the Narcotic Division of the Bandaranayake International Air Port with effect from 02.05.2016 without any prior notice or valid reason.

d) On 03.05.2016 a circular was issued under the hand of the 10th Respondent to the Officer-in-Charge of the Katunayake Unit of the Police Narcotic Bureau, directing him to have a close supervision on his subordinates' work, including the Petitioner and to record progress made by them. A fax copy of which was strangely kept on his table by somebody as against the general practice of pasting a copy of the message in the telephone register.

e) The Petitioner continued to work diligently and was able to arrest a Pakistani National for smuggling drugs on 25.06.2016 with his team and sized 5 kilos of heroin.

f) The Petitioner was not allowed to continue with his work even at the Bandaranayake International Air Port for three months. On 28.07.2016 he was transferred back to the Police Narcotic Bureau.

g) Whilst serving in the Police Narcotic Bureau, the Petitioner was summoned to report to the Orderly Room on 04.10. 2016 assigned to address minor disciplinary issues.

In discussion with the 12th Respondent, the Officer-in-Charge of the Police Narcotic Bureau who advised the Petitioner to plead guilty, regardless of the charge to avoid undue delay, the Petitioner pleaded guilty, placed his signature on a document and was found guilty by the 11th Respondent.

However, Petitioner continued to make inquiries as to what made him to be placed before the Orderly Room and discovered that he was charged under sections A (7), 4(a), 4(b) and 4(f) of the Department Orders for neglecting to carryout duties assigned to him, namely "neglecting to correct the entries pointed out by the 10th Respondent at the bi-annual inspection, conducted on 29.10.2015 and submitting the same to Inspector of Police Keerthi Perera, a Junior Police Officer, but further discovered that the 10th Respondent had in fact not come for an inspection on the day specified in the charge.

On 10.10.2016 the Petitioner informed the 13th Respondent of the disparity referred to above. Even though the 13th Respondent had agreed with the Petitioner, when he submitted the above before the 13th Respondent, the Petitioner was unaware of any steps taken by the 13th Respondent thereafter.

h) On 10.10.2016, the 12th Respondent came to the Petitioner with Form 51 which is for the purpose of nomination for transfer and requested the Petitioner to place his signature on the Form.

When the Petitioner refused to sign the Form, the 12th Respondent left, leaving the form on the Petitioner's desk. On perusal, the Petitioner observed that the said document had already being recommended by 12th, 11th and 10th Respondents and had placed their signatures on the document. Both the 12th and the 11th Respondents in their comments with regard to the work and conduct, stated that the Petitioner's work and conduct was unsatisfactory. In addition to the above recommendation, the 11th Respondent under column 4 had said that the nomination for transfer had been informed to the officer which is not correct. However, the reasons given by the 10th Respondent for the recommendation is different to the reasons given by his two subordinates 12th and 11th Respondents, and according to 10th Respondent the Petitioner's transfer was recommended due to excessive leave and incapability in handling work (P-16)

i) On the same day i.e. 10.10.2016 the Petitioner was served with a letter issued by the 10th Respondent informing that a transfer had been recommended due to excessive leave taken by him during his service at the Police Narcotic Bureau (P-17)

Whilst disputing the above position taken by the 10th Respondent in letter produced marked P-17, the Petitioner came before the Supreme Court challenging

a) The finding of guilt at the Orderly Room of a charge related to a bi-annual inspection,
b) Imposing of no pay leave on the Petitioner,
c) Recommendation of the transfer to the Petitioner out of Police Narcotic Bureau on 10th October 2016

As further revealed before this court, the instant application had come up before this court for the first time on 01.12.2016, and the learned Senior Deputy Solicitor General who represented the Respondents before this court had moved out the case since, he was held up before another division of this court.

The learned Counsel for the Petitioner, though agreed to put off the case, had submitted that, "there is likelihood of the Petitioner being transferred from his present station and also there is a move to have his personal weapon withdrawn, which will have an impact on his personal safety."

At that stage, the learned Senior Deputy Solicitor General who represented the state had given the following undertaking before the court;

> "that the Petitioner will not be transferred out from his present station or that the personal weapon issued to him will not be withdrawn."

This matter had once again come up before the Chief Justice on 15.02.2017 but the matter could not be taken up since some of the Respondents have seized to hold office. On that day this court had made the following order,

> "Learned Counsel for the Petitioner brings to the notice of court the undertaking given by the learned Deputy Solicitor General on 01.12.2016 that the Petitioner would not be transferred out from his present station and that his personal weapon issued to him would not be withdrawn. Counsel states that he had got instructions from Petitioner that the Petitioner's weapon in fact being withdrawn from him.
>
> The Court directs the learned Deputy Solicitor General to convey this order to the 9th, 10th and 11th Respondents and to ensure that the personal weapon issued to him is restored to the Petitioner" and extended the undertaking until the next date i.e. 16th March 2017.

The above undertaking was once again extended till 05th May 2017 on 16th March 2017. When this matte was once again called on 05.05.2017, this court had observed as follows;

> "Senior Deputy Solicitor General Mr. Parinda Ranaginghe agrees with this court when court pointed out to him that in spite of the court order given after the undertaking was given by the state to grant the Petitioner his weapon, when he was under many threats on his life and even then it was not complied with by the Respondents.
>
> However, since Mr. Dayarathne move to file another Fundamental Rights Petition with regard to the Vacation of Post being served on him this court postpone this matter to be supported on the next date."

Whilst making submissions before this court the Counsel for the Petitioner relied on an affidavit tendered by the Petitioner along with a motion dated 11.04.2017. According to the Counsel, the

Petitioner had explained the circumstances, under which he was compelled not to report to work since 16.03.2017 in the said affidavit.

In his affidavit the Petitioner had stated that notwithstanding the repeated undertaking given by the Hon. Attorney General, he was transferred to the Organized Crime Prevention Division with effect from 17.10.2016 and also the weapon has been removed from his possession.

However, he reported to work in the new branch and continued to work with the officers. On 12.03.2017 he raided a house and a restaurant belonging to an underworld leader and on return he received a call from the said person who threatened the Petitioner that he had received a contract from the police itself to fix him for something. Since then he did not pick the said number, but made an entry in his return notes. The Petitioner was surprised as to how the said under world leader got his telephone number. During the same period, he received some reliable information that a close associate of the 10th Respondent is collecting information with regard to the movements of the Petitioner. In the said circumstance, the Petitioner felt unsafe, specially for the reason that the permission to retain his weapon outside office hours had been withdrawn and his weapon had been taken over.

In those circumstances, he did not report to work since 16.03.2017 but further submitted that he had every intention of returning to duty if his safety is assured.

When considering the material placed before this court, it is necessary to consider whether the Petitioner had any intention of abandoning his job for the Respondents to serve him with a Vacation of Post Notice or on the other hand the Respondents or any one of them had acted in a manner for the Petitioner to keep away from his work, which would finally result in a Vacation of Post Notice being served on him.

Three Respondents namely, the 9th, the 12th and the 14th Respondents have submitted affidavits challenging some of the positions taken up by the Petitioner before this court. The 12th and the 9th Respondents namely the Officer-in-Charge of the Police Narcotic Bureau and the Inspector General of Police whilst denying any act of *mala-fides,* had taken up the position that the Petitioner's transfer recommend by the 10th Respondent was necessitated due to the own conduct of the Petitioner, namely his poor attendance to work and failure to obtain leave as per the relevant and applicable procedure. However, both the above Respondents including the 9th Respondent, the Inspector General of Police

were silent on the question, whether they were aware of any undertaking given before this court by the State not to transfer the Petitioner until the Application before the Supreme Court is supported.

In this regard it is also important to note that, at the time the Petitioner came before this Court, i.e. on 07th November 2016 a transfer order had already being issued on him and was attached to the Organized Crimes Prevention Division since 17.10.2016 but this position was not placed before court by the Deputy Solicitor General who repeatedly gave the undertaking that the Petitioner would not either be transferred out from the Police Narcotic Bureau or the official weapon issued to the Petitioner would not be withdrawn from him until the case was supported before court.

The 14th Respondent, Director of the Organized Crimes Prevention Unit and the 9th Respondent the Inspector General of Police had explained how the Petitioner was sent on Vacation of Post for his failure to report to work since 17.03.2016. According to them, the Notice of Vacation of Post (X-2) was issued on 21.04.2017 and prior to 21st, four police messages were sent to the Petitioner on 18.03.2017, 19.03.2017, 20.03.2017 and 20.04.2017 and a letter dated 28.03.2017 informing him to report to work or to submit a valid medical certificate and that the failure to do so would result in the issuance of a Notice of Vacation of Post. In the absence of any request, medical certificate or Petitioner's failure to report to work, had finally resulted in the issuance of Notice of Vacation of Post, dated 21.04.2017.

However, both the above Respondents are silent on the withdrawal of the permission granted to the Petitioner to retain his personal weapon out of office hours, but had taken up the positions that if there was a threat to his life, that should have been brought to the notice of the authorities by way of a complaint to the relevant police station.

The 14th Respondent was not a party before this Court when the Petitioner came before this Court on 7th November 2016 but was made a Respondent by the Petitioner when he filed the amended Petition on 23rd June 2017. Even though the Petitioner by his affidavit dated 11th April 2017 which was filed along with a motion dated the same had given reasons as to why he kept away from his work since 16th March 2016, the 14th Respondent was not a party before this court by that date and therefore he cannot be made responsible for any failure from his part to look into the complaints made by the Petitioner in the said affidavit and the subsequent amended petition filed before this Court on 23rd June 2017.

In this regard I further observe, that the Petitioner when making the Director, Organized Crime Prevention Unit as the 14th Respondent, had not made any allegation against him for his failure to respond to his return entry dated 16.03.2017 as referred to in the affidavit dated 11.04.2017

However, the 9th Respondent who was a party to the instant application from its inception was well aware of the complaints made by the Petitioner in his affidavit dated 11.04.2014 and the undertaking given before the Supreme Court, but failed to explain any steps taken by him prior to the vacation of Post Notice being served on the Petitioner.

Both the Respondents are once again silent as to whether they were aware of a pending application before this Court and the undertaking given by the state in the said application not to withdraw the permission granted to the Petitioner to retain the weapon issued to him until the application was supported before court.

When considering the position taken by the Respondents with regard to the permission granted to retain the weapon, it is important to consider as to how and why the above permission was granted to the Petitioner.

Along with his counter objection filed before this court the Petitioner, had tendered documents marked P19(a) to P19(f), the recommendations he received and the final approval granted to retain the weapon issued to him, out of office hours. Among the recommendations he produced, P19(d) is the recommendation of the 10th Respondent and in that, whilst referring to some of his important detections had finally recommended to the Deputy Inspector General CID/PNB that,

> 05. මෙම නිලධාරියාගේ රාජකාරි කාලය තුල විෂමාචාර ක්‍රියාවන් සිදුකර නොමැති අතර නිලධාරියා මනා කැපකිරීමකින් ඕනෑම අවධානම් රාජකාරියක් වගකීමකින් සිදුකරන අවංක නිලධාරියෙක් බැවින් නිලධාරියාගේ ජීවිතයට හානියක් සිදුවීමට ඉඩ ඇති බැවින්ද,නිලධාරියා විසින් ඔහුට දෙපාර්තුමේන්තුව මඟින් නිකුත්කර ඇති අංක E9459/2507-9MM දරණ සේවා අවියද පතුරම් ගැබ් 02 හා එම උන්ඩ 50 නිලධාරියාගේ පුද්ගලික භාරයේ තබා ගැනීමට ඉල්ලා ඉදිරිපත්කර ඇති ලිපිය නිර්දේශ කර කාරුණිකව ඉදිරිපත්කරමි.

If the above position taken by the 10th Respondent in September 2014 is correct, the threat to the life and the danger the Petitioner faced to his life by attending to his official work will not suddenly disappear, unless there is proof that, after a proper assessment of the threat to the life of the Petitioner

had revealed that there was no such threat to his life. In the absence of any such material before us this court cannot simply accept the argument placed on behalf of the above Respondents.

When considering the matters already referred by me in this Judgment, it is clear that the Petitioner had a genuine fear for his life when he was suddenly transferred out of the Police Narcotic Bureau and with the implementation of the said transfer, he was compelled to return his weapon.

The Petitioner's Counsel who appeared before this court on 01.12.2016 had informed this to court and the Petitioner by his affidavit dated 11th April 2017, 10 days prior to him being served with the Notice of Vacation of Post, had informed this court that due to the reasons he averred in the said affidavit, that he feel compelled not to report for duty, is not a disinclination from discharging his duty, but due to the belief that there is an imminent threat to his life

When considering the legal issues arising in the instant case, I observe that there are two distinct areas to be considered in this case. Firstly, it is the duty of this court to consider whether the Notice of Vacation of Post said to have been served on the Petitioner will have the same effect as stated in Rule 172 of Chapter XV of the PSC Rules and whether the said act was in violation of the legitimate expectation of the Petitioner. Secondly there is a duty cast upon this court to ascertain whether any of the Respondent before this court had acted in violation of the Fundamental Right guaranteed under Article 12 (1) of the Constitution when allegedly serving the said notice of Vacation of Post on the Petitioner.

Service of Vacation of Post Notice on the Petitioner

It was the position taken by the Respondents before this court, that even after giving several opportunities to the Petitioner by sending reminders either by way of Police messages (14R1) or by way of a letter (14R2) the Petitioner failed to report to work or submit any acceptable explanation to the authorities until 20.04.2017 and thereafter acting under Rule 172 of Chapter XV of the PSC Rules, the Petitioner was served with the Vacation of Post Notice (14R3 as well as P-17).

The Respondents further took up the position that the Petitioner is not entitled to any relief by invoking the fundamental rights jurisdiction of the Supreme Court since he had failed to comply with administrative procedures and exhaust appeal procedures available within the administrative mechanism.

In this regard the Respondents have drawn our attention to Rule 171 and 172 of Chapter XV of PSC Rule and paragraph 6 of the Vacation of Post Notice served on the Petitioner (X2 and 9R11) which reads as follows;

Rule 171; A public officer who finds it difficult to report for duty is required to inform his/her Head of the Institution of such absence and get his leave duly approved so that the Head of the Institution will be able to take measures to get the respective work done. The public officer is required to inform the Head of the Institution within 24 hours of commencement of his/her duties on that particular day.

Rule 172; A public officer who absents himself from duty without informing his Head of the Institution is considered to have vacated his post on his own accord.

> **"ඔබගේ විනය බලධාරියා ජ්‍යෙෂ්ඨ නියෝජ්‍ය පොලිස්පති අපරාධ හා රථවාහන දිසාව තුමා වන අතර කාර්ය පටිපාටික රීති පරිච්ඡේද 15 වගන්තිය 174 ආයතන සංග්‍රහයේ XLVIII පරිච්ඡේදයේ 37 පරිදි සේවය අතහැරයාමේ නියෝගයට විරුද්ධව සේවය අතහැරයාමේ නියෝගය නිකුත්කර මාස 03ක් ගතවීමට පෙර විනය බලධරයා වෙත අභියාචනයක් ඉදිරිපත් කිරීමේ හැකියාව ඇත."**

In addition to the above, the Respondents further relied on the decision of this court in the case of ***Building Materials Corporation Vs. Jathika Sevaka Sangamaya*** *(on behalf of D.N.T. Warnakulasuriya)* ***[1993] 2 Sri LR 316*** where it was decided that,

> "Absence from work of an employee on the ground of illness or other reason beyond his control is inconsistent with the intention to abandon his employment provided that there are no other circumstances from which an inference to the contrary could be drawn.
>
> Where an employee endeavours to keep away from work or refuses or fails to report to work or duty without an acceptable excuse for a reasonably a long period of time such conduct would necessarily be a ground which justifies the employer to consider the employee as having vacated service."

However, as already referred to by me in this Judgment, the 9th and 12th Respondents in their affidavits tendered before this court (it is also important to note that the 10th Respondent, against whom several allegations were made by the Petitioner had preferred not to tender an affidavit before this court) were

silent on their knowledge that the Petitioner had already filed a Fundamental Rights application challenging

a) The finding of guilt at the orderly room of a charge related to a bi-annual inspection,
b) Imposing of no pay leave on the Petitioner,
c) Recommendation of the transfer to the Petitioner out of Police Narcotic Bureau

and that, "the state" on several occasions (as referred to in this Judgment) had given undertaking that,

a) the Petitioner would not be transferred from the Police Narcotic Bureau
b) the permission granted to the Petitioner to retain the service weapon issued to him out of office hours will continue until the instant application is supported before the Supreme Court.

As further observed by me, the Petitioner who had an unblemished service record with 321 good entries including two Inspector General's commendations, was subject to harassment specially during the last six months of his service. As I referred to in this Judgement, transferring him to Katunayake Unit of the Police Narcotic Bureau and getting him down within 3 months when the Respondents observe that even after his transfer, he continued to discharge his duties at his best; within two months thereafter summoning him before the Orderly Room on a charge, the Respondents themselves admitted before this court as incorrect (9R4(a)); thereafter making a failed attempt by the 10th to the 12th Respondents to obtain the signature of the Petitioner to "Form 51" on 10th October 2016 and failing which the 10th Respondent issuing P-17, recommending the transfer of the Petitioner out of Police Narcotic Bureau on the same day, knowing very well that it will badly effect the Petitioner with regard to his own recommendation in P19 (d), include the instances of such harassment.

The Petitioner in his affidavit tendered before this court on 11th April 2017 had explained the above incidents which compelled him to keep away from his work in paragraph 13-15 as follows;

13. I respectfully state that, due to the incidents of the recent past, the continued harassment and attempts to provoke me, inquiries about my whereabouts, removing my weapon from my possession, calls from suspicious persons as aforesaid I felt compelled to not report for duty from 16. 03.2017, due to grave apprehension of any security.

14. I respectfully state that the reason that I feel compelled not to report for duty is not a disclination from discharging my duty, but due to the belief that there is an imminent threat to my life.

15. I specifically state that I have every intention of returning to duty, if my safety is assured

When considering the matters already discussed in my Judgment, I see no reason to reject the above statements of the Petitioner.

The Court of Appeal in the case of ***Nelson de Silva Vs. Sri Lanka State Engineering Corporation [1996] 2 Sri LR 342*** discussed the importance of the mental element in a case of Vacation of Post as follows;

> "The concept of vacation of post involves two aspects. One is the mental element, that is the intention to desert and abandon the employment and second is the failure to repot at the work place of the employee. To constitute the first element, it must be established that the applicant is not reporting at the workplace, was actuated by an intention to voluntarily vacate his employment. The physical absence and the mental element should co-exist for there to be a vacation of post in law…."

In the case of ***V. I. D. J. Perera Vs. University of Colombo and Others SC Appeal 46/2011*** SC minutes dated 07.10.2015 this court observed that,

> "The conduct on the part of the Respondent clearly demonstrate that he had no intention of abandoning his post and he had the *animus revetendi*. Thus, I am of the view that the Court of Appeal has not erred, with regard to the issue as well."

In these circumstances, I take the view that the Petitioner could not be said to have vacated his post by his failure to report to work since 17.03.2017.

The next question that is to be considered by me is whether the service of the alleged Notice of Vacation of Post was in violation of the legitimate expectation of the Petitioner, and does any one of the Respondent is responsible for such violation.

In the case of ***Siriwardena Vs. Senevirathne and Others SC FR 589/2009 SC minute dated 10.03.2011 and 2011 (2) BLR 336*** *Shirani Bandaranayake J* (as she then was) considered the alleged violation of Fundamental Rights guaranteed in terms of Article 12 (1) on the basis of legitimate expectation and held that,

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) ……

c) The applicability of the doctrine of legitimate expectation imposes in essence a duty to act fairly

It was also held by *Shirani Bandaranayake J* (as she then was) in the case of ***Perera Vs. National Police Commission and 24 Others SC FR 290/2006 and 2007 BLR 14*** that,

> "A promise or a regular procedure could give rise to a legitimate expectation that could be enforced by Court."

As discussed by me at length in this judgment the conduct of the 9th to the 12th Respondents were arbitrary and in violation of the regular procedure, and therefore in violation of the legitimate expectation of the Petitioner.

Whilst relying on the contention that the Petitioner's services had been correctly terminated and therefore the Petitioner is not entitled to complain of any violation of equal protection guaranteed under Article 12(1) of the Constitution, the Respondents, further relied on the decisions of this court in ***Rev. Watinapaha Somananda Thero Vs. Akila Viraj Kariyawasam and Others*** SC FR 361/2015 SC minute dated 14.12.2017 and ***W.K. Samarakoon and Others Vs. National Water Supply and Drainage Board and Others*** SC FR 284/2013 SC minute dated 23.09.2016.

As observed by this court in both these cases there is reference to a land mark decision by Sharvananda CJ in ***C.W Mackie Co. Ltd. Vs. Hugh Molagoda, Commissioner General of Inland Revenue and Others [1986] 1 SLR 300*** where Sharvananda CJ had observed the violation by an illegal act, when considering the alleged violation of equal treatment guaranteed by Article 12 in the following words;

> "The equal treatment guaranteed by Article 12, is equal treatment in the performance of a lawful act; via; Article 12, one cannot seek the execution of an illegal act. Fundamental to this postulate of equal treatment is that it should be referable to the exercise of a valid right, founded in law in contradistinction to an illegal right which is invalid in law."

However, this court had already concluded that, even though the Petitioner was served with a notice of Vacation of Post, it does not have the same effect as stated in Rule 172 of the Chapter XV of the PSC Rules since the Petitioner did not intend to abandon his post.

In the said circumstances, the alleged violation before this court is not with regard to an illegal act., as found in the case of ***C. W. Mackie & Co. Ltd Vs. Hugh Molagoda Commissioner General of Inland Revenue and Others [1986] 1 SLR 300*** and therefore I reject the argument of the Respondents based on the above two Judgments.

Has anyone of the Respondent acted in violation of the fundamental rights guaranteed under Article 12 (1) of the Constitution

In the case of ***Farook Vs. Dharmarathne Chairman, Provincial Public Service Commission Uva and others [2005] 1 Sri LR 133*** *Her Ladyship Shirani Bandaranayake J* (as she then was) held,

> "When a person does not possess the required qualifications that is necessary for a particular position, would it be possible for him to obtain relief in terms of violation of his Fundamental Rights on the basis of unequal treatment? If the answer to this question is in the affirmative, it would mean that Article 12 (1) of the Constitution would be applicable even in a situation where there is no violation of the applicable legal procedure or the general practice. The application of the Article 12 (1) of the Constitution cannot be used for such situation as it provides to an aggrieved person **only for the equal protection of the law where the authorities have acted illegally or incorrectly without giving due consideration to the applicable guidelines.** Article 12 (1) of the Constitution does not provide for any situation where the authorities will have to act illegally. The safeguard retained in Article 12 (1) is for the performance of a lawful act and not to be directed to carry out an illegal function. In order to succeed, the Petitioner must be in a position to place material before this court that there has been unequal treatment within the framework of a lawful act" (**emphasis added**)

In the case of ***Horathalage Thilak Lalith Kumara Vs. S.S. Hewapathirana Secretary Ministry of Youth Affairs and Skills Development and Others SC FR 451/2011*** SC minute dated 17.09.2015 *Anil Goonarathne J* had observed,

> "I have to observe at this point that Article 12 of the Constitution forbids hostile discrimination but does not forbid reasonable classification. Equality before the law does not mean that the same set of laws should apply to all persons under every circumstance, ignoring differences and disparities. Reasonable classification is inherent in the concept of 'equality' because all persons **are not similarly situate**" (emphasis by his Lordship)

As already discussed by me in this Judgment the conduct of 10th, 11th and 12th Respondents specially between 04.10.2016 and 10.10.2016 summoning the Petitioner before the Orderly Room on a charge, which the Respondents themselves admitted before this court as incorrect, and thereafter making an unsuccessful attempt by the said Respondents to obtain the signature of the Petitioner to "Form 51" on 10th October 2016 and the 10th Respondent to issue P-17 on the same day recommending the transfer of the Petitioner out of Police Narcotic Bureau clearly shows that the said Respondents had acted incorrectly ignoring the applicable provisions of law. As revealed before this court in "Form 51 the 10th to the 12th Respondents have taken contradictory positions when recommending the transfer of the Petitioner, had made a failed attempt by them to obtain the signature of the Petitioner to "Form 51," is clearly in violation of the accepted legal principles.

In these circumstances, I am of the view that the above conduct of the 10th, 11th and 12th Respondents are in clear violation of the equal protection guaranteed under Article 12 (1) of the Constitution of the Petitioner.

The 9th Respondent, Inspector General of Police, on behalf of whom the state had continued to appear on several days prior to the main application was supported before court, had given an undertaking that,

a) the Petitioner would not be transferred from the Police Narcotic Bureau

b) the permission granted to the Petitioner to retain the service weapon issued to him out of office hours will continue until the instant application is supported before the Supreme Court.

was silent in his affidavit as to why the undertaking was not adhered to, but allowed 10th to the 12th or the 14th Respondent or any one of them to withdraw the facility granted by him to retain the official weapon after working hours, which finally compelled the Petitioner not to report for duty since 16th March 2017. The 9th Respondent, Inspector General of Police was well aware of the

imminent danger to the life of the Petitioner when he permitted the retention of the official weapon after working hours. In the said circumstances the above conduct of the 9th Respondent is in clear violation of the equal protection of the Petitioner guaranteed under Article 12 (1) of the Constitution.

Hence, I declare that the 9th, 10th ,11th and 12th Respondents have acted in violation of the legitimate expectation of the Petitioner and therefore violated the Fundamental Rights of the Petitioner guaranteed under Article 12 (1) of the Constitution. In the said circumstances, I further declare that the Petitioner could not to be said to have vacated his post by his failure to report to work since 17.03.2017.

I therefore direct 1st to 14th Respondents including 1A, 2A, 4A, 7A, 8A, 9A, 10A, 11A and 12A Respondents to re-instate the Petitioner with effect from 17.03.2017 with all back wages, and increments. The Petitioner is entitled to all the promotions due to him as he was considered as in active service since 17.03.2017.

The 9A Respondent is further directed to consider granting permission to retain the official weapon issued to the Petitioner in consideration of proper assessment, if a request is made through proper channels.

The 9th, 10th, 11th and 12th Respondents are directed to pay Rs.25,000/- each to the Petitioner from their personal funds.

Application allowed with cost fixed at Rs.50,000/-

Judge of the Supreme Court

Justice Jayantha Jayasuriya PC

I agree,

Chief Justice

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 a matter of an application in terms of Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

M.T. Mallika,
No 55, Jasmine Villa, Nittambuwa Road, Veyangoda

PETITIONER

-Vs-

SC FR Application No. 542/2009

1. **Jeevan Kumaratunga,**
   Hon. Minister of Land and Land Development, Govijana Mandiraya, 80/5, Rajamalwatte Avenue, Battaramulla

2. **S.G. Wijayabandu,**
   Attanagalle Divisional Secretary, Divisional Secretariat, Nittambuwa

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

RESPONDENTS

1A. **John Amaratunga**,
Minister of Land, Ministry of Lands, 'Mihikatha Medura', Land Secretariat, No.1200/6, Rajamalwatte Road, Battaramulla.

1B. **S.M. Chandrasena**,
Minister of Land, Ministry of Lands, 'Mihikatha Medura', Land Secretariat, No.1200/6, Rajamalwatte Road, Battaramulla.

2A. **D. M. Rathnayake**,
Attanagalle Divisional Secretary,Divisional Secretariat, Nittambuwa.

2B. **S. P. Gunawardhana**,
Attanagalle Divisional Secretary,Divisional Secretariat, Nittambuwa.

SUBSTITUTED- RESPONDENTS

Before : Priyantha Jayawardena, PC, J
L.T.B. Dehideniya, J
P. Padman Surasena, J

Counsel : Asthika Devendra with Wasantha Vidanage and Sudarsha de Silva for the petitioner.
Suren Gnanaraj, SSC for the 1st to 3rd respondents

Argued on : 10th September, 2020

Decided on : 20th January, 2021

Priyantha Jayawardena, PC, J

Facts of the Application

The petitioner filed the instant application challenging the acquisition of a land for the development of St. Mary's College, Veyangoda.

The petitioner stated that she was the owner of the land depicted as 'Lot 1' in Plan No.790 dated 13th of March, 1988 prepared by Licensed Surveyor A.D.M.J. Rupasinghe, in an extent of 1 rood and 0.62 perches.

The petitioner further stated that a notice under section 2 of the Land Acquisition Act, No. 09 of 1950, as amended [hereinafter referred to as "the Land Acquisition Act"] was published by

the 2nd respondent on the 13th of June, 2002 stating that the land known as *Gorakagahalanda*, in an extent of 04 acres and 03 roods, is intended to be acquired for the public purpose of developing St. Mary's College.

Moreover, the petitioner stated that her house and the appurtenant land, in an extent of 1 rood and 0.62 perches, are situated in the said *Gorakagahalanda* land. Further, she claimed that she had servitude rights to use an access road and the well situated in the said *Gorakagahalanda* land.

Thereafter, a notice under section 4 of the Land Acquisition Act was published on the 10th of October, 2003 by the 2nd respondent calling for objections, if any, to the intended acquisition of the said land. In response to the said notice, at the request of the petitioner, her husband had forwarded objections to the proposed acquisition.

The petitioner stated that on the 12th of May, 2005 a government surveyor attempted to survey the said *Gorakagahalanda* land where the petitioner's house and the appurtenant land are situated.

Hence, she had filed the writ application bearing CA(Writ) Application No. 1016/05, on the 22nd of June, 2005, in the Court of Appeal seeking, *inter alia*, a writ of certiorari to quash the notices issued under sections 2 and 4 of the Land Acquisition Act.

The petitioner stated that whilst the said writ application was pending in the Court of Appeal, a declaration in terms of section 5 of the said Act was published by the 1st respondent, in the Gazette No. 1461/16 dated 08th of September, 2006, stating that a part of the said *Gorakagahalanda* land depicted as **'Lot 2'**, in the Advanced Tracing No. GAM/ATH/02/275 prepared by the Surveyor General, was required for the public purpose of St. Mary's College.

Further, in the said Advanced Tracing, the land intended to be acquired, in an extent of 1.2298 hectares, was depicted as '**Lot 2'** while the petitioner's house and the appurtenant land to the house, in an extent of 1 rood and 0.62 perches, were depicted as '**Lot 1**'. Accordingly, the petitioner's house and the appurtenant land had been excluded from the acquisition process.

Subsequent to the said declaration, the petitioner had withdrawn the said writ application on the 28th of November, 2006 reserving the right to file a fresh application with additional documents.

The petitioner stated that the 2nd respondent, by letter dated 21st of January, 2009, informed her that steps were being taken to acquire the said land *Gorakagahalanda* for the development of St. Mary's College excluding the petitioner's house and the appurtenant land. Further, by the said letter, the petitioner was asked to contact the Zonal Director of Education or the Secretary to the Ministry of Education to discuss the issues pertaining to the petitioner's servitude rights claimed over the land intended to be acquired.

The petitioner further stated that the access road proposed by the State was unacceptable as, *inter alia,* it was situated four and a half feet below her house and gave access from the rear side of the house.

Thereafter, a meeting had been convened on the 13th of February, 2009 to discuss the issues pertaining to the petitioner's alleged servitude right to use the access road and the well situated in 'Lot 2' of the said *Gorakagahalanda* land intended to be acquired.

The petitioner further stated that at the said meeting, she conveyed, *inter alia*, that she would be amenable for her house and appurtenant land situated in 'Lot 1' to be given for acquisition, if an alternative land in an extent of 90 perches was given to her. Accordingly, the 2nd respondent had offered an alternative land in extent of 60 perches in lieu of her house and the appurtenant land, by letter dated 04th of March 2009. However, the petitioner stated that she refused the said offer, by letter dated 09th of March, 2009, as the value of the house, appurtenant land and the servitude rights attached were greater than the value of the 60 perches offered.

Moreover, the petitioner stated that the exclusion of the house owned by one Sanath Karunarathne and the shop owned by one Jayawardene, which were situated in between the school premises and its playground, from the acquisition process was discriminatory.

The petitioner stated that even though she was informed by letter dated 22nd of June, 2009 that the land sought to be acquired would be surveyed, a government surveyor conducted the survey on the 02nd of July, 2009 of not only the land intended to be acquired but the entire land including the petitioner's house and the appurtenant land.

Subsequent to the said survey of the land, the petitioner has filed the instant application on the 16th of July, 2009 stating, *inter alia*, that the land acquisition process had reverted to the initial stage whereby steps were being taken to acquire the entire land of '*Gorakagahalanda'* including her house and the appurtenant land that she and her family had been residing for over

forty years constituting to an infringement of her Fundamental Rights under Article 12(1) of the Constitution.

In the circumstances, the petitioner prayed, *inter alia*:

> *"(b) [To] declare that anyone or more or all of the respondents have violated the fundamental rights of the petitioner guaranteed under Article 12(1) of the Constitution of Sri Lanka.*
>
> *(c) [To] make order directing the respondents to grant the petitioner an alternative land in an extent of 90 perches as demarcated in P14, in the event of the Petitioner's house and appurtenant land being acquired.*
>
> *(d) [To] make order directing the respondent to provide a convenient alternative route in the event of the acquisition of the entire land (Lot 2 of P2) excepting the petitioner's house and the appurtenant land.*
>
> *(e) [To] make order directing the respondents to grant compensation to the petitioner in accordance with the Land Acquisition Act, for the portion of the land that would be acquired."*

This court has granted the petitioner leave to proceed for the alleged violation of the petitioner's Fundamental Rights enshrined under Article 12(1) of the Constitution.

Objections of the 2nd Respondent

The 2nd respondent filed an affidavit objecting to the granting of the reliefs prayed for in the petition and stated that the land sought to be acquired was for the public purpose of providing better learning facilities for about 2200 students of St. Mary's College, Veyangoda. He stated that the said public purpose, which was not disputed by the petitioner, is being frustrated due to the conduct of the petitioner.

The 2nd respondent further stated that as described in the declaration issued under section 5 of the Land Acquisition Act, the land sought to be acquired by the State was **'Lot 2**' of the land called *Gorakagahalanda*. Hence, the petitioner's house and the appurtenant land which is situated in **'Lot 1**' of *Gorakagahalanda* would not be acquired by the State.

Further, the 2nd respondent had informed the petitioner, by letter dated 21st of January, 2009, that the petitioner's house and the appurtenant land had been excluded from the acquisition

process considering the objections raised by the petitioner. Hence, the petitioner's contention that the land acquisition process has reverted to the initial stage has no merit.

The 2nd respondent further stated that a meeting was held on the 13th of February, 2009 to discuss the concerns of the petitioner pertaining to the servitude rights, claimed by her, over the land proposed to be acquired, and that at the said meeting, the petitioner had suggested to give her house and the appurtenant land to the State and to have an alternative land as compensation for the acquisition of her house and the appurtenant land.

Consequently, the 2nd respondent, by letter dated 04th of March, 2009, had asked the petitioner whether she would be amenable to accept an alternative land in an extent of 60 perches as compensation for the acquisition of her house and the appurtenant land. In response, the petitioner has refused the said offer, by letter dated 09th of March 2009, stating that the value of the house, appurtenant land and the servitude rights attached to 'Lot 2' were greater than the 60 perches offered by the 2nd respondent.

Responding to the alleged servitude right to use an access road over the land that is sought to be acquired, the 2nd respondent stated that in lieu of the petitioner's said servitude right over 'Lot 2' of *Gorakagahalanda*, the petitioner has been provided a suitable access road, bordering the western boundary of the petitioner's house, which connects to a by-road that leads directly to the Nittambuwa-Veyangoda main road. He further stated that using the said road does not cause any impediment to access the house and appurtenant land of the petitioner as it is situated only two feet above the said access road.

Responding to the allegation that the two lands situated near St. Mary's College, Veyangoda, owned by one Sanath Karunarathne and one Jayawardena have been excluded from the acquisition process, the 2nd respondent stated that a final decision on the acquisition of the said two properties had not yet been taken. In any event, as the petitioner's house and the appurtenant land have been excluded from the acquisition process the petitioner's contention on discrimination is without merit.

In the circumstances, the 2nd respondent prayed *inter alia;*

(a) The petitioner's application is filed out of time,
(b) The petitioner is not entitled to the reliefs sought in the prayer to the petition, and
(c) The petitioner has misrepresented material facts and that her application lacks *uberrimae fides*.

Is the application filed out of time?

In view of the above preliminary objections raised on behalf of the respondents, the objection that the instant application of the petitioner is filed out of time will be considered first.

Article 126(2) of the Constitution states:

> *"Where any person alleges that any such fundamental right or language right relating to such person has been infringed or is about to be infringed by executive or administrative action, he may himself or by an attorney-at-law on his behalf, within one month thereof, in accordance with such rules of court as may be in force, apply to the Supreme Court by way of petition in writing addressed to such Court praying for relief or redress in respect of such infringement. Such application may be proceeded with only with leave to proceed first had and obtained from the Supreme Court, which leave may be granted or refused, as the case may be, by not less than two judges".* [Emphasis Added]

A plain reading of the said Article 126(2) shows that any person who alleges a violation of a Fundamental Right shall file an application within one month of the alleged violation.

Our courts have held that the one-month time limit stipulated in the aforesaid Article should be strictly adhered to by the petitioners.

In the case of ***Edirisuriya v. Navaratnam and others,*** (1985) 1 SLR 100 at page 105, it was held:

> *"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".*

It is settled law that the mandatory time limits set out by the legislator shall be strictly complied with as it affects the invoking of the jurisdiction of a court.

This view was expressed in ***Gamaethige v. Siriwardena*** (1988) 1 SLR 384 at page 400 where Mark Fernando J. cited the case of ***Jayawardena v. Attorney-General***, (F.R.D. (1) page 175) with approval where it was held:

> *"... an application made more than one month after the alleged infringement was refused on the ground that the jurisdiction of this Court cannot be exercised after the lapse of one month from the date of the executive or administrative act complained of."* [Emphasis Added]

Similarly, the requirement to comply with stipulated time limits to invoke the jurisdiction of a court was discussed in the case of ***Edward v. De Silva***, 46 NLR 342 at pages 343-344, where it was held:

> *"It is hardly necessary to labour the point since the language of Chapter 49 of the Code makes it sufficiently clear that the Legislature in enacting, as it did, was creating an exception to the ordinary rule, but in a qualified and limited way. In other words, 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 of procedure. Some of those rules are so vital, being of the spirit of 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 consequence..."* [Emphasis Added]

When did the petitioner become aware of the alleged infringement?

Article 126(2) of the Constitution states that an application for infringement or imminent infringement of Fundamental Rights can be filed "within one month thereof" in the Supreme Court.

The word "within" used in the said Article requires the period of one month to be calculated from the date of the alleged infringement, imminent infringement, or from the date on which the petitioner became aware of the alleged infringement, if knowledge on the part of the petitioner is required to establish the alleged infringement.

This was discussed in ***Gamaethige v. Siriwardena*** *(supra) at page 402* which states:

> *"Three principles are discernible in regard to the operation of the time limit prescribed by Article 126(2). Time begins to run when the infringement takes place; if knowledge on the part of the petitioner is required (e.g of other instances by comparison with which the treatment meted out to him becomes discriminatory), time begins to run only when both infringement and knowledge exist."*

In the instant application, the land acquisition process had commenced with the publication of the notice under section 2 of the Land Acquisition Act on the 13th of June, 2002. Thereafter, a notice under section 4 of the said Act had been published on the 10th of October, 2003. The petitioner had filed the writ application challenging the said land acquisition proceedings in the Court of Appeal on the 22nd of June, 2005. In the said writ application, the petitioner had prayed for, *inter alia*, a writ of certiorari to set aside or quash the notices issued under sections 2 and 4 of the said Act.

However, the petitioner had withdrawn the said writ application with liberty to file a fresh application with additional documents on the 28th of November, 2006 consequent to the publication of the declaration issued by the 1st respondent under section 5 of the Land Acquisition Act on the 08th of September, 2006. Accordingly, the said application had been *pro forma* dismissed. Thereafter, the instant application had been filed in this court on the 16th of July, 2009.

In view of the above, I am of the opinion that on the 08th of September, 2006, with the publication of the declaration issued under section 5 of the Land Acquisition Act, the petitioner became aware that her house and the appurtenant land, situated in 'Lot 1', have been excluded from the acquisition process under reference. Further, the petitioner had come to know that the servitude rights claimed by the petitioner over '**Lot 2**' of *Gorakagahalanda* land to use an 'access road' and the 'well' would be affected by the proposed acquisition.

Is there a continuing infringement?

The learned Counsel for the petitioner, citing the case of ***Demuni Sriyani de Soyza and others v. Dharmasena Dissanayake***, SC/FR/206/2008, SC Minutes dated 09th of December, 2016, submitted that in the event of a continuous infringement, the one-month time limit stipulated in Article 126(2) of the Constitution is not applicable.

The learned Counsel for the petitioner contended that that even following the withdrawal of the petitioner's writ application, the issues surrounding the acquisition process were animate as the respondents were negotiating with the petitioner to obtain her consent to have her house and the appurtenant land to be acquired to the State. As such, it was submitted that the infringement alleged in the instant application is a continuous infringement.

Accordingly, it is useful to examine the provisions of the Land Acquisition Act in order to ascertain whether the alleged violation is a continuous infringement as contended by the petitioner.

The land acquisition process under reference has proceeded until the publication of the declaration under section 5 of the Land Acquisition Act. The notices published under sections 2 and 4 of the Land Acquisition Act for the said land acquisition process have included the petitioner's house and the appurtenant land. However, the words used in the said sections 2 and 4 clearly indicate that during the said stages, the State only investigates the suitability of a particular property for the public purpose of the acquisition and considers the objections raised by the property owners against the intended acquisition.

Section 5 of the Land Acquisition Act states as follows:

> *"(1) Where the Minister decides under subsection (5) of section 4 that a particular land or servitude should be acquired under this Act, he shall make a written declaration that such land or servitude is needed for a public purpose and will be acquired under this Act, and shall direct the acquiring officer of the district in which the land which is to be acquired or over which the servitude is to be acquired is situated to cause such declaration in the Sinhala, Tamil and English languages to be published in the Gazette and exhibited in some conspicuous places on or near that land.*
>
> *(2) A declaration made under subsection (1) in respect of any land or servitude shall be conclusive evidence that such land or servitude is needed for a public purpose.*
>
> *(3) The publication of a declaration under subsection (1) in the Gazette shall be conclusive evidence of the fact that such declaration was duly made".*
>
> [Emphasis Added]

In view of the above, the declaration published under section 5 of the said Act is justiciable as it is considered "conclusive evidence" that a land or a servitude is needed for a public purpose. In the instant application, the said declaration has excluded the petitioner's house and the appurtenant land. Thus, it is conclusive evidence that neither the petitioner's house nor the appurtenant land will be acquired by the State.

Further, the reliefs as prayed for by the petitioner in *subparagraph (c)* and *(e)* of the prayer will not arise for consideration by this court as her property is excluded from the land acquisition process. In any event, the question of compensation has not arisen as the acquisition process has not been completed.

Moreover, the Counsel for the petitioner submitted that with the receipt of the notice dated 22nd of June, 2009 by the surveyor informing of the survey of *Gorakagahalanda* land, the petitioner believed that her house and the appurtenant land were going to be acquired by the State. As such, he submitted that the one-month period should be computed from the date of the said notice by the surveyor.

However, upon perusal of the said notice dated 22nd of June, 2009, it is evident that it gives notice to the petitioner that the *Gorakagahalanda* land would be surveyed on the 02nd of July, 2009.

In any event, section 6 of the said Act enables the Survey Department to survey a land after a declaration is made under section 5 of the said Act in order to prepare a plan for the purpose of proceeding with the procedure stipulated in the Act.

Thus, since the land sought to be acquired is a portion of *Gorakagahalanda* land, it is necessary to survey the entire land to prepare a plan demarcating the boundaries of the Lots that are to be acquired and to be excluded from the acquisition process.

Further, the said notice has only stated what the petitioner was already aware of since the 08th of September, 2007 consequent to the publication of the declaration under section 5 of the said Act and thus, the said notice cannot be construed as an attempt to acquire the property of the petitioner. In any event, the 1st respondent has clearly stated in his affidavit that her property has been excluded from the land acquisition process under reference.

In the circumstances, I am of the view that there is no continuous infringement of the petitioner's rights as contended by the learned Counsel for the petitioner.

Delay in filing the application

As stated above, the petitioner has withdrawn the writ application filed in the Court of Appeal after the said declaration under section 5 of the Land Acquisition Act was published.

Further, subsequent to the withdrawal of the said writ application on the 28th of November, 2006, a meeting had been held between the petitioner and the 2nd respondent on the 13th of February, 2009 to discuss issues of the petitioner pertaining to the acquisition process under reference. During the said meeting, even though her house and the appurtenant land were excluded from the acquisition process, the petitioner had proposed to hand over the same in exchange for a 90-perch block of land as compensation.

As an amicable settlement, the petitioner had been offered an alternative land in an extent of 60 perches in lieu of her house and the appurtenant land by letter dated 04th of March, 2009. However, by letter dated 09th of March, 2009, the petitioner had rejected the said offer on the basis that her house and the appurtenant land are more valuable than the said offer.

A surveyor had given notice to the petitioner of the survey of *Gorakagahalanda* land on the 22nd of June 2009, and the said survey had been conducted on the 02nd of July, 2009. Thereafter, the petitioner had filed the instant application on the 16th of July, 2009.

The abovementioned events show that the petitioner had spent two and a half years, from the date of the publication of declaration in terms of section 5 of the Land Acquisition Act, seeking administrative reliefs, before she filed the instant application in the Supreme Court on the 16th of July, 2009.

Thus, it is necessary to consider whether the time spent in seeking administrative reliefs can be excluded when computing the one-month period stipulated in Article 126(2) of the Constitution.

Can the time spent in seeking administrative reliefs be excluded from the computation of one month?

Article 126(2) does not specify any instances which could be excluded from the computation of the one-month period. However, if a person has filed a complaint in the Human Rights Commission, section 13 of the Human Rights Commission Act, No. 21 of 1996 provides that the time period where an inquiry is pending before the Human Rights Commission shall not be taken into account when computing the one-month time limit prescribed in Article 126(2) of the Constitution.

Further, in the case of ***Namasivayam v. Gunawardena*** (1989) 1 SLR 394, the Supreme Court held that if a person was hindered from having access to the Supreme Court due to his detention, the said period should be excluded when computing the one-month time limit.

It is pertinent to note that none of the aforementioned grounds are applicable to the instant application. On the contrary, the petitioner had been seeking administrative relief since she had withdrawn the said writ application filed in the Court of Appeal.

Accordingly, the time spent in seeking administrative reliefs without invoking the Fundamental Rights jurisdiction of the Supreme Court cannot be excluded when computing the mandatory one-month time limit stipulated in Article 126(2) of the Constitution.

A similar view was expressed in ***Gamaethige v. Siriwardena*** (supra) at page 396 wherein Mark Fernando J. further held**:**

> *"It was the Petitioner's contention, however, that although he might have been entitled to apply to this Court in January or February 1986, it was the refusal of his final appeal that constituted the operative infringement for the purpose of computing the time limit of one month. This contention is untenable. If a person is entitled to institute proceedings under Article 126(2) in respect of an infringement at a certain point in time, the filing of an appeal or an application for relief, whether administrative or judicial does not in any way prevent or interrupt the operation of the time limit. Thus, a person aggrieved by an unlawful arrest may institute Civil proceedings for damages for wrongful arrest or complain to the Ombudsmen, under Article 156. If he is unsuccessful, in that his action or complaint is dismissed, he cannot claim that the computation of time for the purposes of a subsequent petition under Article 126(2) commences from the date of such dismissal. That example relates to a judicial or constitutional remedy; the position of an aggrieved person can hardly be better if he opted to pursue an administrative remedy. The Constitution provides for a sure and expeditious remedy. In the highest Court, to be granted according to law, and not subject to the uncertain discretion of the very executive of whose act the aggrieved person complains; <u>if he decides to pursue other remedies, particularly administrative remedies, the lapse of time will (save in very exceptional circumstances) result in the former remedy becoming unavailable to him"</u>.* [Emphasis Added]

Moreover, *at page 397***,** it was held:

> *"... An aggrieved person who chooses not to pursue his constitutional remedy, and later finds that other remedies are of no avail, can grant himself an extension of time, by the simple device of filing yet another appeal; if he had previously appealed only to the Secretary to the Ministry, he will appeal to the Minister; or from the Minister, to the Prime Minister; and then to the President; or he will make a second or a third appeal, before ultimately deciding to petition this Court. Article 126 neither permits, nor was intended to permit, such a course of action: on the contrary, the remedy under Article 126 must be availed of at the earliest possible opportunity, within the prescribed times, and if not so availed of, the remedy ceases to be available".* [Emphasis Added]

In the circumstances, I am of the view that the petitioner became aware that her alleged Fundamental Rights were violated at least on the 08th of September, 2006, when the declaration under section 5 of the Land Acquisition Act was published. Thereafter, she had been seeking administrative relief to resolve her alleged grievances relating to her house, the appurtenant land and alleged servitude rights for a period of two and half years from the publication of the said declaration. The instant application had been filed after exhausting all the other remedies available to the petitioner including resorting to judicial remedies.

The said Court of Appeal judgment states that the Counsel for the petitioner moves to withdraw the application with liberty to file fresh application with additional documents. However, in such an instance, a party who had withdrawn an application is bound to comply with the mandatory time frames stipulated by law. As such, the one-month time limit stipulated in Article 126(2) will be computed from the date of the alleged infringement or imminent infringement of the Fundamental Right.

Hence, the time spent by the petitioner in seeking administrative reliefs and other judicial remedies cannot be excluded from the computation of the one-month time limit stipulated in Article 126(2) of the Constitution.

In view of the above, I am of the opinion that the petitioner has not invoked the jurisdiction of this court by filing the petition within one month of the alleged infringement of her Fundamental Rights enshrined in Article 12(1) of the Constitution and thus, the petition should be dismissed.

Accordingly, for the reasons stated above, the application is dismissed with Rs. 50,000/- as costs to be paid to the State.

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**

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

In the matter of an Application under Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC FR Application No. 556/2008

SC FR Application No. 557/2008

Petitioners

U. N. S. P. Kurukulasuriya,
Convenor, Free Media Movement,
237/22, Vijaya Kumaratunga Mawatha,
Colombo 05.
(Petitioner SC FR Application No. 556/2008)

J. K. W. Jayasekara,
No. 58/10, Suhada Place,
Thalapathpitiya, Nugegoda.
(Petitioner SC FR Application No. 557/2008)

Vs.

Respondents

1. **Sri Lanka Rupavahini Corporation**
   Bauddhaloka Mawatha,
   Colombo 07.

2. **Dr. Ariyaratne Athugala**
   The Chairman & the Director-General,
   Sri Lanka Rupavahini Coporation,
   Bauddhaloka Mawatha,
   Colombo 07.

2(b-i). **Ms. Enokaa Sathyangani**

The Chairperson
Sri Lanka Rupavahini Coporation,
Bauddhaloka Mawatha,
Colombo 07.

2(c-i). **Thusira Malawwethantri**

Director General
Sri Lanka Rupavahini Coporation,
Bauddhaloka Mawatha,
Colombo 07.

3. **Lakshman Muthuthantri,**
Programme Producer,
Sri Lanka Rupavahini Corporation,
Bauddhaloka Mawatha,
Colombo 07.

4. **Anura Priyadarshana Yapa,**
Hon. Minister of Mass Media and Information,
163, Kirulapone Avenue,
Polhengoda,
Colombo 05.

4(b). **Mangala Samaraweera**

Hon. Minister of Finance and Mass Media Information,
163, Kirulapone Avenue,
Polhengoda,
Colombo 05.

5. **Hon. Attorney General,**
   Attorney-General's Department,
   Colombo 12.

6. **Sarath Kongahage**
   The Chairman & the Director-General,
   Sri Lanka Rupavahini Coporation,
   Bauddhaloka Mawatha,
   Colombo 07.

7. **Keheliya Rambukwella**
   Hon. Minister of Mass Media and Information,
   163, Kirulapone Avenue,
   Polhengoda,
   Colombo 05.

ADDED RESPONDENTS

Before: Buwaneka Aluwihare, PC, J.
Priyantha Jayawardena, PC, J. &
L. T. B. Dehideniya, J.

Counsel: J. C. Weliamuna, PC with Pasindu Silva for Petitioner.

Geoffrey Alagaratnam, PC with Lasantha Gurusinghe for 1st Respondent.

Nerin Pulle DSG with Nirmalan Wigneswaran, SSC for Attorney General.

Argued on: 29. 11. 2018

Decided on: 17. 02. 2021

Aluwihare, PC J.

Introduction

1. **The Petitioner in SC FR Application 556/2008**, a media professional and Convenor of the Free Media Movement at the time of the alleged infringement, complained of the infringement of his fundamental rights under Articles 10, 12(1), 12(2), 14(1), 14(1)(a) of the Constitution due to the abrupt termination and/or censoring of the programme '*Ira Anduru Pata*' in which he was appearing as a panelist. The particular episode of the programme in question was televised on the 'Rupavahini Channel' of the Sri Lanka Rupavahini Corporation (hereinafter referred to as 'SLRC') on 4th November 2008. The court granted leave to proceed for the infringement of Articles12(1) and 14(1)(a) of the Constitution.

2. **The Petitioner in SC FR Application 557/2018** is a viewer of the same programme '*Ira Anduru Pata*' who complained that the decision of the Respondents to abruptly stop and/or censor the televising of that particular episode of the programme on 4th November 2008 was an infringement of his fundamental rights under the Articles 10, 12(1), 12(2) and 14(1)(a) of the Constitution. The Petitioner was granted leave to proceed for the alleged infringement of Articles 10 and 12(1) of the Constitution.

3. With the consent of the learned Counsel representing the Petitioners and the Respondents, both applications were taken up for argument together. Combined written submissions were filed on behalf of the Respondents in both applications.

The Averments in SC FR Application 556/2008

4. On 3rd November 2008 the Petitioner in SC FR Application 556/2008 (hereinafter sometimes referred to as 'Kurukulasuriya') was invited by the SLRC to participate

in the programme titled '*Ira Anduru Pata*' ('ඉර අඳුරු පට' or Challenge the Darkness) to discuss the 'Private Television Broadcasting Station Regulations of 2007' (hereinafter sometimes referred to as 'the Regulations') issued and published in the Gazette Extraordinary No. 1570/35. The 3rd Respondent, a producer of programmes of the SLRC at the time had invited the Petitioner via telephone and had briefed the Petitioner regarding the programme. The Petitioner had been informed that the other two panelists would be Charitha Herath, Senior Lecturer of the Department of Philosophy of the University of Peradeniya and an advisor to the Ministry of Media and Telecommunication, and Dhamma Dissanayake, a Senior Lecturer of the University of Colombo and a Director of the Sri Lanka Foundation.

5. The Petitioner maintains that he was informed that the discussion would be televised live on the 'Rupavahini Channel' for a duration of one and a half hours from 10.30 pm until 12 midnight on the 4th of November 2008. He had also been informed that the viewers would be allowed to direct questions to the panelists via telephone calls during the telecast.

6. The Petitioner states that he accepted the invitation to participate in the programme representing the 'Free Media Movement'. The Respondents, however, dispute this assertion and state that the Petitioner was invited as an independent panelist and not as a representative of the 'Free Media Movement' or any other non-governmental organization.

7. On the 4th of November 2008 the programme commenced as scheduled, at 10.30 pm with the presenter of the programme, Chaminda Gunaratne, an employee of the SLRC introducing the panelists and the topic for discussion. The Petitioner avers that prior to the commencement of the programme it had been decided that in each round, the other two panelists would comment on the topic which would be followed by the Petitioner's response, thereby allowing each panelist to express his viewpoint, for about 5 to 10 minutes in every round and that the panelists

were expected to express their views freely, discussing the sociopolitical aspects and the adverse implications of introducing the Regulations as appearing in the Gazette.

8. The Respondents state that prior to the commencement of the programme the 3rd Respondent, the Producer of the programme, briefed the participants on the topic and the parameters of the discussion as well as the limitations applicable. According to the Respondents, the participants were specifically requested to strictly limit their presentations to the topic, refrain from obstructing the other panelists, refrain from engaging in personal attacks on the characters of individuals and to avoid making defamatory statements, or any statements that would make the SLRC and its employees, liable for contempt of court and to avoid reference to any proceedings pending before a court of law, to all of which they had agreed.

9. During the course of the programme it had been interrupted only once for a very brief commercial break at 11.00 pm to convey the time. Thereafter around 11.14 pm, after a lapse of approximately 45 minutes from the commencement of the programme the discussion was interrupted and the programme interrupted by a commercial break with the presenter stating; "හොඳයි ප්‍රශ්න සමාජයේ ඇති වෙනවා නම් ඒ ප්‍රශ්නවලට විසඳුම් තියෙන්න ඕන. ඉතින් අනිවාර්යෙන්ම විසඳුම් ලබාගන්නේ කොයි ආකාරයෙන්ද කියන එක පිළිබඳවයි අපි කතා කළ යුතුව තිබෙන්නේ. එය තමා සමාජයේ අනාගතය සඳහා වැඩි වශයෙන් හේතුවක් බවට පත්වන්නේ. අපි කෙටි විරාමයක් ලබා ගන්නවා දැන්." (In short; "If issues arise in the society, we must deliberate as to how solutions can be found to resolve those problems. Now we take a short break.")

10. The Respondents claim that during the first round of discussion the Petitioner deviated from the guidelines of the programme and made a political speech alleging that the media was exercising self-restraint and referred to a court case pending against a journalist under the Prevention of Terrorism (Special

Provisions) Act. The Petitioner had also disturbed the presentations of the other panelists. The Petitioner on the other hand, denies this claim and states that he abided by the instructions.

11. Following the commercial break, the programme did not recommence although the presenter and the panelists were present in the studio. Instead, a series of advertisements were televised followed by a number of songs. The 3rd Respondent had thereafter come to the studio and said that he was facing a difficulty in continuing with the programme. Upon inquiry he had intimated that when the commercial break was taken the line had been transferred to the Main Control Room which is under the direct control of the 2nd Respondent and that the line had not been transferred to the studio room to continue the programme.

12. Shortly thereafter, the 3rd Respondent had informed them, that the programme could not be continued as it had been stopped by the authorities. According to the Petitioner the 3rd Respondent had stated that, the programme could only have been stopped on the instructions of the 2nd Respondent.

13. The Respondents take up the position that, once the telecasting of the programme had commenced, the 2nd Respondent had received several telephone calls querying as to why his Corporation had permitted a Petitioner who had challenged the validity of the Private Television Broadcasting Station Regulations of 2007 by way of a Fundamental Rights Application, to appear on National Television and refer to matters which were the subject of a case pending before the Supreme Court (paragraph 11(a) of the 2nd Respondent's Statement of Objections). The 2nd Respondent has stated that at that point he sought the advice of the legal adviser of the 1st Respondent Corporation, Attorney-at-Law Jayantha De Silva and realized that it was not proper to discuss any matter which is pending before a court of law on live television.

14. The 2nd Respondent had also expressed [to the 3rd Respondent] his own concern over the same matter (per paragraph 11(d) of the Objections). The 3rd Respondent had replied that the Petitioner had not divulged to him any information about the pending Fundamental Rights application, and that he would speak to the Petitioner during the commercial break that was to follow. An affidavit by the 3rd Respondent ('1R3') has been submitted.

15. The legal advisor had then, via telephone, notified the 2nd Respondent that the court reporters had confirmed that the Petitioner and several others had filed Fundamental Rights Applications challenging the Regulations under discussion and the matter had been fixed for support on 5th, 6th or 14th November 2008. The 2nd Respondent had then been advised that since the matter is accordingly *sub judice,* it would be inappropriate to discuss the same on live television as any inappropriate statement made by the panelists would make the entire Board of Directors liable to face contempt of court proceedings. Attorney-at-Law Jayantha de Silva has confirmed this position by his affidavit produced marked 'IR2'.

16. The Respondents claim that the 2nd Respondent had reasons to believe that the Petitioner intended to embarrass the management of the 1st Respondent Corporation since the Petitioner had suppressed the fact that he had litigated on the very topic he was invited to discuss. In view of such apprehensions, the 2nd Respondent, as the Chairman of the Board of Directors and the Director General of the 1st Respondent Corporation, had immediately directed the 3rd Respondent to terminate the programme and informed the Main Control Room of his decision. (per paragraph 11(g) and 11(h) of the Objections and paragraph 12(h) of the affidavit of the 2nd Respondent).

17. The Petitioner on the other hand has flatly refuted the 2nd Respondent's claim in his counter affidavit. He states that, he had revealed his intention to challenge the regulations at a stakeholder meeting convened by the Minister of Mass Media and Information, on 4th November 2008, two days prior to the filing of the application.

The Petitioner argues that the 2nd Respondent and the panelist Charitha Herath, who were attendees at that meeting, were fully aware of the pending litigation, and that in any event, the fact that a case was pending in court should not prevent a broadcaster from debating issues of public importance.

18. The Petitioner argues that the justification offered for the termination of the programme should be rejected for several reasons. The contemporaneous recordings regarding the manner and reasons for stopping a programme midway are generally compiled by the Production Division but no such document has been produced by the Respondents for the perusal by the court. Even though the Petitioner repeatedly inquired the reason for stopping the programme neither he, nor the other panelists, had been informed of any reasons by the officials of the 1st Respondent Corporation. The Petitioner refutes the contents of the affidavits marked 'IR2' and 'IR3' submitted by the Legal Consultant of the SLRC and the 3rd Respondent respectively, and states that, in the case of the latter affidavit, the 3rd Respondent was well aware of the pending litigation at the time of inviting him to participate in the discussion.

19. The Respondents in turn argue that the Petitioner was only an invitee and that the 1st Respondent Corporation was at liberty to revoke the invitation at their discretion. They further contend that neither the Petitioner nor any citizen has the absolute right to demand an opportunity to express their views or make speeches on National Television.

<u>The Averments in SC FR Application 557/2008</u>

20. The Petitioner in SC FR Application 557/2018 (hereinafter sometimes referred to as 'Jayasekara') claims that he has been engaged in media journalism for over 15 years, and that he is a regular viewer of the programme '*Ira Anduru Pata*'. The Petitioner states that he had been closely following the developments regarding

the introduction of the Private Television Broadcasting Station Regulations of 2007.

21. According to Petitioner Jayasekera, the programme usually spanned a duration of one and a half hours to two hours and included a 'phone-in' component where the viewers were given the opportunity to participate via telephone thereby making it a participatory programme. On 4th November 2008 there had been several advertisements regarding the programme on the Rupavahini channel, prior to it being telecast.

22. The Petitioner Jayasekara claims that the presenter specifically stated that the viewers can directly ask questions on matters pertaining to the said regulations. A copy of the recording of the programme furnished by the Petitioner in Application 556/2008 confirms this averment. About two minutes into the programme, the presenter announced that viewers could express their views or ask questions.

23. The Petitioner had waited in anticipation to participate in the programme by raising questions and expressing his views, when the programme was interrupted by a commercial break. When the programme did not recommence after the commercial break as is the usual practice, the Petitioner had called the SLRC general number i.e. 0112-599 506 and queried whether the programme for the day had been stopped. The receptionist had given the Petitioner another number and requested him to clarify the matter with the 'Producing Section'. The Petitioner had not been successful in contacting the 'Producing Section' as no one had answered the call. The Petitioner had then reverted to the receptionist who had informed him that they were unable to provide further assistance regarding the discontinuation of the programme. Around 11.45 pm the Petitioner had managed to contact Uvindu Kurukulasuriya, the Petitioner in Application 556/2008 over the phone who had then confirmed that the programme for that particular day had been terminated by the SLRC.

Analysis

24. There is no question that the duration of the programme was scheduled to exceed 45 minutes, and that on 4th November 2008, the telecast did commence at the planned time. The Programme schedule for 4th November 2008 of the Rupavahini Channel marked 'P2', indicates that the "*Ira Anduru Pata-Live Discussion*" was scheduled to commence at 22:30 hrs. and was to continue up to the "*End of transmission*" at 24:00 hrs. There is nothing to indicate that any other programme was slotted for that period. It is also apparent that the prior understanding was that the programme was to continue beyond 23:14 hrs. This is borne out by the presenter's words immediately before the short break "…අපි කෙටි විරාමයක් ලබා ගන්නවා දැන්." (We are taking a short break now.) per 'P3', the recording of the programme submitted by Petitioner Kurukulasuriya.

25. Therefore, it is evident that paragraph 2 of the Respondents' Statement of Objections, where they deny that the programme was scheduled to be telecasted for a period of one and a half hours and that there would be telephone calls from viewers, does not appear to be correct.

26. The Respondents have alleged that during the first round of the discussion the Petitioner deviated from the topic of discussion by making political speeches, alleging that the Media was subject to self-censorship, and referring to a pending court case against a journalist detained under the Prevention of Terrorism Act. Having viewed the recording of the programme, I observe that the Petitioner did in fact make those statements; namely that Sri Lanka's global ranking in media freedom has fallen from 52 to 165, journalists had been murdered and kidnapped under the incumbent government, journalists who wrote security analyses had been assaulted or threatened, there was a self-imposed censorship in the whole media sector, these regulations were being introduced during the tenure of a president who used to be a friend of the media, and that a journalist was being detained for more than 100 days without a hearing.

Making a Political Speech

27. The judgements of the Supreme Court constitute a body of jurisprudence that has evolved over the years, and the Supreme court has recognized that the right to comment on public issues and criticize public officials and public institutions is essential for the exercise of civil and political freedoms so valued by democratic society (See **Joseph Perera v. The Attorney General** (1992) 1 Sri LR 199; **Amaratunga v. Sirimal and Others** (1993) 1 Sri LR 264; **Wijeratne v. Vijitha Perera, Sub-Inspector of Police, Polonnaruwa and Others** (2002) 3 SLR 319; **Deshapriya and Another v. Municipal Council Nuwara Eliya and Others** (1995) 1 Sri LR 362; **Dissanayake v. University of Sri Jayawardenapura** (1986) 2 SLR 254; **Sunila Abeysekara v. Ariya Rubasinghe, Competent Authority and Others** (2000) 1 SLR 314). This view was succinctly expressed in **Deshapriya and Another v. Municipal Council Nuwara Eliya and Others** (*supra*);

> *"The right to support or to criticise governments and political parties, policies and programmes is fundamental to the democratic way of life; …and democracy requires not merely that dissent be tolerated, but that it be encouraged* (***De Jonge v. Oregon*** *(2),* ***Amaratunga v. Sirimal****(3),* ***Wijeratne v. Perera*** *and* ***Pieris v. A. G.*** *(s)."* (at page 370)

and thus, in **Amaratunga v. Sirimal** (*supra*);

> *"Criticism of the Government, and of political parties and policies, is per se, a permissible exercise of the freedom of speech and expression under Article14 (1)(a)."* (at page 271)

28. Accordingly, I cannot agree with the Respondents' contention that a speech should be censored purely for being political. I do not think that all political speeches should be shunned and censored. A speech that promotes or pays excessive homage to a particular political party or politician in a partial and an imbalanced manner may be distasteful to a section of the society. It may even sit very oddly in

a programme that is not concerned with political matters. An invitee must be both responsible enough and ethical enough to abide by the agreed parameters of the discussion and confine himself to the topic under discussion. The need to observe the ethical and responsible conduct should not however provide an excuse for censoring the opinions of another. The Constitution of Sri Lanka only curtails free speech to maintain racial and religious harmony, parliamentary privilege, to avoid contempt of court and defamation or to avoid incitement to an Offence. The nature of the expression being *political* is certainly not a criterion recognized in the Constitution to limit freedom of expression. Even if it were a criterion for limitation, in the present case the Petitioner did not mention the name of any political party or politician whose interests, he sought to advance nor did he state that media freedom in the country would have been in a better state under a different government. He voiced his dissatisfaction with a certain state of affairs, he criticized the incumbent government. It was an opinion, and from the perspective of the SLRC, could be considered political dissent, which however does not call for the restriction of such comment. An expression that is well within the parameters of the law as set out in Article 15, does not lose its legitimacy for being political or for being unpalatable to those who listen to it. If every speech which points out the shortcomings of an incumbent government or politicians were to be interpreted as being a political speech and censored, no legitimate criticism which could promote better governance would ever be made.

29. At this point I would also like to cite the unanimous view of the Supreme Court expressed in **Fernando v. The Sri Lanka Broadcasting Corporation and Others** (1996) 1 SLR 157 (at page 172);

> *"…the media asserts, and does not hesitate to exercise, the right to criticize public institutions and persons holding public office; while, of course, such criticism must be deplored when it is without justification, the right to make and publish legitimate criticism is too deeply ingrained to be denied."*

The media is not restrained from publicizing or broadcasting criticism provided that such criticism is legitimate, and the objective of the criticism is not for one to obtain an undue advantage to the disadvantage of another.

30. The jurisprudence of the European Court of Human Rights on the right to freedom of expression is mainly concerned with whether there has been an interference with the right and whether such interference can be justified. It is useful as a source of persuasive guidance in Sri Lanka in determining the parameters within which permissible interference on the freedom of expression can be justified. The European Court of Human Rights in its noteworthy decision in **Lingens v. Austria** (8 July 1986, Series A No. 103) provided a guideline for 'acceptable criticism'. The matter in issue was whether the confiscation of two articles written by an Austrian journalist and the imposition of a fine on him for accusing the retiring Chancellor of supporting a former Nazi to engage in the country's politics, was a restriction of the Freedom of Expression recognized in Article 10 of the European Convention on Human Rights. At paragraph 42 of the judgment, it was stated that while the press should respect the entitlement to the protection of reputation which extends to all persons, the 'limits of acceptable criticism' were wider regarding politicians in order to allow the freedom of political debate necessary in a democratic society and to afford "*the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders.*" In **Ceylan v. Turkey** (8 July 1999, Reports 1999-IV) the European Court held that "*the limits of permissible criticism are wider with regard to government than in relation to a private citizen or even a politician*" (at paragraph 34).

31. The permissible grounds for restricting criticism of the government were emphasized in **Joseph Perera v. Attorney General** *(supra)* at page 225;
"…criticism of government, however unpalatable it be, cannot be restricted or penalised ***unless it is intended or has a tendency to undermine the security of the State or public order or to incite the commission of an offence****. Debate on public issues should be uninhibited, robust and wide open and that may well include vehement, caustic and sometimes unpleasantly sharp attacks on Government.*

Such debate is not calculated and does not bring the Government into hatred and contempt." [emphasis added.]

32. In the present case, the Petitioner Kurukulasuriya criticized the then incumbent President, a person holding public office, at a forum telecasted by the Rupavahini Channel. In my view the Petitioner, in the exercise of freedom of speech and expression, was making a legitimate criticism of a public figure. The Petitioner did not denigrate the President in harsh words or resort to malicious comments about the President. I am of the view, that his criticism of the President was neither character assassination nor defamatory. The Respondents have not contested the facts presented by the Petitioner regarding the repression of the media. As correctly held in **Mallawarachchi v. Seneviratne, OIC Kekirawa** (1992) 1 SLR 181 "*A true statement, made in the public interest or in the protection of a lawful interest, would be clearly in the exercise of freedom of speech although* ex facie *defamatory. Such statements may be made by way of criticism of those holding or seeking public office, particularly where relevant to such office.*" Therefore, truth is a defence for defamation and even if the statement in question was defamatory, unless the falsity of the statement is proven or at the very least contested, neither the 1st Respondent Corporation nor this Court can presumptively bar a citizen from exercising his rights, on the ground of defamation.

33. Regardless of whether the Petitioner appeared in the programme in the capacity of the Convener of the Free Media Movement or not, the matters he adverted to, would be issues of concern to him as a journalist. As described by the Respondents themselves, the objective of the programme was to discuss current issues in the country. Discussion entails the examination of an issue by considering wide, varied and conflicting opinions and perspectives. At the commencement of the programme, the presenter introduced the topic of discussion as "The Regulations and Media Freedom". In that light, reference to any alleged persecution of journalists and censorship can hardly be called irrelevant to the topic as it has a direct impact on media freedom. It is only natural that the Petitioner will present

his perspectives and experiences as a journalist. A skewed discussion focusing only on the positive aspects of the topic cannot be a successful discussion which can advance democratic values.

Issue of Sub Judice

34. Sub judice or commenting on ongoing legal proceedings is one form of contempt of court recognized in Sri Lanka. Although contempt of court as an offence is recognized, the constituent elements of contempt of court have not received statutory recognition. What would constitute contempt in the eyes of the court would vary according to the facts and circumstances of each case.

35. It is pertinent to note that in common law jurisdictions contempt of court operates as a safeguard mainly regarding pending judicial proceedings in which the opinion of a jury or the veracity of witnesses, may be affected by comments or opinions expressed publicly. Buckley J. has explained this situation in the English case of **Vine Products Ltd. v. MacKenzie & Co. Ltd.** (1965) 3 All ER 58 (at page 62); "*It has generally been accepted that professional judges are sufficiently well equipped by their professional training to be on their guard against allowing [a prejudging of the issues] to influence them in deciding the case.*"

36. The Petitioner Kurukulasuriya did not speak of anything that would materially interfere with the judicial proceedings in the particular criminal case or, criticize the court. He merely alluded to the factual situation regarding the detention of the said journalist. The Petitioner stated that the journalist was detained for writing two articles, to highlight the regime abusing provisions of the Prevention of Terrorism Act. That statement could hardly influence public opinion and have a material impact on the outcome of the case. Therefore, it would be an overreaction to say that the Petitioner made a statement that would be held in contempt.

37. Fundamental Rights applications pivot on the application of the law and judges, are in general immune to material in the public domain that may create bias. Therefore, even though the main subject matter of the programme i. e. the regulations, relates to the Fundamental Rights application filed by the Petitioner, the concern of sub judice is minimal. The Respondents have submitted that the decision in **Re Garumunige Tilakaratne** (1999) 1 SLR 134 provides justification for the Respondents to take an extra cautionary approach and discontinue the programme. In the said case, it was held that a news reporter who reported a speech by a politician in which comments were made prejudging the outcome of an election petition had committed contempt of court for 'causing the publication' of the speech. However, no punishment was imposed on the reporter by the court which observed *"that Contempt of Court is an offence purely* sui generis *and one that is vaguely defined; and taking account of the fact that the cognizance of the offence involves in this case an exceptional interference with the fundamental right of freedom of speech and expression, including publication….and considering the fact that the respondent did not have the consequences of his act as a conscious object of his conduct; and considering that, although as a reporter he had duties and responsibilities, yet his role in the publication was a comparatively subordinate one,…"*

38. The approach with regard to the application of Article 14(1)(a) and the limitations that apply, cannot be uniform and the considerations as to its application should necessarily vary, taking into account the type of the media that it concerns, be it print, radio or television. The reason being that, in the case of the print media, it may allow the writer or the editor a comparatively wider margin of time and the degree of authority in controlling the content of a particular news item or column. The same may not be available to a producer or a broadcaster of a live television programme. Therefore, the court's reasoning in **Re Garumunige Tilakaratne** (*supra*) that the reporter of the offending news item should be held liable for sub judice for reporting the news item, cannot be applied to the instant application as the former was a newspaper, whereas the instant application is

concerned with a live television programme where speakers were invited to express their own views in a discussion which was simultaneously being telecast to the public.

39. As an experienced journalist, the Petitioner Kurukulasuriya could have acted more responsibly by specifically disclosing beforehand that he had filed a fundamental rights application regarding the same regulations that were to be discussed in the programme. In an ideal situation, the uncertainty about being held in contempt could have been avoided altogether if the Producer could have checked beforehand with the 3rd respondent, whether the topic of discussion was subject to any legal impediments such as being a matter pending before the court. Taking into consideration, however, the tight schedules and the limited resources for checking for possible legal impediments in the process of putting together a live discussion programme aired weekly, it would be an undue burden to expect the SLRC to adopt such stringent measures. Furthermore, I do not wish to limit the platform for adverse opinions and varied perspectives by setting a standard that would cause the media to steer clear of providing the opportunity for 'risky' views to be expressed.

40. The Respondents have submitted opinion pieces written by the Petitioner ('IR4 (a) to (e)') which would arguably amount to contempt of court to demonstrate that the Petitioner has acted in a similar manner on previous occasions. Those opinion pieces, however, are of little use as justification for the discontinuation of the programme as they have been published much later in 2011 and 2013. In any event, if the Respondents were aware beforehand that the Petitioner had earned a notoriety for writing and publishing contemptuous material it is unlikely that they would have taken the risk of inviting the Petitioner to the programme.

Infringement of Article 14 (1) (a)

41. Article 14(1)(a) of the Constitution guarantees to every citizen the freedom of speech and expression including publication. The exercise of this fundamental right is subject to restrictions that may be prescribed by law in the interests of racial and religious harmony or in relation to parliamentary privilege, contempt of court, defamation or incitement to an offence (Article 15(2)). Further, Article 15(7) stipulates that restrictions 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.

42. Justice Mark Fernando in **Fernando v. Sri Lanka Broadcasting Corporation** (*supra*) adopted the view expressed in the Indian Case of **Secretary, Ministry of Information v. Cricket Association of Bengal** (1995) 2 SCC 161, 292 *"broadcasting media by its very nature is different from press. Airwaves are public property… it is the obligation of the State…to ensure that they are used for public good."* His Lordship went on to state further that due to the limited nature of frequencies available for television and radio broadcasts only a handful of persons are bestowed with the privilege of operating via them and thereby they become "*subject to a correspondingly greater obligation to be sensitive to the rights and interests of the public*." (at page 172).

43. The Sri Lanka Rupavahini Corporation is a statutory body established by the Sri Lanka Rupavahini Corporation Act No. 6 of 1982 (as amended). Section 7(1)(c) of the said Act reads thus;

> *"7(1) The functions of the Corporation shall be—…*
> *(c) that any news given in the programme (in whatever form) is presented with due accuracy and* ***impartially*** *and with* ***due regard to the public interest.***" (emphasis added).

The provision no doubt imposes a statutory obligation on the SLRC to present any news conveyed through their programmes impartially and with due regard to public interest.

44. It becomes evident from the above cited precedent and statutory obligations that neither the 1st Respondent Corporation nor the other Respondents can lawfully abridge the right of the Petitioner to present a view that is not flattering to the government that controls the SLRC especially where it is in the interest of the public to know the state of media freedom in the country. The Respondents' argument that there is no positive duty cast on the Respondents to provide a forum for the Petitioner to exercise his fundamental right of speech and expression does not apply here due to airwaves being public property and attracting a higher standard of duty as well as due to the statutory obligation imposed on the 1st Respondent, by the Sri Lanka Rupavahini Corporation Act No. 6 of 1982.

45. The discontinuation of the programme, therefore, in my view, amounts to an infringement of the exercise of Article 14(1)(a) of the Petitioner Kurukulasuriya. The Petitioner has alleged that no reasons were given for the discontinuation of the programme even after he inquired about it, and the Respondents have not contested this allegation. It is curious that the 3rd Respondent nor any other employee of the SLRC had not inquired from the Petitioner about the case filed by him after it became known that he had filed such a case. Failure to divulge to the petitioner that his own past record had been the reason for discontinuing the programme hints of a lack of bona fides on the part of the Respondents. The admission of the 2nd Respondent that he had received several telephone calls questioning why the Petitioner Kurukulasuriya was allowed to appear on National Television and present a case, gives rise to the suspicion that the 2nd Respondent's decision was influenced by those who found his views unpalatable. It appears that the Respondents have used sub judice as a cover to evade responsibility for circumscribing the Petitioner's freedom of speech and expression.

46. The danger of suppressing dissent was emphasized in **Gunawardena v. Pathirana, OIC, Police Station, Elpitiya** (1997) 1 Sri LR 265. Stating that dissent, or disagreement manifested by conduct or action, is a cornerstone of the Constitution, which should not only be tolerated but encouraged by the Executive as obligated expressly by Article 4(d), Justice Mark Fernando cited the dictum of Justice Jackson in **West Virginia State Board of Education v. Barbette** (1943) 319 US 624, 641;

> *"Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard. It seems trite but necessary to say that the First Amendment was designed to avoid these ends by avoiding these beginnings."* (at page 277)

47. The lack of credibility in the version of the Respondents, together with their conduct in abruptly discontinuing the programme without informing the Petitioner Kurukulasuriya the reason for such a drastic step, reflects of an imperious attitude on the part of the Respondents, that they have absolute discretion and control over views that are telecasted through the television channel that they are steering. Media institutions certainly should be given discretion to curate their programmes, but such discretion must be exercised within the objectives and parameters set out in the law referred to earlier. Media institutions must curate their programmes to include all views and cater to all citizens equally without manipulating the leverage they have over public opinion. Unfortunately, attitudes that shun media ethics and legal obligations appear to influence the conduct of many of the Sri Lankan media institutions, whether state-owned or private.

48. Sub judice is a legal safeguard and media institutions should not be allowed to use a safeguard as a cloak to stifle the citizen's right to freedom of expression guaranteed by the Constitution. Sub judice is not meant for justifying autocratic and stifling conduct relating to freedom of expression. These safeguards are for

the purpose of creating an equal marketplace of ideas with minimal risk of polarization. Preventing views that are either disagreeable or disadvantageous to the broadcaster or the agenda that they seek to further, from reaching the public, impinges on the citizen's entitlement to exercise freedom of expression. Although the Supreme Court's power to strike down acts or omissions that may lead to the infringement of fundamental rights is expressly with regard to executive or administrative action, the courts as an organ of government is mandated by Article 4(d) of the Constitution to respect, secure and advance fundamental rights declared and recognized by the Constitution. Therefore, I have no hesitation in observing that it is not desirable for even a semi-private body to be allowed to make inroads into fundamental rights, in the absence of express prohibitions. As Shakespeare put it, "*We must not make a scarecrow of the law, setting it up to fear the birds of prey, and let it keep one shape till custom make it their perch and not their terror.*" (***Measure for Measure*** *(1604) Act 2, Scene 1.)*

Infringement of Article 10

49. Leave to proceed was granted to the Petitioner in application 557/2008 for the alleged infringement of Article 10. By virtue of Article 10 every person, regardless of whether they are a citizen or not, is entitled to **freedom of thought**, conscience and religion, including the freedom to have or to adopt a religion or belief of his choice. Article 10 is an absolute right without any constitutionally recognized restrictions or fetters.

50. The Petitioner Jayasekara's contention that, the presenter (of the programme) specifically stated that viewers can ask questions on matters pertaining to the regulations in discussion is correct, as evidenced by the recording of the programme submitted by the Petitioner Kurakulasuriya. About two minutes from the commencement of the programme, the presenter can be heard announcing that viewers can express their views or ask questions.

51. I am unable to agree with the argument of the Respondents that the mere desire to participate, is insufficient to clothe the Petitioner Jayasekera with the character of a participatory listener. Even though the Respondents point out that the Petitioner had called the SLRC only after the programme was discontinued, it appears that, in spite of announcing that the viewers can phone in, a telephone number for the public to communicate was not immediately announced. This might have been with the expectation of opening the telephone lines to the viewers at a later round of the discussion. I am of the view that, by being a viewer of a programme with a participatory component via telephone, the Petitioner Jayasekera becomes a participatory viewer. Even though every viewer of the programme may not have had the intention of making use of the phone-in component, the fact that the invitation to phone-in is extended in general to all viewers who may at any time during the programme decide to avail themselves of it, makes every viewer a participatory viewer. To my mind, categorization of the viewer ought to be based on the nature of the programme, rather than on whether the viewer intended to actually participate or not.

52. Having disposed of that concern, I would now make a distinction between the Petitioner's entitlement to gain the information that was being disseminated through the television programme, and being given the opportunity to phone-in and raise any questions he may have in relation to the topic of discussion or express his opinion in relation to the topic. At the outset, it must be accepted that the ability of a viewer to join a programme via a telephone call is subject to the overriding discretion of the producers of the programme. The limited time allocated for the phone-in component necessarily has to be counterbalanced with the number of phone calls they may receive. The producers may be further required to restrict certain phone calls and give priority to others, in order, *inter alia*, to avoid duplication of questions or opinions, to provide a value-addition to the discussion and to confine the programme to the prior-agreed bounds.

53. On the other hand, the right of the Petitioner as a viewer to gain information from the programme, in the instant circumstances, cannot also be ignored. The programme itself was a weekly panel discussion which sought to place before the public the various aspects of a chosen topic- in the present case the media regulations that were to be introduced by the government- through speakers comprising of various stakeholders or experts. The purpose of the programme was to impart information to the public and enlighten them as suggested by even the title of the programme '*Ira Anduru Pata*'. Furthermore, the public had an interest in learning about the regulations, especially those like the Petitioner whose choice of a programme could be curtailed by the regulations. The views expressed in the programme could have aided the Petitioner to form an opinion about the regulations and would likely have provided the clarifications he needed on any issues as to the proposed regulations. The ability to form and hold an opinion on regulations that would have an impact on oneself is, to say the least, a characteristic of the democratic way of life.

54. It is in the backdrop of the afore-stated, that one ought to consider as to whether the conduct of the Respondents in abruptly terminating the programme, has infringed the Petitioner Jayasekera's fundamental right of 'freedom of thought' enshrined in Article 10 of the Constitution.

55. Justice Marshall in the US case of **Stanley v. Georgia** 394 US 557 (1969), delivering the opinion of the Supreme Court held;

> *"It is now well established that the Constitution protects the right to receive information and ideas… This freedom [of speech and press] … necessarily protects the right to receive…This right to receive information and ideas, regardless of their social worth, is fundamental to our free society."*

The Appellant's claim in the said case was that his right to freedom of expression had been violated. Here it is useful to note that the Constitution of the United States **does not** explicitly recognize the right to freedom of thought. This may be the

reason for the US courts to recognize the freedom of thought as a peripheral right or a right included in freedom of speech.

56. The decision in **Fernando v. Sri Lanka Broadcasting Corporation** (*supra*) is significant in that, the Supreme Court considered the US Supreme Court decision in **Stanley v. Georgia** and found it difficult to regard the decision as being one relating to freedom of speech. The Court in the case of **Fernando** (*supra*) considered whether the right to information *simpliciter* falls within the ambit of the right to freedom of expression or the right to freedom of thought. It was observed (at page 177) that;

> "*In the strict sense, when A merely reads (or hears) what B writes (or says) in the exercise of B's freedom of speech, it does not seem that A receives information in the exercise of A's freedom of speech, because that would be to equate reading to writing, and listening to speaking. Accordingly, while preventing A from reading or listening would constitute a violation of B's freedom of speech, it may not infringe A's freedom of speech. A's* ***right to read or listen is much more appropriately referable to his freedom of thought, because it is information that enables him to exercise that right fruitfully****.*" [emphasis added]

57. Justice Fernando was of the opinion that the better rationale is to regard information *simpliciter* as the "*staple of food of thought*" (as was done in the **Stanley v. Georgia**) *and "a corollary of the freedom of thought guaranteed by Article 10."* Fernando J. went on to state that *"Article 10 denies government the power to control men's minds, while Article 14 (1) (a) excludes the power to curb their tongues.*" observing that this distinction may be the reason for the difference in the restrictions placed on those two rights respectively.

58. It appears that, the earlier decisions relating to 'information' have followed the thinking of the US Supreme Court. **Joseph Perera v. The Attorney General** (*supra*) which was decided a few years anterior to **Fernando** (*supra*), advanced a different view from that in **Fernando**. The right to receive information was seen as a right

peripheral to freedom of expression, rather than a right included in freedom of thought. Citing Justice Douglas' words (at page 223) in **Griswold v. Connecticut** (1965) 28 US 479, to the effect of; "*The right of freedom of speech and press include not only the right to distribute,* ***the right to receive, the right to read and freedom of inquiry*** *and the right to teach... These are proper peripheral rights.*" [emphasis added]. Chief Justice Sharvananda went on to state [in **Joseph Perera**] that "*Freedom of speech and expression consists primarily not only in the liberty of the citizen to speak and write what he chooses, but in the liberty of the public to hear and read, what it need.*" (at page 223-224). It was further observed that in a democratic polity, government shall be by the consent of the people and that such consent should not only be free but also grounded on adequate information. However, in **Fernando** the court was reluctant to follow this view on the basis that it was *obiter* as the Petitioner's rights were not found to be infringed in that particular case.

59. In a previous case, **Visuvalingam v. Liyanage** (1984) 2 SLR 123- where the court held that the readers and contributors of a newspaper which was banned from publication by the Competent Authority had *locus standi* to seek relief under Article 126 of the Constitution- Wimalaratne J., with Colin-Thome J., Ranasinghe J. and Abdul Cader J. agreeing (at page 132-133), was of the opinion that the freedom to receive information is encompassed within the freedom of speech and expression guaranteed by Article 14(1)(a) and that the restrictions that may be placed on the freedom of speech and expression would apply to the freedom to receive information.

60. Justice Rodrigo in his opinion in the said **Visualingam** case observed, along the same lines, that; "*To impart information there must be a recipient to receive it. So a reader or hearer is inseparably linked to the concept of publication. One does not exist without the other. Likewise, if one ceases to exist, so does the other.*" Justice Rodrigo stating that; significantly the right to receive information finds no place specifically in our Constitution, did not consider **Stanley v. Georgia** (*supra*),

which was relied on later in **Fernando v. SLBC**, based on the distinction that it dealt with "*the First Amendment to the US Constitution relating to Freedom of the Press and not to a provision corresponding to Article 14(1)(a) of our Constitution.*" (at page 150).

61. As the above cited judicial pronouncements indicate, the question as to whether the right to receive information *simpliciter* is within the right to freedom of speech and expression or within the freedom of thought, has been approached in different ways by the Supreme Court.

62. The International Covenant on Civil and Political Rights (ICCPR) as well as the European Convention on Human Rights (ECHR) recognizes Freedom of thought in conjunction with the Freedom of conscience and religion. Article 18 (1) of the ICCPR stipulates that "*Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.*" While Article 9 (1) of the ECHR reads thus; "*Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.*"

63. On the other hand, the European Court of Human Rights has combined the right to information with the freedom of expression. Article 10 of the Convention guarantees freedom of expression, including the "*freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.*" In **Guerra and Others v. Italy** Application No. 14967/89; (1998) 26 EHRR 357; [1998] ECHR 7 where the residents in the vicinity of a chemical factory brought an action against the Government of Italy for failing to furnish them with information about the health risks posed by the emissions from the factory, it was stated that "*The Court reiterates that freedom*

to receive information, referred to in paragraph 2 of Article 10 of the Convention, ***basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him*** *(see the* ***Leander v. Sweden*** *judgment of 26 March 1987, Series A no. 116, p. 29, 74). That freedom cannot be construed as imposing on a State, in circumstances such as those of the present case, positive obligations to collect and disseminate information of its own motion.*" (at paragraph 53) [emphasis added]. Although the European Court has been reluctant to impose positive obligations to ensure the right to information, the right has been recognized as a corollary of the freedom of expression.

64. In the present applications, the programme in question was stopped without notice. The audience was not informed that the programme for the day was to be discontinued, nor given the reasons for the sudden discontinuation. It amounts to a sudden and arbitrary stoppage given the statutory obligation of the SLRC to present their programmes with due regard to public interest. The manner of halting the programme without any respect to the wishes of the audience cannot be viewed lightly. The learned President's Counsel for the Respondents argued that the State is not under any positive duty to sponsor or provide State resources for the petitioner to exercise such rights and drew the attention of the court to 'Hohfeld's First Amendment' analysis by Fredrick Schauer [2008, The George Washington Law Review Vol 76, 914]. The learned President's Counsel pointed out that the 'negative duty' cast upon the State is to not infringe, restrict or interfere, when a person is exercising or enjoying his right with whatever means or resources available to him.

65. In the said analysis **Schauer**, makes an interesting point regarding positive and negative rights under the US Constitution; *"...the existing American constitutional framework is* ***one that prohibits government*** *action rather than one that allows the citizens to demand it.*" [Page 920, emphasis added]. Even in the instant case, Petitioner Jayasekera's complaint is against the positive action on the part of the SLRC authorities, in terminating the programme arbitrarily. In the case of **Rambachan v. Trinidad and Tobago Television Company Ltd** [decision 17 July,

1985], Justice Jeyalsingh, commenting on the importance of access to television in the present day society stated, "... *Government is duty bound to uphold the fundamental rights and with television being the most powerful medium of communication in the modern world, it is in my view idle to postulate that freedom to express political views means what the Constitution intends it to mean without the correlative adjunct to express such views on television. The days of soapbox oratory are over, so are the days of political pamphleteering".* Although the advent of Social Media has challenged the prominence of Television, it still remains a force to reckon with in Sri Lanka. In areas with limited internet connections or limited signal coverage, the State-owned television channels which enjoy better coverage remain the foremost mode of communication and dissemination of information, apart from print media.

66. Although the contours of the right to freedom of thought do not appear to have significantly crystallized through fundamental rights jurisprudence except perhaps with regard to freedom of religion, to lose the freedom of thought is to lose one's dignity, democracy and one's very self. This might be the reason that the right is made absolute with no room for derogation. To my mind what the right aims to secure is, one's mental autonomy. Arguably, the domain of the right to freedom of thought should extend to include an external action that is constitutive of thought. (See *Simon McCarthy-Jones in 'The Autonomous Mind: The Right to Freedom of Thought in the Twenty-First Century'* at https://www.frontiersin.org/articles/10.3389/frai.2019.00019/full)

67. The law must protect the citizen from threats to the freedom of thought by the State and its agencies; government needs to act positively in facilitating mental autonomy. One significant way to foster mental autonomy would be to provide information in an 'autonomy supportive' context. The rights of the listeners to reply was considered in the case of **Red Lion Broadcasting Co. v. FCC,** 395 US 367 (1969) where the US Supreme Court stated; *"It is the right of the public to receive suitable access to social, political, aesthetic, moral and other ideas and*

experiences which is crucial…". Two of the rights on which the decision in **Red Lion Broadcasting** (*supra*) was based on were, the listener's right to equality and the listener's right to information needed to make his freedom of speech effective. In my view, information is needed not only to make 'freedom of speech' effective, information is equally relevant to make freedom of thought effective as well for, if one were to form an opinion, information is an essential ingredient and opinions are formed through the thought process. Thus, one cannot detach 'information' from the faculty of thought; they are inextricably interwoven.

68. The Respondents argued that the right to receive specific information from any particular person or group of persons or a source (such as information on TV Regulations from panelists of a programme televised by SLRC) could not be recognised under Article 10 since the jural correlative would impose a corresponding positive duty on the panelists or the SLRC to provide such information. I do agree, that as the law stood at the time the alleged infringement took place. There was no affirmative obligation on the State to provide information to persons (The enactment of the Right to Information Act No. 12 of 2016 has now changed this position). A licensed broadcaster, however, cannot be placed on the same plane as any other institution, due to the special status they enjoy in being given permission to use airwaves which are public property.

69. There could be a number of persons seeking broadcast licenses, but due to limited availability of frequencies to allocate, even though all applicants may have the identical right to a license, only a selected few can be granted the license and others will necessarily have to be denied the license. In that context a licensee is permitted to broadcast, but as observed in the case of Red Lion Broadcasting (*supra*) the licensee has no constitutional right "*to be the one who holds the license or to monopolize a radio frequency to the exclusion of his*

fellow citizens". In that context a broadcaster who operates on a (frequency) license granted by the State has the duty to uphold and safeguard the rights of the public. As Justice White said in the **Red Lion Broadcasting** case;

> *"Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favour of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment [freedom of speech and press].* ***It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."*** [emphasis is mine]

70. As far as Petitioner Jayasekera was concerned in the circumstances of the Application 557/2008, I am of the view that the Petitioner was entitled to receive information purported to be disseminated by the programme in addition to what he may have gathered had he got the opportunity to pose questions to the panelists through the phone-in component of the programme. I agree with the opinion adopted by His Lordship Justice Mark Fernando in the case of **Fernando v. SLBC** (*supra*) *" …that information is the staple food of thought and that the right to information simpliciter, is a corollary of freedom of thought guaranteed by Article 10".* As I have stated earlier in the judgement, the decision to terminate the programme was not due to any justifiable reasons on the part of the Respondents and I hold it was done arbitrarily on the direction of the 2nd Respondent. In the circumstances I hold that the fundamental right to freedom of thought, of Petitioner Jayasekera, enshrined in Article 10 of the Constitution has been infringed.

Infringement of Article 12(1)

71. Leave to proceed was granted for the infringement of Article 12(1) in both Applications 556/2008 and 557/2008.

72. The 'classification theory' or the approach that it is essential to prove that there was unequal treatment of equals or equal treatment of unequals for a violation of Article 12 to be recognized, which was followed in the early stages of the fundamental rights jurisprudence of Sri Lanka (See the full bench decision in **Elmore Perera v. Major Montague Jayawickrema, Minister of Public Administration and Plantation Industries and Others** (1985) 1 SLR 285, **C.W. Mackie and Co. Ltd v. Hugh Molagoda, Commissioner General of Inland Revenue and Others** (1986)1 SLR 300) has now been replaced in favour of a broader approach to granting relief.

73. The broader approach has been adopted in a number of subsequent cases, to strike down arbitrary and mala fide exercise of power and guarantee natural justice and legitimate expectations. The ambit of Article 12(1) has been extended so far as to even include Rule of Law. Chief Justice H. N. J. Perera in **Sampanthan v. The Attorney General** SC FR 351/2018-356/2018, SC FR 358/2018-361/2018 decided on 13th December 2018, listing out a number of cases where the broader approach was adopted (**Chandrasena v. Kulatunga and Others** (1996) 2 SLR 327, **Premawathie v. Fowzie and Others** (1998) 2 SLR 373, **Pinnawala v. Sri Lanka Insurance Corporation and Others** (1997) 3 SLR 85, **Sangadasa Silva v. Anurudda Ratwatte and Others** (1998)1 SLR 350, **Karunadasa v. Unique Gem Stones Ltd and Others** (1997) 1 SLR 256, **Kavirathne and Others v. Pushpakumara and Others** SC FR 29/2012 SC Minutes 25.06.2012, **Jayanetti v. Land Reform Commission** (1984) 2 SLR 172 **Shanmugam Sivarajah v. OIC, Terrorist Investigation Division and Others** , [SC FR 15/2010, SC Minutes 27. 07. 2017]) went on to hold, (at page 87);

> "*I am unable to agree with the submission that Article 12 (1) of the Constitution recognizes 'classification' as the only basis for relief. In a Constitutional democracy where three organs of the State exercise their power in trust of the People, it is a misnomer to equate 'Equal protection' with 'reasonable classification'. It would clothe with immunity a vast*

majority of executive and administrative acts that are otherwise reviewable under the jurisdiction of Article 126. More pertinently, if this Court were to deny relief merely on the basis that the Petitioners have failed to establish 'unequal treatment', we would in fact be inviting the State to 'equally violate the law.' It is blasphemous and would strike at the very heart of Article 4 (d) which mandates every organ of the State to - respect, secure and advance the fundamental rights recognized by the Constitution. Rule of Law dictates that every act that is not sanctioned by the law and every act that violates the law be struck down as illegal. It does not require positive discrimination or unequal treatment. An act that is prohibited by the law receives no legitimacy merely because it does not discriminate between people."

74. In the present Applications, the discontinuation of the programme affected the Petitioner Kurukulasuriya as well as the other panelists who were appearing in the programme alike, by preventing them from expressing their views. In the case of Petitioner Jayasekara the discontinuation of the programme for the day affected the Petitioner along with all the other participatory viewers of the programme in that they were unable to receive the information they sought by watching the programme and even if they wished so, they were unable to make use of the phone-in component. Thereby it is clear that the Petitioners' entitlement to equality before the law and the equal protection of the law was derogated from. The law (Sri Lanka Rupavahini Corporation Act No. 6 of 1982) requires the SLRC to maintain high standards in its programmes in the public interest [Section 7 (1) (a)] and the SLRC is under a duty to maintain a balance in the subject matter [Section 7(2) (a)] and to ensure that news given in whatever form is presented with due accuracy, impartially and with due regard to the public interest [Section 7 (2) (c)]. The decision- without any legitimate reason for doing so- to discontinue the programme for the day, without offering any reasons for such discontinuation and without informing the viewers of the discontinuation of the programme is

arbitrary and mala fide. Therefore, I hold that the rights of both Petitioners under Article 12(1) have been infringed.

Compensation

75. The matter of awarding compensation for the infringement of fundamental rights has been discussed by the Supreme Court in a number of cases. Judicial opinion in such matters has been that, compensation should not be limited only to the extent of the monetary loss caused. I am of the view that regard should be had to the curtailment of liberty that resulted in such infringement as well. In **Gunawardena and Another v. Pathirana** (*supra*) and **Deshapriya and Another v. Municipal Council Nuwara Eliya** (*supra*), both cases involving the seizure of publications, the following opinions were expressed in relation to the awarding of compensation;

> *"In deciding whether the petitioners are each entitled to …compensation, …I must not fail to take account of the numerous decisions of this Court, stressing the importance of the freedom of speech, the right to criticise governments and political parties, and the importance of dissent; of the degree of intrusiveness and undue haste which characterized the infringements; … and of the fact that the amount of compensation must not be restricted to the proprietary loss or damage caused."* See page 274, **Gunawardena and another v. Pathirana, OIC, Police Station, Elpitiya and others** (*supra*).
>
> *"We are here concerned with a fundamental right, which not only transcends property rights but which is guaranteed by the Constitution; and with an infringement which darkens the climate of freedom in which the peaceful clash of ideas and the exchange of information must take place in a democratic society. Compensation must therefore be measured by the yardstick of liberty, and not*

weighed in the scales of commerce." See page 371, **Deshapriya and Another v. Municipal Council Nuwara Eliya** (*supra*).

76. The First Respondent, SLRC being a state corporation, the question of whether the State should be ordered to pay compensation needs to be dealt with. There is no question that the State is responsible for safeguarding fundamental rights, and the ordering of compensation should depend on the circumstances particular to each case, keeping in mind that the State coffers should not be emptied haphazardly because the State pays out from the tax-payers money.

77. I am of the view that it is just and equitable to make order, directing the State to pay the two Petitioners [FR Applications 556 and 557] Rs.30,000 each and I also direct the 2nd Respondent to pay each of the Petitioners in the said Applications, Rs.50,000 as compensation.

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